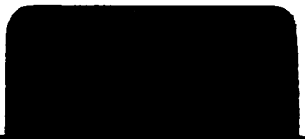

ANNOTATED CASES

AMERICAN AND ENGLISH

CONTAINING THE IMPORTANT CASES SELECTED FROM
THE CURRENT AMERICAN, CANADIAN,
AND ENGLISH REPORTS

THOROUGHLY ANNOTATED

EDITORS

WILLIAM M. McKINNEY AND H. NOYES GREENE

ANN. CAS. 1916 C

EDWARD THOMPSON COMPANY
NORTHPORT, L. I., N. Y.
1916

BANCROFT-WHITNEY COMPANY
SAN FRANCISCO
1916

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ANN. CAS.

1916 C.

DIBBLE ET AL.

v.

CURRIER.

Georgia Supreme Court—December 18, 1914.

142 Ga. 855; 83 S. E. 949.

Wills — Testamentary Capacity — Monomania.

A caveat to the propounding of a will alleged that the testatrix made an unfortunate marriage; that her husband deserted her, and she obtained a divorce from him; that she brooded so much over the unhappy events and outcome of the marriage that her mind became unbalanced and incapable of ratiocination with reference to it and events associated with it or arising from it; that, under an insane delusion with reference to the relationship and the continuation of the affection between herself and her heirs at law, she sought to have her former husband killed or maimed by them, and, because of their refusal to comply with such request, she became imbued with the hallucination that they were not of her blood or family, were not related to her, and were not entitled to her affection and treatment as kinsmen; that she became possessed of an insane delusion that she was disgraced in the eyes of the community by her relatives, because they would not maim or kill her former husband; that she was mistaken as to their condemning her or not sympathizing with her, and in believing that they did not condemn her former husband; that they assured her of that fact, but she was possessed of the insane hallucination that nothing short of the maiming of her former husband would relieve her of the supposed contempt in which she thought she was held because of her unfortunate marital experience and because her heirs at law refused to comply with her request; and that, because her heirs at law refused to violate the law at her demand, under the influence of said insane delusion, she conceived and maintained a wholly insane and mistaken idea as to their conduct in the matter and as to their relations and feelings toward her; and that this delusion existed prior to and at the time of the making of the will and caused her to make it, leaving a large part of her property to different charities, instead of to her next of kin. It is held that such allegations sufficiently averred monomania to withstand a demurrer.

[See note at end of this case.]

Same.

Allegations to the effect that the testatrix desired to have her male relatives maim or kill her former husband, and to have her female relatives urge them so to do, that because they refused to do so she believed that she was disgraced in the eyes of the community by them, and that they did not sympathize with her but with her former husband, and were prompted thereby in refusing her request, and that this constituted a mistake of fact as to the conduct of the heirs at law, were subject to demurrer. Such allegations amounted only to alleging erroneous inferences or conclusions drawn by the testatrix from their refusal to comply with her illegal request.

[See note at end of this case.]

Same.

"Monomania," within Civ. Code 1910, § 3840, providing that a monomaniac may make a will in no way resulting from the mania, is a mental disease; not merely the unreasonable conduct of a sane person. It is a species of insanity. "Mania" is a form of insanity accompanied by more or less excitement which sometimes amounts to fury. An "insane delusion," such as will deprive a person of testamentary capacity, is the delusion which exists when a person conceives something extravagant to exist which has no existence whatever, and is incapable of being permanently reasoned out of that conception.

[See note at end of this case.]

Mistake of Fact.

A "mistake of fact" such as under Civ. Code 1910, § 3836, will nullify in part the operation of a will is a mistake arising from mere ignorance, and not one resulting from an error of judgment after investigation, or wilful failure to make a proper investigation by means of which the truth could be readily and surely ascertained.

Error to Superior Court, Fulton county: ELLIS, Judge.

Proceeding to probate will. Currier, propounder, and Dibble et al., contestants. Judgment for propounder. Contestants bring error. The facts are stated in the opinion. MODIFIED.

Rosser & Brandon and *King & Spalding* for plaintiffs in error.

Westmoreland Brothers and *C. P. Goree* for defendant in error.

[856] LUMPKIN, J.—A will was propounded and a caveat filed by the heirs of the decedent. The case was carried from the court of ordinary to the superior court by appeal. The grounds of the caveat as amended, which set up monomania and mistake of fact on the part of the testatrix, were stricken on demurrer, and a verdict for the propounder was directed. The case turns on the striking of the grounds of the caveat.

1. The medico-legal discussions of monomania as distinguished from prejudice, animosity, ill will, bad judgment, drawing conclusions from insufficient premises or erroneous conclusions from facts—all of which may coexist with sanity—are often apt to confuse rather than enlighten the lay mind, and sometimes the professional mind. Our code recognizes such a thing as monomania as affecting testamentary capacity. Civil Code (1910) § 3840. But it means a mental disease, not merely the unreasonable conduct of a sane person. It is a species of insanity. Mania is a form of insanity [857] accompanied by more or less excitement, which sometimes amounts to fury. The person so affected is subject to hallucinations and delusions, and is impressed with the realty of events which have never occurred and things which do not exist, and his actions are more or less in conformity with his belief in these particulars. Hall v. Unger, 4 Sawy. 672, 2 Abb. 507, 11 Fed. Cas. No. 5,949. This mania may extend to all objects; or it may be confined to one or a few objects, in which latter case it is called monomania. It is not every delusion which will deprive one of testamentary capacity. It must be an insane delusion. A definition of such a delusion which has been approved by this court is that it exists wherever a person conceives something extravagant to exist which has no existence whatever, and he is incapable of being permanently reasoned out of that conception. Bohler v. Hicks, 120 Ga. 800, 804, 48 S. E. 306. The subject-matter of the insane delusion must have no foundation in fact, and must spring from a diseased condition of mind. It does not mean merely a mistaken conclusion from a given state of facts, nor a mistaken belief of a sane mind as to the existence of facts. Probably all men believe some things on slight evidence or that which is insufficient to prove the facts with any degree of certainty. But a bad reasoner, even one wanting in ordinary discernment or discrimination, is not necessarily insane. All men make some mistakes, and some men make almost constant mistakes. But this alone does not constitute insanity. Who is devoid of some prejudice? Some men are full of prejudices, and are largely governed by their likes and dislikes, often with little or no proper basis. But if mistakes, prejudices or dislikes, though unjust, would suffice to show insanity, how many men could make a will?

One who investigated the subject of spiritualism and became convinced and believed in it, though apparently on spurious or insufficient evidence, was held not to be a monomaniac for that reason. Middleditch v. Williams, 45 N. J. Eq. 726, 17 Atl. 826, 4 L.R.A. 738. Mere jealous suspicious, though groundless, are not enough. The test to distinguish between a delusion used in the sense of a mistake of fact, and a delusion which is the offspring of a deranged mind, is thus stated by Mr. Justice Evans in Bohler v. Hicks, supra: "The latter springs spontaneously from disordered intellect, while the former is the result of an erroneous conclusion based upon either a mistake of fact or an illogical deduction drawn [858] from facts as they really exist." Again he says: "The very name 'monomania' implies partial insanity and excludes the idea of any sort of ratiocination as to the particular subject to which the partial insanity relates. Monomania cannot be implied because a person takes a narrow, or prejudiced, or utterly illogical view of a particular subject." Tested by these views, how stands the case before us? The allegations on this subject, contained in the caveat as amended, were in substance as follows: The testatrix married one Garner, with whom she lived very unhappily, and from whom she was divorced after he had deserted her. She brooded over the unhappy events and outcome of her marriage, "and so brooded and worried over the same that her mind became unbalanced and incapable of ratiocination with reference to said marriage, and events associated, or arising therefrom, and especially with reference to relationship and the continuation of the affection between herself and said heirs at law; that, seized by said insane delusion, the said deceased, Barbara C. Dodd, sought the death or maiming of the said Garner, and requested the said heirs at law that they would maim or kill the said Garner; and, because of their refusal, and failure to comply with such insane request, she stated and became imbued with the hallucination that said heirs at law who refused to comply with her said insane desires were not of her blood or family, were not related to her, and were not entitled to her

affection and treatment as kinsmen; that said insane delusion had no foundation in fact, but sprang from the diseased condition of her intellect, and was the inducing cause of the exclusion of said heirs at law from the benefits of said pretended will, which is therefore inoperative and void as to them." It was also alleged that this condition existed prior to and at the time of the making of the will, and continued until the death of the testatrix. In an amendment it was alleged, that her marital troubles rendered the testatrix insane on all subjects connected with her marital experiences; that she was irrational whenever she acted under the influences thereof; that she became possessed of an insane delusion that she was disgraced in the eyes of the community by her relatives, because they would not assail Garner and either permanently maim him in some physical manner or kill him, and that their failure to do this was due to their condemning her in the matter, and placed her in a disgraced position before the community and the public; that she was entirely [859] mistaken in this matter, and that they assured her of their sympathy and condemnation of Garner, but she was possessed of the insane hallucination that nothing short of a physical maiming of him at their hands would relieve her of the supposed contempt in which she thought she was held; that, under the influence of this insane delusion and insane and irrational dislike and hatred for the caveators, she conceived and maintained a wholly insane and mistaken idea as to their conduct, and as to their relations and feelings toward her; and that this delusion caused the testatrix to make the will.

We think that the averments of the caveat measured up to the requirements laid down in Bohler v. Hicks, supra. The allegations that the mind of the testatrix became unbalanced and incapable of reasoning with reference to her marriage and the events associated with or arising from it, that she became imbued with the hallucination that her heirs, who refused to comply with her insane desires, were not of her blood or family, were not related to her, and were not entitled to her affection or treatment as kinsmen, go beyond allegations of prejudice, passion, illogical reasoning, unfounded suspicion or the like, and set up an actually diseased condition of the mind, and delusions arising therefrom, —in other words, partial insanity or monomania. These allegations are of course to be treated as true for the purpose of the demurrer: and so treating them, it was error to sustain the demurrer as against them. Whether in fact there were insane delusions springing spontaneously from a disordered intellect, or merely erroneous conclusions based upon a mistake of fact, or illogical deductions from actual facts, groundless suspicion, or unjust dislikes or prejudices, will be for determination of the jury, under the evidence adduced at the trial. All that is now held is that the allegations in regard to monomania should not have been stricken on demurrer.

2. Another ground of the caveat was based on the allegation that the testatrix, in making the will, was governed by a mistake of fact. On this subject the caveators alleged in substance as follows: Prior to the making of the will the testatrix had contracted a marriage with one Garner, which resulted unhappily. He deserted her for another woman. She labored under the mistake that she was disgraced in the eyes of the community by her relatives, because they would not assail and either permanently maim him in some physical manner or kill him, and that their failure to do [860] so was due to their condemning her in the matter, and placed her in a disgraced position before the community and public. She sought to have her male heirs to make such an attack, and her female heirs to insist that the male heirs should do so. She was entirely mistaken as to their condemning her, or as to their not sympathizing with her, and also in believing that they did not condemn Garner. They did condemn him and did not blame her. She falsely believed that, in refusing to maim or kill Garner, they were prompted by, or their conduct was the result of, an approval by them of him and a condemnation of her. This mistake existed prior to the making of the will, and up to the time of the death of the testatrix, and caused her to make the will.

These allegations were insufficient to show a mistake of fact. They set out, in effect, that the testatrix had been deserted by her husband; that she sought to have her relatives wreck vengeance upon him by killing or maiming him; and that, because they did not comply with her request on that subject, she drew the erroneous conclusion that they did not sympathize with her but with her husband, and that this conduct on their part disgraced her before the community. It was not a case of failure to know the basal facts, or of a mistake in regard to any act or conduct. Her conclusion, from the refusal of her relatives to commit violence at her request, that their sentiments were hostile to her, may have been illogical or unsound. But this did not amount to a mistake of fact in a legal sense. It is an every-day occurrence that some person asks a favor of another, and, if refused, declares that the latter person is not his friend. This may be a mistake in reasoning from facts, but does not itself constitute a mistake of fact in the legal acceptation of the term. As was declared in Young v. Mallory, 110 Ga. 12, 35 S. E. 278:

"There is a difference between a 'mistake' arising from mere ignorance and one which results from an error of judgment after investigation or from negligence or wilful failure to make a proper investigation by means of which the truth could be readily and surely ascertained. It is to such a mistake as that first indicated that section 3262 [now § 3836] applies." That section declares that "A will executed under a mistake of fact as to the existence or conduct of the heirs at law of the testator is inoperative, so far as such heir at law is concerned, but the testator shall be deemed to have died intestate as to him." In the case just cited, [861] a testator knew that a certain woman claimed to be his niece and nearest of kin, and that she was the daughter of his deceased brother. The testator stated that he had been informed that she was not his niece, and he came to the conclusion that this was true. It was held that this did not amount to a mistake of fact, although he may have come to a wrong conclusion. In Bohler v. Hicks, supra, the mistake of fact alleged was that the testator falsely supposed that his wife advised or attempted to procure another to kill him, and also that he falsely believed that acts of kindness on her part toward one Bohler were the result of improper intimacy between her and such person. In Franklin v. Belt, 130 Ga. 37, 60 S. E. 146, the mistake of fact alleged was that the testatrix falsely believed that her husband intended to deprive her of the possession, custody, and control of her infant daughter. It will readily be seen that such mistakes of fact differ from that sought to be set up in the present case, where the testatrix endeavored to induce her heirs at law to commit an act of violence, and, upon their refusal to comply with her request, inferred or believed that they were not in sympathy with her but with the person whom she sought to have injured. This ground of the caveat was properly stricken on demurrer.

Judgment affirmed in part, and reversed in part. All the Justices concur, except Fish, C. J., absent.

NOTE.

Insane Delusion with Respect to Relative as Affecting Testamentary Capacity.

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I. Generally.

Though a testator has general testamentary capacity, comprehending the natural objects of his bounty, the nature and extent of his estate, and the disposition which he wishes to make of it, if he is at the time of making his will subject to an insane delusion as to a relative who would in the ordinary course of events be one of the beneficiaries of his will, and is controlled or materially influenced by that delusion, the will is invalid. Taylor v. McClintock, 87 Ark. 243, 112 S. W. 405; Layer v. Layer, 110 Ky. 542, 62 S. W. 15; Swygart v. Willard, 166 Ind. 25, 76 N. E. 755; Trumbull v. Gibbons, 22 N. J. L. 117; In re Forman, 54 Barb. (N. Y.) 274; Colhoun v. Jones, 2 Redf. (N. Y.) 34. And see the cases cited throughout this note. This view, admitted under the stress of extreme facts in the case of Dew v. Clark, 1 Add. Ecc. (Eng.) 279, 3 Add. Ecc. 79, is now universally upheld. Thus in Rivard v. Rivard, 109 Mich. 98, 66 N. W. 681, 63 Am. St. Rep. 566, it was said: "If a testator disinherits a daughter upon the belief that she is a bad woman or that she is not his own offspring, or a son upon the belief that he is a drunkard, or his grandchildren upon the belief that his son-in-law has threatened to kill him, and it appears that there is no foundation in fact for any such beliefs, and they are shown to be mere delusions, a will disinheriting such children and grandchildren is void, notwithstanding he was entirely sane upon every other subject, and fully competent to manage his business affairs. Justice Cooley makes the distinction clear in his able opinion in Fraser v. Jennison, at page 231 [42 Mich.] 'When the monomania is conceded, it is only necessary to inquire further whether the provisions of the will are or are not affected by it, and the will stands or falls by that test. [Citing a large number of authorities.] A man may believe himself to be the Supreme Ruler of the Universe, and nevertheless make a perfectly sensible disposition of his property; and the courts will sustain it, when it appears that his mania did not dictate its provisions.' The converse of the proposition is true,—that where the monomania or de-

lusion does dictate its provisions, and results in the disinheritance of the subjects of the delusion, whom he would otherwise remember in his will, it cannot stand." So in American Seamen's Friend Soc. v. Hopper, 33 N. Y. 619, it was said: "If a person persistently believes supposed facts, which have no real existence, except in his perverted imagination, and against all evidence and probability, and conducts himself, however logically, upon the assumption of their existence, he is, so far as they are concerned, under a morbid delusion; and delusion in that sense is insanity. Such a person is essentially mad or insane on those subjects, though on other subjects he may reason, act and speak like a sensible man." Similarly in Matter of Mintzer, 5 Phila. (Pa.) 206, 20 Leg. Int. 380, the court said: "It is further to be observed, that a will made under the influence of delusion, which amounts in fact to a monomania, will be invalid. If a testator entertains against his own flesh and blood some monomaniacal delusion, and because of the existence of this delusion, and while laboring under its effects, he disinherits them, the act is evidently one for which he would not be morally or legally responsible; it is the act of a man laboring under a specific species of insanity, and the testator is not and cannot be deemed to be a rational being—he is not a free agent." In like manner it was said in the case of In re Segur, 71 Vt. 224, 44 Atl. 342: "Evidence of delusions is not necessarily countervailed by evidence of business capacity as to ordinary business transactions. The fact that a man is capable of transacting business, whatever its extent, or however complicated it may be, and however considerable the powers of intellect it may require, does not exclude the idea of his being of unsound mind. . . . To have the capacity to make a will, a man must be able to know the number of his children, or others, dependent upon his bounty, their deserts with reference to conduct and capacity, as well as need, and what he has before done for them relatively to each other, and the amount and condition of his property. . . . If he has an insane delusion in respect to one of his children, or other natural object of his bounty, and the instrument presented for probate is the product of such insane delusion, it is void, because he has not the testamentary capacity the law requires, and this is so, notwithstanding he may have had capacity to trade, and do all kinds of business, not involving such delusion." In the case of In re Ganson, 2 Misc. 329, 21 N. Y. S. 960, it was said: "In order to invalidate a will it is not necessary that the intellect should be in total eclipse and oblivion, or that the testator should be generally insane. There is a partial insanity, and a total insanity. Such partial insanity may exist as respects particular persons, things, or subjects, while as to others the person may not be destitute of the use of reason. A person may have upon some subjects, and even generally, mind and memory, and sense to know and apprehend ordinary transactions, and yet upon the subject of those who would naturally be the objects of his care and bounty, and the reasonable and proper disposition to them of his estate, he may be of unsound mind. In this case we think it clear that he was a monomaniac in respect to his wife's fidelity, and as to the disease which he claimed she had communicated to him. Monomania is a perversion of the understanding in regard to a single object, or a small number of objects, with the predominance of mental excitement; while mania is a condition in which the perversion of the understanding embraces all kinds of objects, and is accompanied with general mental excitement." So in Stanton v. Wetherwax, 16 Barb. (N. Y.) 259, it was said: "A monomaniac may make a valid will, where the provisions of the will are entirely unconnected with, and of course uninfluenced by, the particular delusion. But where there is good reason to believe that the will is the offspring of that particular delusion which has seized his mind, and controls its operations, the rule is otherwise. A will thus made, under the influence of a powerful delusion which has not only impaired but perverted his judgment and understanding in relation to subjects connected with the provisions of the will, so as to exercise a controlling influence in the disposition of his property, is not the will of a testator of sound mind. His mind is unsound quoad the very subject on which he is called to exercise its powers, in making the will."

II. What Constitutes Delusion.

1. In General.

Substantially every definition of an insane delusion is based in substance on the language of Sir John Nichol, in the great case of Dew v. Clark, 1 Add. Ecc. (Eng.) 279, 3 Add. Ecc. 79, wherein it was said: "Wherever the patient once conceives something extravagant to exist, which still has no existence whatever but in his own heated imagination, and wherever at the same time, having so conceived, he is incapable of being, or at least of being permanently reasoned out of the conception, such a patient is said to be under a delusion, in a peculiar, half technical sense of the term, and in the absence or presence of delusion, so understood, forms, in my judgment, the true and only test or criterion of present or absent insanity." In Boughton v Knight, 6 Moak 349, Sir John Hannen adopted the foregoing definition and expressed the

belief that it would solve most if not all of the difficulties which arise in investigations of this kind. In Banks v. Goodfellow, L. R. 5. Q. B. 560, Cockburn, C. J. said: "When delusions exist which have no foundation in reality and spring only from a diseased and morbid condition of the mind, to that extent the mind must necessarily be taken to be unsound." In American Seamen's Friend Soc. v. Hopper, 33 N. Y. 624, it was said: "If a person persistently believes supposed facts which have no real existence except in his perverted imagination, and against all evidence and probability, and conducts himself, however logically, upon the assumption of their existence, he is, so far as they are concerned, under a morbid delusion; and delusion in that sense is insanity." In Middleditch v. Williams, 45 N. J. Eq. 726, 17 Atl. 826, 4 L.R.A. 738, Van Vleet, vice ordinary, said: "According to these definitions, it is only a delusion or conception which springs up spontaneously in the mind of a testator, and is not the result of extrinsic evidence of any kind that can be regarded as furnishing evidence that his mind is diseased or unsound: in other words, that he is subject to insane delusions. If, without evidence of any kind, he imagines or conceives something to exist which does not in fact exist, and which no rational person would in the absence of evidence believe to exist, then it is manifest that the only way in which his irrational belief can be accounted for is that it is the product of mental disorder. Delusions of this kind can be accounted for upon no reasonable theory except that they are the creations of the mind in which they originate." In Friedersdorf v. Lacy, 173 Ind. 429, 90 N. E. 766, it was said: "An insane delusion is a spontaneous conception and acceptance of that as a fact which has no existence except in the imagination and which is persistently believed in against all evidence and probability." In the case of In re Calef, 139 Cal. 678, 73 Pac. 539, an insane delusion was said to be the spontaneous and firmly fixed belief of a diseased mind which no argument or evidence can overthrow and which a rational mind could not entertain. In the case of In re Scott, 128 Cal. 57, 60 Pac. 527, it was said: "In ordinary language, a person is said to be under a delusion who entertains a false belief or opinion which he has been led to form by reason of some deception or fraud, but it is not every false or unfounded opinion which is in legal phraseology a delusion, nor is every delusion an insane delusion. If the belief or opinion has no basis in reason or probability, and is without any evidence in its support, but exists without any process of reasoning, or is the spontaneous offspring of a perverted imagination, and is adhered to against all evidence and argument, the delusion may be truly called insane; but if there is any evidence, however slight or inconclusive, which might have a tendency to create the belief, such belief is not a delusion. One cannot be said to act under an insane delusion if his condition of mind results from a belief or inference, however irrational or unfounded, drawn from facts which are shown to exist." See to the same effect. Morgan v. Morgan, 30 App. Cas. (D. C.) 436, 13 Ann. Cas. 1037. In Bohler v. Hicks, 120 Ga. 800, 48 S. E. 306, the court said: "The very name 'monomania' implies partial insanity and excludes the idea of any sort of ratiocination as to the particular subject to which the partial insanity relates. Monomania cannot be implied because a person takes a narrow, or prejudiced, or utterly illogical view of a particular subject. . . . It is not the result of any conclusion; the person does not arrive at his conviction because of any attempt either at reasoning or investigation; the partial insanity is the offspring of a disordered intellect." And see the reported case.

The essence of an insane delusion is that it has no basis in reason and cannot be dispelled by reason. Merrill v. Rolston, 5 Redf. (N. Y.) 220. In re Tracy, 46 Hun 675, 11 N. Y. St. Rep. 103. So it was said in Barr v. Sumner (Ind.) 107 N. E. 675: "Of course, there may be a belief, the falsity of which cannot be disproved by evidence, such as, for example, the supposed appearance of an angel to a testator, at night, when alone. Here, however, we are dealing with a mistake that could be disproved by evidence, and with a belief of the existence of a thing neither inherently impossible nor improbable. There was no evidence presented to testatrix of the mistake in her belief, nor was there resort to argument or persuasion to convince her of its falsity." Similarly in the case of In re Kendrick, 130 Cal. 360, 62 Pac. 605, it was said: "Finally, as to each and all of these alleged delusions, it does not appear that any of them were dominant ideas in the mind of Mrs. Kendrick. They were not always nor constantly referred to when Mrs. Masterson was under consideration, and very many witnesses never heard any such expressions from her. It is a characteristic of monomania and insane delusion that when the conversation turns upon the subject, the patient is dominated by it and cannot conceal his conviction."

2. Illogical or Unreasonable Conclusion as to Relative from Facts.

Since the accepted definitions require that a belief shall, to be an insane delusion, arise spontaneously in the mind of the testator, a belief existing as a conclusion of the testator from facts is not such a delusion though

the conclusion is illogical and the facts are insufficient to give it reasonable support. Taylor v. McClintock, 87 Ark. 243, 112 S. W. 405; In re Scott, 128 Cal. 57, 60 Pac. 527; In re Kendrick, 130 Cal. 360, 62 Pac. 605; Young v. Malloy, 110 Ga. 10; Bauchens v. Davis, 229 Ill. 557, 82 N. E. 365; Rush v. Megee, 36 Ind. 69; Friedersdorf v. Lacy, 173 Ind. 429, 90 N. E. 766; Coffey v. Miller, reported in full, post, this volume, at page 30; Bean v. Bean, 144 Mich. 599, 108 N. W. 369; Sibley v. Morse, 146 Mich. 463, 109 N. W. 858; Leffingwell v. Bettinghouse, 151 Mich. 513, 115 N. W. 731; Stackhouse v. Horton, 15 N. J. Eq. 202; Davenport v. Davenport, 67 N. J. Eq. 320, 58 Atl. 535; Clapp v. Fullerton, 34 N. Y. 190, 90 Am. Dec. 681; Coit v. Patchen, 77 N. Y. 533; In re Tracy, 46 Hun 675, 11 N. Y. St. Rep. 103; In re Gross, 47 Hun 633, 14 N. Y. St. Rep. 429; In re Fricke, 64 Hun 639 mem. 19 N. Y. S. 315; In re Smith, 24 N. Y. S. 928; In re Cline, 24 Ore. 175, 33 Pac. 542, 41 Am. St. Rep. 851; In re Diggins (Ore.) 149 Pac. 73; Alexander's Estate, reported in full, post, this volume, at page 33; In re Herr (Pa.) 96 Atl. 464. And see infra this note subdivision III. *Unfounded Belief as to Particular Matter.* "An insane delusion does not mean a mistaken conclusion from a given state of facts, nor a mistaken belief as to the existence of facts. An erroneous conclusion of a sane person may arise from incorrect reasoning or from a deduction from information which he supposed to be correct." Bohler v. Hicks, 120 Ga. 800, 48 S. E. 306. In Morgan v. Morgan, 30 App. Cas. (D. C.) 436, 13 Ann. Cas. 1037, it was said respecting an alleged delusion that a child of the testator was illegitimate: "The facts developed in that suit appear to have convinced the testator that he was not the father of the youngest child, and to have tended to raise some doubt in his mind as to the paternity of the two older ones. Then the evidence of his declarations made it to appear that he claimed to have acquired further information, relating to earlier misconduct of their mother, by which he was led to disclam their paternity also. The source and nature of this information were declared to two persons. The information might have been false, and he might have been largely induced to give credit to it by the undoubted fact of the mother's later misconduct. While, therefore, he might have acted under a delusion, it was not an insane delusion, that is to say, a conception originating spontaneously in the mind, without evidence to support it, and which could be accounted for on no reasonable hypothesis." So in Stull v. Stull, 1 Neb. (unofficial) Rep. 380, 389, 96 N. W. 200, it was said: "Now, with reference to his belief that his wife had turned the children against him, this idea, while perhaps cruel and unjust, was not without some evidence for a basis; for the testimony clearly shows that in 1871 his sons, with the exception of Marinus, combined against him and coerced him into deeding his home place to his wife, by threatening to apply for a conservator of his estate unless he did so. The only reason that they allege for this was that he had signed a bond for his son Marinus and a note for one of his neighbors. The evidence clearly shows that after this the deceased became, as one of the contestant's witnesses said, 'dissatisfied,' and left his home, and resided from that time, until he came to the home of his son, John S. Stull, in 1895, among strangers. It is also in evidence that his children neglected him, and seldom, if ever, recognized him in any manner for several years after he had left his old home. During this time it is in evidence that he complained of the neglect of his children and blamed his wife for it. When a man, stricken in years and suffering from bodily infirmities, has been long taught, like King Lear, to feel

> 'How sharper than a serpent's tooth it is
> To have a thankless child'

—the fact that he complains of neglect is not sufficient to establish an insane delusion." The rule was stated and applied in Fulton v. Freeland, 219 Mo. 494, 118 S. W. 12, 131 Am. St. Rep. 576, the court saying: "There is no such thing as a delusion founded upon facts. It is a mental conception in the absence of facts. If the idea entertained has for a basis anything substantial it is not a delusion. There may be a misjudgment of facts or there may be an accentuated opinion founded upon insufficient facts, but not a delusion, rising to the dignity of a mental aberration. As to the conspiracy of his former wife and her relatives and friends forming a plot in the East to do him bodily injury, it cannot be said that this was a delusion in face of the facts. His brother had written him sufficient facts to remove his views from the realm of delusions." In the case of In re Merriman, 108 Mich. 454, 66 N. W. 372, it was said: "So, as regards the statement which Howard made after the making of the will, implying that his father was trying to cheat him, it can be said of this that Dwight Merriman delayed in turning over to Howard his money, and while such a judgment of his father was harsh, and perhaps unwarranted, it cannot be said it had no foundation in fact." So in Purdy v. Evans, 156 Ky. 342, 160 S. W. 1071, it was said: "The prejudice, resentment, or anger of testator toward his daughter may have been without reasonable cause; yet, it was not the spontaneous production of a diseased mind based upon no evidence whatever; for it had some basis in fact. It arose from the refusal of his daughter to live with him, and from her

marriage with one to whom testator objected; and, however imperfect the process of his reasoning, or however illogical or unjust the conclusion that she was so greatly at fault as his conduct toward her proves his belief to have been, it was not without some basis in fact; at least there was sufficient to free it from the imputation of spontaneity, and, therefore, from the charge of having its origin in an insane delusion." Likewise in Owen v. Crumbaugh, 228 Ill. 380, 10 Ann. Cas. 606, 81 N. E. 1044, 119 Am. St. Rep. 442, the court said: "Take for example, the fact that the testator said that his brother and sister-in-law caused the death of his only child. The evidence explained what the testator meant. The child was being fed from the milk of a cow belonging to the testator's brother. It is not denied that the owner of the cow took it away from the testator's home without his consent, thereby making it necessary to feed the child upon the milk of another cow. It is not denied that the child sickened and died after the change in its food. Who would say that there was no evidence whatever for the charge that the taking away of the cow was the cause of the baby's death?" In the case of In re White, 121 N. Y. 406, 24 N. E. 935, it was said: "As to the testator's belief that there was collusion between neighbors, surveyor and his son to defraud him, we cannot say that there was absolutely no basis for any such reasoning by testator. There were the facts that the testator and his neighbors disputed on questions of boundary lines and fences; that his son disagreed with his views of his rights in the matters; and that one of the neighbors, his son and the surveyor, recommended by his son, were Masons. Can we say that because he could not believe anything good of the Masonic fraternity, and because he supposed them bound to stand by each other as against an outsider, that he was influenced by an insane delusion? Delusion is insanity, where one persistently believes supposed facts, which have no real existence, except in his perverted imagination, and against all evidence and probability, and conducts himself, however logically, upon the assumption of their existence. That was so held in American Seamen's Friend Soc. v. Hopper [33 N. Y. 619] supra. But if there are facts, however insufficient they may in reality be, from which a prejudiced, or a narrow, or a bigoted mind might derive a particular idea, or belief, it cannot be said that the mind is diseased in that respect. The belief may be illogical, or preposterous, but it is not, therefore, evidence of insanity in the person. Persons do not always reason logically, or correctly, from facts, and that may be because of their prejudices, or of the perversity, or peculiar construction of their minds. Wills, however, do not depend for their validity upon the testator's ability to reason logically, or upon his freedom from prejudice."

What was said in Phillips v. Chater, 1 Dem. (N. Y.) 533, to be "a very simple and practical standard" by which to determine the rationality of a belief was laid down in Boughton v. Knight, L. R. 3 P. & D. (Eng.) 64, wherein Sir James Harmon in charging the jury said: "The tribunal that is to determine the question (whether judge or jury), must, of necessity, take his own mind as the standard whereby to measure the degree of intellect possessed by another man. You must not arbitrarily take your own mind as the measure, in this sense, that you should say, I do not believe such and such a thing, and therefore the man who does believe it is insane. Nay, more; you must not say, I should not have believed such and such a thing, therefore the man who did believe it is insane. But you must of necessity put to yourself this question, and answer it: Can I understand how any man in possession of his senses could have believed such and such a thing? And if the answer you give is, I cannot understand it, then it is of the necessity of the case that you should say the man is not sane."

The question at issue being the state of the testator's mind facts not known to him which tend to support that belief cannot be considered. Matter of Stoll, 90 Misc. 266, 153 N. Y. S. 362.

3. Unreasonable Antipathy to Relative.

a. *In General.*

An unfounded prejudice or antipathy on the part of a testator toward even a near relative is not ordinarily evidence of an insane delusion.

California.—In re Kendrick, 130 Cal. 360, 62 Pac. 605; In re Calef, 139 Cal. 673, 73 Pac. 539; In re Riordan, 13 Cal. App. 313, 109 Pac. 629.

Connecticut.—Kimberly's Appeal, 68 Conn. 428, 36 Atl. 847, 57 Am. St. Rep. 101, 37 L.R.A. 261.

Georgia.—Carter v. Dixon, 69 Ga. 82.

Illinois.—Claussenius v. Claussenius, 179 Ill. 545, 53 N. E. 1006; Huggins v. Drury, 192 Ill. 528, 61 N. E. 652; Schmidt v. Schmidt, 201 Ill. 191, 66 N. E. 371; Drum v. Capps, 240 Ill. 524, 88 N. E. 1020; Carnahan v. Hamilton, reported in full, post, this volume at page 21.

Indiana.—Barr v. Sumner, 107 N. E. 675.

Kentucky.—Purdy v. Evans, 156 Ky. 342, 160 S. W. 1071.

Maine.—Barnes v. Barnes, 66 Me. 286.

Mississippi.—Mullins v. Cottrell, 41 Miss. 291.

Missouri.—Current v. Current, 244 Mo. 429, 148 S. W. 860.

Nebraska.—In re Clapham, 73 Neb. 492, 103 N. W. 61.

New Jersey.—Stackhouse v. Horton, 15 N. J. Eq. 202; Hollinger v. Syms, 37 N. J. Eq. 221.

New York.—Dobie v. Armstrong, 160 N. Y. 584, 55 N. E. 302; Matter of Lang, 9 Misc. 521, 30 N. Y. S. 388; Matter of Brush, 35 Misc. 689, 72 N. Y. S. 421; Matter of Townsend, 73 Misc. 481, 133 N. Y. S. 492; Phillips v. Flagler, 82 Misc. 500, 143 N. Y. S. 798; In re Forman, 54 Barb. (N. Y.) 274; Bull v. Wheeler, 6 Dem. (N. Y.) 123.

Oregon.—Potter v. Jones, 20 Ore. 239, 25 Pac. 769, 12 L.R.A. 161.

Pennsylvania.—McGovean's Estate, 185 Pa. St. 203; In re Hemingway, 195 Pa. St. 291, 45 Atl. 726, 78 Am. St. Rep. 815; In re Alexander, reported in full, post, this volume, at page 33; In re Herr (Pa.) 96 Atl. 464; Matter of Mintzer, 5 Phila. 206, 20 Leg. Int. 380.

Rhode Island.—Jenckes v. Probate Ct. 2 R. I. 255.

"People may hate their relations for bad reasons and yet not be deprived of testamentary power." Carpenter's Estate, 94 Cal. 419, 29 Pac. 1101. In Carter v. Dixon, 69 Ga. 82, it was said: "A testator may entertain his animosities, cherish his prejudices, and nurse his wrath against heirs at law of his estate, and he may be guided and controlled by them in the disposition of his property; still, if he is competent in mind and makes a will freely and voluntarily, these conditions of his mind will not per se destroy his testamentary capacity." So it was said in Schneider v. Manning, 121 Ill. 376, 12 N. E. 267. "A man may become prejudiced against some of his children, and that, too, without proper foundation; and because he may make unjust remarks against them,—remarks not warranted by the facts,—it does not follow that he has insane delusions, or that he is devoid of testamentary capacity. If such was the rule, but few wills would be able to stand the test where an unequal distribution of property has been made by a testator among children." See to the same effect Huggins v. Drury, 192 Ill. 528, 61 N. E. 652. In Lowe v. Williamson, 2 N. J. Eq. 82, it was said: "It was further urged, that the testator was under a species of derangement or delusion as to his relative; that he took up a prejudice without cause. I have before said, that I find no good reason for this hostility, but it is plain that the testator had such feelings towards them. There was no intimacy with them. They visited him very little. He had an idea that they looked down upon him, and was no doubt jealous of their superior standing. There was, then, no delusion, but a reality in the fact, that there existed no cordiality between him and his relatives. It was of long standing; not sudden and accidental, but abiding." In the case of In re Spencer, 96 Cal. 448, 31 Pac. 453, wherein it appeared that the testatrix entertained a strong prejudice against her daughter-in-law it was said: "There is nothing to show anything like mental unsoundness or monomania on the part of the testatrix. It is quite probable that the conduct of Homer in various matters caused her to attach blame to Ella, when it should have fallen on Homer himself; but she did not know the real facts. She believed the son, whom she loved, rather than the daughter-in-law, whom she disliked and mistrusted; but would not any sane mother, under the circumstances, have done the same? The likes and dislikes of human beings—their confidences and mistrusts—are often capricious and arbitrary; but they are not evidences of insanity because they cannot be logically defended to the satisfaction of those who think them wrong. In the case at bar there is no warrant for the claim that the testatrix's dislike of her daughter-in-law and her family was an insane delusion; it was simply such a feeling, arising out of the recondite principles of attraction and repulsion, as is quite common among people of undoubted sanity." In Trumbull v. Gibbons, 22 N. J. L. 117, the court said: "In what does the alleged delusion exist, or how has it been exhibited in the present case? I have carefully looked through the testimony to be found in the case prepared, and in the documents, including the diary and the libels, which evidence I am not disposed to recapitulate or record. It is sufficiently referred to and stated in the charge of the Chief Justice for the present purpose, and it undoubtedly exhibits a sad instance of the extent to which family feuds may be carried. There seems to have been, on the one side, an imperious and haughty temper sustained by wealth and power, and restrained by no softening influences from moral or religous principles. On the other, as I take it, there was great imprudence on the part of a daughter and son-in-law in dealing with the errors of an uncontrollable and violent parent, upon whom they were dependent. But I can find nothing like delusion or insanity. The first dissatisfaction and incipient dislike were heightened, by continued disputes and irritation, into settled aversion and enmity; but this was the result of obvious causes having an actual existence, and not the consequences of imaginary difficulties. The rebukes for alleged licentiousness, the disputes and difficulties with regard to property, threatened divorce, the libel suit, all these matters, which embittered the feelings of the testator in the highest degree, were not mere imaginary causes of offence.

These and other successive bitter quarrels between the testator and his son-in-law, daughter, and family, certainly occurred, and they account for the provisions of the will, by which the latter were disinherited, without any necessity to resort for explanation to monomonia or any other form of insanity." In Conner v. Skaggs, 213 Mo. 334, 111 S. W. 1132, wherein it appeared that the testator disinherited a daughter who married against his wishes, it was said: "Testator's opinions as to the soundness of Mr. Conner's morals, may have been grossly narrow and unjust, but there was no insanity about it. It is natural and usual for men to act on what they are told by others, in whom they trust. The solicitude of the father was natural. A clandestine courtship in the teeth of parental protest is a most dangerous domestic experiment. Mischief and unwholesomeness lurk in the shade of concealment. The resentment of the father was most human and natural though extravagantly exhibited. That he did not rise to the lofty and divine plane of complete forgiveness when time had healed his wounds, is unfortunate; but is still natural and human—not insanity."

b. *Exceptional Cases.*

However, an antipathy of a testator toward a near relative may be so violent, extravagant and baseless as to amount to an insane delusion. Dew v. Clark, 3 Add. Ecc. (Eng.) 79; Nicewander v. Nicewander, 151 Ill. 156; Huggins v. Drury, 192 Ill. 528, 61 N. E. 652; Miller v. White, 5 Redf. (N. Y.) 320; Thomas v. Carter, 170 Pa. St. 272, 33 Atl. 81, 50 Am. St. Rep. 770; Chaney v. Bryan, 16 Lea (Tenn.) 63. And see Brown v. Ward, 53 Md. 387, 36 Am. Rep. 422. As was said in Broughton v. Knight, L. R. 3 P. & D. (Eng.) 64: "It is unfortunately not a thing unknown that parents—and in justice to women I am bound to say it is more frequently the case with fathers than mothers,—that they take unduly harsh views of the characters of their children, sons especially. That is not unknown. But there is a limit beyond which one feels that it ceases to be a question of harsh unreasonable judgment of character, and that the repulsion which a parent exhibits towards one or more of his children must proceed from some mental defect in himself. It is so contrary to the whole current of human nature that a man should not only form a harsh judgment of his children, but that he should put that into practice so as to do them injury or deprive them of advantages which most men desire above all things to confer upon their children. I say there is a point at which such repulsion and aversion are themselves evidence of unsoundness of mind." In the leading case of Dew v. Clark, supra, an issue as to testamentary capacity was awarded, it appearing that the testator harbored the most unfounded and unreasonable impressions in regard to the character of an only daughter, against whom, in consequence, he entertained an unnatural dislike. He imagined that the daughter was vile, profligate, and depraved in the highest degree, and treated her accordingly with the utmost severity, and even cruelty, and finally cut her off in his will with an inadequate provision. It was a dislike founded purely on delusion. It was satisfactorily shown, that while this delusion had gained such possession of his mind that nothing could shake his belief, yet, in point of fact, she was amiable in disposition, engaging in her manners, of superior natural talents, diligent, dutiful, affectionate, modest, and virtuous, and giving no occasion for the extraordinary feelings exhibited by the father. In Ballantine v. Proudfoot, 62 Wis. 216, 22 N. W. 392, the court said: "It is rare that a mother, without the greatest provocation, entertains such an aversion to a daughter that she refuses to see her in her last illness. And yet, but a few hours before she died, Mrs. Stewart was asked if her daughter should not be sent for, and she replied that she did not wish to see her daughter; that the Proudfoots might come and look upon her after she was dead. Such unnatural feelings are so contrary to human nature that we are inclined to account for them on the ground that the mother at the time was not herself, but was laboring under some mental disorder." In Merrill v. Rolston, 5 Redf. (N. Y.) 220, the court said: "If she had taken the notion that George had become indifferent to her wishes, and rebellious against her authority, however unreasonable and untrue, it might have been said that there was some semblance of fact and circumstances to base the suspicion upon, in his marriage against her will, which an imperious disposition and over-jealous nature might have magnified into an unpardonable offense; but her extravagant and irrational exaggeration of his so-called offense, her apparently sincere imputation of an unworthy and depraved character, of his reprehensible, impure and immoral conduct, her baseless accusation of unworthiness and wickedness and impurity on the part of George and his estimable and accomplished wife, her utterly false and irrational statement that his adopted father from his visit to Liverpool, which appears to have been about 1852, discovered his innate depravity, and thereafter distrusted and disliked him, and refused him his name, and her alleged discovery of his baseness and subsequent dislike of him, all entirely and overwhelmingly disproved by numerous subsequent letters, full of extravagant expressions of confidence in his ability, education, moral purity, and her

great pride in his talents and brilliant prospects; her extraordinary expressions of solicitude for his advancement, and especially for his safety in respect to the strike at the zinc works, and her anxiety lest his mind should be dethroned by his rejection; by the frequent conversation with different persons as to their estimate of and affection for him, years after the event which was stated by her as the beginning of their distrust, and especially by the terms of both of their wills, made and executed in 1856, four years after the time mentioned, wherein he was made the ultimate beneficiary by name, as their adopted son, and many other circumstances, which might be recalled. Taken in conjunction with the foregoing facts and circumstances, her vulgar and false charge, without the remotest foundation, of illicit intercourse between George and his intended wife, the general imputation of unchastity, equally baseless, her diabolical and fiendish imprecations upon George, just referred to, her incoherent and impious curses, her senseless mutilation of her will and his portrait, and the reasons given for it, all combine to show that, if decedent was of sound mind, an intelligent, affectionate, kind, modest, truthful Christian woman had been transformed into a bold, defiant, passionate, unfeeling, cruel, false, vulgar and obscene fiend incarnate, which cannot be pleaded even as a thoughtless ebullition of intemperate, ungovernable anger and jealousy, for the utterances were oft repeated and rewritten with deliberation at distances from the object of her malediction, with nothing apparently but a distorted brain to account for her transformation so complete and the delusions so marked, which would be a signal mercy to her memory and the fame of her sex, to ascribe it to a morbid or insane delusion." In Johnson v. Moore, 1 Litt. (Ky.) 371, it was said: "We are, therefore, satisfied that on this point, we mean that of hostility to his brothers, without cause, he was subject to a species of derangement which affected him there and nowhere else, except with regard to his assertions of his extraordinary wealth. As in one point only, except when under the influence of intoxication, he was subject to a peculiar species of derangement which cannot be explained but by the existence of the fact, unless we could measure and scrutinize the mind, we have no hesitation in saying he was competent to do any act, which was not subject to be influenced by that derangement, and that he might be the subject of responsibility both civilly and criminally, for any act which was not influenced or induced by it, and if the persons as to whom his mind was disordered were strangers, and could not be supposed by the ties of natural affection to be the objects of his bounty, we should have no difficulty in sustaining this will. But this is not the case. To them, it might be supposed, or to some of them, he would have given his estate. Once in 1820, he did make that sound and rational disposition. From that he departed, afterwards, and made them the objects of hatred and disgust. And at the time of making his last will now in contest, he labored strongly under the effects of this disorder of mind; for when he was inquired of by one of the subscribing witnesses, why he had pretermitted his relations, he became instantly irritated, and declared that they had endeavored to get his estate before his death, and that he had declared war against all the Moores. For this disaffection towards them, there never appeared to be the slightest cause, but the contrary; and the reasons for it, when assigned by himself, were futile and groundless. He cannot, therefore, be accounted a free agent in making his will, so far as his relatives are concerned although free as to the rest of the world. But however free he may have been as to other objects, the conclusion is irresistible that this peculiar defect of intellect did influence his acts in making his will, and for this cause it ought not to be sustained." And in Sherley v. Sherley, 81 Ky. 240, it was said: "While ill-will, prejudice, hatred, or the exhibition of violent passions, by a person usually good humored and affable, such as the evidence tends to portray Capt. Sherley, do not of themselves constitute insanity, they may be, and often are, the manifestations of mental derangement; and evidence of their existence with reference to persons so nearly related to those naturally entitled to his bounty as the maternal grandfather, against whom he entertains suspicions which might affect the disposition of his property, should be left to the jury to determine, whether they result from naturally ungovernable passions, or were produced by provocation, or were the indication or sign of a decaying or decayed mind, where the issue of sanity or insanity is being tried by them."

III. Unfounded Belief as to Particular Matter.

1. Disloyalty or Ingratitude of Relative.

Since the proper manifestation of affection and gratitude is to a great extent a matter of personal judgment, a belief however unfounded of a testator that his immediate relatives have been deficient in that respect will not ordinarily be considered an insane delusion. Carpenter v. Bailey, 94 Cal. 406, 29 Pac. 1101; Bauchens v. Davis, 229 Ill. 557, 82 N. E. 365; Reichert v. Reichert, 144 Mich. 295, 107 N. W. 1057; Leffingwell v. Bettinghouse, 151 Mich. 513, 115 N. W. 731; Stull

v. Stull, 1 Neb. (unofficial) Rep. 380, 389, 96 N. W. 200; In re Weil, 48 Hun 621, mem. 1 N. Y. S. 91; In re Cline, 24 Ore. 175, 33 Pac. 542, 41 Am. St. Rep. 851. Alexander's Estate, reported, in full, post, this volume, at page 33. "To establish insane delusion, the contestant must do something more than simply show 'a mistaken notion' on the part of the testator as to the feelings or intentions of his relatives in reference to him or his property." Hall v. Hall, 38 Ala. 131, McBride v. Sullivan, 155 Ala. 166, 45 So. 902. And see Mosser v. Mosser, 32 Ala. 551. In Bean v. Bean, 144 Mich. 599, 108 N. W. 369, it was said: "I do not understand how it can be determined that the opinion of a father that a son has no regard for him, and is waiting for him to die in order to get a portion of his estate, can be said to have no foundation in fact, and to be the result of insane delusion, except it may be, in cases where relations, induced by a lifetime of dutiful conduct on the one side and of continued and known affection on the other, are suddenly and without known cause interrupted and succeeded by an attitude on the part of the father utterly inconsistent with past conduct." So in Buchanan v. Belsey, 65 App. Div. 58, 72 N. Y. S. 601, the court said: "The relations between this testator and his wife and children were not only strained, but there is evidence to show that those persons were ungrateful to him. His leaving each of them merely a nominal legacy he declares by his will to be in consequence of their ingratitude shown to him for many years. Upon the whole testimony, while the record is replete with accounts of unhappy relations existing between the testator and his family, the impression made by reading it is that the wife and daughters of the testator were not blameless in their conduct towards him, and that although he may have exaggerated their conduct in some respects and attributed to them persecutions which undoubtedly emanated from some one, and which from various indications he might well have believed came from them, we are not satisfied that it is shown by a preponderance of evidence that the provisions of this will were the result of insane delusions entertained by the testator." In Shorb v. Brubaker, 94 Ind. 165, in sustaining the refusal of an instruction as to the effect of an insane delusion, the court said: "The evidence upon which this instruction was asked did not relate to any fact. Its application was simply to an opinion given by the testator at the time of making his will, that the appellants had misused and mistreated him, and to a contrary opinion expressed by the appellants while testifying that they had never misused or mistreated him. Evidence of this kind is too intangible for judicial cognizance in determining the validity of a will. An act, which in the opinion of one person might be regarded as misuse or mistreatment, might, in the judgment of another, be esteemed as harmless, or, indeed, as a token of affection or friendship. Had the testator given any fact which if true, would have been a flagrant breach of filial duty upon the part of appellants, and had it been shown that this fact had no existence except in the imagination of the testator, it would have been right in that case to charge the jury that such evidence was proper for their consideration in determining the testator's mental capacity. But upon the evidence before the jury, the instruction, if given, would have tended to confuse and mislead." See to the same effect, Hite v. Sims, 94 Ind. 333. In Taylor v. McClintock, 87 Ark. 243, 112 S. W. 405, it was said: "Filial love and gratitude do not belong to a class of theoretical or metaphysical subjects not susceptible of proof. Indeed, there is scarcely anything in our civilization more concrete and real than these emotions growing out of the natural ties of blood, and incident to the family relation. Their presence or absence is manifested, and may be proved, in manifold ways. If a parent believes that his daughter does not love him, or love him as well as she does some others, or is ungrateful to him, the falsity of such belief, if it be false, may be easily shown. . . . But if the belief be that his daughter does not love him as much as he wishes, or as much as his daughter ought, or that his daughter is not as grateful as he wishes, or as grateful as she should be, then it is not a belief of the total want of affection and gratitude, but only as to the degree thereof. Such a belief necessarily is in the domain of speculation and theory, where no proof can discover its error; for no evidence can measure the quantum of love and gratitude that a father may wish his child to have towards him, nor the quantum of love and gratitude that child should have towards its parent. The unexpressed wishes of a parent as to the degree of love and gratitude that he desired his child to have for him, as well as the quantum of love and gratitude that the child should have for the parent, are so purely psychical and ethical that they are not susceptible of proof. A belief of that kind cannot be shown to be erroneous; nor can it be shown that such a belief would not be changed by evidence and argument. There is no criterion by which to demonstrate the error and unchangeability of such belief, and the whole subject-matter is in the wide realm of speculation, and cannot therefore be a delusion."

2. Character of Relative.

Subject to the qualification heretofore noted that an illogical conclusion from facts is not an insane delusion (see supra subdivision II.

2. *Illogical or Unreasonable Conclusion as to Relative from Facts*), a groundless and persistent belief by a testator that one of his relatives is a person of vile and worthless character may constitute an insane delusion. Dew v. Clark, 1 Add. Ecc. (Eng.) 279; Mills' Appeal, 44 Conn. 484. In Rivard v. Rivard, 109 Mich. 98, 66 N. W. 681, 63 Am. St. Rep. 566, it was said: "He disinherited his youngest daughter. If the testimony of the contestants is worthy of belief, he was under the insane delusion that she was an inmate of a house of ill fame. There is no shadow of a reason shown for this belief. If the jury found that this insane delusion was the cause of his disinheriting her, it alone would be sufficient to invalidate the will." So in Hardenburgh v. Hardenburgh, 133 Ia. 1, 109 N. W. 1014, it was said: "It is almost conclusively shown that the testator was the subject of the delusions which are said to have existed in his mind, and, from a very careful examination of the evidence, we are fully satisfied that these delusions were insane in their nature and quality. At the time of the contest the daughters were women well along in years. They were all women of respectability and high standing in the community where they resided. There had been nothing in their conduct, either in private life or in public, indicating that they were not women of the severest virtue, and yet the charges of unchastity were frequently made against them. It is true, the charges were not made to the public, but were confined to the members of his own family, and oftentimes made directly to the persons accused." In Swygart v. Willard, 166 Ind. 25, 76 N. E. 755, a finding that the testator was influenced by an insane delusion as to the character of a relative was sustained on facts stated by the court as follows: "During the last ten years of his [testator's] life the burden of his conversation was his money, his property and his children, and the manner in which he would dispose of his property. His children were all men and women of respectable standing, and treated him as kindly and affectionately as he would permit them to do. He lamented the fact that none of the family lived with him. He talked occasionally of his first wife—sometimes saying she was a good woman and helped to earn his property, and again that she was a spendthrift, recklessly extravagant and a strumpet, when in truth she was a good woman and of frugal habits. In speaking of his children he would sometimes say they were all good children, and he intended to treat them alike in his will; at other times he would denounce some of his daughters as extravagant spendthrifts and unworthy, and declared that he would give them nothing. In speaking of his children he would often become greatly excited, and sometimes abuse his daughters using vile and base names and epithets, and probably the following day would say they were dutiful and worthy women, and declare that his sons were thieves and rascals and should receive no part of his estate. His daughter Lillie, thirty-eight years of age, had been an invalid from childhood. He generally said she was unfortunate and unable to provide for herself, and that he would make abundant provision for her, and give her more than any other one of his children; but sometimes he would curse and abuse her. She lived at Elkhart the last three years of his life, and at one time he sent for her to come to South Bend to visit him. She came, and on arrival informed him that she only had enough money to pay her fare coming and would have to get from him the money for her return fare, about fifty cents, whereupon he flew into a rage, cursed and abused her, and drove her from his house; and she went penniless to a neighbor who sent her home on the following day. He afterwards frequently said he thought more of her than any other child."

Very closely related to a delusion of this kind is an unfounded antipathy to a relative, which is discussed in an earlier division of this note. See supra the subdivision II. 3, *Unreasonable Antipathy to Relative.*

3. Injury by Relative or Intent to Injure.

A belief by a testator that a relative has injured or attempted to injure him or is engaged with others in a conspiracy to injure him is not an insane delusion if it is a conclusion, however unreasonable, from acts of the relative or information imparted to the testator. Rush v. McGee, 36 Ind. 69; Fulton v. Freeland, 219 Mo. 494, 118 S. W. 12, 131 Am. St. Rep. 576; American Seamen's Friend Soc. v. Hopper, 33 N. Y. 619; Coit v. Patchen, 77 N. Y. 533; In re White, 121 N. Y. 406, 24 N. E. 935; In re Gross, 47 Hun 633, mem. 14 N. Y. St. Rep. 429. Thus in Friedersdorf v. Lacy, 173 Ind. 429, 90 N. E. 766, it was said: "It is clear that the suspicion or belief of Mrs. Friedersdorf that her daughters designed to poison her was not a mere conception of her morbid fancy, or an insane delusion; but if the testimony is true, was a false belief founded upon the statements of men on whose word she might ordinarily rely." So in In re Kendrick, 130 Cal. 360, 62 Pac. 605, it was said: "The violated agreement, the recording of the deed, the detention of the keys, the locking of the chickenhouse, the sale and removal of Mrs. Kendrick's lard, while not sufficient to justify the conclusion that Mrs. Masterson did intend to eject her invalid sister from the house, afforded some ground of belief to the sick and irascible woman that her sister designed to take ad-

vantage of her helplessness. And it being further considered that Mrs. Kendrick, when aroused, seems to have been both violent and extravagant of speech, the matter of the accusation does not appear extraordinary. At least the belief did not originate in a diseased mind, but found color for its support in the matters that have been recited. It cannot, then, be considered an insane delusion." In the case of Skinner, 40 Ore. 571, 62 Pac. 523, 67 Pac. 951, the court said: "Some of the witnesses indicate that the decedent was imbued with the idea that the daughter-in-law would resort to extreme measures in order to possess herself of the property, if it should be divided or bequeathed to his son. If this be so, it was not shown that it was a delusion. It may, for aught that appears, have had its foundation in fact. We do not mean to say that the daughter-in-law was possessed of any such purpose, because there is not a scintilla of evidence in the record to bear out the statement. On the contrary, the proven admissions of the decedent show her treatment of him to have always been kind, indulgent and considerate. But what we mean is that his information may have been such as to superinduce the belief, and thus the state of his mind may have been the result thereof, and not of sheer delusion. Some of the witnesses relate that, when he was asked to give reasons for thinking that his daughter-in-law intended to possess herself of the property, he answered that the neighbors told him so. Further than this the matter was not pursued. Now, if he believed his neighbors, and acted upon neighborhood gossip, he was not possessed of a delusion: but the idea with which he was imbued had its basis in fact, and hence the will could not have been superinduced by an insane delusion."

It is, however, recognized that the delusion of persecution is one of the most common manifestations of monomania and a belief of that kind as to relatives of the testator, wholly without basis in fact, has frequently been held to destroy testamentary capacity. Fulleck v. Allinson, 3 Hag. Ecc. (Eng.) 527; American Bible Soc. v. Price, 115 Ill. 623, 5 N. E. 126; Woodbury v. Obear, 7 Gray (Mass.) 470; Lathrop v. American Board of Foreign Missions, 67 Barb. (N. Y.) 590; Matter of Dorman, 5 Dem. (N. Y.) 112; Shaw's Will, 2 Redf. (N. Y.) 107; In re Keeler, 12 N. Y. St. Rep. 148. In Ballantine v. Proudfoot, 62 Wis. 216, 22 N. W. 392, it was said: "The evidence conclusively shows that, for a considerable period and up to the time of executing the will, Mrs. Stewart labored under the strange delusion that her only living child and the husband of that daughter had ill-treated her; had purposely made her uncomfortable and unhappy while she lived with them; had permitted their young children to annoy her in different ways, and had even attempted to poison her. Several of the proponent's witnesses testified to conversations had with the testatrix, in which she complained of her daughter and son-in-law's treatment of her, and said that she believed they proposed to poison her or make way with her in some way. So impressed was she with this notion that she would not eat food which her daughter or her family brought to her, and often repeated the story that she had thrown a piece of suspected meat, which had been given her to eat, to a dog, and that the meat poisoned the dog. It is not necessary to go over this testimony in detail. Suffice it to say that it establishes the fact, beyond doubt, that Mrs. Stewart was laboring under these insane delusions as to the conduct and motives of her daughter and son-in-law, and that these delusions, in all probability, influenced her in disposing of her property. It is needless to inquire whether this mental disorder was brought on by the sun-stroke, which some of the witnesses say she had some years prior to her death, or whether it was the result of constitutional irritability and weakness; but it is plain that her affections had become so alienated from her only child, and her sense of right so perverted, that she repeatedly imputed to her daughter the wish to poison her. This presents a clear case of unsoundness of mind, caused by insane delusions, which influenced and induced the testatrix to give her property to those not akin to her and having no claims upon her. In the execution of a will it is essential that the testator shall understand the nature of the act and its effects; shall be able to comprehend and appreciate the claims which he ought to regard and satisfy; and that no disorder of mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties; that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it, which, if his mind had been sound, would not have been made." So in the case of In re Kahn, 1 Connoly 510, 5 N. Y. S. 556, the court said: "They were in substance, that his children were endeavoring to get his property away from him; that a son and daughter had attempted to poison him; that his children, or some of them, had declared he ought to be in an insane asylum; that they had employed men to watch him for the purpose of taking him to an asylum; that his son had spoken with the captain of a steamer, in which he went to Europe, to have him arrested as a lunatic when he arrived at Bremen; that his children had conspired to place him in a lunatic asylum; that they had caused carriages to be employed to remove him from his house to an asylum; had threatened to have a lawsuit begun against him by

the government because he had once brought from Europe a pair of earrings without paying duty thereon, and that they had caused the children in the street to cry out to him as he passed. These statements were made by the decedent in different forms to several persons, wholly disinterested. The testimony of the children and the friends of the family prove that these accusations were without foundation in fact; that he continued to make them more or less from the time of the marriage of his daughter Bella until within a week or ten days of his death. When reasoned with by friends he sometimes seemed convinced that he was in error, but at the next interview, he repeated his charges. On the 27th of January, Jacob Kahn a brother of the decedent died. During the week following his funeral, in conformity with a custom of the Hebrews, the decedent passed the time with Mrs. Yette Kahn, the widow of his brother, at her house, and then in conversation with her was especially emphatic in his assertions of the persecution of his children, and he refused to eat food which his daughter sent him, alleging that it contained poison. It was about this period that the instructions were given for the preparation of the instrument under consideration, which was executed a few days thereafter. I am compelled to conclude that the belief entertained by the decedent of persecution on the part of the wife and children was a delusion proceeding from a diseased brain, and that the instrument is the offspring of the delusion." In Lancaster v. Lancaster (Ky.) 87 S. W. 1137, it was said: "Under the testimony and the issues in the case at bar, the trial judge should have instructed the jury that if the deceased, at the time of the executions of the paper in contest, was under an insane delusion that his brother Robert had grossly wronged him in their business transactions, and was of unsound mind on this subject, and by reason of such unsoundness of mind made a different disposition of his estate from that which he would otherwise have made, they should find the paper not to be his last will and testament, although his mental capacity was sound on other subjects; but that, to invalidate the paper on this ground, the deceased must not only have been mistaken as to his brother's having grossly wronged him in their transactions, but must have been insane on the subject, and the will must have been induced by such insanity." In the case of In re Lapham, 19 Misc. 71, 44 N. Y. S. 90, the court said: "It is conceded that a person may have a delusion and still be competent to make a valid will; but the theory in such a case is that the delusion did not enter into the testamentary act. It is where the will is governed by or is the offspring of an insane delusion that the courts have invariably held that such a testamentary disposition is invalid. Such a conclusion must be applied to this case. The proponent herein insists that the decedent had no delusions which entered into the execution of the will; and that his acts and sayings in reference to himself and as to others were mistaken beliefs. Numerous cases were cited, and there can be no dispute as to the legal conclusions drawn in those particular cases. There was no evidence that the testator had been poisoned or that he acted in the manner as described by him; or that the effect of the poison was as he claimed. He was ill, as the doctor stated. Any other condition was the result of his perverted imagination. There was nothing from which he could draw the conclusion that his daughter-in-law had poisoned him, that Laura, his grandchild, had robbed him, or that his grandson Albert had committed some act which justified his being sent from home. He spread widecast his accusations and could not be reasoned with. Where a person tenaciously holds to the belief that a certain state of affairs exists, which in fact does not, and which can only be accounted for as the creation of a perverted imagination, without probable cause or evidence, he is suffering from a delusion and not a mistaken belief. From the entire evidence in the case the delusions of the decedent could not be confounded with unreasonable prejudice or mistaken beliefs. The persons who were the subjects of his accusations at the beginning and for a long time after treated him kindly, and were attentive to his wants. No other conclusion as to the relation of these parties can be drawn from the evidence." In Colhoun v. Jones, 2 Redf. (N. Y.) 34, it was said: "The testimony given on the trial, showing that Colhoun harbored intensely hostile feelings towards his father, at the time he executed the last will, is very strong. It is unnecessary to quote it at length, but it is sufficient to state that the fact was established by numerous witnesses. He justified this hostility on various grounds. He charged that his father and sister were Catholics—that his father hated him because of his Protestant faith, that his father had treated him harshly—that he had driven him away from home—that he had refused to aid him in getting an education—that they had not been on good terms for a number of years—and his father wanted to get him out of the way, so that he could get hold of his property, etc. It was clearly shown that there was no foundation for any of these charges, and that no reason existed why the testator should have entertained any of those beliefs against his only surviving parent. That the testator believed in the truth of what he said I have no doubt; that the facts which he asserted had no real existence is equally clear to my mind; and that

the will was the direct offspring of the delusion, no one can deny. We therefore have the precise condition of the monomaniac."

4. Fidelity of Husband or Wife.

The fact that one spouse entertains a belief unwarranted by the facts that the other has been unfaithful to his or her marital obligation of chastity does not necessarily establish the existence of an insane delusion. If such a belief is based on some facts or grounds for suspicion, however they may be magnified by a credulous or jealous disposition, it does not destroy testamentary capacity. In re Scott, 128 Cal. 57, 60 Pac. 527; Johnson v. Johnson, 105 Md. 81, 65 Atl. 918, 121 Am. St. Rep. 570; Thayer v. Thayer (Mich.) 154 N. W. 32; American Seamen's Friend Soc. v. Hopper, 33 N. Y. 619; Coit v. Patchen, 77 N. Y. 533; In re Gannon, 2 Misc. 329, 21 N. Y. S. 960; Potter v. Jones, 20 Ore. 239, 25 Pac. 769, 12 L.R.A. 161; Foster v. Dickerson, 64 Vt. 233, 24 Atl. 253; Cole's Will, 49 Wis. 179, 5 N. W. 346. In the case of Scott, supra, it was said: "There is no evidence in the record from which the court could find that the contestant was ever unfaithful to his wife or that he ever made any attempt or had any thought to poison her, or to cause her to be placed in an insane asylum. The court, however, was not authorized to hold that she was under an insane delusion in reference to these propositions unless it was satisfied, from the evidence before it, not only that these charges against him were without any foundation in fact, but also that there was no evidence of any facts brought to her knowledge from which she might form a belief, however irrational or inconclusive it might be, in the existence of the acts or purposes with which she charged him, and, in addition thereto, that she did in fact believe that he was guilty thereof." So in Cole's Will, 49 Wis. 179, 5 N. W. 346, it was said: "It must be conceded that the belief of deceased in respect to the unchastity of his wife, persisted in as it was without evidence to support it and against all reasonable probabilities of its truth, looks very much like insane delusion. Yet it is not necessarily so. Observation teaches us that there is a very large class of people, whose sanity is undoubted, who are unduly jealous or suspicious of others, and especially of those closely connected with them, and who, upon the most trivial, even whimsical grounds, will wrongfully impute the worst motives and conduct to those in whom they ought to confide. This insanity, which is developed in a great variety of forms, is altogether too common, and too many persons confessedly sane are to a greater or less extent afflicted with it, to justify us in saying that because the deceased was so afflicted he was insane, or the victim of insane delusion. The line between the unfounded and unreasonable suspicions of a sane mind (for doubtless there are such) and insane delusion is sometimes quite indistinct and difficult to be defined. However, the legal presumption is in favor of sanity, and on the issue of sanity or insanity the burden is upon him who asserts insanity, to prove it. Hence, in a doubtful case, unless there appears a preponderance of proof of mental unsoundness, the issue should be found the other way." In Phillips v. Chater, 1 Dem. (N. Y.) 533, the court said: "Now, does his behavior, in connection with those divorce proceedings, tend to establish the existence of an 'insane delusion' touching the purity of his wife? There are many circumstances, some trivial, some important, which lead to the contrary conclusion. Several of the witnesses, for example, testified to a certain freedom of intercourse between Mrs. Phillips and army officers stationed at posts where her husband was assigned for duty. Her conduct was thoroughly innocent, for aught that is established by the evidence, but it sometimes occasioned remark, and always angered the decedent, who was apparently of an inordinately jealous disposition. The intimacy between Auris and his wife was another circumstance which may very likely have excited a mind constituted like his, and the statements which Auris and the detective made, as to what took place after the former returned from the theatre with Mrs. Phillips, might well have furnished reasonable ground for his distrust. I certainly do not mean to intimate, in the least, that there was any just foundation for such vile suspicions, but simply to assert that the existence of the suspicions, under all the circumstances, may have been quite consistent with the decedent's sanity. What is an 'insane delusion?' Bouvier, in his law dictionary, defines a 'delusion' to be 'a diseased state of the mind, in which persons believe things to exist which exist only in their own imaginations, with a persuasion so fixed and firm that neither evidence nor argument can convince them to the contrary.' Tried by this standard, I can find no warrant in the evidence for holding that Dr. Phillips was suffering from any delusion whatever in relation to his wife. He does not, indeed, seem to have been constant in his opinion of her infidelity, for on several occasions he was apparently in the state of mind which was illustrated by his remark to the witness Grant, that 'sometimes he believed it, and at others he could not.' This is by no means the condition of a monomaniac such as he is claimed to have been. 'A sane man in error,' says Wharton, 'retains the power of doubting; not the madman' (Med. Juris. 4th ed. sec. 727)." In Potter v. Jones, 20 Ore. 239,

25 Pac. 769, 12 L.R.A. 161, it was said: "Tested by these definitions, can it be said, upon facts as disclosed by this record, that the testator was beset with an insane delusion in respect to the legitimacy of the contestant and her brother? The circumstances which he relates, and upon which his belief is founded, fix the place, identify the person and the manner of the improper meeting, and there is no evidence to show, nor is there any attempt to deny, that there was such a place or person or that such a meeting might not have occurred, only that the adulterous purpose which he ascribed and professed to believe to be the object of such meeting was so absolutely inconsistent with her known character for chastity as to be utterly unworthy of belief and only to be accounted for in him upon the theory of an unnatural dislike or aversion which amounted to an insane delusion. The evidence in contradiction of his belief proceeds on the assumption that there may have been such a place and man and meeting; and if so, her known character for chastity, her every-day walk and life, render it impossible that it could have occurred for the foul purposes which he imputes, or otherwise than accidentally and without concert or evil design in thought or deed. But these facts, however falsely or unjustly he may have reasoned from them, or however absurd his conclusions, as applied to the wife and contestant impugned by them, nevertheless furnished the evidence which inspired his suspicions and the ground upon which his belief was founded. It is conceded that the conclusions he drew from the facts are wholly unwarranted and without any justification, indicating at least an unrelenting jealous disposition; but unjust and absurd as they may be, they were not the pure creations of a perverted imagination, without any foundation in reality. Delusions are conceptions that originate spontaneously in the mind without evidence of any kind to support them, and can be accounted for on no reasonable hypothesis. The mind that is so disordered imagines something to exist or imputes the existence of an offense which no rational person would believe to exist or to have been committed without some kind of evidence to support it. They are as baseless as the fabric of a dream conjured into existence by a disordered or perverted imagination, without any sort of foundation of fact. As in Smee v. Smee, 5 P. D. (Eng.) 84, the testator imagined himself to be the son of George IV., and that when he was born a large sum of money had been put in his father's hands for him, but which his father, in fraud of his rights, had distributed to his brothers; or, as in Smith v. Tebbitt, L. R. 1 P. & D. (Eng.) 398, the testatrix imagined herself to be one of the persons of the Trinity, and her chief legatee to be another. In cases like these the belief is the offspring of a disordered mind, and not induced by the existence of any facts or occurrences which could lend any sort of countenance to it. The case at bar is not such. Here there is a claim of facts upon which the belief is founded, and unjust and unfeeling as may be such belief, in view of the known character of his wife for chastity, it is not the spontaneous product of pure fancy, but a grave error, showing a lack of judgment or a want of reasoning powers—the outcome of an oversensitive, jealous disposition, prone to exaggerate any trifling circumstance with which his wife may be connected into an unworthy and wicked importance, and to draw from them conclusions untenable, illogical and unworthy of belief. . . . To support the contention for the contestant, the belief or suspicion the testator entertained of his wife's infidelity and the illegitimacy of the children to be an insane delusion, must have been wholly without foundation in reality, and the mere figment of his perverted imagination. But the evidence discloses that it was formed on an apparent cause, leading on his part to a view of his wife's conduct, which we have admitted was erroneous, unjust, and unnatural, yet this only shows an unfortunate error of judgment or a want of reasoning power, but not an absolute want of intellect upon the subject. The conclusion which he drew from the facts was untenable and erroneous, and showed that he formed a bad judgment upon an insufficient state of facts, but does not show that his conclusion or belief was formed without any foundation in fact whatever." So it was said in Coit v. Patchen, 77 N. Y. 533. "The proof certainly does not establish the infidelity of the husband; and it may therefore be assumed that the deceased acted upon an unfounded suspicion as to his fidelity. But as other causes, as we have seen, co-operated to influence her judgment and action, which may have been sufficient to account for her discrimination as to him in making her will, it cannot, we think, be said that this act of itself was conclusive upon the question of insane delusion."

But if such a belief arises spontaneously in the mind of the testator without any basis in fact and is held as a fixed conviction it constitutes an insane delusion. Haines v. Hayden, 95 Mich. 332, 54 N. W. 911, 35 Am. St. Rep. 566; In re Gannan, 2 Misc. 329, 21 N. Y. S. 960; In re Long, 43 Misc. 560, 89 N. Y. S. 555. And see Burkhart v. Gladish, 123 Ind. 337, 24 N. E. 118. In the case of In re Jenkins, 39 Misc. 618, 80 N. Y. S. 664, it was said: "Shortly after their marriage he began to talk with neighbors and friends about his wife's infidelity, and, up

to the time of his death, made untrue allegations as to her character. The evidence emphasizes the fact, however, that during her entire life in the neighborhood where she lived her reputation for chastity was good, and no suspicions were held against her. Untrue reports were circulated only by her husband. People with whom he talked endeavored to persuade him that he was mistaken, and insisted that his accusations against his wife were the creations of his own imagination; but, in opposition to evidence and argument, he asserted in positive terms that his wife was guilty of immoral acts. A person has a delusion who believes that a certain state of affairs exists which in fact does not, and which can only be accounted for as the result of a perverted imagination, without cause or evidence. . . . Applying these definitions to the facts in this case, it cannot be argued that testator had a mistaken belief or an unreasonable prejudice. It went beyond these. It was an insane delusion."

5. Paternity of Child.

A false belief by a testator that one of his children is illegitimate, being of course closely related to a similar belief in the infidelity of his wife (discussed in the preceding subdivision), is governed by the same rules and does not constitute an insane delusion if it exists as a conclusion illogically or unreasonably drawn from facts. Johnson v. Johnson, 105 Md. 81, 65 Atl. 918, 121 Am. St. Rep. 570; O'Dell v. Goff, 149 Mich. 152, 112 N. W. 736, 119 Am. St. Rep. 662, 10 L.R.A.(N.S.) 989; Thayer v. Thayer (Mich.) 154 N. W. 32; Potter v. Jones, 20 Ore. 239, 25 Pac. 769, 12 L.R.A. 161. And see Smith v. Smith, 48 N. J. Eq. 566, 25 Atl. 11, wherein it was held on a review of the evidence that the testator's denial of the legitimacy of his child was a wilful falsehood and not a delusion. In Clapp v. Fullerton, 34 N. Y. 190, 90 Am. Dec. 681, it was said: "It was also insisted, that, aside from the issue of imbecility, the testator was disqualified by lunacy. This claim rested on the assumption, that during the last year of his life, he was laboring under an insane delusion as to the legitimacy of his elder daughter To sustain the allegation, it is not sufficient to show that his suspicion in this respect was not well founded. It is quite apparent, from the evidence, that his distrust of the fidelity of his wife was really groundless and unjust; but it does not follow, that his doubts evince a condition of lunacy. The right of a testator to dispose of his estate, depends neither on the justice of his prejudices, nor the soundness of his reasoning. He may do what he will with his own; and if there be no defect of testamentary capacity, and no undue influence or fraud, the law gives effect to his will, though its provisions are unreasonable and unjust. . . . The testator, in view of his own approaching end, very naturally recurred to the circumstances attending the death of his first wife, which had been the most marked event in his own family history. He unfortunately recalled a declaration made by her on her deathbed, that the contestant, though born in wedlock, was not his daughter. He knew that it was uttered in the delirium of a fatal disease of the brain, but he permitted it to be a source of uneasiness and disquietude, until it made an impression on his mind, in his then feeble and morbid condition, which it had not produced when the incident occurred. He connected it with the circumstances of his occasional absence from home, during the first year of his married life, of her light-hearted youth and gayety, and of suspicions which had fallen upon some who had been early associates of the family; and he was thus led to apprehend, that her statement, though made when she was delirious, was more significant than he had deemed it at the time. He admitted, that he had attached no importance to the declaration, when it was made, and expressed his surprise, that it had not impressed him more deeply. He spoke of it, however, only to his nearest relatives, and evidently appreciated the embarrassment and delicacy of alluding to it at all. He continued to refer to Mrs. Fullerton in terms of kindness and affection, acknowledged that he did not, and could not know that she was not legitimate, and declared, that he should always continue to claim and treat her as his daughter. It is manifest, that his original judgment was right. He dismissed the delirious expression of his wife, as of no moment, when all the circumstances were fresh, and his mind healthy and vigorous; but when his affection for her had waned, with the lapse of time, and he was no longer able to recall the grounds of his former confidence in her fidelity, the recollection of the incident produced undue impression on a mind enfeebled by age and disease. The fact should be referred to weakness and credulity, rather than to insane delusion." So in the case of In re Smith, 24 N. Y. S. 928, it was said: "It is beyond question that he believed that the contestant was not his child, and that such belief was without foundation in fact. But was this belief the creature of his imagination? I cannot but believe from the evidence that 'the stories' which were in circulation had much to do with this belief. The gossip of the neighborhood had lodged in his mind a position, the venom of which, in his sober hours, he was able to restrain, but which, when reason was driven out by rum, exhibited itself in the charge of unchastity of his

wife. It must be remembered that on the first occasion in which she says he mentioned the matter to her he said he had heard that Henry was not his child. The continued repetition of this charge for years in drunkenness produced such an effect upon his mind that he came at last to believe it, and at length he reveals his convictions to his priest. Thus the element of a delusion, a belief existing without cause other than the imagination of the deluded, is wanting. The other element of a delusion—that it must be belief maintained in opposition to evidence and argument that would convince the ordinary mind of its falsity—is also wanting. So far as the evidence in this case goes, it does not appear that the wife whose chastity was impugned, nor the good priest to whom he went for advice, made any attempt by argument or evidence to convince him of his error. It must be apparent that if Owen Smith heard the report that contestant was not his child, and that report was true, he labored under no delusion in regard to the matter. If the report was not true, it was still evidence upon which he could act, however unjust and mistaken his action might be, without rendering what he did the result of insanity. If no such report was heard by him, and he never believed his wife to have been untrue to him, then he can be accused of depravity, not of insanity. Upon all the evidence I cannot escape the conclusion that at the time of the execution of the instruments offered for probate Owen Smith was not the subject of a delusion in regard to the paternity of the contestant, and the instruments must, therefore, be admitted to probate." In the case of In re Bennett, 201 Pa. St. 485, 51 Atl. 336, the court said: "But all delusions are not insane delusions. A man may, from information given him, believe that his son is dead, when, in point of fact, the son is alive. The father's belief is a delusion; and if, when his son appears to him in person and explains that the information was false, the father persists in thinking him dead, his belief becomes an insane delusion. The difference between the two species is that one is the product of the reason, and the other a figment of the imagination. The belief of the testator rested upon very practical realities—upon confessions, oral and written, made to him and repeated to others, and upon other circumstances which we need not narrate, but which were almost as convincing as confessions. We do not say whether, in our judgment, the confessions were true or false, or whether the circumstances were or were not misleading: but we do say that both were of a character which might fairly persuade a sensible man to the belief which they induced in the testator. He acted under this conviction just as any sane man would have acted; he became for a time indifferent as to his personal appearance, and moody and reserved in his manner; and these very natural expressions of rational grief are sought to be tortured into exhibitions of madness."

But the belief of a testator that one of his children is illegitimate may be so baseless as to constitute an insane delusion. Drinkhouse's Estate, 14 Phila. (Pa.) 291, 38 Leg. Int. 214; Bell v. Lee, 28 Grant Ch. (U. C.) 150. In Morgan v. Morgan, 30 App. Cas. (D. C.) 436, 13 Ann. Cas. 1037, it was said: "Had there been evidence showing that there was no possible foundation for the impeachment of the mother's chastity before the birth of those children, and that the statements made to the testator of her misconduct were false and had been maliciously made, yet if, in the absence of such proof, the testator believed them to be true and acted under that belief, it still could not be said that he was the victim of an insane delusion. That condition could only be shown by evidence that proof of their falsity, which no sane mind could fairly reject, had been furnished him, notwithstanding which he clung to his unfounded opinion and acted in accordance with it. So in Layer v. Layer, 110 Ky. 542, 62 S. W. 15, the court said: "It is hard to understand how a father could treat his only son in the manner described by a number of witnesses in this record, unless we credit the testimony of the repeated declarations of this man that he was not the father of the boy. There seems to have been absolutely no ground for this belief, which was so exhibited in the conduct of the father as to impress upon the boy's mind the idea that he was an adopted child. There was also some proof of insanity in other members of testator's family, and that he had once set out to drown himself. Independently of the opinions of the witnesses, the jury, on the testimony for appellant, might well have inferred that the testator labored under an insane delusion that he was not the father of appellant, and for that reason left him out in his will. It is true there was testimony for the appellees from which the jury might have drawn the opposite conclusions; but the credibility of the witnesses was to be determined by the jury under proper instructions, and this court is not the tribunal in which it may be decided." In Florey v. Florey, 24 Ala. 241, it was held that the fact that the testator, a white man married to a white woman, believed the principal beneficiary, a negro, to be his son was sufficient to go to the jury on the issue of testamentary capacity.

IV. Influence of Delusion on Testamentary Disposition.

In a few early English cases it was said that the mind is a unit and that an insane

delusion on any subject, however disconnected from the testator's disposition of his estate, deprives him of testamentary capacity. Waring v. Waring, 6 Moo. P. C. 341; Smith v. Tebbitt, L. R. 1 P. & D. 398, 36 L. J. P. 97, 16 W. R. 18. However, the doctrine of those cases was repudiated in Banks v. Goodfellow, L. R. 5 Q. B. 549 (*followed* in Murfett v. Smith, 12 P. D. 116, 57 L. T. N. S. 498 and Smee v. Smee, 5 P. D. 84, 49 L. J. P. 8). And in the United States it has been held uniformly that an insane delusion as to a relative of the testator does not invalidate a will unless the disposition therein made of the testator's estate is materially influenced by the delusion to which he is subject. Florey v. Florey, 24 Ala. 241; Taylor v. McClintock, 87 Ark. 243, 112 S. W. 405; In re Kendrick, 130 Cal. 360, 62 Pac. 605; Lucas v. Parsons, 24 Ga. 640, 71 Am. Dec. 147; Zinkula v. Zinkula (Ia.) 154 N. W. 158; Gesell v. Baugher, 100 Md. 677, 60 Atl. 481; Johnson v. Johnson, 105 Md. 81, 65 Atl. 918, 121 Am. St. Rep. 570; Fraser v. Jennison, 42 Mich. 231, 3 N. W. 892; Rivard v. Rivard, 109 Mich. 98, 66 N. W. 681, 63 Am. St. Rep. 566; In re Forman, 54 Barb. (N. Y.) 274; Colhoun v. Jones, 2 Redf. (N. Y.) 34; In re Hart (Pa.) 89 Atl. 816. "Even a monomaniac may make a valid will if the delusion has no relation to the subject or object of the will, or the persons who would be likely, ordinarily, to be the recipients of his bounty." In re Lang, 9 Misc. 521, 30 N. Y. S. 388. In Lathrop v. American Board of Foreign Missions, 67 Barb. (N. Y.) 590, it was said: "A monomaniac may undoubtedly make a valid will if the delusion which affects the general soundness of his mind has no relation to the subject or object of the will, or the persons who would otherwise be likely, ordinarily, to be the recipients of his bounty; or where, as Judge Gridley states the rule in Stanton v. Wetherwax, 16 Barb. 263, 'the provisions of the will are entirely unconnected with, and of course uninfluenced by, the particular delusions.'" So it was said in Sayre v. Princeton University, 192 Mo. 95, 90 S. W. 787: "Medical men of great learning maintain that a mind diseased on one subject must be classed as unsound, but the law of this State is too well settled to be gainsaid that a man's mind may be impaired in one faculty and practically unimpaired in all others. Derangement of mental faculties does not incapacitate one under our laws from making a will, if it does not render him unable to transact his ordinary business, and incapable of understanding the extent of his property and of appreciating the natural objects of his bounty."

A delusion on the part of a testator that he has been told something derogatory to a relative does not invalidate his will if he does not believe the supposed statement to be true. In re Bartels (Tex.) 164 S. W. 859, wherein the court said: "The only evidence of any insane delusion on the part of Mrs. Bartels is the testimony as to her statement that Mrs. Sonet had told her that Mrs. Milam would poison her. Mrs. Sonet did not make this statement, and, if Mrs. Bartels believed that she had made such statement, she was under a delusion. But, conceding this to be true, the undisputed evidence is that Mrs. Bartels, whenever she mentioned the matter, stated that she did not believe that Mrs. Milam would poison her, and the fact, which is also shown by the undisputed evidence, that she allowed Mrs. Milam to prepare her meals for her, and always waited for her to prepare and bring her meals to her, conclusively shows that she did not believe the statement in regard to Mrs. Milam. This being so, her delusion as to Mrs. Sonet having made the statement could not possibly have influenced her bequest to Mrs. Milam."

A will is not invalidated by a delusion of the testator with respect to a relative who is provided for with reasonable liberality by the will. Rice v. Rice, 50 Mich. 448, 15 N. W. 545; In re Iredale, 53 App. Div. 45, 65 N. Y. S. 533; Cole's Will, 49 Wis. 179, 5 N. W. 346. In the case first cited, it was said: "But the existence of a delusion that his wife was unworthy of esteem, or was abusing him, would be a singular reason for setting aside a gift which he had deliberately made in her favor." In Skinner v. Farquharsan, 32 Can. Sup. Ct. 58, *reversing* 33 Novia Scotia 261, it was held that a delusion that the testator's wife and son had been guilty of a heinous crime would not be deemed to have affected his will, it appearing that after the delusion was entertained he reduced the bequests theretofore made to them, but still left to each of them a liberal amount. The court said: "If the deceased's delusions had influenced the disposal of his property, the respondent's contention should perhaps prevail. But that is a question of fact. And twelve average men could not, reasonably, but come to the conclusion that if that had been the case, if he had had present to his mind, when he went to his solicitor, that his wife was the vile, loathsome creature that he intermittingly had believed her to be, if that had been the impulsive cause of his making a new will, he would not, by that new will, have appointed her guardian of his children and one of his executors, besides bequeathing to her and his son a substantial amount of his property. Such dispositions cannot have been the offspring or result of this delusion. On the contrary the inference from them is that the delusion cannot have been in actual operation at the time when he made them. Then

this will cannot be said to be an inofficious one as regards the wife and the son. It was a rational act rationally done, according to the solicitor's evidence. The respondent's reasoning is, in my opinion, fallacious. This testator must have been insane, he argues, because, though under the belief of his wife and son's heinous criminality, yet he did not disinherit them altogether, but left them a considerable portion of his estate. But there is, in that theory, no compatability between the efficient cause and the effect. It is petitio principii, it is assuming that the will was made because of that delusion. Now that is the very question to be determined. And I cannot but help thinking that if it were that delusion that had guided the mind of the testator when he made this will, he would not have given a cent to his wife and to his son. If he had disinherited them altogether, they would be justified in contending that it was an insane delusion that had influenced him to do so. But I cannot see that they can base such a contention on the ground that he left them a portion of his estate. What he left them, it is true, is less than what he had left them by the first will, but that he left them anything at all, that he appointed his wife one of the executors, that he appointed her guardian to his infant children, seems to me utterly irreconcilable with the proposition that he was, at that time, acting under the impulse of hatred or of vengeance and under the impression that he had suffered a most grievous tort at their hands."

While an unnatural or unjust disposition of property does not evince insanity (see the note to Morgan v. Morgan, 13 Ann. Cas. 1037), it may afford some evidence that a delusion of the testator as to a relative who was disinherited by the will was effective in producing the will. Evans v. Arnold, 52 Ga. 169.

A delusion of a testator will not be deemed to have effected his will unless it was entertained by him at the time the will was made. In re Merriman, 108 Mich. 454, 66 N. W. 372; Stull v. Stull, 1 Neb. (unofficial) Rep. 380, 389, 96 N. W. 200; Philadelphia Trust, etc. Co. v. Drinkhouse, 17 Phila. (Pa.) 23, 41 Leg. Int. 164.

It requires a very strong case to induce a court to set aside a will at the instance of persons not heirs-at-law at the time the will was made on the ground that the testator entertained towards them an insane aversion, though by an unlooked for casualty they have become the heirs. Cleveland v. Lyne, 5 Bush (Ky.) 383.

CARNAHAN

v.

HAMILTON

Illinois Supreme Court—December 16, 1914.

265 Ill. 508; 107 N. E. 210.

Appeal — Questions Reviewable — Failure to Ask Peremptory Instruction.

On a direct appeal to the Supreme Court, the failure to ask a peremptory instruction in the trial court does not preclude the contention that the verdict is against the weight of the evidence.

Wills — Testamentary Capacity — Age and Infirmity.

Infirmity from old age does not render a person incapable of making a will unless it has so far impaired the testator's mind that he is incapable of understanding his business at the time he is engaged in making the will.

Same.

To sustain an allegation of want of testamentary capacity, something more than mere physical disease and old age on the part of the testator must be shown.

Insane Delusion.

An "insane delusion" which will render one incapable of making a will is a belief in a state or condition of things in the existence of which no rational person would believe, or a belief in something impossible in the nature of things, or impossible under circumstances surrounding the individual, and which refuses to yield either to evidence or reason.

[See note at end of this case.]

Same.

Prejudice of the testator against a relative is not ground for setting aside a will unless it can be explained upon no other ground than that of an insane delusion.

[See note at end of this case.]

Unequal Division as Indicating Incapacity.

The unequal division of property among his heirs does not itself justify a finding of want of testamentary capacity, as the testator has the right to dispose of his property as he thinks best.

[See 13 Ann. Cas. 1044.]

Same.

Unequal disposition of property is a circumstance which the jury may consider in connection with other evidence in passing on the mental capacity of the testator.

Ancestral Insanity — Presumption.

It cannot be presumed that the testator is insane merely because his father was insane, as, until the disease manifests its presence, its existence cannot be inferred in the mind of the person in question.

Belief in Spiritualism and Witchcraft.

The fact that a person believes in witchcraft, clairvoyance, spiritual influences, presentiments of the occurrences of future

events, dreams, mind-reading, and the like does not show testamentary incapacity as a man's belief cannot be made a test of sanity.

[See Ann. Cas. 1914C 1049; Id. 1915D 573.]

Excitability as Evidence of Incapacity.

The fact that testator shed tears when conversing about his deceased daughter, or grew excited when talking about business affairs that were troubling him, does not in itself prove testamentary incapacity.

Disease as Evidence of Incapacity.

Hardening of the arteries is no proof of testator's mental incapacity without a showing that it actually did affect the mind.

Test of Testamentary Capacity.

A person who is capable of transacting ordinary business is capable of making a valid will.

[See generally Ann. Cas. 1915A 362.]

Same.

To incapacitate the person from making a will, the derangement must be of that character which renders him incapable of understanding the effect and consequences of his act; it must be a want of capacity which prevents him from understanding the relation of cause and effect in ordinary business matters.

Foolish Conduct as Evidence of Incapacity.

That an old man, a widower 72 years of age, after his daughter's death, proposed marriage to two different women, is not very strong proof of unsoundness of mind, especially where he was unhappy with his home life with his son-in-law.

Evidence of Incapacity Insufficient.

In a will contest, a finding that a testator 72 years of age was wanting in testamentary capacity held against the great weight of the evidence.

Evidence — No Change in Testator's Condition Observed.

In a will contest in which it was claimed that testator did not have testamentary capacity, a witness may state that he had observed no change in testator, and that he was, on the day the will was executed, the same as he was any other day the witness ever saw him.

Testamentary Capacity — Comprehension of Estate "Without Prompting."

An instruction in a will case basing mental capacity on understanding the nature and extent of his property "without prompting" is erroneous, where there is no evidence that he was prompted.

Same.

It is not a rule of law that testator should have sufficient strength of mind to know what property he owned "without prompting."

Instructions — Injustice of Will.

An instruction on mental capacity of a testator that testator, if mentally unsound, did not have the right to cut off his grandchild with $100, was erroneous as assuming that only $100 was given, where there was evidence that she received personal property in addition to the money.

Same.

An instruction on testamentary capacity that if testator was of sound mind he had the right to cut off his grandchild, as only heir at law, and had the right to give his property to persons who would not have been heirs at law had he died without a will, but if he did not possess a sound mind or memory then he had no right to cut her off and give his property to persons not his heirs, is erroneous as having a tendency to permit the jury to decide whether the will was just or unjust as to the various relatives.

Instruction Not Warranted by Evidence.

Where at the time a testator made a will there was no evidence that he was suffering from mental derangement, anger, or jealousy, an instruction based on those facts is erroneous.

Appeal from Circuit Court, Shelby county: JETT, Judge.

Action to contest will. Mary E. Carnahan, plaintiff, and Nathan Hamilton, executor, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. REVERSED.

Whitaker, Ward & Pugh and *Steidley & Crockett* for appellant.

William H. Ragan and *George B. Rhoads* for appellee.

[509] CARTER, J.—This was a bill filed by appellee, Mary E. Carnahan, to contest the will of her grandfather, Payton A. Bond, of whom she was the only heir-at-law. After an answer and replication were filed an issue of fact was submitted to the [510] jury as to whether the instrument in question was the last will and testament of Payton A. Bond, deceased. The jury found in the negative. A motion for new trial was overruled and a decree entered in accordance with the verdict. Thereupon this appeal was prayed.

The will was executed on April 4, 1910, at which time Bond was seventy-two years of age. He lived until May, 1913. His wife died some fifteen years previous and he never afterward re-married. At the time of his wife's death they had one child living, Julia Ann. After his wife died Bond lived on his farm in Shelby county with said daughter, Julia Ann, and her husband, William Carnahan, until her death, January 25, 1910. She left surviving two children, one of whom was appellee, then fifteen months old, and the other a baby just born and who died within a few days after its mother. At the time of making the will Bond had three sisters living and one sister deceased, who left surviving her several children and descendants of deceased children. Very shortly after the will was executed Bond took a trip to Okla-

homa, where he visited relatives. After his return he lived with one of his sisters in the city of Pana, Christian county, Illinois, until the time of his death. At the time the will was made he owned 160 acres of land in Shelby county, upon which he and his son-in-law were then residing, besides some personal property. Some time thereafter he purchased a house and lot in Pana, which he continued to own until the time of his death. By his will he gave his grand-daughter, appellee herein, $100 and all his household goods and effects. To his sisters then living, and the heirs of the deceased sister, he gave the 160-acre farm, the will further providing that all other personal property, goods and chattels should go to the heirs heretofore mentioned. The will contained no residuary clause as to real estate, and consequently the house and lot that he afterward acquired in the city of Pana would descend to his grand-daughter, appellee herein.

[511] The bill averred that Payton A. Bond, the testator, was of unsound mind and memory at the time of the execution of the will; that at that time he was suffering from insane delusions and therefore did not possess testamentary capacity. Upon the trial of the case appellant produced forty witnesses who testified they were acquainted with the testator, and that in their opinion he was capable of transacting ordinary business affairs and understood the nature of his property and the natural objects of his bounty, relating various conversations they had had with him during the last few years of his life. Among this number of old acquaintances and neighbors,—farmers, physicians and bankers,—most of them having known him all the way from ten to fifty years, and many testified their acquaintance had been of an intimate nature. On behalf of appellee thirteen witnesses were introduced, the majority of them relatives of her father. Most of these thirteen witnesses testified they had seen and talked with Bond near the time he executed the will, and that at that time they did not think he was of sound mind and memory or had sufficient mental capacity to transact ordinary business, or was able mentally to understand the extent of his property or who his relatives were. It is apparent, however, from the testimony of at least one or two of these witnesses, that they were not certain on this point. The allegations of the bill admit, and it is conceded in the briefs of appellee, that subsequent to the execution of the will the testator took care of and transacted his business. The theory of counsel for appellee is that mental incapacity existed at the time of the execution of the will by reason of delusions, jealousy and sickness, from which he subsequently recovered though he never fully regained his ordinary health.

Appellant contends that the verdict is manifestly against the great weight of the evidence. Appellee contends that this question cannot be raised in this court as no motion was made at the close of all of the evidence asking for a [512] peremptory instruction, citing in support of this contention Dowie v. Sutton, 227 Ill. 183, 81 N. E. 395, 118 Am. St. Rep. 266. That case was brought to this court by way of the Appellate Court. What was there said about the failure to give a peremptory instruction being a waiver of the question as to whether there was sufficient evidence to support the verdict has no bearing on a case like this, brought here directly from the trial court. In that case the court cited Long v. Long, 107 Ill. 210, where it was said the rule is well settled by the previous decisions of this court that in will contests like the present "the finding of the jury is conclusive unless clearly against the weight of evidence [citing authorities], and in this respect they are put upon the same footing with cases at law. Such being the case, it would seem to follow—and we so hold—the finding of the Appellate Court in conformity with the verdict of the jury is conclusive upon all questions of fact. Ordinarily the finding of the facts by the Appellate Court, in a chancery proceeding, is not conclusive on this court, but this class of cases, under the construction given to our statute, does not fall within the general rule, but such cases are treated in this respect, as we have already seen, as actions at law." This case was properly brought directly to this court because a freehold was involved. In all cases of this kind thus brought here this court has always reviewed the evidence regardless of whether a peremptory instruction was asked of the trial court, and has reversed such cases when in the judgment of the court the verdict of the jury was clearly and manifestly against the weight of the testimony.

The physician who attended the testator at the time of his death had known him for about ten years and testified that he had hardening of the arteries, and that this condition, in the three or four years before his death, had gradually grown worse; that he had poor circulation, generally, but mostly complained of pain in his feet; that his death was caused by gangrene, beginning in one of his feet, which condition was superinduced by hardening of the arteries; [513] that a man of the age of the testator at that time who has been active in his life is more or less troubled with hardening of the arteries. We judge from the record that the testator had been in fair health most of his life. There is evidence tending to show that he had an attack of *la grippe* in December, 1909, and remained in bed until near the middle of February; that he was troubled at the

same time with piles and fistula; that on this account he was unable to attend either the funeral of his daughter on January 25, 1910, or that of the new-born child four days later. We think the weight of the evidence shows that he was up and around during the month of March that year, going on business or otherwise to Pana, Assumption and other near-by places. There is some evidence on the part of appellee that during this time he complained that his head troubled him. Two days after the will was drawn Dr. Martin, who had treated him in the preceding January for the "grip," testified he was called from Tower Hill to treat him; that on April 6 in question he found him in bed with a high temperature and apparently suffering intensely, and that the cause was an abscess just over the nose, in the forehead; that he saw him later, on April 25, and the abscess had broken and he was practically recovered. He testified, also, that he noticed that the testator's arteries were hardening, and other conditions arising from old age. This is substantially all the testimony in the record bearing on the testator's physical condition during the last three or four years of his life. So far as the record discloses he was in fair health, considering his age, after April, 1910, until his final sickness, which lasted only a few days.

In the forenoon of April 4, 1910, testator left his farm, where he was residing with his son-in-law, William Carnahan, and walked to the home of a neighbor, Joseph Kelly, living about three miles and a half away, where he had the will in question drawn by Kelly. Charles Simmons, another neighbor, who lived about a mile south of the Bond home, [514] testified that he had met the testator going to Kelly's, and the two, having been acquainted for years and having often transacted business together, stopped and had quite a visit; that during the conversation Bond asked Simmons if he had seen Kelly pass there that morning, stating that he was going to Kelly's to have his will made; that he was going to take a trip out west and might meet with an accident or might get sick, and he wanted his business matters fixed up before he went away. Simmons further stated that after they parted testator went on toward Kelly's home. Joseph Kelly, who drafted the instrument here in question, died in May thereafter. His wife testified that the testator came to their house the morning of April 4 and talked with her husband about making his will. The witness had known testator all his life and talked with him on that day. Her husband and testator sat down at a table to write the will, Mrs. Kelly leaving the room. After the will was written, some time that afternoon, Bond left to get someone to witness it, and came back with Isaac Lockwood and George W. Simpson, who signed as witnesses. Mrs. Kelly further testified that in her conversation with testator he spoke of his sisters and said they were always good to him and that he wanted to leave something to them, and also spoke of his grand-daughter (appellee herein) in a friendly way; that he said nothing while he was there to indicate that he was angry with any of his relatives. Lockwood and Simpson were plowing in a field about a quarter of a mile from Kelly's house when the testator asked them to witness his will. They consented and walked with him to Kelly's, where the will was signed and witnessed. They talked with him in a general way from the field to the house, and both testified that he showed no anger at the time the will was signed or at any time that day when they saw him. Both of these witnesses had known him for years. Mr. and Mrs. Kelly, Lockwood and Simpson were the only ones present with testator in the house at the time the will was signed and witnessed. [515] The three that were living all testified that they believed him to be of sound mind and memory at that time, and that he was able to transact the ordinary business affairs of life and understood what property he owned, who were his heirs and the natural objects of his bounty. Charles Simmons testified that testator on that or the next evening came to his house and drank a cup of coffee at the supper table, remaining there, visiting, some twenty or thirty minutes. Simmons and Simpson saw him frequently between the time the will was drawn and the date of his death, and both testified that they thought he had testamentary capacity at all of their interviews. Many farmers who lived near Bond, and a number of merchants and business men who had known him and met him before, about the time and after the will was drawn, all testified substantially to the same effect,—that in their judgment he was a man of sound and disposing mind and memory. The physician who attended him during his last illness testified that in his judgment Bond's mental condition was such in 1910, and until his death, that he was able to transact ordinary business affairs, understand what property he owned and who were his relatives. He stated on cross-examination that a person having hardening of the arteries was sometimes affected thereby so that he might be predisposed to irrational likes and dislikes. There was, however, nothing in the testimony of this witness that indicated that he was of the opinion that the testator was predisposed in this way. Dr. Martin, to whose testimony we have heretofore referred with reference to treatment for an abscess on April 6, 1910, stated on direct examination for appellant that in his judgment, in the

years 1909, 1910 and 1911, testator was competent to transact the ordinary affairs of life and understood the extent of his property, who were his heirs and the natural objects of his bounty. He stated on cross-examination that on April 6, 1910, when he treated testator for this abscess, he did not think testator was in condition to transact ordinary [516] business, and that from what the testator said to him then and what he saw, the condition he found him in was one that in his opinion had existed for several days. We do not understand this witness' testimony as stating, as contended by counsel for appellee, that he (the doctor) thought testator lacked testamentary capacity at that time, but only that he was in such pain then that witness would not say he was in a condition to transact ordinary business.

There was nothing in the testimony of any of the forty witnesses who testified for the appellant, except that of Dr. Martin, to which we have just referred, that could in any way be construed as indicating that the testator was not of sound and disposing mind and memory at or about the time the will was executed or at any other time, or that there was anything in his actions or talk that in the slightest degree indicated that he was possessed of an insane delusion or harbored an unreasonable jealousy against any of his relatives or friends. It would serve no useful purpose to set out in detail the testimony of all these forty witnesses. They are all in substantial accord upon the issue here involved.

Mrs. Alta Rowley, who was a niece of William Carnahan, appellee's father, lived in testator's family from the time of his daughter's death, in January, 1910, until June after the will was executed. She was at that time seventeen years of age and unmarried. She testified that she thought testator was not of sound mind from February to June of that year; that she did not mean that he was of unsound mind at all times, but that he had spells, and when he had these spells he was not of sound mind; that usually he talked naturally, just as anyone else would, but would get worked up and nervous at times. The witness further testified that while she worked there Bond proposed marriage to her; that she advised him to get someone older than she was, and he replied she was his choice; that he would only live a few years, and if she married him she would have a [517] home after he was gone and could take someone younger; that he never talked to her about marriage but this once; that she overheard him ask Mrs. Halbrook, who was then living there, to marry him.

Mrs. Mary Halbrook (now Mrs. Carnahan, the wife of appellee's father), testified that from February 20 to April 4, 1910, testator was not of sound mind and memory, did not understand what property he owned or its value or who his relatives were; that she had known the testator as long as she was old enough to remember, and that she was keeping house for him and Carnahan, with the assistance of the witness last referred to, after Mrs. Carnahan's death until she married Carnahan, in June of that year. She testified that the testator proposed marriage to her in March, 1910; that during that conversation he asked her if she would drop one of her admirers and marry him; that if she would do that she would have a home the rest of her days. She testified that during that or another conversation on the subject he asked her whether she was engaged to Oscar Pope or William Carnahan, saying it was all right if she was going to marry the former but he did not want her to marry Carnahan; that he stated that if she did not marry him he would change his will and go out west; that when she refused him he became sullen and remained in that condition for several days; that during these talks about marriage he would sometimes cry and seem quite excited; that the last conversation he had with her about this matter was April 4, 1910; that she did not see him again until late that evening. Mrs. Carnahan further testified that when Bond came home after the will was drawn he was taken sick in the night, and the next morning Dr. Martin was called and treated him for the abscess heretofore referred to. The witness further stated that during her conversations with the testator he had talked about some money he said his father had buried on the old home place by a stump, and that he had dug for this money and believed he would be able to find it. The witness further [518] testified that she had been married three times and that she had been divorced from her second husband; that shortly before the testator had proposed to her she had been engaged to Oscar Pope, but had broken that engagement prior to her talks with the testator.

William Carnahan, the father of appellee, testified that he believed that when the testator left home on the morning of April 4, 1910, he knew what he was talking about and had sense enough to know who his relatives were and what property he owned. He testified that after the testator's daughter's death he (the witness) told Bond he did not know what he was going to do with appellee; that he did not see how he could take care of her and keep the home; that he had about decided to put her in an orphanage; that testator broke down and cried and said to the witness to get somebody to come and keep house; that he did not want the child

taken away; that it was not right to take her to a strange place; that because of this they got Mrs. Halbrook and Alta Hoover (now Mrs. Rowley) to keep house for them and look after the little girl; that he (the witness) had a sale of some personal property on testator's farm in March, 1910, and that the testator on the day of the sale began piling up some chairs and a patent churn and washing machine and articles of furniture that he owned and said he was going to sell them at the sale; that he looked at the witness with a glare in his eyes when talking about the subject; that he finally decided not to sell the goods and said he would leave them to Mary, the appellee; that testator was a peculiar man, with a very high temper at times, and that he would get mad and go all to pieces, and you could not reason with him during these mad spells; that during the spring of 1910 testator had a row with him about the way he was plowing the garden. The testimony in the record tends to show that William Carnahan had trouble at one time with his wife, testator's daughter, and that they [519] were separated, but that several years before her death they began living together again.

George Kelly, the brother of the man who drew the instrument in question, testified that he met the testator on the morning of April 4 at the cross-roads near his brother's place and that they had quite a long talk; that the testator talked about his proposal to Mary Halbrook; that he told Kelly of a dream he had of money in a glass jar buried by an old stump; that during the conversation testator cried and wrung his hands and waved his arms to such an extent as to scare a team of horses that approached, driven by a lady, so that they wheeled around and started in the other direction and witness was compelled to help her get them under control again. The witness was not asked, and did not state, just what he did with his own horse and buggy during these proceedings. This witness testified he did not think the testator was of sound mind. He is a brother-in-law of appellee's father.

The wife of George Kelly, sister of William Carnahan, also testified that she did not think the testator was of sound mind at the time the will was executed; that she saw him at her house on April 5, 1910, and that the way he talked then she did not know whether he had mental power to know what property he owned or not; that he told her on that day that he had fixed it so that the appellee would get everything.

Mr. and Mrs. George Morgan testified that they lived near the home of testator; that on, or a day or two before, the fourth of April (they could not fix the date with certainty) the testator visited them at their home and was complaining bitterly of William Carnahan; that he was also complaining of his forehead. Mrs. Morgan testified that what he said did not sound sensible, and that it sounded "like a man that was insane." Her reason for this belief was, apparently, that he stated he was not going to stay any longer on his farm because Carnahan did not want him [520] around, and that she thought this sounded like an insane man. Both she and her husband testified that he said he had had trouble with Carnahan about plowing the garden, and other things. Both of them stated that they did not think he was of sound mind on the day in question.

Some of the witnesses for the appellee testified to additional details as to what they alleged were the testator's peculiarities about the time the will was executed. Two of them stated they heard him talking aloud to himself about his property when confined to his bed with *la grippe*, the winter previous to the execution of the will. Others testified as to his worrying over business affairs on the ground that some money he had loaned was not paid according to agreement, and that he expressed a fear he would not have enough to live on in his old age. Several witnesses also stated that the testator told them he was worrying as to the future life of his daughter, until he found something, by studying the Bible, with reference to a woman dying in childbirth that greatly relieved him.

We have set out, in the main, the substantial facts relied on by counsel for appellee to show the mental incapacity of the testator. It is urged that he was possessed of insane delusions. The principal grounds relied on to support this argument were his proposal of marriage to the two women, Mrs. Halbrook and Miss Hoover, his alleged unreasonable prejudice toward his son-in-law, William Carnahan, and his extreme excitability when talking about his daughter's death and other matters of great interest to him.

Infirmity from old age does not render a person incapable of making a will, unless such infirmity has so far impaired the testator's mind that he is incapable of understanding his business at the time he is engaged in making the will. (Schmidt v. Schmidt, 201 Ill. 191, 66 N. E. 371.) To sustain an allegation of want of testamentary capacity something more must be shown than mere physical disease and old age on the part of the testator. (Woodman v. Illinois Trust, [521] etc. Bank, 211 Ill. 578, 71 N. E. 1099, and cases cited; Waters v. Waters, 222 Ill. 26, 78 N. E. 1, 113 Am. St. Rep. 359.) An insane delusion which will render one incapable of making a will is difficult to define. This court has said that it is a belief in a

state or condition of things in the existence of which no rational person would believe. (Schneider v. Manning, 121 Ill. 376, 12 N. E. 267; Snell v. Weldon, 243 Ill. 496, 90 N. E. 1061.) Again, it has been stated that an insane delusion is a belief in something impossible in the nature of things, or impossible under the circumstances surrounding the individual, which refuses to yield either to evidence or reason. (Scott v. Scott, 212 Ill. 597, 72 N. E. 708; Drum v. Capps, 240 Ill. 524, 88 N. E. 1020; Louby v. Key, 258 Ill. 558, 101 N. E. 946.) Prejudice of the testator against a relative is not ground for setting aside a will unless it can be explained upon no other ground than that of an insane delusion. A person may be prejudiced against some of his children or persons who are the natural objects of his bounty and make unfair remarks about them without having a proper foundation for his conduct, but it does not necessarily follow that he is without testamentary capacity. Unreasonable prejudice against relatives is not ordinarily ground for invalidating a will. That can only be done when the testator's aversion is shown to be the result of an insane delusion, his conduct not being able to be explained on any other ground. (Nicewander v. Nicewander, 151 Ill. 156, 37 N. E. 698; Schmidt v. Schmidt, supra; Scott v. Scott, supra; Snell v. Weldon, 239 Ill. 279, 87 N. E. 1022; Drum v. Capps, supra.) An unequal division of testator's property among his heirs does not, of itself, justify the court in holding that testator did not possess testamentary capacity. The testator has the undoubted right to dispose of his property as he thinks best, and the fact that it is unequally divided among those who have claims on his bounty does not impair the validity of the will. It is only a circumstance which the jury may consider, in connection with other evidence, in passing upon the soundness of mind of the testator. (Cunniff v. Cunniff, 255 Ill. 407, 99 N. E. 654; Schmidt v. Schmidt, [522] supra.) It cannot be presumed that the testator is insane merely because his father was insane. Until the disease manifests its presence we cannot infer its existence in the mind of the person in question. (Snow v. Benton, 28 Ill. 306.) The fact that a person believes in witchcraft, clairvoyance, spiritual influences, presentiments of the occurrences of future events, dreams, mind-reading, and the like, does not necessarily affect the validity of his will. Manifestly, a man's belief cannot be made a test of sanity. When we leave the domain of experience or knowledge and enter upon the field of belief the range is limitless, extending from the highest degree of rationality to the wildest dreams of superstition. What to one man may be a reasonable belief is to another wholly unreasonable. While, under certain circumstances, belief in what men generally understand to be supernatural may tend to prove insanity, it is well known that some of the brightest and clearest intellects have honestly believed in spiritualism and other apparently supernatural influences. (Whipple v. Eddy, 161 Ill. 114, 43 N. E. 789, and cases cited.) It is the settled law that testamentary capacity cannot be determined, alone, by what one believes, nor by the character of the tales he tells concerning hidden treasure, spirits, spooks and supernatural things. Where the acts of the testator in the conduct of his business affairs and in his ordinary life are uniformly intelligent, rational and reasonable, proof that he has related stories concerning hidden treasures that in no way appear to have influenced him in the execution of his will does not prove testamentary incapacity. (Wait v. Westfall, 161 Ind. 648, 68 N. E. 271; Middleditch v. Williams, 45 N. J. Eq. 726, 17 Atl. 826, 4 L.R.A. 738.) The fact that the testator shed tears when conversing about his daughter or grew excited when talking about business affairs that were troubling him does not, in itself, prove that he lacked testamentary capacity at the time he executed the will. Whether hardening of the arteries has affected the mind is not a question of what the tendency of that disease [523] is, but the proof must be as to its effect in the particular case. (Brainard v. Brainard, 259 Ill. 613, 103 N. E. 45; Drum v. Capps, supra.) It is difficult to adopt any absolute or fixed rule as to what will constitute insanity in all cases. Temperament, nervous force and physical organization differ in infinite degree, and these may all have a direct or remote influence upon the intellect. While each case must depend in some measure upon its special facts, it is the settled law that a person who is capable of transacting ordinary business is capable of making a valid will; that is, if he is capable of acting in all ordinary affairs he possesses testamentary capacity. The derangement, to incapacitate the person from making a valid will, must be of that character which renders him incapable of understanding the effect and consequences of his act. It must be a want of capacity which prevents him from reasoning correctly and from understanding the relation of cause and effect in ordinary business matters. (Meeker v. Meeker, 75 Ill. 260.) That an old man in the condition of the testator, after his daughter's death should want a home and would be looking for a wife and companion certainly cannot, under the circumstances shown in this record, be very strong proof of unsoundness of mind. Such a desire is usually recognized as strong proof of a sane

mind. If his home life with his son-in-law was not pleasant,—and the evidence tends strongly to show it was not,—it would be most natural that he should be thinking of how he could bring about proper home surroundings for himself. On this point, however, the character of the evidence tending to prove this desire on the testator's part may well be subject to close scrutiny. All who testified to this fact, with one exception, were relatives of William Carnahan. One of them was his present wife, whose experiences in matrimony, as shown by her own evidence, are certainly not such as to justify any strong reliance upon her statement that such an offer of marriage was proof of an unsound mind.

[524] Counsel for appellee contend that the record shows conclusively that there was no ground for the testator having a dislike for his son-in-law, William Carnahan. A number of the witnesses testified that the testator had said to them that he always got along well with Carnahan and had been treated right by him. Other witnesses, however, some of whom testified for appellee, said positively that the testator claimed that he had trouble with Carnahan. Manifestly, the conditions were such that he did not care to live at his old home, on his own farm, after his daughter's death.

If it be admitted that Dr. Martin is correct as to the date (April 6, 1910), when he treated the testator for the abscess above his nose, it is most improbable from the evidence in the record that this abscess was causing him severe pain or making him trouble in marked degree on April 4, the day the will was executed. No person testifying for appellee testified that he did or said anything on that day that indicated that he was suffering physically. If the witness George Kelly is correct as to the time when he met the testator on the road to his brother's, and if his testimony is conceded to be correct as to the talk and actions of Bond at that time, it by no means follows that this proves that the testator lacked testamentary capacity on the day in question. The testimony of all the witnesses in the record proves conclusively that for some time before the execution of the will the testator had been up and around and attending to his business affairs; that he was physically able to walk miles by himself; that the son-in-law did not seem to think it was at all improper for the testator to leave home at any time he desired; that he went alone, on foot, to Joseph Kelly's house on the day in question, and the four witnesses who were present on that day at that house and talked with him saw or heard nothing that indicated in the slightest degree that he was not as mentally sound and vigorous as would be expected of any man of his age. The evidence also shows conclusively that although he did not [525] return to his home until the next evening, or later, the son-in-law or his present wife did not think such actions on testator's part were at all out of the way. Furthermore, there is not a scintilla of testimony offered by any witness that after April, 1910, the testator did or said anything that indicated that he was not of sound mind or memory. It is conceded by counsel for appellee that there is no evidence of that character. The witnesses who testified for appellant as to the testamentary capacity of testator were most of them fully as well qualified by long acquaintance with him, and in every other way, to judge of his mental capacity as any of the witnesses for appellee. The great majority of witnesses for appellant were not interested in any manner in this litigation. The same cannot be said as to the majority of the witnesses who testified for appellee. On this record we can reach no other conclusion than that the great weight of the testimony is against the verdict of the jury on the question of the testator's testamentary capacity.

The attesting witness Simpson was asked the question what Bond's appearance was on the day that he signed the will. The witness replied that "he was just that day as he was any other day that I ever saw him." This answer was stricken out by the trial court on motion of counsel for appellee, as was another answer of the same witness that he did not observe any change in testator, and the same ruling was made as to a question asked of the other subscribing witness. The trial court's ruling on this question is in conflict with the rule laid down by this court in Kellan v. Kellan, 258 Ill. 256, 101 N. E. 614, where we said that it was proper for the witnesses to state that they had not observed any change in the mental condition of the testator; that as witnesses can testify as to the mental condition of the testator before and after the time the will was executed, this would necessarily result in a direct or indirect comparison.

Counsel for appellant insist that the court erred in giving various instructions for appellee. Among others, they [526] urge that instruction 5 so given was incorrect. That instruction states that the testator, at the time he executed the will, in order to possess the sound mind and memory required by law, must have had "the strength and clearness of mind sufficient to know in general, *without prompting*, the nature and extent of his property, the persons who were the natural objects of his bounty and their relation to him and natural claims upon him, and he must know and understand what he is doing and be able to keep things in his mind long

enough to form a rational judgment in regard to them." In view of the nature of the evidence in this record we think this instruction was wrong in using the term "without prompting." There is not the slightest evidence in the record that he required or had any prompting at the time the will was executed. On the contrary, all the evidence as to what he said and did at the time the will was executed showed that he was not prompted in any way. Furthermore, this court has never laid down the rule of law that it was essential that testator should have sufficient strength of mind to know what property he owned "without prompting." So far as we are advised such a rule has never been laid down by any authority. Nothing was said by this court in Piper v. Andricks, 209 Ill. 564, 71 N. E. 18, that should be construed as holding to the contrary.

Appellee's instruction 10 is also criticised. It stated that the jury were instructed "that while, as a matter of law, Payton A. Bond, if he at the time was of sound mind and memory, had a right to cut off his grandchild, Mary A. Carnahan, (who, had he died without a will, would have inherited all of his property), with but $100, and had a right to give the rest of his property to persons who would not have been his heirs-at-law had he died without making a will, yet if, in fact, at the time he make said will he did not possess the sound mind and memory required by law, then he had no right to cut her off with this $100 and give his property to persons not his heirs." This instruction is erroneous [527] in assuming that he gave his grand-daughter only $100. The will showed that he gave her also the personal property that he owned at the time of his death. Counsel for appellee argue that the testimony shows that this personal property amounted to very little. The record is not at all clear as to its value. But there is a more serious objection to the instruction. The tendency of an instruction so worded would be to cause the jury to think they had a right to decide whether the will was just or unjust as to the various relatives. This court has frequently said in contests concerning wills, where the testator has made, or seemingly made, an unequal or inequitable distribution of his property among those related to him, that there is a disposition in the minds of most men to seek to hold the will invalid; that such an inclination has been found to exist in the minds of most jurors to such an extent that it cannot be controlled by instructions; that while the law is that the testator may make such disposition of his property as he sees fit and may bestow his bounty where he wishes, "the common mind is disinclined to recognize it, and jurors will too frequently seize upon any pretext for finding a verdict in accordance with what they regard as natural justice." (Nieman v. Schnitker, 181 Ill. 400, 55 N. E. 151, and cases cited.) The jury has nothing to do with the equity or inequity of the will. (Rutherford v. Morris, 77 Ill. 397.) Appellee had no property rights in testator's property and therefore could not be deprived or "cut off" from them. Instructions similar to this were held error in Brainard v. Brainard, supra, and Rowcliffe v. Belson, 261 Ill. 566, Ann. Cas. 1915A 359, 104 N. E. 268.

Instruction 8 given for appellee was also erroneous in telling the jury that if the testator "at times had attacks of mental derangement, anger and jealousy, which, while the attacks were upon him, rendered him, during their continuance, of unsound mind and memory," and if they believed, from the evidence, that at the time he executed the purported will he was suffering from one of these attacks, they [528] should find the will not valid. There is no evidence that at the time he executed the will at the house of Joseph Kelly he was moved by anger or jealousy or was suffering from one of these attacks.

Counsel for appellant argue that several other instructions given for appellee were erroneous. While they may be subject to criticism in some particulars along the same lines as the instructions already referred to, we do not deem them so misleading as to require consideration at our hands.

What has already been said, together with what is laid down in the cases cited in this opinion, indicates clearly the general rules of law that should govern in the trial of a case of this character. To discuss in detail all of these various questions raised would be to unduly extend this opinion, already too long.

The decree of the circuit court must be reversed and the cause remanded to the circuit court for further proceedings not in conflict with the views herein expressed.

Reversed and remanded.

NOTE.

The reported case holds that the fact that a testator entertains an unfounded prejudice against certain of his relatives does not ordinarily establish that he is subject to an insane delusion or affect his testamentary capacity. The cases on this subject are reviewed in the note to Dibble v. Currier, reported ante, this volume, at page 1.

COFFEY ET AL.

v.

MILLER ET AL.

Kentucky Court of Appeals—October 21, 1914.

160 Ky. 415; 169 S. W. 852.

Wills — Testamentary Capacity — Insane Delusion.

An "insane delusion" is an idea or belief which springs spontaneously from a diseased or perverted mind without reason or without foundation in fact. It is distinguishable from a belief which is founded upon prejudice or aversion, no matter how unreasonable or unfounded the prejudice or aversion may be, and if it is the product of a reasoning mind, no matter how slight the evidence on which it is based, it cannot be classed as an insane delusion.

[See note at end of this case.]

Same.

Evidence in a will contest held insufficient to show testamentary incapacity, in that testator had an insane delusion that certain of his nieces and nephews had mistreated him.

[See note at end of this case.]

Undue Influence — Evidence Insufficient.

Evidence in a will contest held insufficient to raise an issue of undue influence.

Appeal from Circuit Court, Wayne county.

Will contest. P. M. Coffey et al., plaintiffs, and J. W. M. Miller et al., defendants. Judgment for defendants. Plaintiffs appeal. The facts are stated in the opinion. AFFIRMED.

W. R. Cress & Son, Joe Bertram and *O. H. Waddle & Son* for appellants.

Harrison & Harrison, Duncan & Bell, George E. Stone and *J. Bryan Stone* for appellees.

[415] TURNER, J.—Armstead Miller, a bachelor over sixty years of age, died in Wayne County on the 21st of December, 1911, leaving an estate valued at forty thousand dollars or more, and leaving as his heirs at law two brothers and a number of nieces and nephews, the children of deceased brothers and sisters.

He left an original will dated the 18th day of June, 1905, which is as follows:

"I Armstead Miller of the county of Wayne and State of Kentucky being of sound mind and disposing memory do ordain and publish this as my last will and testament hereby revoking all others heretofore made by me.

[416] "First: It is my will and desire that all my just debts be paid out of my estate. It is further my will and desire and I hereby give and bequeath to my cousin F. C. Miller Ten Thousand Dollars to have in cash or real estate either one that I may have in my possession at my Death. For her kindness shown me during my sickness.

"Second and it is further my will and desire and I hereby give and bequeath to my Beloved Brother John W. M. Miller the Remainder all and every interest that I may own or have in any real or personal property or estate at the time of my death.

"It is my further Will and I hereby appoint Brother John W. M. Miller my executor of this my last will and testament, and request the county court of Wayne county not to Request Bond of said Miller.

"Given under my hand and seal this 18th day of June, 1905.

"ARMSTEAD MILLER."

On the 20th of August, 1908, he executed what is called a codicil to this will, which is as follows:

"Codicil.

"It is my will and desire to Dispose of my property at my death in the following Way and Manner.

"I bequeath to my cousin, F. C. Miller, Ten Thousand for her kindness shown me during my sickness.

"I also Bequeath to my nieces and nephews all their lawful parts except four namely, Maud Shearer, P. M. Coffey, C. L. Cooper, which they shall pay four thousand Dollars each of them out of their parts which shall be equally Divided among the other heirs for their uncindness showen me in my sickness, and also being agains me in the Burning of my Barns and shooting in my House.

"I bequeath to my nephew F. F. Cooper Ten Dollars and this is to be in full of his part for his unkindness shown me in the Burning of my Barnes and shooting in my House and also for the way he conducted the goods business for me while a Pardner.

"this is my last Will and Testament given under my hand signed and sealed this 20th day August, 1908. "A. MILLER."

[417] On the 15th day of December, 1911, and just six days before his death, another codicil was executed by him, which is as follows:

"Sumpter, Ky., Dec. 15, 1911.

'Coticell of A. Miller.

"Willed to F. C. Miller the amount of Ten Thousand Dollars.

"Willed to Robert Hurst the amount of One Thousand Dollars.

"This same to be paid him after he becomes of age—that is 21 yrs.

"Willed to William Homer Hurst Five Hundred Dollars; this sum to be paid when he becomes of age—21 yrs. old.

"Willed to P. E. Cooper, my nephew Five Dollars, no more or no less.

"Willed to F. F. Cooper Five Dollars, no more or no less.

"Willed to Clem Cooper his equal share after his debts are paid, that he owes me.

"Willed to Miller Cooper his equal share after his debts are paid, that he owes me.

"Willed to Janson Cooper his equal share after his debts are paid, that he owes me.

"Willed to M. H. Miller his equal share after his debts are paid, that he owes me.

"I will to Pearson Miller my nephew his equal part.

"I will to Pearson Coffey, my nephew Five Hundred Dollars, less than his equal share for his unkindness shown me during my trouble, The Burning of the barn.

"I will to Maud Coffey Shearer, my niece, Five Hundred Dollars less than her equal share for her unkindness to me during trouble, that is the burning of the barn.

"I will to Frank Miller my brother, his equal share, after all his debts are paid to me that he owes me.

"I will my brother Marion an equal share.

"I don't want my land that Marion and I own divided until his death.

"A. MILLER."

"Witness: G. W. Pyle,

"Witness: G. M. Ferrell,

"Witness: 'Miss' Marion Casey, Nurse."

[418] These three papers were offered for probate in the Wayne County Court, and were admitted to record by that court, from which judgment an appeal was prosecuted to the Wayne Circuit Court, where a trial resulted in a peremptory instruction by the court directing the first two papers to be found as the last will and first codicil of the deceased, and submitting to the jury the question as to the competency of the deceased when he executed the last named paper; the jury found against the last named codicil, whereupon, judgment was entered directing that the first two papers be recorded as the last will and testament of the decedent, and from that judgment this appeal is prosecuted, there being no cross-appeal as to the validity of the last named codicil.

The decedent and his brother, J. W. M. Miller, who was named as executor, were near the same age and lived together all of their lives, and owned a great deal of property in common, and by their combined efforts had each accumulated a competency. Some fifteen or sixteen years before the death of A. Miller his brother was paralyzed, and while he was able to get around the house and yard and occasionally go to the county seat, he was never thereafter an active man, although he retained his mental faculties.

The two brothers owned the old home farm which had been left by their father, and there lived with them as housekeeper their cousin Miss Fayette C. Miller; in fact she had lived with their mother and father in their lifetime.

At the time the papers involved were executed by A. Miller the household consisted of the two bachelor brothers, the cousin Fayette C. Miller, a negro man named Ingram, and a white cook named Coffey.

The contest is grounded upon two ideas:

First. That the testator was at the time each of the papers were executed laboring under an insane delusion toward some of the natural objects of his bounty, which delusion resulted from fraud practiced upon him by Fayette C. Miller and others inducing him to believe that certain of his nieces and nephews were his enemies; and that because of chronic alcoholism and his diseased condition resulting therefrom he did not have sufficient mind to understand the nature and value of his estate or his obligations to his relatives, or to dispose of his property according to a fixed purpose of his own.

[419] Second. Because each of the papers were procured to be executed through the fraud and undue influence of Fayette C. Miller and others acting in concert with her.

The evidence shows that from about 1902 until his death A. Miller was afflicted with chronic alcoholism, although during all that period, except the last few months of his life, he was an active business man, managed his own affairs and those of his paralytic brother, ran the farm, bought and sold stock, carried on a mercantile business, acted as director in a bank, and attended to all these things in an efficient and businesslike way. As to his general mental capacity in 1905 and 1908 there is no conflict in the evidence, one physician testifying that he had known him for forty years, that he had never seen him except within a few weeks of his death when he was not capable of transacting any kind of business.

But the charge that he was laboring under an insane delusion, that some of his nieces and nephews were his enemies, grows out of some most unusual and unexplained occurrences at and around his home during the late winter and early spring of 1904. It appears that during that period there was something approaching a reign of terror; two of his barns were burned, a grain house was set afire, shots were frequently fired around his house at night, the house was ac-

tually fired into upon one or more occasions, rocks were thrown against the house and around and about him. Guards were employed to guard the place, the neighbors and relatives came and stayed at night to assist, and the sheriff and his deputies stayed on the premises several nights to aid in ascertaining the cause of these disturbances.

Out of this condition two theories as to their cause were evolved. First. The sheriff and his deputies, a number of the neighbors and some of the relatives reached the conclusion that the negro man Ingram and the Coffey woman, possibly aided and assisted by others, were responsible therefor; and second, the two old men and Miss Miller believed that certain men in the neighborhood with whom the Millers had had a protracted and bitter litigation were at the bottom of the trouble.

Warrants were issued for Ingram and the Coffey woman, and upon their examining trial they were held to the grand jury, when they were indicted; but the attorney for the Commonwealth filed the indictments away. Warrants were also issued for the three men suspected by the Millers, and two of them were arrested, [420] the other leaving the State; but it does not appear whether any of them were ever tried or convicted.

The decedent, A. Miller, believed firmly in the innocence of his two servants, went on their bond, and otherwise actively assisted in their defense. He was very much incensed and outraged at their arrest, and fell out with a number of his neighbors and relatives because of their belief in their guilt. The negro man Ingram had lived with the Millers since his boyhood, and the Coffey woman had lived with them several years.

It grows out of this situation that the charge that he was laboring under an insane delusion that certain of his nieces and nephews were his enemies.

It will be observed that he did not charge any of his relatives with being guilty of any of these outrages themselves, but, as expressed in the first codicil, merely with "being against me in the burning of my barns, and shooting in my house;" that is he felt that they had unjustly sided against him and his trusted servants about a matter which vitally involved his welfare and happiness; and it might very well have been that he felt the stand they had taken as to the guilt of his two trusted servants, of whose innocence he was fully convinced, might have prevented him from punishing the real guilty parties.

An insane delusion is an idea or belief which springs spontaneously from a diseased or perverted mind without reason or without foundation in fact; it is distinguishable from a belief which is founded upon prejudice or aversion no matter how unreasonable or unfounded the prejudice or aversion may be. If it is the product of a reasoning mind no matter how slight the evidence upon which it is based it cannot be classed as an insane delusion. In every day life men of the strongest minds, being in possession of the same facts, reach different conclusions. In this case Miller being presumably in possession of at least as much knowledge about these occurrences as his relatives and neighbors, reached a different conclusion as to who were the guilty parties, and the fact that he reached a different conclusion from most of his relatives and neighbors does not make his belief an insane delusion.

This question was exhaustively treated in the recent case of Purdy v. Evans, 156 Ky. 342, 160 S. W. 1071. In that case the court quoting from Schouler on Wills, said:

[421] "Insane delusion should be distinguished from prejudice, or error, as well as from eccentricity. It differs essentially from some rational belief, not well founded, however perversely the testator may have clung to it. An ill founded belief, not actually insane, does not destroy testamentary capacity. And where one indulges in an aversion, however harsh, which is the conclusion of a reasoning mind, on evidence, no matter how slight or inaccurate, his will cannot be on that account overturned."

And again, after reviewing the authorities, the court said:

"Viewed in the light of these authorities, what was there in the conduct of Thomas C. Purdy to invalidate his will? The prejudice, resentment, or anger of testator toward his daughter may have been without reasonable cause; yet it was not the spontaneous production of a diseased mind based upon no evidence whatever; for it had some basis in fact. It arose from the refusal of his daughter to live with him, and from her marriage with one to whom testator objected; and, however imperfect the process of his reasoning, or however illogical or unjust the conclusion that she was so greatly at fault as his conduct toward her proves his belief to have been, it was not without some basis in fact; at least there was sufficient to free it from the imputation of spontaneity, and, therefore, from the charge of having its origin in an insane delusion."

Tested by the rule therein laid down it cannot be said that the decedent in this case had an insane delusion that certain of his nieces and nephews had mistreated him. It cannot be said to have been unnatural for this old man to have thought and felt that in this trying period of his life when his property was being destroyed, and his very life threatened, as he believed, that he was entitled to the fullest support and comfort from his relatives.

The only remaining question to be determined is whether there was any evidence of undue influence. The uncontradicted evidence is that Fayette C. Miller never saw the original will or the first codicil until after they were prepared by Miller in his own handwriting. There is an absolute failure of evidence to show that she exerted or attempted to exert any influence in the preparation of either of those papers. Nothing was more natural than that this old bachelor should have amply [422] provided for his first cousin and housekeeper who had for long years presided over his home, and who doubtless in many ways had aided him and his brother in the accumulation of their property.

It may be said that the theory of appellant that Miss Miller instigated the trouble at the Miller home and aided and assisted Ingram and the Coffey woman in the preparation of those outrages for the purpose of frightening the decedent in the making of a will, is not founded upon the least evidence. It is, at most, a bare supposition without any tangible evidence to base it upon.

We are of opinion that the lower court properly instructed the jury, and the judgment is affirmed.

NOTE.

In the reported case it is held that the belief of a testator that certain of his relatives are his enemies will not be considered an insane delusion, though it has no other support than the fact that they do not give him active assistance at a time when he believes that he is in danger. For a review of the cases on an insane delusion respecting relatives as affecting testamentary capacity, see the note to Dibble v. Currier, reported ante, this volume, at page 1.

IN RE ALEXANDER'S ESTATE.

Pennsylvania Supreme Court—July 1, 1914.

246 Pa. St. 58; 91 Atl. 1042.

Wills — Testamentary Capacity — Insane Delusion.

A "delusion" of a testator, such as will invalidate a will, is an insane belief or a mere figment of the imagination.

[See note at end of this case.]

Same.

The burden is on a party, relying on the existence of a delusion to invalidate a will, to prove that such delusion controlled the testator's volition and destroyed his freedom of action in disposing of his estate.

[See note at end of this case.]

Same.

Evidence in support of a petition for an issue devisavit vel non held insufficient to show that the will was executed in consequence of an insane delusion on the part of the testator, the petitioner's father, though testator practically disinherited her and may have been mistaken in his judgment that she had been guilty of unnatural conduct toward him and her mother.

[See note at end of this case.]

Appeal from Orphans' Court, Berks county: BUSHONG, Judge.

Proceeding for probate of will of Edgar W. Alexander. Decree by register of wills refusing an issue devisavit vel non. Decree affirmed by Orphans' Court. Nettie I. Moyer appeals. The facts are stated in the opinion. AFFIRMED.

Cyrus G. Derr and *E. H. Deysher* for appellant.

Isaac Hiester, E. Carroll Schaeffer and *C. H. Ruhl* for appellees.

[61] BROWN, J.—Edgar W. Alexander died November 12, 1912, leaving personal property appraised at $332,956.87 and real estate worth about $10,000. He left to survive him but one child, a daughter, Nettie, born to him by his first wife, who died May 11, 1897. The daughter subsequently married J. Harry Moyer and became the mother of two children, Josephine and Dorothy. By a will, dated September 4, 1912, and a codicil executed a month later, appellant's father gave the bulk of his estate to his second wife, collateral relatives, step-children and charities. To each of his two grandchildren, Josephine and Dorothy Moyer, he gave $5,000. He practically disinherited his daughter and only child by the following clause in his will: "I give and bequeath to Mrs. Nettie I. Moyer, wife of J. Harry Moyer, the sum of One Thousand ($1,000) Dollars, on condition that should she take any exceptions to the provisions of this my will she shall not participate in my estate to the extent of One Dollar. I make this a condition in view of the unnatural conduct of said Mrs. Nettie I. Moyer towards her deceased mother as well as myself in her relation as a child and daughter." The daughter appealed from the decree of the register admitting the will of her father to probate, and in a petition to the Orphans' Court, in which she averred that the will, so far as it affected her, was the result of a delusion on the part of the testator, prayed for an issue to determine,

(1) Whether he was the victim of a delusion with respect to her conduct towards himself and her mother, so affecting him as to have rendered him insensible to his parental obligations and to have caused him to execute the paper admitted to probate as his will; and (2) whether at the time he executed the same he was of sound and disposing mind. This appeal is from the refusal to award the issue prayed for.

[62] The habits of the decedent, upon which we need not dwell, were not good, but nothing was shown to indicate that he was not of sound mind and good business judgment, and the prayer for an issue to determine whether he had testamentary capacity was groundless. This does not seem to be questioned, for we are asked to reverse the decree of the court below solely on the ground that the decedent was the victim of a delusion with respect to his daughter which controlled him in making his will.

A delusion which will render invalid a will executed as the direct result of it is an insane belief or a mere figment of the imagination—a belief in the existence of something which does not exist and which no rational person, in the absence of evidence, would believe to exist: Taylor v. Trich, 165 Pa. St. 586, 30 Atl. 1053, 44 Am. St. Rep. 679; In re McGovran, 185 Pa. St. 203, 39 Atl. 816; In re Bennett, 201 Pa. St. 485, 51 Atl. 336. The burden was upon the appellant to show that such a delusion controlled the will of her father and destroyed his freedom of action in disposing of his estate. In her effort to do so she submitted much testimony, the recital of which in detail will serve no useful purpose. It was shown by a number of witnesses that she had nursed her mother during a long period of sickness with the tender solicitude of an affectionate child; that her father and mother had both praised her for what she had done for them, and that after the death of her mother the father had exhibited great affection for her and her two children. In view of all the testimony as to this, it is difficult to understand why he left but $1,000 of his large estate to her, and it would almost seem that he must have been under an insane delusion in giving his reason for doing so; but there was evidence from which he may have believed that his daughter's conduct towards himself and her mother had been unnatural. It was, therefore for him alone, being of sound mind, to pass judgment on that evidence, and, however harsh, unnatural and cruel his judgment may have been, it was not, in legal contemplation, a delusion—a mere figment of his [63] imagination, all-controlling with him in the execution of his will. For ten years prior to his death he and his daughter had been estranged. This appears from her own testimony. She admits that she talked about him to members of his family, and it may be, as she says, not maliciously or unkindly, but for the purpose of helping him to do better. He, however, manifestly thought otherwise. On two occasions prior to her leaving his home in 1902, where she and her family were living with him, she had reproached him for his indecedent conduct towards an orphan girl who was living with them as a domestic. While he did not resent this at the time, he may subsequently have done so and regarded her reproof as "unnatural conduct" on her part. In a letter written to him in 1910, when she was about to undergo a serious operation, she pathetically refers to his long time estrangement from her and asks his forgiveness for what he may have thought it was not her privilege as a daughter to ask and demand from him as a father. This appeal was unavailing and he died unreconciled to his daughter, whose conduct he believed to have been unnatural towards him, in view of what she had said or done and of what she was reported to him as having said about him.

From the testimony submitted by the proponents it appeared that, for years before the testator's death, the appellant had repeatedly spoken of his failings; that she had been reproached for doing so by those to whom she had complained of him, and that what she said about him had been repeated to him, leading him at times to say that what she had said of him had nearly made him crazy and almost ashamed to stay in Reading. It further appeared that she had charged her mother with over indulgence in drink, and this, too, was repeated to her father, who expressed his grief that she should have so accused her mother. In September, 1903, in response to a request from her, he sent her the earrings of her mother, and in an accompanying letter wrote that he preferred [64] sending them by a messenger to having her come to his house for them, and that he could no longer submit to her vilification of him, threatening her that, if she did not desist from it, he would prosecute her. All this may have been unjust on his part, but there is nothing to show that it was a mere delusion which drove him into an unnatural attitude towards his daughter. He has stated why he discarded her. It may be—and we are inclined to so believe—that he was unreasonable in characterizing her conduct towards him and her mother as unnatural, and that his treatment of her as the natural object of his bounty was most harsh, but he acted upon what was his belief, and, if it was error, we are powerless to correct it. His opinion of his daughter's conduct, upon which he acted in making his will, may have been wholly unreasonable, but

this can have no weight in the present inquiry, unless it be shown that the opinion rested on an imagined state of facts: McGovran's Estate, supra.

The burden was upon the appellant to show, by proof sufficient to sustain a verdict in her favor, that what she most naturally regards as the injustice of her father to her resulted from the delusion which she avers in her petition for the issue. After a review of all the testimony, we are constrained to say that she has failed to do so, and that we must concur in the following conclusion of the court below: "It may safely be asserted as a clear fact from the testimony that there were many stories afloat about Mr. Alexander which he believed to have been started by Mrs. Moyer. She, herself, tells her father not to believe what he hears without giving her a chance to defend herself, and he speaks of stories in his own letter about the earrings. Whether Mr. Alexander is to be condemned for listening to rumors and idle gossip or, perhaps, to false stories told by persons to discredit his own child, is not a question that this court is called upon to decide. The only inquiry is whether there is evidence from which a jury might reasonably infer [65] that Mr. Alexander was laboring under a mental disorder; and the result of that inquiry is that there is nothing to show that he did more than take the stories as they came to him, including the story about his dead wife, believe them and pass a very severe judgment upon the daughter."

Decree affirmed at appellant's costs.

NOTE.

The reported case holds that a belief by a testator that his daughter has been guilty of unnatural and ungrateful conduct toward him is not an insane delusion where it is founded on facts giving some cause for complaint on his part, although it may be a harsh and unreasonable conclusion from those facts. The cases discussing an insane delusion concerning a relative as affecting testamentary capacity are collected in the note to Dibble v. Currier, reported ante, this volume, at page 1.

PETTIT

v.

COUNTY COMMISSIONERS OF WICOMICO COUNTY.

Maryland Court of Appeals—March 19, 1914.

123 Md. 128; 90 Atl. 993.

Counties — Liability of Commissioners — Injury to Property — Widening Road.

Though county commissioners condemn a strip of land for widening a road, if they, in doing the work of widening unnecessarily injure land outside that condemned they are liable therefor.

Eminent Domain — Collateral Attack on Proceedings.

County commissioners having had jurisdiction in condemning land for the widening of a road, the question of disqualification of one of the examiners, or a mere irregularity in that statutory provisions were not strictly followed, may not be inquired into collaterally; direct appeal from the action of the commissioners being the remedy.

[See note at end of this case.]

Damages — Instructions — Damage to Land.

An instruction on damages for taking and injuring land should lay down a definite rule to guide the jury in estimating the damages.

Eminent Domain — When Title Passes.

Until the report of the examiners in condemnation by county commissioners under Acts 1904, c. 583, of land for widening a road, is ratified by the commissioners, as thereby required, they do not acquire title to or interest in the land, and therefore in constructing the road on it are wrongdoers.

Appeal from Circuit Court, Worcester county: JONES, Judge.

Action of trespass. Linden H. Pettit, plaintiff, and County Commissioners of Wicomico County, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. REVERSED.

Elmer H. Walton and *John H. Handy* for appellant.

L. Claude Bailey, Joseph L. Bailey and *John W. Staton* for appellee.

[129] BURKE, J.—The appellant is the owner of a tract of land which binds upon a county road leading from Rocka Walking milldam to Catchpenny, in Wicomico County. The road is referred to [130] in the declaration and mentioned in the evidence. The County Commissioners of Wicomico County determined to widen and straighten this road in front of the appellant's property.

The Act of 1904, Chapter 583, conferred upon the commissioners of that county the power to widen and straighten the road and prescribed the procedure to be followed. Section 128 of the Act provided that: "The County Commissioners of Wicomico County shall have the power by ordinance or resolution of condemning, laying out, opening, extending, and making new roads, and for altering, straightening, widening, grading, improving or closing up, in whole or in part, any existing road . . . when in their opinion the public necessity or convenience requires the same, without any previous application or petition. . . . If, however, the County Commissioners aforesaid shall proceed by condemnation in the exercise of the powers herein granted, all benefits or damages done, suffered, or incurred by laying out, opening, and making new roads, or by altering, straightening, widening, grading, improving, or closing up, in part or in whole, any existing road . . . shall be determined or assessed by three disinterested persons, freeholders and residents of Wicomico County and above the age of 21 years, who shall be appointed by the County Commissioners aforesaid and shall, within ten days, after notice of their appointment, take an oath before a justice of the peace of Wicomico County that they will faithfully and fairly, and without partiality or prejudice, view and assess the cost and damage to be suffered and incurred by any person interested in said property over, through or by which the said road . . . is to be opened, closed, extended, widened, graded or improved; and also to estimate the benefits that may accrue therefrom to any subsequent property owner, through and by which the said road, drain, waterway, or landing is to be opened, closed, extended, widened, graded or improved, or any property adjacent thereto, or any other property injured or benefited by said road; . . . but they shall give at least fifteen days' notice in one or more [131] newspapers published in Wicomico County of their purpose to lay out, open, extend, close up, widen, straighten, grade or improve the road . . . as directed to be laid out, etc., and of the day and hour of place of meeting for said purpose; and shall meet at the time and place mentioned in the notice given by them and proceed to exercise the powers and perform the duty assigned and required of them, and to ascertain whether any and what amount in value of the damages will be caused thereby for which the owner or occupant of any rights or interests claimed in any ground improved ought to be compensated over and above the amount in value of benefits which will thereby accrue to said owner or occupant thereof, and ascertain what amount in value or benefits will thereby accrue to any lot or parcel of ground by or through which the same may pass or improvements be made, or any other property, or to the owner or occupant thereof, which said lot or parcel of ground or owner or occupant thereof ought to pay. They shall locate boundaries and prepare an explanatory map giving description of the road opened, closed, extended, widened, straightened . . . with each separate lot or parcel of ground deemed to have sustained or received benefit, and they shall, within twenty days, return to the County Commissioners such maps, together with the amount of damage awarded such owner or occupant and the amount of benefits assessed to any lot or parcel of ground or the owner thereof, together with a certificate of their qualifications, which may be ratified or rejected, or allowed, and amended, in whole or in part, by said County Commissioners; provided, that the County Commissioners shall give ten days' notice, at least, by publication in one newspaper published in Wicomico County, or by ten days' notice, at least, in writing to each property owner so interested, of the time set for final action on the return of said examiners, and the County Commissioners shall act on said return within twenty days after the expiration of said notice and may issue a new commission as in their judgment may seem proper; and before proceeding to actually open, widen, [132] extend, straighten, or close any such road . . . the County Commissioners shall pay or tender to the person, his agent, guardian or representative, the amount of damages so awarded; and if anyone shall feel aggrieved by the decision of the County Commissioners in any matter affected by their decision, he may appeal to the Circuit Court for Wicomico County by giving written notice, within twenty days from said decision, filed with the clerk of the County Commissioners, of his desire to appeal. And on filing of said notice it shall be the duty of said clerk to deliver the papers connected therewith to the clerk of the said Court, and the same proceeding shall be had on the appeal as in cases of appeal from judgments of justices of the peace; provided, nevertheless, that the County Commissioners may decline to open, lay out, extend, grade, widen, or straighten any road . . . notwithstanding the decision of the said Court, but in case of refusal to do so they shall be liable for all cost incurred and shall pay the same; all benefits assessed by virtue of the above provisions shall be prior liens on the respective lots or parcels of ground which are assessed from the time of the final ratification of the aforesaid return, and shall be collected as taxes are now collected or may be collected by action."

On December 2nd, 1909, the County Commissioners appointed James M. Jones, A. W. Gordy and H. M. Clarke, commissioners or

examiners to lay out, extend, widen, etc., said road, and to assess benefits and damages as provided for in the act, and to locate boundaries, prepare an explanatory map, showing each separate lot or parcel of land deemed to have sustained injuries or received benefits, together with the amount of damages and benefits awarded, with directions to report their proceedings to the County Commissioners, with a certificate of their qualifications, within twenty days from the date of their meeting upon the premises. The commission was issued January 5th, 1910. Messrs. Jones and Gordy qualified before a justice of the peace for Wicomico County, but H. M. Clarke qualified before the clerk of the Court. [133] The examiners met on the premises on March 7th, 1910, having first given the notice required by the act. They made their return, to which was attached as a part thereof, the commission, certificate of publication and plat; they estimated the cost of construction to be $650.00; they assessed the damages to the various property owners at $180.00 and the benefits at $64.00. The appellant was awarded one dollar as damages and assessed one dollar for benefits. Upon the return of the examiners, the County Commissioners published in the Wicomico News for two weeks prior to October 25th, 1910, the following notice: "The County Commissioners of Wicomico County hereby give notice that the report of James M. Jones, A. W. Gordy and H. M. Clarke, commissioners to widen and straighten the Rocka Walking to Catchpenny road, in Quantico District, has been filed in this office and will be taken up for final ratification on Tuesday, October 25th, 1910. Objection to the ratification must be made by noon on the above date. If the commissioners' meeting is postponed from this date the report will be taken up at the next regular meeting of the board. By order of the board. Thomas Perry, clerk."

The record does not show when the report of the examiners was filed. Mr. Clarke, one of the examiners, was the road engineer of Wicomico County, and was appointed and paid by the County Commissioners. The return of the examiners was admitted in evidence over the objection of the appellant, and the action of the Court in overruling the objection and admitting the return in evidence constitutes the first bill of exceptions. The appellant bases his objection to the admissibility of the examiners' return upon five grounds: First, that no ordinance or resolution was passed by the commissioners as required by the act; secondly, that Clarke was disqualified as an examiner, for the reason that he was an appointee of the County Commissioners, and, therefore, was not a disinterested freeholder; thirdly, that the examiners did not take the oath within ten days after their appointment, as required by [134] law; fourthly, that one of them took the oath before the clerk, and not before a justice of the peace, as the law directed; and, fifthly, that the return was not made within the time prescribed by the act.

Acting under the proceedings, the County Commissioners proceeded to widen and straighten the road. The work of construction upon the plaintiff's land was begun by Mr. Orlando Taylor, one of the County Commissioners and whose son was in charge of the men doing the work. They appropriated a strip of the plaintiff's land about four feet wide and binding on the county road from a thousand to twelve hundred feet, and, against the protest of the plaintiff, dug up and destroyed a number of shade trees, and, without any necessity for so doing, they hauled parts of the trees and branches over the plaintiff's property, and deposited them upon his strawberry patch, located quite a distance beyond the boundaries of the new road. The plaintiff instituted an action of trespass in the Circuit Court for Wicomico County to recover damages for these injuries. Upon his suggestion and affidavit the case was removed to the Circuit Court for Worcester County for trial. At the conclusion of the evidence of both parties a verdict and judgment were entered for the defendant under the direction of the Court upon the ground that no legally sufficient evidence had been offered under the pleadings to entitle the plaintiff to recover.

There are some questions of pleading presented which will be first stated. The declaration contained four counts, to each of which the defendant demurred. The Court overruled the demurrer to the first count and sustained those to the second, third and fourth counts. We can discover no error in the first, third and fourth counts. The first count alleged that the defendant broke and entered certain land of the plaintiff lying and being and situate on the public county road from Rocka Walking to Catchpenny, Quantico District, in the said Wicomico County, owned in fee simple and occupied by the plaintiff, and dug up and cut down the trees [135] thereupon growing and took possession of a large quantity of said land and wrongfully dispossessed the plaintiff of the same on or about the month of March, or a little later, in the year 1910. The third count charged that the defendant "wrongfully seized and took possession of a large quantity of the plaintiff's land situated in Quantico Election District, in Wicomico County, Maryland, owned and occupied by him as a residence lying on the county road from Rocka Walking to Catchpenny, in said Wicomico County. The said defendant under some claim that such taking was under some

pretended right that was necessary for the public use, seized and took possession of the same and says that the defendant did not pay him or any one for him, anything for the same, contrary to the Constitution of the State of Maryland, and the defendant never paid for the same or tendered him any payment therefor or any one for him, to the great wrong and injury of the plaintiff, etc."

The fourth count alleged that the defendant "wrongfully entered the land of the plaintiff and dug up and cut down and carried away a large quantity of shade trees, ornamental trees, timber trees, and other valuable trees, strawberry plants, and other valuable plants and shrubbery, and converted the same to the defendant's own use, etc."

The second count was bad. It alleged that the defendant was acting under its power as County Commissioners of Wicomico County to open, alter, close, and straighten public county roads and then proceeded to set out certain acts which could only be taken advantage of by exceptions to the return of the commissioners or by a direct appeal to the Court from the action of the commissioners ratifying the return. The count conceded the jurisdiction of the commissioners and upon that concession any inquiry into practically all the facts alleged is precluded under the authority of the cases presently referred to.

The defendant filed two pleas to the first count: First, that the alleged wrong was done in the execution of legal proceedings [136] to widen and straighten the said public county road from Rocka Walking mills to Catchpenny; and, secondly, the general issue plea. The plaintiff joined issue upon the second plea and demurred to the first. The Court sustained the demurrer, whereupon the defendant filed the following amended plea: "That on October 25th, 1910, the County Commissioners of Wicomico County, after notice, *duly ratified finally* the report of James M. Jones, Allison W. Gordy and Horace M. Clarke, three disinterested freeholders of said Wicomico County, duly appointed by the County Commissioners of Wicomico County, under provisions of Chapter 583 of the Acts of the General Assembly of 1904, to determine and assess all benefits and damages to be suffered and incurred by any person by widening and straightening the public county road from Rocka Walking mills to Catchpenny, and no appeal having been taken by anyone interested therein from the said decision of the said County Commissioners after payment or tender to the respective persons entitled thereto of any and all damages awarded them—the alleged wrong was done in widening and straightening said public county road from Rocka Walking mills to Catchpenny in accordance with the report and explanatory map and location of boundaries by the commission aforesaid."

It also refiled the general issue plea. The defendant joined issue on the general issue plea and demurred to the amended plea. The Court overruled the demurrer, and the plaintiff then filed five replications to the plea. Issue was joined upon the first replication, which was a direct traverse of the facts alleged in the plea, and rejoinder was filed to the third, fourth and fifth replications, and issue was joined thereon. A demurrer was filed and sustained to the second replication. The result of the pleadings was to raise the following issues in the case: First, an issue of fact under the first count; secondly, an issue of fact under the amended plea; thirdly, an issue upon the disqualification of the examiners; fourthly, an issue of tender or payment of damages to the plaintiff for the [137] property taken; and, fifthly, an issue of law as to the constitutionality of section 128 of the Act of 1904.

Assuming that the County Commissioners had jurisdiction in the premises, it would seem clear that the third issue was improper, and should not have been submitted to the jury; it was likewise improper to have presented an issue of law namely, the constitutionality of section 128 of the Act of 1904. The case proceeded to trial, and the plaintiff offered evidence tending to prove the injuries alleged in the declaration, and also the extent of those injuries. The defendant then called Horace M. Clarke, one of the examiners, and the road engineer of Wicomico County, and proved by him the quantity of land taken, and put in evidence the report of the examiners, above referred to, and closed its case. The plaintiff submitted six prayers, all of which were refused. The first prayer is based upon the proposition that the plaintiff was entitled to recover for injuries done to his property, including injury to his strawberry patch and other crops, not embraced in the condemnation proceedings and not necessary to the execution of said proceedings. The second told the jury that if they found that there was no payment or tender of payment to the plaintiff for the land condemned then their verdict should be for the plaintiff, "and in estimating the damages they may take into consideration all the damage of every nature which may have directly resulted from the widening and straightening of said road." The third prayer was similar to the first, but concluded as to the damages which the plaintiff might recover. The fourth presented the question as to the disqualification of one of the examiners, and the fifth asserted that the condemnation was null and void if the commissioners did not "follow strictly the statutory provisions." The sixth prayer was as follows: "The plaintiff prays the Court to instruct the jury that if they shall find for the plaintiff under the fourth and fifth prayers of the plaintiff, then in

estimating the damage they shall take into consideration all the damage and injury which the plaintiff sustained [138] by reason of the taking of said land by the defendant, and the injury to the trees and the loss and damage sustained by the cutting down and removal of said trees and the loss and damage sustained by the plaintiff by reason of the injury to the strawberry beds and other growing crops of the plaintiff." If the case was entitled to go to the jury, we think the Court should have granted the second and third prayers in connection with each other. If the County Commissioners had jurisdictions in the premises, the fourth and fifth prayers were properly refused, for the reason that the facts submitted by those prayers were not open to inquiry in this case, but should have been availed of by a direct appeal from the action of the commissioners. The second and sixth prayers were defective in not laying down a definite rule to guide the jury in estimating the damages. It is a perfectly well settled principle of law, that where the proceedings of a Court are collaterally attacked, and it appears on their face that the subject matter and the parties were within the jurisdiction of the Court they are not impeachable for mere errors or irregularities that may be apparent. Such errors and irregularities must be corrected by some direct proceeding either in the same Court to set them aside or on appeal. If, however, there be a total want of jurisdiction either of the parties or the subject matter, the proceedings are void and can confer no right, and will be rejected, though the objection to them be taken in a collateral proceeding. This principle applies likewise to condemnation proceedings. In Huling v. Kaw Valley R. etc. Co. 130 U. S. 559, 9 S. Ct. 603, 32 U. S. (L. ed.) 1045, Justice Miller, discussing a collateral attack upon condemnation proceedings upon the ground that one of the commissioners appointed to locate a railroad and assess damages for land taken was disqualified, said: "The plaintiffs cannot recover in the present action without holding in this collateral proceeding that all that was done by these commissioners is void by reason of this want of qualification in one of their number. The proper time for these plaintiffs to have taken this objection [139] to Mr. Wood as a commissioner was either at the time of his appointment or at the time he proceeded to act as commissioner. If it be objected that they could not be supposed to have any notice of the application for the appointment of these commissioners and of the time and place when the judge would act on that application, the law presumes that they had notice, and might have attended at the time the commissioners entered upon their duties. If this objection had been then taken, it might have been sustained, or it could have been taken advantage of by way of appeal from the proceedings of the commissioners; but to permit such an objection as this to prevail at this time, and thus defeat the whole of the proceedings upon this narrow ground is a proposition unsupported by sound principle or by authority. It is a collateral attack upon a proceeding which has been completed according to the forms of law. There is no more reason why this want of qualification should, when shown at this stage of the proceeding, invalidate it all, than there is why the discovery, after a judgment, and after that judgment has passed beyond the control of the Court, that one of the jurors was disqualified, should make absolutely void the verdict and the judgment. It is only one of those cases frequently occurring in the administration of the law, in which it is better that errors not pointed out at the proper time should be disregarded, than that, by attempts to correct them, evils much worse should follow than those incident to the error."

In Jenkins v. Riggs, 100 Md. 427, 59 Atl. 758, in which the proceedings of the County Commissioners of Baltimore County in the opening of certain roads were attacked in a Court of Equity the Court said: "If the County Commissioners acted within their jurisdiction in reference to these roads the other matters alleged in the bill were subject to their determination, and mere errors made by them or irregularities in their proceedings were reviewable only upon appeal taken, as provided for in the statute, to the Circuit Court for Baltimore County, and do not form a proper foundation for a bill in [140] equity. Greenland v. Hudson County, 68 Md. 62; Gaither v. Watkins, 66 Md. 581; Allegany County v. Union Min. Co. 61 Md. 548."

The Act of 1904, Chapter 583, under which the proceedings in this case were taken, provided for the return of the examiner to the commissioners and for an opportunity for all persons interested to object thereto, and it gave all such persons who felt aggrieved by the decision of the County Commissioners a right to appeal therefrom to the Circuit Court. There must be a ratification by the commissioners of the action of the examiners, or a judgment by a Court of law upon appeal and payment and tender of the damages sustained by the land owner before his rights are concluded, or title vested in the condemning corporation. The amended plea, which set up the condemnation proceedings as a part of the suit, alleged that the report of the commissioners had been "duly ratified finally" by the County Commissioners. But the record shows no ratification of the report. It merely discloses the appointment of the examiners and their proceedings,

upon which no action appears to have been taken by the commissioners, except the publication of the notice, above transcribed, that the report of the examiners would be taken up for final ratification on October 25th, 1910. There is nothing in the report to show that the defendant acquired any title or interest in the land taken, and, therefore, in the construction of a road upon the land of the plaintiff the defendant must be treated as a wrongdoer. But had the report of the examiners been finally ratified, as alleged in the plea, the plaintiff under the evidence would have been entitled to recover for injuries done to his property outside the boundaries of the land actually taken. "The authorities undoubtedly hold that the assessment of damages will be presumed to include all damages which arise from constructing the works in a reasonable and proper manner, having regard to the efficiency of the works on the one hand and the interest of the land owner on the other. Where a subsequent claim for damages is made, [141] arising from the construction of works, the question will be whether the works have been constructed in a proper manner, and whether the damage necessarily results from the works as so constructed. If these questions are answered in the affirmative, then the damages complained of will be presumed to have been considered in estimating the damages, and no further recovery can be had. If they are answered in the negative, then a recovery can be had in an appropriate common law action. . . . The rights of the party condemning are confined to the land taken, and if any damages are done to adjoining lands by blasting, by occupation, or encroachments, or by using it as a roadway, a recovery may be had." Lewis on Eminent Domain, secs. 567 and 573. Such damages are not included in the award of compensation.

The defendant has appropriated permanently a portion of the plaintiff's property upon which was growing certain trees described in the evidence, and in addition thereto, the plaintiff offered evidence tending to show other injuries not of a permanent character. In cases of tort "the Court must decide and instruct the jury in respect to what elements and within what limits damages may be estimated in the particular action." Baltimore, etc. R. Co. v. Carr, 71 Md. 143, 17 Atl. 1052; Western Maryland R. Co. v. Martin, 110 Md. 554, 73 Atl. 267. The rule of damages to be applied in cases of this kind is stated in Redemptorists v. Wenig, 79 Md. 348, 29 Atl. 667. It follows that the judgment must be reversed and a new trial awarded.

Judgment reversed and new trial awarded, the appellee to pay the costs.

NOTE.

Collateral Attack on Eminent Domain Proceeding.

Introductory, 40.
Voidable Proceeding:
General Rule, 40.
Application of Rule, 42.
Void Proceeding, 43.

Introductory.

This note reviews the cases dealing with the right to attack collaterally the validity of a proceeding to take property under the power of eminent domain. It excludes, however, the cases wherein relief is sought through an injunction against the prosecution of eminent domain proceedings.

Voidable Proceeding.

General Rule.

Eminent domain proceedings conducted by a court of competent jurisdiction are in the absence of fraud not subject to collateral attack because of errors or irregularities which render the proceedings voidable on a direct attack.

United States.—Secombe v. Milwaukee, etc. R. Co. 90 U. S. 108, 23 U. S. (L. ed.) 67; Huling v. Kaw Valley R. etc. Co. 130 U. S. 559, 9 S. Ct. 603, 32 U. S. (L. ed.) 1045; Mercantile Trust Co. v. Pittsburgh, etc. R. Co. 29 Fed. 732; Foltz v. St. Louis, etc. R. Co. 60 Fed. 316, 19 U. S. App. 576, 8 C. C. A. 635; Robinson v. Sea View R. Co. 169 Fed. 319; Houck v. U. S. 201 Fed. 862, 120 C. C. A. 200; Cape Girardeau, etc. R. Co. v. Jordan, 201 Fed. 868, 120 C. C. A. 206.

Alabama.—Choate v. Southern R. Co. 143 Ala. 316, 39 So. 218.

Arkansas.—McDonald v. Ft. Smith, etc. R. Co. 105 Ark. 5, 150 S. W. 135.

California.—Levee Dist. No. 9 v. Farmer, 101 Cal. 178, 35 Pac. 569, 23 L.R.A. 388; Siskiyou County v. Gamlich, 110 Cal. 94, 42 Pac. 468; Sutter County v. Tisdale, 136 Cal. 474, 69 Pac. 141.

District of Columbia.—Fay v. District of Columbia, 33 App. Cas. 366.

Illinois.—Galena, etc. R. Co. v. Pound, 22 Ill. 399; Chicago, etc. R. Co. v. Springfield, etc. R. Co. 67 Ill. 142; Chicago, etc. R. Co. v. Chamberlain, 84 Ill. 333; Townsend v. Chicago, etc. R. Co. 91 Ill. 545; Allen v. Chicago, 176 Ill. 113, 52 N. E. 33; South Chicago City R. Co. v. Chicago, 196 Ill. 490, 63 N. E. 1046. See also Bell v. Mattoon Waterworks, etc. Co. 245 Ill. 544, 19 Ann. Cas. 153, 92 N. E. 352, 137 Am. St. Rep. 338.

Indiana.—Ney v. Swinney, 36 Ind. 454; Indiana Oolitic Limestone Co. v. Louisville, etc. R. Co. 107 Ind. 301, 7 N. E. 244; St. Joseph Hydraulic Co. v. Cincinnati, etc. R. Co. 109 Ind. 172, 9 N. E. 727; Graves v. Middletown, 137 Ind. 400, 3 N. E. 157; Darrow v. Chicago, etc. R. Co. 169 Ind. 99, 81 N. E. 1081. See also Monroe County v. State, 156 Ind. 550, 60 N. E. 344.

Iowa.—State v. Kinney, 39 Ia. 226; Carlisle v. Des Moines, etc. R. Co. 99 Ia. 345, 68 N. W. 784.

Kansas.—Union Pac. R. Co. v. McCarty, 8 Kan. 125; Chicago, etc. R. Co. v. Griesser, 48 Kan. 663, 29 Pac. 1082.

Maryland.—Hamilton v. Annapolis, etc. R. Co. 1 Md. 553, *affirming* 1 Md. Ch. 107; Gaither v. Watkins, 66 Md. 581, 8 Atl. 464. And see the reported case.

Michigan.—Tuller v. Detroit, 97 Mich. 597, 56 N. W. 1032.

Missouri.—Evans v. Haefner, 29 Mo. 141; Burke v. Kansas City, 118 Mo. 309, 24 S. W. 48; New Madrid County v. Phillips, 125 Mo. 61, 28 S. W. 321; State v. Moniteau County, Ct. 113 Mo. App. 586, 87 S. W. 1193. See also Thompson v. Chicago, etc. R. Co. 110 Mo. 147, 19 S. W. 77; Leonard v. Sparks, 117 Mo. 103, 22 S. W. 899, 38 Am. St. Rep. 646; Sedalia v. Missouri, etc. R. Co. 17 Mo. App. 105; State v. Miller, 110 Mo. App. 542, 85 S. W. 912.

Nebraska.—Fremont, etc. R. Co. v. Mattheis, 39 Neb. 98, 57 N. W. 987. See also Omaha v. Clarke, 66 Neb. 33, 92 N. W. 146; Roberts v. Sioux City, etc. R. Co. 73 Neb. 8, 10 Ann. Cas. 992, 102 N. W. 60, 2 L.R.A. (N.S.) 272.

Nevada.—Byrnes v. Douglass, 23 Nev. 83, 42 Pac. 798.

New Hampshire.—Clement v. Burns, 43 N. H. 609.

New York.—Allen v. Utica, etc. R. Co. 15 Hun 80; New York v. Wright, 58 Hun 607 mem. 12 N. Y. S. 20; Weinckie v. New York Cent. etc. R. Co. 61 Hun 619 mem. 15 N. Y. S. 689, *affirmed* 133 N. Y. 656, 31 N. E. 625; Farrington v. New York, 83 Hun 124, 31 N. Y. S. 371, 63 N. Y. St. Rep. 820; Van Steenbergh v. Bigelow, 3 Wend. 42; Dyckman v. New York, 5 N. Y. 434; In re Department of Public Parks, 73 N. Y. 560; Cottle v. New York, etc. R. Co. 27 App. Div. 604, 50 N. Y. S. 1008; Matter of Public Service Commission, 167 App. Div. 908, 151 N. Y. S. 766. See also Matter of Whitlock Ave. 101 App. Div. 539, 92 N. Y. S. 18.

Ohio.—Colby v. Toledo, 12 Ohio Cir. Dec. 347, 22 Ohio Cir. Ct. 732.

Oregon.—Chase v. Oregon City, 72 Ore. 112, 143 Pac. 629.

Texas.—Gulf, etc. R. Co. v. Ft. Worth, etc. R. Co. 86 Tex. 537, 26 S. W. 54; Davidson v. Texas, etc. R. Co. 29 Tex. Civ. App. 54, 67 S. W. 1093.

Vermont.—State v. Vernon, 25 Vt. 244; Drouin v. Boston, etc. R. Co. 74 Vt. 343, 52 Atl. 957.

Virginia.—Foster v. Manchester, 89 Va. 92, 15 S. E. 497; Chesapeake, etc. R. Co. v. Washington, etc. R. Co. 99 Va. 715, 40 S. E. 20.

Washington.—State v. Superior Ct. 49 Wash. 392, 95 Pac. 488.

Wyoming.—Edwards v. Cheyenne, 19 Wyo. 110, 114 Pac. 677, 122 Pac. 900.

Canada.—See Sanders v. Edmonton, etc. R. Co. 6 Alberta 459, 25 West L. Rep. 540, 14 Dominion L. Rep. 89.

The general principle underlying this rule was pointed out by the court, in St. Joseph Hydraulic Co. v. Cincinnati, etc. R. Co. 109 Ind. 172, 9 N. E. 727, as follows: "It is a principle running through many cases, and enforced in many forms, that an objection made seasonably and in the original proceeding will be given force, which would be utterly unavailing in a mere collateral attack. We can perceive no reason why the general principle should not apply here, for the judgment of the court in the condemnation proceedings must settle all questions as to the sufficiency of the instrument of appropriation, or else it settles none." And in Evans v. Haefner, 29 Mo. 141, the court, pointing out the necessity for the rule, said: "The condition of railroad companies would be a hard one, if they could not be assured, before a road was built, that they might rely with confidence on the validity of the condemnation under which they acted. If the law, under which they proceed, is a valid and binding one, and they conform to its provisions in condemning the land necessary for their purposes, it would be ruinous if the validity of those proceedings could be called in question in a collateral suit. , . . A railroad company would never be safe in building a road. After condemning land under a law which authorized it, they would be left to the fluctuating opinions of the courts, and would have no assurance that the steps they had taken would be of any avail in a subsequent action against them. If the construction of railroads is a measure encouraged and promoted by the community as one in which its interests are involved, there would be no policy in leaving companies in this defenceless state." In Indiana Oolitic Limestone Co. v. Louisville, etc. R. Co. 107 Ind. 301, 7 N. E. 244, the court said: "In its complaint appellant has sought to make a collateral attack upon the validity of appellee's appropriation proceedings. As in other cases of collateral attack, of course, in the absence of averment or showing to the contrary, every reasonable presumption must

be indulged in the case in hand in favor of the regularity, legality and validity of such appropriation proceedings as against the appellant, who was a party to such proceeding. . . . Thus, in the case under consideration, appellant's complaint shows that on June 4th, 1884, the appellee deposited in the clerk's office of the proper court its instrument of appropriation of a strip of appellant's land, for its switch, sidetrack or turnout. But the complaint fails to show whether or not appellee delivered to appellant a copy of such instrument of appropriation, as required by section 3907, supra. In such case we presume in aid of the appropriation proceedings, and in favor of their regularity, legality and validity, that appellee did deliver to appellant, as required by the statute, a copy of such instrument of appropriation. So, the complaint shows that the judge of the court in vacation appointed by warrant three named persons to appraise appellant's damages by reason of appellee's act of appropriation; but it fails to show whether such appraisers were, or were not, disinterested freeholders of the proper county, or were, or were not, duly sworn, as required by the statute. In such case, also, we conclusively presume in aid of the appropriation proceedings, that the persons appointed were competent appraisers, under the statute, and were duly sworn as such, as required thereby." And in Secombe v. Milwaukee, etc. R. Co. 90 U. S. 108, 23 U. S. (L. ed.) 67, it was said: "The judgment of condemnation in this case was rendered by a competent court, charged with a special statutory jurisdiction, and all the facts necessary to the exercise of this jurisdiction are shown to exist. A judgment thus obtained is no more subject to impeachment in a collateral proceeding than the judgment of any other court of exclusive jurisdiction. If it were so, railroad companies would have no assurance that the steps taken by them to procure the right of way would conclude any one, and they would be constantly subject to vexatious litigation." The rule was stated forcibly in Byrnes v. Douglass, 23 Nev. 83, 42 Pac. 798, wherein the court said: "The order in the condemnation proceeding authorized the defendant, during the pendency of those proceedings, to take possession of that part of the tunnel which passed through the Atlantic mining claim. This order, if valid, would seem to be a complete defense as to that part of the ground. Its validity is attacked only upon one point, and that is that a tunnel constructed for the purpose of one mine cannot be condemned for the use of another mine; and a long list of authorities are cited wherein that principle has been asserted. We do not, however, deem it necessary to decide the point upon this appeal. As this is a collateral attack upon the order, the question is not whether it is erroneous, but whether the court had jurisdiction to make it." In New Madrid County v. Phillips, 125 Mo. 61, 28 S. W. 321, the court said: "The county acquired by the condemnation the right to maintain the road as against Mr. Murray Phillips. If the county paid too much for the easement, the time to have had that error corrected was in that very proceeding. The present action is nothing else than an attempt to review collaterally the finding for damages in favor of Mr. Murray Phillips then made by the commissioners. The finding cannot be thus revised. It is binding on the county as well as on Mr. Murray Phillips, until set aside in some direct way. This is so firmly settled by recent adjudications that it is unnecessary to repeat the reasons for the ruling." And in Foltz v. St. Louis, etc. R. Co. 60 Fed. 316, 19 U. S. App. 576, 8 C. C. A. 635, it was said: "There are three questions that the trial court must determine in every condemnation proceeding, viz: First. Has the plaintiff corporation legal capacity to exercise the power of eminent domain? Second. Is it necessary for the plaintiff to take the land it seeks to condemn? Third. Does it seek it for a public use? Every judgment of condemnation is necessarily an affirmative decision of each of these questions. If either of them is erroneously decided, the judgment may be reversed by a writ of error for that purpose; but to hold that either of these questions can be tried de novo in an action of trespass or of ejectment, or in any other collateral proceeding, would be counter to our views of justice, of the reason of the case, and of the uniform decisions of the courts."

Application of Rule.

Where the judgment in a condemnation suit recites that process was duly and regularly served on a certain party defendant, the recital is conclusive evidence on collateral attack that the defendant named, whether sui juris or laboring under disability, was served with process in the manner prescribed by law. McDonald v. Ft. Smith, etc. R. Co. 105 Ark. 5, 150 S. W. 135.

Whether one of the commissioners who conducted the proceedings was a freeholder as required by the statute is not open to consideration in a collateral action brought by the owner of the land taken. Huling v. Kaw Valley R. etc. Co. 130 U. S. 559, 9 S. Ct. 603, 32 U. S. (L. ed.) 1045; Chicago, etc. R. Co. v. Griesser, 48 Kan. 663, 29 Pac. 1082; Van Steenbergh v. Bigelow, 3 Wend. (N. Y.) 42; Gulf, etc. R. Co. v. Ft. Worth, etc. R. Co. 86 Tex. 537, 26 S. W. 54.

Whether the land taken was necessary for the public use cannot be raised in a collateral suit. Hamilton v. Annapolis, etc. R. Co. 1

Md. 553, *affirming* 1 Md. Ch. 107; State v. Superior Ct. 49 Wash. 392, 95 Pac. 488. Especially is this true where the landowner accepts the compensation and no objection is made for a long time. Drouin v. Boston, etc. R. Co. 74 Vt. 343, 52 Atl. 957.

Irregularities in condemnation proceedings cannot affect the validity of such proceedings in a collateral action of ejectment. Secombe v. Milwaukee, etc. R. Co. 90 U. S. 108, 23 U. S. (L. ed.) 67; Leath v. Corbia, 175 Ala. 435, 57 So. 972; Tuller v. Detroit, 97 Mich. 597, 56 N. W. 1032.

The authority of the Secretary of War to acquire certain land for levee construction cannot be questioned in a criminal prosecution for injury to the levee. Houck v. U. S. 201 Fed. 862, 120 C. C. A. 200. Nor can a deputy's title to the office he was exercising in condemnation proceedings be questioned in a collateral action. State v. Superior Ct. 49 Wash. 392, 95 Pac. 488.

Objection to the description of the land taken in condemnation proceedings cannot be raised in a collateral action. St. Joseph Hydraulic Co. v. Cincinnati, etc. R. Co. 109 Ind. 172, 9 N. E. 727, Chase v. Oregon City, 72 Ore. 112, 143 Pac. 629. Nor can an objection be made in such an action to a change of line by the railroad company prosecuting the proceedings. Davidson v. Texas, etc. R. Co. 29 Tex. Civ. App. 54, 67 S. W. 1093.

In an action for trespass the plaintiff cannot attack eminent domain proceedings by showing that a condition precedent to condemnation was not complied with. Ney v. Swinney, 36 Ind. 454. So the conclusion of the court that the facts of the case brought it within the meaning of the statute cannot be impeached in a collateral action for damages. Merchantile Trust Co. v. Pittsburgh, etc. R. Co. 29 Fed. 732. Similarly the claim that the legislative acts under which the property was condemned were not broad enough to cover that property cannot be set up in an action of ejectment. New York v. Wright, 53 Hun 607 mem. 12 N. Y. S. 20. The authority of a railroad company to construct a certain branch road for which the plaintiff's property was taken cannot be assailed in an action of ejectment or trespass. Evans v. Haefner, 29 Mo. 141. Likewise whether a city had power to proceed against a part only of the lands designated for condemnation cannot be raised in a supplemental proceeding to collect the amount awarded for compensation. South Chicago City R. Co. v. Chicago, 196 Ill. 490, 63 N. E. 1046. The sufficiency of evidence supporting a fact found to be true in condemnation proceedings cannot be passed on in any collateral proceeding. Galena, etc. R. Co. v. Pound, 22 Ill. 399. Nor can the question who is entitled to receive the compensation, where it is adjudicated in the eminent domain proceedings, be inquired into collaterally. Farrington v. New York, 83 Hun 124, 31 N. Y. S. 371, 63 N. Y. St. Rep. 820.

Where it appeared that while a proceeding was in progress to condemn a part of a lot for an alley, a second proceeding was commenced to condemn the remainder of the lot for a street, it was held that the award in the second proceeding could not in an appeal in the first proceeding be attacked as being too low. Fay v. District of Columbia, 33 App. Cas. (D. C.) 366.

Where the board of county supervisors is authorized to condemn land for public highways, the order of the board cannot be collaterally attacked. Humboldt County v. Dinamore, 75 Cal. 604, 17 Pac. 710; Levee Dist. No. 9 v. Farmer, 101 Cal. 178, 35 Pac. 569, 23 L.R.A. 388; Siskiyou County v. Gamlich, 110 Cal. 94, 42 Pac. 468; Sutter County v. Tisdale, 136 Cal. 474, 69 Pac. 141.

Void Proceeding.

Where, however, the judgment or award in eminent domain proceedings is absolutely void, a different rule applies; and in such a case the proceedings can be impeached collaterally. Kanne v. Minneapolis, etc. R. Co. 33 Minn. 419, 23 N. W. 854; Ells v. Pacific R. Co. 51 Mo. 200; Williams v. Monroe, 125 Mo. 574, 28 S. W. 853; Clement v. Barns, 43 N. H. 609; Adams v. Washington, etc. R. Co. 10 N. Y. 328, *reversing* 11 Barb. 414; Southern Kansas R. Co. v. Vance (Tex.) 155 S. W. 696; Justice v. Georgia Industrial Realty Co. 109 Va. 366, 63 S. E. 1084; In Re Third, etc. Aves. 49 Wash. 109, 94 Pac. 1075, 95 Pac. 862. See also McDonald v. Ft. Smith, etc. R. Co. 105 Ark. 5, 150 S. W. 135; Thompson v. Chicago, etc. R. Co. 110 Mo. 147, 19 S. W. 77; Norwood v. Gonzales County, 79 Tex. 218, 14 S. W. 1057. And see the reported case. Thus, in Williams v. Monroe, supra, the court said: "We all agree that condemnation proceedings under these statutes are judicial, and that, when once the court has acquired jurisdiction over the persons and subject matter, the judgment, if within the power of the court, is not open to collateral attack. . . . But this doctrine, when rightly understood, does not in the least shake the authority of those decisions in this state which hold that, although the record of a court of general jurisdiction recites that defendants have been duly served with process, it is competent to overthrow such recital by showing by other portions of the record of equal dignity, and importing equal verity, that such recital of service is not true."

Accordingly, it was held in Kanne v. Minnesota, etc. R. Co. 33 Minn. 419, 23 N. W.

854, that the owner of land taken under proceedings void for want of notice could recover possession and damages in a separate action. And in Adams v. Washington, etc. R. Co. 10 N. Y. 328, it was held that evidence was admissible to prove the falsity of the record of the eminent domain proceedings in order to show a lack of jurisdiction.

In Hamilton v. Annapolis, etc. R. Co. 1 Md. 553, the court seemed to think it necessary to determine, though in a collateral suit, whether the corporation that had exercised the rights of eminent domain had been forbidden to act in that particular case by its charter.

In Justice v. Georgia Industrial Realty Co. 109 Va. 366, 63 S. E. 1084, the court said: "We have the case of a municipal corporation, under the guise of acquiring private property for public use, in point of fact fraudulently procuring the condemnation of private property for private use. The question which confronts us, therefore, is shall a court of equity sanction a proceeding of this character upon the hypothesis that a judgment thus obtained is not amenable to collateral attack at the suit of the appellant, whose inchoate right of dower has since become consummate. The decision of the trial court is placed upon the ground, 'that Mr. Justis was the only necessary party interested in the condemnation proceedings had in the hustings court, except the city of Richmond, and that the decision of the hustings court upon all questions involved in that controversy is impregnable to collateral attack.' The conclusion of the learned court would unquestionably be sound in a lawful proceeding against the husband to condemn land in which the wife had an inchoate right of dower. In such case the wife, not being a necessary party under the statute, on the principle of representation, would be concluded, however irregular the proceedings or erroneous the judgment might be. But the view taken by the lower court loses sight of the distinction between a judgment which is voidable simply by reason of error of judgment of the court which rendered it, upon matters within the pleadings and issues, and a judgment voidable for fraud practiced upon the court which rendered it, and which is extrinsic and collateral to any issue submitted to its determination. The judgment in the first instance can only be corrected by writ of error or other direct proceedings, but in the last it may be impeached collaterally. . . . That distinction seems to be clearly recognized by the authorities. For instance, if a court of general jurisdiction in condemnation proceedings, with the facts before it, erroneously appropriates private property for private use, that is an error of judgment for which its sentence may be reversed on writ of error. But if, on the other hand, the court could be induced to render such judgment by the fraudulent concealment of the facts upon which it is founded, such judgment is liable to collateral impeachment."

AMERICAN-HAWAIIAN ENGINEERING AND CONSTRUCTION COMPANY

v.

BUTLER ET AL.

California Supreme Court—May 28, 1913.

165 Cal. 497; 133 Pac. 280.

Building Contracts — Termination for Default of Contractor — Requisites of Notice.

Where a building contract contains provisions authorizing the owner, on certificate of the architect, and after notice to the contractor, to provide labor and materials, or terminate the contract, the certificate of the architect must substantially comply with the contract, and the notice to the contractor, following the certificate, must fully advise the contractor of what the owner demands.

[See Ann. Cas. 1914D 286.]

Right of Owner to Complete Work.

A building contract which provides that, on the architect certifying to the failure of the contractor to supply skilled workmen or proper material, or to prosecute the work with promptness, the owner may, after three days' notice, provide labor and materials and deduct the cost thereof from any money then or thereafter to become due the contractor, and that, if the architect shall certify that the failure is sufficient grounds for such action, the owner may terminate the employment, and enter on the premises, and employ persons to finish the work, and, in case of discontinuance of the employment of the contractor, he shall not receive any further payment until the work shall be finished, does not contemplate a termination of the employment of the contractor for only a part of the work, but as to any part of the work touching which, according to the architect's certificate, the contractor is delinquent, the owner may furnish the necessary labor and material to be used by and charged to the contractor, but may not oust the contractor from that part of the work and undertake to perform it independent of him, though, where the contractor has become so delinquent as to justify a termination, the owner, on the architect's certificate to that effect, may, after proper notice, terminate it.

Same.

Where an owner, employing a building contractor, fails to give lawful notice to the contractor of the termination of the contract, as authorized by the contract, on receiving a proper architect's certificate, the owner may not take charge of the work, or any part thereof, and the contractor may resist the attempt of the owner to do so.

Conclusiveness of Architect's Certificate.

Where a building contract authorizes the architect to determine and certify the existence of a fact, material to a proceeding under the contract, the certificate of the architect, duly made, that the fact exists is conclusive on the parties as to the thing to be done to which the fact relates, or as to which, under the proceeding, it is to affect the rights of the parties, except for fraud or gross mistake amounting to fraud.

[See Ann. Cas. 1913A 180.]

Right of Contractor to Instalment — Delay in Prosecuting Work.

The provisions in a building contract, which authorize the owner to terminate the contract on the architect certifying that the delinquencies of the contractor justify such action, and which authorize the owner, on terminating the contract, to enter on the premises and complete the work, and provide that, in case of discontinuance of the employment, the contractor shall not be entitled to receive any further payment until the work is finished, do not affect the right of the contractor, under the provision for partial payments as the work progresses, to receive moneys due him for work already done, unless there is an actual discontinuance of the employment, in which case he is not entitled to any further payment until the work has been completed by the owner, and the architect's certificate of delinquency, authorizing a termination of a contract, is conclusive for the purpose of authorizing a termination, and for the purpose, after termination, of authorizing the owner to refuse further payments, and where the architect merely certifies to the failure of the contractor to prosecute the work diligently, the contractor is entitled to the partial payment stipulated for during the month preceding the making of the certificate.

Judgment for Contractor — Provision for Paying Subcontractor.

Where an owner, required to pay the building contractor monthly as the work progressed, refused to make a monthly payment on the ground that he had lawfully terminated the employment, and the owner, when sued by the contractor for the value of the work done, did not rely on the existence of a claim against the contractor, in favor of a subcontractor, as an excuse for the refusal to pay, the owner could not complain of a judgment for plaintiff with a direction that a subcontractor's claim should be paid out of the amount of the judgment.

Right to Payment — Architect's Certificate Refused.

Where it was the custom for a contractor, entitled to monthly payments on certificates of the architect, to present each month to the architect an estimate of the work done and material furnished the preceding month, and for the architect to examine the work and certify that it was done to his satisfaction, and when a monthly estimate was presented to the architect, the architect replied that he had been instructed by the owner not to give the certificate, and the owner declared that he would not make any more payments, and there was no claim that the work for the preceding month had not been properly done, or any suggestion that the want of the architect's certificate was the ground for refusing payment, and the work for the month was, in fact, well done, the payment for the work becomes due, though the architect did not approve and certify to the work.

Rescission by Contractor — Failure to Pay Instalment.

Where an owner, required to make monthly payments to the contractor as the work progressed, wrongfully refused to make a monthly payment, it is a breach of contract, and the contractor can rescind and sue on a quantum meruit for the work done and materials furnished.

[See note at end of this case.]

Same.

The rule that a rescission of a contract by one party thereto, without the consent of the adverse party, cannot be made except by one who is not in default applies where the obligations on which each party is in default are dependent and concurrent, or where the rescinding party's default is so related to the obligation in which the adverse party has failed that it, in some manner, affects performance, or the duty of the latter to perform, but does not apply to a building contractor whose sole default is that he has not been diligent in performance; and where the owner refuses to make a monthly payment due under the contract, the contractor may rescind.

[See note at end of this case.]

Conclusiveness of Architect's Certificate.

A certificate of an architect that the contractor has failed to prosecute the work with diligence, made pursuant to a stipulation in the contract authorizing a termination of the contract on the architect certifying that the delinquencies of the contractor justify it, is at most only prima facie evidence in any collateral matter, and is not conclusive in an action by the contractor for the value of work done and material furnished.

[See Ann. Cas. 1913A 180.]

Time for Completion of Work — Waiver.

Evidence held to sustain a finding that an owner, employing a contractor to construct a building, waived the time of performance specified in the contract, so that he could not recover damages for delay in completing the work.

[See 134 Am. St. Rep. 693.]

Oral Extension of Time.

A substantial performance of an oral agreement for an extension of time for the com-

pletion of a building contract reduced to writing makes the oral agreement a lawful alteration of the written contract.

[See Ann. Cas. 1914A 457.]

Effect of Waiver of Stipulation as to Time.

Where time of performance of a building contract, made of the essence, is once waived, another date for performance can only be fixed by definite notice, or by conduct equivalent thereto.

Harmless Error — Overruling of Demurrer.

Where the issues on a cross-complaint are tendered by the affirmative allegations of the answer of defendant, and the evidence relating thereto is fully presented, and the findings embrace them all, overruling of demurrers to the answers to the cross-complaint is not prejudicial error.

Appeal from Superior Court, City and County of San Francisco: STUBTEVANT, Judge.

Action for labor and material furnished. American-Hawaiian Engineering and Construction Company, plaintiff, and Emma G. Butler, et al., defendants. Judgment for plaintiff. Defendant named appeals. The facts are stated in the opinion. AFFIRMED.

Charles W. Slack for appellant.

Edgar C. Chapman for plaintiff.

Robert H. Countryman for defendant Western Expanded Metal and Fireproofing Company.

[502] SHAW, J.—The defendant Butler, appeals from the judgment and from an order denying her motion for a new trial. The following statement of the case and discussion of the first question presented are taken from the opinion prepared by Mr. Justice Henshaw, upon which the case was decided in department:

"Plaintiff's complaint is in the form of a common count for the value of labor and material furnished defendant. Defendant's answer is by denial, by certain affirmative defenses and by counterclaim. To the end that complete equity might be done, the court ordered the respondent, the Western Expanded Metal and Fireproofing Company, corporation, and a subcontractor of plaintiff, to be brought in. This was done under a cross-complaint filed by defendant. The purpose of so bringing in the Metal and Fireproofing Company was that there might be made by the court an apportionment to it of such share of the judgment awarded to the plaintiff as might be just, so that the defendant might not be subjected to further litigation and perhaps compelled to pay a double judgment. The judgment was in favor of plaintiff in the sum [503] of $67,326.43, of which the Metal and Fireproofing Company, as a subcontractor, was awarded $21,373.08.

"The plaintiff had been engaged in the construction of a building for defendant under a written contract. Defendant, contending that plaintiff had violated the terms of the contract, completed the building at her own expense, and her counterclaim is composed of the items of liquidated damages, of the excess which she was obliged to pay for the completion of plaintiff's contract over and above the contract price and of lost rents. The contractor, upon the other hand, insists that defendant first breached the contract, and that by reason of this breach he was justified in rescinding, as in fact he did rescind, and therefore is entitled to recover in his action of *quantum meruit* and *valebat* the value of the labor and material which he had bestowed upon and placed in defendant's building. This, in skeleton form, presents the general controversy between the parties. As one of the specific defenses, defendant set up the contract, pleaded the failure and neglect of plaintiff for more than the period of two years to supply the sufficiency of workmen and material and a failure to prosecute the work with promptness and diligence, pleaded the certificate of the architect authorizing the defendant to terminate the employment of plaintiff, and that accordingly 'on or about the 12th of September, 1907, the defendant terminated the employment of the plaintiff as mentioned in said notice, and attempted by her agents and servants to enter upon the premises;' that the entry of her agents and servants was resisted and 'thereafter, on or about the fourteenth day of September, A. D. 1907, the defendant, because of such resistance and because of the continued failure and neglect of the plaintiff to supply a sufficient number of workmen and of materials, and the continued failure of the plaintiff to prosecute the work, wholly terminated the employment of the plaintiff for the said work provided in the said contract, and thereafter, on or about the seventeenth day of September, A. D. 1907, the plaintiff quit work on the said building and left the said building in an unfinished condition.'

"The contract between these parties is in the form approved by the Architects' Association and is in general use throughout the United States and Canada. The terms of this contract [504] pertinent to the questions under consideration are the following:

"By paragraph one the contractor agreed that it would 'well and sufficiently perform and finish, under the direction and to the satisfaction' of the architects all work agreed by the contractor to be performed by it.

"By paragraph seven time is declared to be of the essence of the contract.

"By paragraph eight the contractor agreed to prosecute the work with diligence and to complete it according to the plans on or before September 1, 1906. The contractor agreed to pay $200 a day as liquidated damages for every day after the date fixed for completion on which the contract stood uncompleted.

"By paragraph ten provision is made for extending the time for the completion of the contract when delay was caused by the owner or by the act of God but extensions were not to be recognized unless a claim were presented in writing by the contractor at the time of the delay whereupon the architects were to ascertain and certify the amount of additional time to be allowed.

"Paragraph sixteen is as follows: 'Should the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fail in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements on his part herein contained, such refusal, neglect or failure being certified by the architects, the owner shall be at liberty, after three days' written notice to the contractor, to provide any such labor and materials, and to deduct the costs thereof from any money then due or thereafter to become due to the contractor under this contract; and if the architects shall certify that such refusal, neglect or failure is sufficient grounds for such action, the owner shall also be at liberty to terminate the employment of the contractor for the said work and enter upon the premises and take possession of all materials thereon, and to employ any other person or persons to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the contractor, he shall not be entitled to receive any further payment under this contract until the said work shall be wholly [505] finished at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor, but if such expense shall exceed the unpaid balance, the contractor shall pay the difference to the owner. The expense incurred by the owner, as herein provided, either for furnishing materials or for finishing the work and any damage incurred through such default shall be audited and certified by the architects.'

"By paragraph seventeen payments of monthly installments were to be made to the contractor. These payments were to be seventy-five per cent of the value of the workmanship and materials incorporated by the contractor in the building during the previous month. No progress payments were to be made until the architects certified in writing that all the work upon the performance of which the payment is to become due had been done to their satisfaction, and until satisfactory evidence was produced that the premises were free from liens and claims chargeable to defendant.

"Paragraph eighteen is as follows: 'It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part against any claim of the owner, and no payment made (even the final payment) or the partial or complete release of any sureties given in connection with this contract shall be construed as an acceptance of defective work, or as a release of the contractor from the obligation to promptly repair and make good such defective work, as soon as discovered, and to reimburse the owner for any loss or damage resulting from such defective work.'

"The certificate given by the architects to the owner is as follows:

"August 26, 1907.

" 'To Mrs. Emma G. Butler, 2005 Sutter St.,
" 'San Francisco, California.

" 'We hereby certify that the American-Hawaiian Engineering and Construction Company, Ltd., the contractor for certain work on your building in course of construction on the southwest corner of Geary and Stockton Streets in the City [506] and County of San Francisco, State of California, has failed and neglected to supply a sufficient number of workmen and has failed and neglected to supply sufficient materials to perform the following of the said work according to the terms of its contract,—namely: The plumbing work, the ornamental iron work, the work on the sidewalk arches, the sidewalk work generally, the work on the elevator tops and the work connected with the main roof of the said building.

" 'And we hereby further certify that the said contractor has failed and neglected to prosecute the above mentioned work, and the work generally to be performed by it under its said contract with promptness and diligence.

" 'And we hereby further certify that the said failure and neglect of the said contractor is seriously delaying, interrupting and preventing the proper prosecution of the work on other branches of the said building not included in the said contract.

" 'And we hereby further certify that the said failure and neglect of the said contractor are sufficient grounds to warrant you in terminating the employment of the said contractor for the said work, and to warrant you in entering upon the said premises and taking

possession of all materials thereon, and in employing any other person or persons to finish the said work and to provide the materials therefor.

"'REID BROS.
"'By Jas. W. Reid,
"'Architects of the said Building.'

"The notification given by the owner to the contractor is as follows:

"'San Francisco, Cal., September 3, 1907.

"'To the American-Hawaiian Engineering and Construction Company, Ltd., 332 Turk St., San Francisco, Cal.

"'You are hereby notified that Reid Brothers, architects of the building in course of construction for the undersigned on the southwest corner of Geary and Stockton streets, in the city and county of San Francisco, state of California, have issued a certificate, of which the inclosed is a copy.

"'And you are hereby further notified to supply a sufficient number of workmen and sufficient materials to perform the following work on said building which you are required to perform under your contract with the undersigned, and [507] to prosecute the said work with promptness and diligence: The plumbing work, the ornamental iron work, the work on the sidewalk arches, the sidewalk work generally, the work on the elevator tops, and the work connected with the main roof generally.

"'And you are hereby further notified that if you fail or neglect, for the period of three (3) days after this notice shall have been served upon you, to supply a sufficient number of workmen and sufficient materials to perform the said work and to prosecute the said work with promptness and diligence, the undersigned will terminate your employment for the said work, and will enter upon the said premises and take possession of all materials thereon, and will employ others to finish the said work and will provide the materials therefor, and will otherwise proceed as in the said contract provided.

"'Yours, etc.,
"'EMMA G. BUTLER,
"'By H. C. Breeden,
"'Her attorney in fact.'

"Certain of the court's findings are as follows:

"'8. That on the 4th day of September, 1907, plaintiff made and presented to defendant its estimate of all of the materials and labor incorporated in said building by plaintiff during the month of August, 1907, amounting to the sum of $16,311.58, accompanied with a demand that seventy-five per cent of the amount thereof, to wit, $12,233.64, be paid to plaintiff; but said seventy-five per cent of said last mentioned estimate was not then or ever paid by defendant, nor did defendant ever pay or offer to pay plaintiff any portion of the same, nor has defendant ever paid or offered to pay plaintiff for any materials and labor incorporated in said building subsequent to the month of July, 1907.

"'9. That on or about the 17th day of September, 1907, plaintiff again demanded of defendant the payment to it of the sum of $12,233.69, the same being seventy-five per cent of the value of the materials and labor so as aforesaid incorporated in said building during the month of August, 1907, but defendant, without stating any reason, cause, or excuse for so doing, did then and there refuse, and has ever since refused, to pay seventy-five per cent, or any per cent, of said last named sum or any sum of money whatever.'

[508] "'10. That after such last mentioned refusal on the part of defendant on to wit, the 17th day of September, 1907, plaintiff, rescinded the said contract so as aforesaid made and entered into on said 29th day of June, 1905, by and between defendant and plaintiff, and did cease to furnish any materials or perform any labor for or upon or about said building after said 17th day of September, 1907.'

"'17. That from and after the 1st day of September, 1906, down to and including the 17th day of September, 1907, the defendant paid plaintiff monthly as the work of the construction of said building progressed, excepting only for work done thereon during the months of August and September, 1907, without deducting or attempting to deduct from any of the said estimates of plaintiff, so as aforesaid presented by it, or making any claim for damages, liquidated or otherwise, by reason of any delay in completing said contract of June 29th, 1905, within the time fixed therein for completion thereof, to wit, September 1, 1906. And in this connection the court finds the fact to be that both plaintiff and defendant well knew that said building could not be completed pursuant to the terms and provisions of said original contract pertaining thereto, unless and until defendant should first complete the work so as aforesaid damaged and destroyed, and that the conditions surrounding and affecting all building operations in said city and county of San Francisco were so uncertain and abnormal that neither plaintiff nor defendant was in a position to determine the time within which the said restoration work could be completed. And the court further finds that shortly after said fire and earthquake, and at the time said last mentioned contract was so as aforesaid entered into, plaintiff and defendant then and there mutually agreed to carry out the work of the construction of said building according to the original plans and specifications thereof and under the terms and provisions of said original contract, except as to time of com-

pleting said work; and in this behalf the court finds that no time was agreed upon by and between plaintiff and defendant as to time of completing said building.'

"'18. That, except as herein otherwise stated, it is not true that plaintiff failed and neglected, or failed or neglected, for more than a period of two years, or any other period of [509] time, to supply a sufficiency of workmen and materials, or a sufficiency of workmen or materials, or failed to prosecute the said work as provided in said contract with promptness and diligence, but in this behalf the court finds that plaintiff proceeded with said work with promptness and diligence from and after the 29th day of June, 1905, to and including the 17th day of September, 1907, and except as to time of performance complied with all of the terms and provisions of said contract on its part to be performed.'

"'19. . . . And in this behalf the court finds that plaintiff at the time said notice of September 3d, 1907, and the copy of said certificate of August 26, 1907, were so as aforesaid served upon plaintiff, there had been no delay upon the part of plaintiff in the work of constructing said building, nor had plaintiff failed to supply a sufficient number of workmen or sufficient materials to perform the work mentioned in said notice, or in said certificate, but on the contrary, the court finds the fact to be that all of the work specified in said notice and said certificate was being performed with promptness and diligence and in a manner to meet all of the requirements of the terms and provisions of said contract on the part of the plaintiff to be performed. That on the 26th day of August, 1907, and subsequent thereto, the general progress of the work of the construction of said building did not require the immediate furnishing of any ornamental iron work, the putting in of the sidewalk arches, the building of the sidewalks generally, the work on the elevator tops, or the work connected with the main roof generally. And, in this connection, the court finds that said last named work could have been performed within the period of thirty (30) days, while the interior work of the building was being performed, which interior work would necessarily require several months to perform. That after, as well as at all times prior to the receipt of said notice of September 3d, 1907, by plaintiff, plaintiff performed the plumbing work pertaining to said building with promptness and diligence; and also performed with promptness and diligence all other work pertaining to said building at all of the times and during all the periods of time from and after the 29th day of June, 1905, to and including the 17th day of September, 1907.'

[510] "'20. That on the 12th day of September, 1907, without any fault on the part of plaintiff, defendant, without cause, provocation or excuse, attempted to terminate the employment of plaintiff to as much only of said work as is set forth in said notice of September 3d, 1907, by entering upon said premises by her agents and servants and by attempting to take from plaintiff forcible possession of a portion of said premises and also forcible possession of a portion of the materials thereon and to employ others to finish such of the work only as was and is set forth in said notice of September 3d, 1907, but no attempt was made by said agents and servants of defendant to take possession of the whole of said premises, or of all of the materials thereon or to employ others to finish the entire work of the construction of said building as set forth in said contract of June 29th, 1905; defendant's said agents and servants were then and there resisted in said attempt to take forcible possession of any portion of said premises, or forcible possession of any of said materials, or to perform any labor in said building by the agents and servants of the plaintiff, whereupon the agents and servants of the defendant did then and there desist from any further attempt either to take possession of said premises or any of said materials to perform any labor in, upon, or about said building.'

"'21. That on the 17th day of September, 1907, the plaintiff ceased all of the work on said building under said contract of June 29th, 1905, modified as aforesaid, and left said work in an unfinished condition, but, in this behalf, the court finds that on said last named day plaintiff rescinded said contract upon the ground that defendant was indebted to plaintiff for materials and labor incorporated in said building during the month of August, 1907, amounting to $12,233.64, for which it, plaintiff, had not been paid, after demand having been duly made by plaintiff upon defendant for such payment.'

"Analyzing paragraph 16 of the contract, it means that the architect having certified to the owner the refusal or neglect of the contractor in any of the indicated particulars, the owner, after three days' notice to the contractor to supply the deficiency or make good the neglect, and upon the contractor's failure after three days' notice so to do, may provide any such labor or material and deduct the money from the [511] amount due or to become due to the contractor. The architect may further certify to the owner that the refusal or neglect of the contractor is sufficient ground to justify the owner in terminating the whole contract, in which case, upon the three days' notice from the owner to the contractor, so declaring the owner's intent, the owner 'may enter upon the premises,

take possession of all materials thereon, and employ any other person or persons to finish the work.' In other words, this is a provision for a rescission of the contract at the instance of the owner for the default of the contractor. The provision of paragraph 16 of this contract touching the termination of the whole contract needs no further elucidation. The provision authorizing the owner to provide the necessary labor and material when the contractor fails so to do does not contemplate a termination of the whole contract, and does contemplate nothing more than the supplying of a sufficient number of properly skilled workmen or the supplying of a sufficiency of proper material to be used by the contractor under his contract, in the event that he himself shall have refused or neglected to supply them. As it contemplates that the material thus furnished by the owner shall be used by the contractor under his contract, so also it contemplates that the skilled workmen furnished by the owner shall also be employed by the contractor under his contract. Referring to the certificate of the architect, it will be noted that it conforms in all respects to the provisions of paragraph 16 of the contract, and that it is a certificate authorizing and empowering the owner not alone to supply labor and material, but also to terminate the contract because of the failure and neglect of the contractor properly to prosecute his work. Specifically, the architect's certificate enumerated six branches of the work as to which the contractor was delinquent. The notice by the owner called upon the contractor to supply a sufficient number of workmen and sufficient material to perform those six specified pieces of work, and declared that if the contractor failed, for the period of three days, to supply a sufficient number of workmen and sufficient materials to perform the work, and to prosecute the work with promptness and diligence 'the undersigned will terminate your employment for the said work, and will enter upon the said premises and take possession of all materials thereon and will employ others to finish [512] the said work.' But, springing from the nature of such certificates, their power for weal or woe, and the fact that they contemplate forfeitures and the right of rescission, the terms of the certificates themselves are strictly construed. In other words, to make such a certificate operative, there must be a substantial compliance by the architect with the terms of the contract touching its issuance. (O'Keefe v. St. Francis' Church, 59 Conn. 551, 22 Atl. 325; White v. Mitchell, 30 Ind. App. 342, 65 N. E. 1061; Charlton v. Scoville, 144 N. Y. 691, 39 N. E. 394.) The same reasons call for the same strict construction of the notice following the architect's certificate which the contract requires shall be given by the owner to the contractor. By this it is not meant that any precise form of words is required in the notice, but the notice must be such as fairly and fully to advise the contractor of what the owner demands and what the owner will do in the event of a noncompliance with the demand. The notice given in this case misconceived the meaning and import of paragraph 16 of the contract. That paragraph does not contemplate a termination of the employment of the contractor for only a part of the work. As to any part of the work touching which, according to the architect's certificate, the contractor is delinquent, the owner may furnish the requisite labor and material, which shall be used by and charged to the contractor. But the owner may not oust the contractor from that part of the contract and undertake to perform it himself independent of the contractor. This is what the notice here declared that the owner proposed to do. Such a construction, we say, is foreign to the meaning of paragraph 16, and would lead to utter confusion and inharmony. It can be readily seen that it would be practically impossible to proceed with work under such conditions. If the contractor has become so delinquent as to justify the owner in terminating his contract, then, under the architect's certificate to this effect, the owner may do so, after notice. The authorization so to do was in this instance given to the owner by the architect's certificate, but the owner did not notify the contractor that she proposed to exercise her right in this regard."

The consequences of this failure on the part of the owner to follow up the architects' certificate with a lawful notice to the contractor that its employment would be terminated, are [513] that the owner was not authorized to take charge of the work or premises, or any part thereof, as she attempted to do on September 12, 1907, that the plaintiff was justified in resisting such attempt, and that the alleged attempt of the owner, on September 14, 1907, to terminate the employment of the plaintiff under the contract, in accordance with paragraph 16 thereof, even if it had been proven that such attempt extended to the whole work instead of only parts thereof, would have been ineffectual and vain. In the light of this conclusion, we must consider whether or not the plaintiff was justified in rescinding the contract because of the owner's refusal to pay the money due to it for the work done during the month of August, 1907. The right of the plaintiff to recover fails unless it appears that it rightfully rescinded.

It is well settled that where the parties to a building contract thereby authorize the architect, as arbiter, to determine and certify the existence of a fact when such fact becomes

material to a proceeding under such contract, the certificate of the architect, duly made, that the fact exists, is conclusive upon the parties with respect to the thing to be done to which such fact relates, or as to which, under the proceeding, it is to affect the rights of the parties, and that such certificate can be impeached as to such facts only for fraud, or for gross mistake amounting to fraud. (Dingley v. Greene, 54 Cal. 333; Moore v. Kerr, 65 Cal. 519, 4 Pac. 542; City St. Imp. Co. v. Marysville, 155 Cal. 419, 23 L.R.A. (N.S.) 317, 101 Pac. 308.) There can be no doubt that if, in pursuance of said certificate, the owner had given a proper notice terminating the employment, the certificate, if not so impeached, would be conclusive evidence of the delinquency of the contractor in the particulars therein stated, in any controversy growing out of such termination. It is not, however, strictly speaking, a common law award. (M. E. Church, etc. v. Seitz, 74 Cal. 295, 15 Pac. 839; Foster v. Carr, 135 Cal. 86, 67 Pac. 43.)

The object and purpose of paragraph 16, in this regard, was to provide a proceeding whereby the owner might terminate the employment in case the contractor failed in any respect to perform the contract. It does not purport to qualify or affect the right of the contractor to receive the moneys due him for work already done at the time of his failure, [514] unless the proceeding is carried to the extent of an actual discontinuance of the contractor's employment. To provide for that contingency the paragraph declares that "in case of such discontinuance of the employment of the contractor, he shall not be entitled to receive any *further* payment under this contract," until the work shall have been wholly finished by the owner. It will be seen that the right to receive the regular monthly payments under the 17th paragraph does not cease until, nor unless, there has been a valid termination of the employment in the manner provided and that such termination bars only the right to "any further payment." The certificate of delinquency is conclusive thereof for the purpose of authorizing a termination and for the purpose, after such termination, of authorizing the owner to refuse further payments under the contract. The certificate here given does not state that any of the work done was defective or not in conformity with the contract. All it declares is that part of the work had not been diligently prosecuted. Under the terms of the contract, the plaintiff was entitled, on the first day of each month, to a payment equal to three-fourths of the value of the work and materials put into the structure during the preceding month. The facts stated in the certificate had no bearing whatever upon the right of plaintiff to the September payment for the August work. No matter how slowly the work was carried on, the plaintiff, until its employment was lawfully discontinued under the contract, was entitled to the contract payments for the work properly done. It follows that the facts stated in this certificate, admitting for the present that it is conclusive, did not deprive plaintiff of the right to demand and receive payment for the August work, nor justify the owner in refusing to make said payment.

Paragraph seventeen of the contract, with regard to the monthly payments, provided "that before each payment, if required, the contractor shall give the architects good and sufficient evidence that the premises are free from all liens and claims chargeable to the said contractor; and further, that if at any time there shall be any lien or claim for which, if established, the owner of said premises might be made liable, and which would be chargeable to the said contractor, the owner shall have the right to retain out of any payment then due or thereafter to become due, an amount sufficient to completely [515] indemnify himself against such lien or claim." The requirement or demand for evidence, mentioned in the first part of this provision, was not made. At the time of the demand for payment for August work, there was a claim against the contractors in favor of the Western Expanded Metal and Fireproofing Company, on account of which Mrs. Butler might have withheld that payment, if she had so desired. The refusal to pay was not based on that fact, but on the fact that she then believed that she had lawfully terminated the plaintiff's employment. Neither the lack of evidence of freedom from liens, nor the existence of the said claim, was pleaded in the answer as an excuse for the refusal to pay. Under these circumstances the absence of a finding on the subject is immaterial. The amount of the claim is stated in the findings and judgment. But as the only relief given to that defendant is a direction that its claim be paid only out of the sum found due to the plaintiff, Mrs. Butler has no further substantial interest concerning it.

The findings do not, in terms, state that the architects did not certify in writing that the August work for which payment was demanded had been done to their satisfaction. The general finding is that plaintiff rescinded the contract upon the ground that the amount owing for August work had not been paid, "after demand having been duly made by plaintiff upon defendant for such payment." This finding appears to be sufficient to support the judgment, so far as this point is concerned. The evidence shows a state of facts under which the owner would not be authorized to insist that there was no archi-

tects' certificate that the work was satisfactorily done. It appears that the custom was for plaintiff, each month, to present to the architects an estimate of the work done and material placed during the preceding month, that this was understood to constitute a request to the architects to examine the work and certify that it was done to their satisfaction. Until September, 1907, this had always been done. When the September estimate was presented the architects said that they were instructed by the owner not to give the certificate. The owner also declared that she would not make any more payments. There was never any claim that the work for August had not been properly done, nor any suggestion that the architects' certificate was desired. The refusal [516] to pay was wholly based upon reasons having no relation to the character of the work. As matter of fact, the work for August was well done. The architects should therefore have given their certificate to that effect. Under these circumstances, the payment for the August work became due, notwithstanding the fact that the architects did not approve and certify to the work, the preliminary certificate must be considered as having been waived, and the demand for payment must be deemed to have been duly made. (Coplew v. Durand, 153 Cal. 281, 16 L.R.A.(N.S.) 791, 95 Pac. 38; Tally v. Ganahl, 151 Cal. 421, 90 Pac. 1049; Wyman v. Hooker, 2 Cal. App. 40, 83 Pac. 79; Antonelle v. Kennedy, etc. Lumber Co. 140 Cal. 309, 73 Pac. 966; 30 Am. & Eng. Enc. of Law (2d ed.) 1245, 1249; 6 Cyc. 36.) The finding of a due demand is supported by this evidence. The refusal of the owner to pay for three-fourths of the August work was therefore unjustifiable and was a breach of the contract. As to the contractor, the consideration of the contract had thereby, to that extent failed. In such cases the refusal to pay is a sufficient cause for a rescission by the contractor and authorizes a suit upon the *quantum meruit* for the reasonable value of the work and materials by it incorporated into the building. (San Francisco Bridge Co. v. Dumbarton Land, etc. Co. 119 Cal. 272, 51 Pac. 335; Porter v. Arrowhead Reservoir Co. 100 Cal. 502, 35 Pac. 146; Golden Gate Lumber Co. v. Sahrbacher, 105 Cal. 116, 38 Pac. 635; Carlson v. Sheehan, 157 Cal. 696, 109 Pac. 29; Fairchild-Gilmore-Wilton Co. v. Southern Refining Co. 158 Cal. 273, 110 Pac. 951.)

We are here met with the suggestion that a rescission without the consent of the other party cannot be made except by one who is not himself in default. The rule is usually stated in this general language. (State v. McCauley, 15 Cal. 458; Fairchild-Gilmore-Wilton Co. v. Southern Refining Co. 158 Cal. 273, 110 Pac. 951.) Where the respective obligations upon which each party is in default are dependent and concurrent, the justice and necessity of the rule is obvious. So, also, in cases where the rescinding party's default is so related to the obligation in which the other party has failed that it in some manner affects the performance thereof, or the duty of the other party to perform, the rule is plainly applicable. But no case which has been cited applies this rule to a delinquency of the rescinding [517] party which has no relation to the obligation of the other party, in respect of which the right of rescission is claimed, and which does not excuse, prevent, or interfere with his performance of that obligation, or affect or impair his duty to perform it. Nor have we found any case in which it has been claimed that the rule is thus applicable. It is, in truth, an application of the maxims that he who seeks equity must do equity and must come into court with clean hands. It is well understood that this rule does not apply to all derelictions by the complaining party, but only to a delinquency "connected with the matter in litigation, so that it has in some measure affected the equitable relations subsisting between the two parties, and arising out of the transaction." (1 Pomeroy's Equity Jurisprudence, sec. 399; Lewis's Appeal, 67 Pa. St. 166; American Assoc. v. Innis, 109 Ky. 605, 60 S. W. 388; Rice v. Rockefeller, 134 N. Y. 186, 30 Am. St. Rep. 658, 17 L.R.A. 237, 30 N. E. 907; Bethea v. Bethea, 116 Ala. 272, 22 So. 561.) Here the default of the plaintiff, as claimed, was negative; it had not been diligent in performance. The contract provided a remedy for that neglect, a remedy which the owner did not pursue. The neglect specified in the certificate, still conceding its conclusive effect, did not, as we have said, in any way affect the liability of the owner to pay for the work actually done. The plaintiff's dereliction was not connected with the default in the payment or with the obligation to pay but was wholly collateral thereto. The rule referred to does not apply to this case.

There is another sufficient answer to the above suggestion. The court found that the allegations of the answer that the plaintiff had failed and neglected to supply sufficient workmen and materials and to prosecute the work with diligence were untrue. There is ample evidence to sustain these findings. The claim is that the certificate of the architects, above set forth, relating to the abortive attempt to terminate the contract, is conclusive as to the fact of such failure, not only upon any question properly arising in connection with the proceeding for the termination of the plaintiff's employment, or as to which it would be material, but also conclusive between the parties at all times and upon all

occasions to which the fact certified to may relate, although upon a matter collateral to the proceeding in and for which the certificate was authorized, [518] and not in any way connected therewith or dependent thereon. We are of the opinion that it is not conclusive in a matter collateral to the proceeding in and for which alone it was authorized to be given. Its sole function was to serve as a basis for a notice terminating the contract. Upon any matter dependent on or arising out of that proceeding, it would be conclusive. But the proceeding failed for want of a proper notice and it thereupon lapsed and became wholly ineffectual. The certificate made to initiate that proceeding, being unauthorized for any other purpose, falls with it, at least so far as its conclusive effect as evidence upon collateral matters is concerned. (Newall v. Elliot, 1 H. & C. (Eng.) 797.) At most it could be no more than *prima facie* evidence in any collateral matter. The court below properly held that it was not conclusive and was justified by the evidence in finding contrary to its statements of fact.

It is claimed that the plaintiff was in default in failing to complete the building on or before September 1, 1906, as the original contract provided, and upon this ground the defendant, Butler, claims liquidated damages under the contract at two hundred dollars for each day's delay, amounting to one hundred and fifteen thousand dollars, or damages for loss of rents during the delay amounting to $113,433.27.

The court found, in effect, that after April, 1906, a new contract was made by the parties for the completion of the building, providing that it should be completed according to the original plan and specifications and under the terms of the original contract, except that no time of completion thereof was fixed, but the same was left indefinite. It also found other facts which, if true, would operate as a waiver of the claim for damages caused by the delay. If these findings are true it necessarily follows that no damages could be recovered by the owner for the delay in question. It is contended that these findings are contrary to the evidence. We think they are sufficiently supported. When the great fire of April, 1906, occurred, the building was partially completed. The fire destroyed everything in it that was combustible. It also for several months completely prevented the resumption of ordinary business in San Francisco. Under the contract, the owner was bound to restore the destroyed parts of the building and put it in such condition that the remainder of the work could be done. [519] She elected to do so and for that purpose she employed the plaintiff to do the work of restoration. She knew it could not be done until after September 1, 1906, the time fixed in the original contract for the completion of the entire building, but she did not specify any time within which the work of restoration should be completed. In fact, it was not completed until more than two months after the above date. She made no complaint of this delay whatever, but thereupon directed the plaintiff to proceed with the work and complete the building in accordance with the original plans. Thereafter she directed the work to proceed, made the monthly payments regularly as they became due and allowed the contractor to go on expending large sums of money in the building, without ever mentioning the fact, now claimed, that liquidated damages at two hundred dollars a day, or damages by loss of rents, from September 1, 1906, had been and were accruing, and without ever claiming or suggesting the right to deduct such damages from the monthly payments. The stipulation as to time and damages were both for the benefit of the owner and she could waive them if she desired. The suggestion that the supplemental agreement was oral and therefore was not effectual to alter the written contract, is disposed of by the fact that the new agreement for an extension of time was relied on by the plaintiff and was acted upon by it to such an extent as to be a practical performance thereof and sufficiently to estop the owner from denying either the making of the agreement for an indefinite extension or the waiver of the covenants aforesaid. This substantial performance of the oral agreement would make it lawful as an oral alteration of a written contract. Furthermore, the time of perfomance even when it is made of the essence, if it is once waived, sets the matter at large, and another date for performance can only be fixed by a definite notice, or by conduct equivalent thereto. (Boone v. Templeman, 158 Cal. 297, 139 Am. St. Rep. 126, 110 Pac. 947.) The facts found clearly show a waiver of the right to demand damages for delay in completion after September 1, 1906. The evidence still more clearly establishes such waiver.

The question whether the demurrers to the answers of the plaintiff and the other defendant to the amended cross-complaint of Mrs. Butler, on the ground that they were uncertain [520] and ambiguous, were properly overruled, is of no importance. The issues arising upon the cross-complaint were all tendered by the affirmative allegations of her answer, the evidence relating thereto was fully presented, and the findings embrace them all. If the answers were uncertain or ambiguous, as claimed, it is clear that the owner was in no wise prejudiced or misled thereby.

The judgment and order are affirmed.

Henshaw, J., Angellotti, J., Lorigan, J., Sloss, J., and Melvin, J. concurred.

Rehearing denied.

BEATTY, C. J.—I dissent from the order denying a rehearing. The validity of the judgment in favor of the contractor depends upon his right to rescind the written contract, and he had no right to rescind if it was not a breach of the contract on the part of Mrs. Butler to refuse payment of his demand for the August work. She had a perfect right to refuse payment of that demand if, as is conceded, there was a claim of the Western Expanded Metal and Fireproofing Co.—as subcontractor—then existing for more than the contractor's claim. And the fact that she did not put her refusal on that ground is of no consequence unless her failure to do so in some way raises an estoppel.

I cannot see that it does.

NOTE.

Right of Building Contractor to Rescind Contract for Failure of Owner to Make Payment.

Generally, 54.
Wrongful Refusal of Certificate by Architect, 56.
Effect of Default of Contractor, 59.
Right to Recover Prospective Profits, 59.

Generally.

The failure to pay an instalment of the contract price as provided in a building agreement, is a substantial breach of the contract, and gives the contractor the right to consider the contract at an end, to cease work, and to recover the value of the work already performed.

United States.—South Fork Canal Co. v. Gordon, 6 Wall. 561, 18 U. S. (L. ed.) 894; Phillips, etc. Const. Co. v. Seymour, 91 U. S. 646, 23 U. S. (L. ed.) 341; Pigeon v. U. S. 27 Ct. Cl. 167.

California.—Porter v. Arrowhead Reservoir Co. 100 Cal. 500, 35 Pac. 146; Golden Gate Lumber Co. v. Sahrbacher, 105 Cal. 114, 38 Pac. 635; San Francisco Bridge Co. v. Dumbarton Land, etc. Co. 119 Cal. 272, 51 Pac. 335; Beck v. Schmidt, 13 Cal. App. 448, 110 Pac. 455; Tubbs v. Delillo, 19 Cal. App. 612, 127 Pac. 514. And see the reported case. See also Cox v. McLaughlin, 52 Cal. 590, 54 Cal. 605, 63 Cal. 196, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164 (*explained* in Porter v. Arrowhead Reservoir Co. 100 Cal. 500, 502, 35 Pac. 146; Carlson v. Sheehan, 157 Cal. 692–696, 109 Pac. 29; Fairchild-Gilmore-Wilton Co. v. Southern Refining Co. 158 Cal. 264, 110 Pac. 951.

Illinois.—Schwartz v. Saunders, 46 Ill. 18; Dobbins v. Higgins, 78 Ill. 440; Geary v. Bangs, 37 Ill. App. 301, *affirmed* 138 Ill. 77, 27 N. E. 462.

Iowa.—Shulte v. Hennessy, 40 Ia. 352.

Kansas.—See Draper v. Miller, 92 Kan. 275, 140 Pac. 890, *rehearing denied* 92 Kan. 695, 141 Pac. 1014.

Louisiana.—See Bergen v. New Orleans, 35 La. Ann. 523.

Minnesota.—Peet v. East Grand Forks, 101 Minn. 518, 112 N. W. 1003.

Missouri.—McCullough v. Baker, 47 Mo. 401; Bean v. Miller, 69 Mo. 384. See also Murgan v. Regan, 48 Mo. App. 461.

New York.—Moore v. Taylor, 42 Hun 45–58, 5 N. Y. St. Rep. 202; Cunningham v. Massena Springs, etc. R. Co. 63 Hun 439, 18 N. Y. S. 600, *affirmed* 138 N. Y. 614, 33 N. E. 1082; Thomas v. Stewart, 132 N. Y. 580, 30 N. E. 577; Lawrence v. Heylman, 89 App. Div. 620, 85 N. Y. S. 789; Smith v. Corn, 3 Misc. 545, 23 N. Y. S. 326. See also Graf v. Cunningham, 109 N. Y. 369, 16 N. E. 551; Flaherty v. Miner, 123 N. Y. 382, 25 N. E. 418; White v. Livingston, 6[illegible] App. Div. 361, 75 N. Y. S. 466 (*affirmed* 174 N. Y. 538, 66 N. E. 1118).

Pennsylvania.—Wo[illegible]8; Harton v. Hildebrand, 230 Pa. St. 335, 7[illegible] St. 281–285, 46 Atl. 2[illegible] Atl. 571.

Utah.—Bennett v. Shaughnessy, 6 Utah 273, 22 Pac. 156.

Vermont.—Preble v. Bottom[illegible]al, 27 Vt. 249.

Washington.—Anderson v. M[illegible]cDonald, 31 Wash. 274, 71 Pac. 1037.

Thus in Geary v. Bangs, 37 Ill. A[illegible]237, pp. 301, 27. court *affirmed* 138 Ill. 77, 27 N. E. 462, the[illegible]ain[illegible]ented said: "The first question of law presen[illegible] it for our determination upon record, as[illegible] in stands, is whether a party, who is engaged [illegible] the performance of a contract, may, on th[illegible] other party's refusal to comply with some stipulation on his part to be performed, such as in this case, the payment of an instalment of money when due, abandon the further performance of the contract and sustain an action to recover for the work already performed. While it cannot be said that a failure to pay an instalment due on a contract is an absolute prevention of the performance, still we know that in many instances, particularly in building contracts, the nonpayment of an instalment when due will render it necessary for the contractor to abandon the work. But the true ground is that a refusal to pay in accordance with the terms of the agreement is a breach which indicates that the one who is guilty of it, does not intend to be bound by the contract, and therefore the other party may rescind it and recover for the work he has done."

In Tubbs v. Delillo, 19 Cal. App. 612, 127 Pac. 514, it appeared that the plaintiff and the defendant had entered into a contract for the construction of a building on a lot of land owned by the defendant. The consideration was to be paid in seven instalments as the work progressed. Under the terms of the contract each instalment was payable on the

contractor's writen statement showing that the necessary amount of work had been done to entitle him thereto. It was also agreed that if the owner delayed for more than five days in paying an instalment, such delay, at the contractor's option, might be deemed a prevention by the owner of the performance of the contract. The owner was in default on the fifth instalment and the contractor, having demanded his payment, relinquished further operations on the building. The court said: "The owner's refusal to make any further payment, in the purview of the contract, placed him in default and entitled the contractor to recover the balance due for the work performed. It would make no difference that the contractor continued to work a few days longer than he was required, as this would be rather a favor to the owner."

In Swartz v. Saunders, 46 Ill. 18, the action was instituted to enforce a mechanic's lien against the property of the defendant. The plaintiff had contracted to perform all the carpenter work on a certain building being erected by the defendant and was to receive therefor a certain agreed sum. The plaintiff was also entitled to demand and receive from the architect in charge, from time to time, estimates of the amount due for work done, which amounts were to be immediately paid by the defendant. The plaintiff applied on the 16th of October to the architect for an estimate of the amount due him at that time under the contract, and received from him a written estimate or certificate, that he was then entitled to a payment of fifteen hundred dollars on the contract. He presented this certificate on and at different times after its date, to the defendant and demanded payment, which was refused. On the night of the 21st of October, 1866, the building, not then having received the upper joists, and being uncovered, was blown down by a high wind and destroyed. The court said: "Before the walls had fallen, the defendant had failed to pay the estimate to which the appellee was entitled under the contract, and after their fall appellant insisted and claimed that although he had failed to pay appellee for the work he had done, he was bound to proceed and replace his portion of the work thus destroyed, and that too, without any compensation. This was an unjust demand, with which appellee was not bound to comply. He had once done the work and for which payment had been refused. That he had a right to abandon the work, under the circumstances, seems a proposition so plain as to require no argument. The claim made by appellant upon the appellee, to replace the work destroyed, and that too, gratuitously, was in effect, a denial of all obligation to pay for the work done, and was of itself a sufficient justification to appellee to abandon the contract."

However, in Murray Bros. Co. v. Aroostook Valley R. Co. 109 Me. 350, 84 Atl. 457, it was held that where work is being done on a percentage basis and the agreement includes a stipulation that the contractor is not to pay more than a certain sum for laborers, the fact that the owner justly complains that the contractor is paying higher wages than are necessary and refuses to continue to pay unreasonably high wages, is not such a breach of contract as will justify the contractors in abandoning the work. And in Davis v. Ford, 81 Md. 333, 32 Atl. 280, it was held that a contractor was not justified in abandoning his contract because of the failure of his employer to pay for extra work where it appeared that the extra work was performed without any agreement as to price, as provided in the contract, and the demand for payment was not made for more than a year after the particular work was completed.

In Nelson v. San Antonio Traction Co. (Tex.) 142 S. W. 146, it appeared that the contractor was obligated by the terms of his contract to lay certain pavement and to maintain the same for a period of ten years. After the pavement had been completed there was due the contractor the last instalment under the terms of the contract. This the defendant refused to pay although no valid reason for a refusal existed at the time. Subsequently action was instituted by a sub-contractor to enforce a mechanic's lien against the property of the defendant and the defendant instituted a cross-action to recover for breach of contract in failing to keep the pavement in repair. The court said: "We are of opinion that the default of the traction company in making the final payment did not operate to release [the contractor] from his undertaking to guarantee the maintenance of the pavement. It gave him a right of action immediately against the traction company for the balance, and the latter could be compelled at his suit, as has been done in this proceeding, to pay him with interest. There is no basis for a contention that [the contractor's] agreement to repair for ten years was dependent for its existence or continued existence upon payments being made at the times specified in the contract. [He] is asking for the complete payment of the consideration for his contract, which was to do the work and to maintain it for ten years. For the amount to be paid him, he agreed, not only to do the work, but to maintain it afterwards. He certainly is in no position to require the traction company to pay said consideration to the last cent, and deny his obligation to fully perform that which he was to do for such consideration." In Cranford Co. v. New York, 150 App. Div. 195, 134 N. Y. S. 839, the court held that what would amount to an unexcusable or unreasonable delay on the part of an

individual in making a payment, might not in the case of a municipal corporation justify the contractor in rescinding his contract.

In *Canada*, it seems that the mere refusal of the owner to make payments in acordance with the terms of a building contract, does not justify the contractor in discontinuing work on the building. Thus in Kelly v. Tourist Hotel Co. 20 Ont. L. Rep. 267, it appeared that the plaintiff agreed to construct a hotel building to the complete satisfaction of the architect for a certain sum, payable in monthly instalments in accordance with the estimates issued by the architect, and to deliver to the defendant a bond in the sum of $10,000 for the faithful performance of his contract. The plaintiff commenced work and six progress certificates were issued by the architect, in accordance with the terms of the agreement. Five of these certificates were paid by the defendants, and a portion of the sixth; but, the plaintiffs having failed to deliver the bond in accordance with the agreement, the defendants refused to make any further payments on account of the progress certificates until the delivery of the bond. The plaintiffs thereupon stopped work on the building, and brought an action to recover the amount of the balance they claimed for all work done and materials supplied by them, on a quantum meruit. The court recognized the right of the plaintiff to sue for the amounts certified to be due, but held that they were not justified in abandoning their contract and said: "We agree with the view of the local Master that the respondents' refusal to make further payments was not justifiable, and that the appellants were not justified in discontinuing work on the building. . . . It follows that the appellants were not entitled, at all events at the commencement of the action, to be paid anything but the sums for which the architect had given them progress estimates, in accordance with the provisions of the agreement, the written certificate of the architect to the effect that the payment is 'due' being a condition precedent to the right of the appellants to payment." However, in Clayton v. McConnell, 14 Ont. 608, it appeared that the defendant and owner not only refused to pay the contractors the amount due under their building contract but caused them delay by not having certain joists ready at the proper time for their use and when the contractors asked for more money he finally told them to go on with their work, or, if they would not go on, to leave the building. The court said: "It is true the defendant did not in express terms forbid the plaintiffs proceeding with the work, but he did, by the expression used by him, leave it optional with the plaintiffs to proceed with or abandon the work. They accepted the option; and therefore I am of opinion the learned Referee was right when he found the plaintiffs were justified in considering the contract at an end."

Wrongful Refusal of Certificate by Architect.

A building contractor is justified in abandoning his work and instituting proceedings to recover for the value of his labor and materials where he is not in default and is entitled to a payment, and the architect wrongfully or unreasonably refuses to issue a certificate for payment. Batchelor v. Kirkride, 26 Fed. 899; Flaherty v. Miner, 123 N. Y. 382, 25 N. E. 418; Thomas v. Stewart, 132 N. Y. 580, 30 N. E. 577; Smith v. Corn, 3 Misc. 545, 23 N. Y. S. 326. And see the reported case. See also Bean v. Miller, 69 Mo. 384. Thus in Batchelor v. Kirkride, supra, the court said: "This suit was brought by the contractor upon the quantum meruit, on the allegation and assumption that the owner had unlawfully terminated the contract, and that he was entitled to recover payment for the work which he had actually done. The jury gave a verdict for the plaintiff for the sum of $13,168.54. Under the charge of the learned circuit justice this verdict must be held to have established (1) that the work has sufficiently progressed in the months of February and March to entitle the plaintiff to the certificates; (2) that the architects fraudulently refused to give them; and (3) that the defendant failed to make the payments when the contractor demanded them, and was entitled to them under the contract, and wrongfully took the building out of his hands. The jury was advised by the court, on the trial, that unless these questions of fact were found for the plaintiff he could not recover in this action. The counsel for the defendant, on the argument, insisted that a new trial should be granted, because there was no evidence of collusion between the owner and the architects; that no proof was offered that he induced them to withhold the certificates; and, even admitting that the architects acted fraudulently, the owner was not to be prejudiced by such action unless he was in some way a party to the fraud. The counsel for the plaintiff, on the other hand, contended that a fraudulent refusal of the architects to furnish a certificate, when the work was sufficiently progressed to call for one, whether in collusion with the owner or for any other cause not traceable to the influence and action of the contractor, justified the latter in not going on with the work until paid; and when the owner taking advantage of the fraudulent conduct of the architects, went into the possession of the unfurnished building, and completed it, the contractor had a legal right to recover for the value of the work done up to the time when the owner took the charge and control.

We have thus presented for consideration an interesting, and, judging from the conflicting views in various cases which I have examined, I may add, unsettled, question, contracts of this character for the erection of buildings or the construction of other kinds of work are not common. As a rule, the owner has the means to pay, but wishes to guard against loss by paying no faster than the progress of the work warranted, and the contractor is dependent upon the moneys received during the progress of the building for the means of carrying the undertaking on to completion. A third party is therefore selected to determine when the payments ought to be made. In the present case the third party were the architects of the builder, and the contractor agreed to be bound by their judgment, not their fraudulent but honest judgment, in regard to the payment of the several instalments provided for in the contract. Evidence was offered tending or, at least, designed to show that during the progress of the work these architects complained to the contractor that they were not receiving enough money from the owner to pay them for superintending the buildings in their construction; that they had the opportunity, under the terms of the contract, to determine whether the work should cost him forty thousand dollars or sixty thousand dollars; and that it was to his interest, therefore, to pursue a liberal policy towards them if he wished them to decide any matters depending on their judgment in his favor. He naturally concluded, when the architects refused their certificates in the months of February and March, that they were not expressing their honest convictions, but were pursuing a course which they imagined would bring them compensation for changing their judgment. There is no pretense that the builder was in collusion with them. They were not acting to benefit him, but themselves. On the other hand, the testimony indicates that he was ready and willing to pay when the architects signed the certificates that the work was sufficiently advanced to render it safe for him to do so. Whether the work had so far progressed as to entitle the contractor to have the certificates, and whether they were withheld for a fraudulent purpose, were questions of fact which the jury has determined in favor of the plaintiff, and I quite agree with the circuit justice in his charge that fraud by the arbiters, although not in collusion with the defendant, entitles the plaintiff to recover." In Thomas v. Stewart, 132 N. Y. 580, 30 N. E. 577, the New York Court of Appeals set out and affirmed the opinion of the lower court wherein it was said: "According to the evidence of the contractors, they made four demands of the architect for a certificate that they were entitled to the second payment. On the occasion of the first demand he refused because the door-jambs were not set. Thereupon the contractors, although claiming that the door-jambs were not a necessary part of completing the house to the laying of the floors and the setting of the partitions, proceeded to set the door-jambs, when they again demanded a certificate, but the architect said that he would not issue one until the piazza was up. The contractors insisted that this was not required because it was outside of the house, but notwithstanding, they put it up and laid the floors therein. When the certificate was next demanded the architect refused it because the piazza was not finished. They informed the owner of what they had done, and that the architect would not give a certificate, and asked him to pay them, but he refused, stating that he did not know anything about it, and that everything was left with the architect. A witness testified to a statement made by the architect, although the latter denied it, that in drawing the contract he had made the first and second payments too large, thus suggesting a personal reason for his persistent refusal. There was no request to find that the piazza was not finished. We think that the evidence warranted the finding, as made by the trial court, that the architect unreasonably withheld the certificate. While it may have been proper to require the piazza to be erected and the floor thereof laid, so that progress of erection should be uniform inside and outside of the building, it does not seem reasonable to require the piazza to be finished at a period when no part of the interior was finished. The second payment was earned when the floors were laid and the partitions set, ready for the masons. This did not include the completion of the back piazza, either by specific mention or because that work was necessary in order to do anything that was specifically mentioned. As the refusal of the architect was based upon an unreasonable requirement, it furnished no protection to the owner."

In Bean v. Miller, 69 Mo. 384, it was held that where a contractor has abandoned his contract because of the default of the owner in making payments, and the engineer has made no final or full estimate of all the work done as provided by the contract, the contractor will be permitted to recover for the whole amount of work done, whether estimated or not.

However, in Fox v. Clark, 44 App. Div. 626, 60 N. Y. S. 237, it appeared that the plaintiff entered into a contract to build two houses for the defendant according to certain plans and specifications. It was agreed that certain payments should be made at various times when the buildings had advanced to a certain stage of completion. It was further provided that "in each case of the said payments, a

certificate shall be obtained from, and signed by, [the] architect, to the effect that the work is done in strict accordance with the plans and specifications, and that he considers the payments properly due." The plaintiff began work in December and subsequently the architect gave two certificates for a payment on account of each of the two buildings. On February 1st, the plaintiff requested another certificate from the architect for a second payment on one of the houses. The architect made an examination, and found that the payment was not due; that there were several things yet to be done before there was anything due under the terms of the contract, and he made a memorandum of the work necessary to be done before he could give a certificate. The work continued on the houses until the 7th day of February, when the defendant received a letter from the plaintiff stating that the second payments were due on both houses, and that, as they had not been paid, they had stopped work. The court said: "The test of whether that payment was due was whether the buildings were 'inclosed and ready for lathing,' and it was stipulated in the contract that the evidence of this fact should be the certificate of the architecture to the effect 'that the work is done in strict accordance with the drawings and specifications, and that he considers the payment properly due.' The complaint contains no averment that the architect unreasonably withheld his certificate, as it should have done. . . . The defendant did not call the attention of the court to the defect, but it may be said that there was no evidence in the case from which it could be fairly inferred that the architect was actuated by any improper motives in refusing to give the certificate at the time. He was required by the contract to state, in effect, that 'the work is done in strict accordance with the drawings and specifications, and that he considers the payment properly due.' Admitting that evidence might be received in support of the theory that the certificate was unreasonably withheld, to establish such unreasonableness, under the provisions of the contract, it was necessary to show, not only an absolute compliance with the drawings and specifications, but facts which would establish that the architect could not, with any fair degree of reason, have any doubt that the payment was 'properly due.' We fail to find such evidence in the record. On the contrary, it appears from the plaintiff's own admissions that the heating pipes, speaking tubes, etc., which the plans and specifications called for, and which it was necessary should be in place before the lathing could be completed, were not in the building at the date mentioned. This being merely a payment of an instalment, there could be so substantial performance which would render the payment due. The plaintiff suffered no legal wrong by having his payment deferred until he had complied with the conditions necessary to entitle him to payment. He could have completed the construction within the terms and conditions of the contract, and recovered the amount agreed upon, by showing a substantial performance of the whole contract, but he could not claim that a single instalment was due, except by complying with the letter of agreement under which the parties were acting. He did not have the certificate of the architect required by the contract. He has not established that he had the buildings in the condition demanded by the agreement as a condition of the second payment becoming due, or that the architect had reason to believe that the payment was fairly due. Under these circumstances, it cannot be held that the defendant had failed to keep his covenant; and, without default on his part, it cannot be said that there was any ground for a recission of the contract." In National Contracting Co. v. Com. 183 Mass. 89, 66 N. E. 639, the action was instituted to recover damages for a breach of contract. The plaintiff's petition alleged, inter alia, that the defendant was required to furnish once in each week an approximate estimate of the amount of work done and its value and to furnish the contractor with an order for the payment of eighty-five per cent of the value estimated and that he had failed to furnish the estimate and order as provided in the agreement. The clause of the contract invoked by the plaintiff was as follows: "The engineer shall, once a week, make an approximate estimate in writing of the amount of work done and of the relative value thereof, according to the terms of this contract. And said engineer may make such allowance in said weekly estimates as he may deem reasonable on account of the work having been more or less difficult than the average of this contract. And it is expressly understood that said weekly estimates shall only be made when the work progresses in accordance with the provisions of this contract and specifications. Upon each such weekly estimate being made, the board will give an order on the treasurer of the Commonwealth for the payment to said contractor of eighty-five per cent of such estimated value." The defendants demurred to the petition on the ground that it did not aver that the work was progressing in accordance with the provisions of the contract. The court said: "We are of opinion that this is a good ground of demurrer. The petitioner was not entitled to an estimate unless the work was progressing in accordance with the contract, and this should have been alleged."

For cases discussing generally, the conclusiveness of the decision of an architect or en-

gineer under a working contract, see the notes to Williams v. Mount Hood, R. etc. Co. Ann. Cas. 1913A 177, and Mercantile Trust Co. v. Hensey, 10 Ann. Cas. 572.

Effect of Default of Contractor.

If the contractor is in default and has not fulfilled his obligations under the contract according to its terms at the time he demands payment, he is not justified in leaving the work. Golden Gate Lumber Co. v. Sahrbacher, 105 Cal. 114, 38 Pac. 635; Casey v. Gunn, 29 Mo. App. 14; Fox v. Clark, 44 App. Div. 626, 60 N. Y. S. 237; McGrath v. Horgan, 72 App. Div. 152, 76 N. Y. S. 412; Cranford Co. v. New York, 150 App. Div. 195, 134 N. Y. S. 839; Finger v. Korn, 123 N. Y. S. 239. See also Schillinger Bros. Co. v. Boschryan Grain Co. (Ia.) 116 N. W. 132; Condon v. St. Augustine Church, 112 App. Div. 168, 98 N. Y. S. 253. Thus in McGrath v. Horgan, supra, the court said: "When a contractor picks up his tools and orders his men to quit work on the ground of a breach of contract on the part of the owner in failing to make an intermediate instalment payment, he should be prepared to show full performance of all conditions precedent to his right to such payment. The plaintiff refused to proceed with the execution of his contract, and elected to stand upon his strict legal rights. He must, therefore, in order to recover, bring himself fairly within the terms of the contract by showing performance of the obligations he incurred 'without any omission so substantial in its character as to call for an allowance of damages.'" And in Golden Gate Lumber Co. v. Sahrbacher, 105 Cal. 114, 38 Pac. 635, it was said: "Nonpayment of an instalment of the contract price when due is such a breach of the contract as to justify a contractor in leaving the work and recovering upon a quantum meruit. Was the contractor entitled to receive the second instalment of money? In other words, was the second instalment due? And the answer to that interrogatory is solely dependent upon a determination of the fact as to whether or not the contractor had progressed with the building according to the plans and specifications. . . . If he had done so he had the legal right to stop work when the second instalment was not forthcoming; but, if he had not performed the contract according to its terms at the time he demanded the second instalment, then it was not due, and he was not justified in leaving the work; and if he left the work without cause it was an abandonment of the contract, as contemplated by section 1200 of the Code of Civil Procedure, and the plaintiffs' rights in this action would be measured by the provisions of that section. Upon an examination of the evidence we conclude that the contractor failed to comply with the terms of his contract in substantial particulars, and, having committed breaches of the contract, he was not justified in leaving the work as he did leave it."

In Casey v. Gunn, 29 Mo. App. 14, the court said: "The fact that the plaintiff refused to pay the third instalment when claims for labor and material for a large amount remained unpaid, was evidence of the exercise by him of a right distinctively reserved by the terms of the contract, and no evidence of an abandonment. Nor was the fact that, upon the contractor's refusal to proceed with the work, the plaintiff had it completed under his own supervision, evidence of such abandonment, since it was the only alternative the plaintiff had."

Right to Recover Prospective Profits.

In some cases, it has been held that the default of the owner in making payments, not only justifies a building contractor in abandoning the work but entitles him to recover as damages his profits on the uncompleted portion of the work. Grand Rapids, etc. R. Co. v. Van Dusen, 29 Mich. 431; Scheible v. Klein, 89 Mich. 376, 50 N. W. 857; Jones v. New York, 47 App. Div. 39, 62 N. Y. S. 284; Schlesinger v. Ritchie, 115 N. Y. S. 116. See also Arnott v. Spokane, 6 Wash. 442, 33 Pac. 1063. *Compare* Christian County v. Overholt, 18 Ill. 223; Moore v. Taylor, 42 Hun 45, 5 N. Y. St. Rep. 202. Thus in Jones v. New York, supra, the court said: "There is undoubtedly a material distinction between the effect of a default in payment of an instalment when it becomes due under such a contract . . . arising from mere temporary inability, and a deliberate refusal, based upon the asserted invalidity of the contract and the denial of the contractor's right to proceed or to receive any payment thereunder. The former may be a breach which, while it would permit the contractor to abandon the work and recover for that already done, would not entitle him to prospective profits. . . . But the latter goes to the root of the contract, and is equivalent to an abandonment of it in its entirety. Under such circumstances the contractor is entitled to recover prospective profits. . . . It was said . . . that even 'mere delay in making the stipulated payments might be inexcusable or unreasonable or so indicative of an utter inability to perform the entire contract as to be equivalent to a refusal to perform, and a denial of the plaintiff's right to proceed under it.'" In Schlesinger v. Ritchie, 115 N. Y. S. 116, it was said: "The plaintiff brought this action for work, labor, services, and materials under a contract calling for the erection and construction of a balcony, four fitting rooms, a cashier's desk, and a stock, a packing, and a cutting table, in the Hudson Terminal

Building, at the agreed price of $1,050. He did not complete the work, even substantially. He claims to excuse his nonperformance by the defendants' refusal to pay according to the agreement, which, as he testifies, was that the defendants, copartners, undertook to pay about two hundred dollars in cash, and the balance in notes during the progress of the work; that he was to get the cash during the job, but on no specified day; that he received a three hundred dollar 90-day note, but that upon his demand for cash on a particular day the defendants said they 'wouldn't give him a damn cent until the job was finished.' The refusing answer, even to phraseology, was admitted by the defendants, who, contradicting the plaintiff's version of the agreement, said the job was to be paid for when done, and that they had given the note as a favor. Having credited the plaintiff's story, as the judgment shows, the learned trial justice could but find a breach by the defendants, which absolved the plaintiff from further performance and entitled him to abandon the work and to recover by way of damages such profits as would result to him from a complete performance, and thereupon award him the difference between the contract price and the estimated cost of the unperformed work." In McCullough v. Baker, 47 Mo. 401, it appeared that the plaintiff after having abandoned his building contract with the defendant because of the latter's alleged default instituted suit on a quantum meruit. The court said "The plaintiff waives that and sues upon the quantum meruit. If he is entitled to recover at all he is entitled to recover a reasonable compensation for the work actually done. That is the rule where the contractor is prevented from completing his job by the unwarranted acts and defaults of the other party. In such a case he is not restricted to a pro rata share of the contract price. He may either sue upon the contract and claim damages for a breach of it, or he may, as in this case, waive the contract and sue for reasonable value of his work." However, in Wharton v. Winch, 140 N. Y. 287, 35 N. E. 589, the court said: "The sole question presented for judicial decision is whether, upon the facts proven in this case, the plaintiff is entitled to recover prospective profits because of the failure of the defendant to pay the instalment of the contract price which fell due upon the delivery of the material at Lincoln on Nov. 9th. The execution of the contract, and what the parties did under it, and what they failed or refused to do, are all matters about which there is no conflict or dispute in the testimony given upon the trial, and at the close of the evidence both parties requested the direction of a verdict, and the motion of the defendant was granted, to which the plaintiff excepted. The plaintiff then requested the court to submit to the jury the question whether or not the evidence in this case did not evince an intention on the part of defendant not to comply with the terms of the contract, and a total failure on his part, which was declined and an exception taken. In view of the structure of this contract it would seem to be clear that the mere failure of the defendant to make punctual payment of an instalment due according to its provisions was not such a breach of the entire contract as to permit the plaintiff to refuse to proceed further under it, and recover damages for the profits which he would have earned had the contract been fully performed on his part." . . . It is undoubtedly true that the defendant's failure to pay the instalment was such a breach of the contract as absolved the plaintiff from all obligation to further perform on his part while the default continued. Nor was he bound to grant the defendant any indulgence and wait for any period of time in order to enable him to make good his broken promise. In that sense punctual payment was a condition precedent. The obligation of the plaintiff to proceed under the contract depended upon it. If it was not fulfilled, one of two courses was open to the plaintiff. He might at once rescind the contract and refuse to go on, and immediately recover for the materials furnished and services rendered under it; or he might proceed with the performance of the contract on his part, and at the same time, if he chose bring suit to recover the past due instalment. In the present case the trial court has found that the plaintiff elected to rescind the contract, and as he had already received more than sufficient to compensate him for the work done under it, that he can recover nothing in this action."

STATE

v.

BAXTER.

Ohio Supreme Court—February 3, 1914.

89 Ohio St. 269; 104 N. E. 331.

Embezzlement — Restoration as Defense.

The accused was state superintendent of banks. He took $37,000, of the funds that came into his custody by virtue of his office, to New York City, and used the money there to redeem his collateral securities which he had pledged for his private debt. Some weeks later, before he was called to account for the money and before he was indicted for its

unlawful conversion to his own use, he negotiated the securities which he had thus obtained, for money with which he restored to the funds the $37,000, with which he paid his debt in New York. Held, this was embezzlement, in violation of section 12876, General Code.

[See note at end of this case.]

Same.

The fact that he returned money of equal amount to the trust fund, before his secret appropriation of it became known, was no defense.

[See note at end of this case.]

Same.

It is the design and policy of that section and kindred statutes to prevent public officers and agents from using public funds in their possession or under their control, in any manner or for any purpose not expressly authorized by law.

[See note at end of this case.]

(Syllabus by court.)

Exceptions from Court of Common Pleas, Franklin county.

Criminal action. Baxter acquitted of charge of embezzlement and prosecuting attorney alleges exceptions. The facts are stated in the opinion. EXCEPTIONS SUSTAINED.

Edward C. Turner and *Timothy S. Hogan* for state.

Kent W. Hughes for defendant.

[270] WILKIN, J.—May 20, 1912, the accused took $37,000 of funds, which came into his possession as superintendent of banks of Ohio, from state banks, where they were deposited by virtue of Section 742–6, General Code, and used them in the city of New York to pay his private indebtedness. He repaid the amount of the funds into the banks June 8, 1912. Later he was indicted under Section 12876, General Code, for embezzling and converting these trust funds to his own use on the date first named. At the trial, upon a statement of the facts to the jury by the prosecuting attorney, the accused moved the court to direct a verdict of acquittal. The court sustained the motion, and discharged the accused, for the reason that "he had accounted in time by the repayment of other money of equal value."

The pertinent clause of the statute reads thus:

"Whoever, being elected or appointed to an office of public trust or profit, embezzles or converts to his own use . . . anything of value that shall come into his possession by virtue of such office or employment, is guilty of embezzlement," etc.

He based his right to acquittal on the proposition that the conversion must be with the intention of depriving the owner of the money, and the crime is complete only after a failure to account and pay it over.

He argues: (1) That the temporary appropriation of the money to his own use, with the intention of restoring it, is not a conversion within the meaning of the statute; and (2) that he does not become an embezzler till he becomes a defaulter.

The logic of both propositions is somewhat confused. [271] The first is that a trustee who appropriates a trust fund, without the owner's knowledge, to pay his own debt, and afterwards repays the secret loan, does not embezzle the fund. This loses sight of one important test which is not conceded in the statement of the case, viz., that at the time he diverted the fund he intended to restore it. The fact that the accused deposited other money of equal amount in the proper place after the misappropriation is only circumstantial evidence bearing on the question of his intention when he purloined the fund. To say the least, such evidence of good motive, without anything else, is hardly convincing; it is not conclusive. The return of the money may have been impelled by the dread of exposure and the fear of punishment, rather than an original intention to restore it, which was in his mind at the time he withdrew it. Of course repentance and restitution do not expunge the guilt.

The second proposition also comes short of the mark. It leaves the decisive question unanswered, whether or not the secret purpose or use for which the custodian of public funds abstracts them, without authority, may determine his guilt or innocence. We think the true test is, Is there a wilful misappropriation of the trust fund, or a breach of faith by the employee to whose custody the fund is entrusted for the benefit or use of the employer or owner? In this case the trustee secretly used the money of the state, for his own benefit and profit, on the hazard of being able to replace it when or before the state would require it. He speculated on the risk of becoming a defaulter; [272] he therefore contemplated the chance that he might not be able to repay. Whether he did this for his own emolument or his mere convenience, he was speculating with public funds, which is certainly a public evil intended to be forbidden and repressed by the statute.

It will be noticed that the predicate words of the statute are "to *embezzle* or to *convert* to his own use." The meaning of these words is to be found in the body of the general law; they are legal terms which are to be understood according to their legal signification. A precise laconic definition of either of them, which will comprehend their full import and cover all cases, cannot be found, if indeed one can be made. Conversion has

been defined as follows: "An appropriation of the thing to the party's own use and beneficial enjoyment, or exercising dominion over it, in exclusion or defiance of the owner's right." (2 Greenl. Ev. Sec. 642.) "Assuming upon one's self the property and right of disposing of another's goods." (Lord Holt, 6 Mod. 212.) "An act of dominion over personal property, inconsistent with the right of the owner." (Bigelow on Torts, 1875, 428.) "Any distinct act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it." (2 Cooley on Torts, 3d ed. 859.) And see 1 Bouv. Dic. (1897) 433; 38 Cyc. 2005.

A definition of embezzlement is still more difficult to find or to frame. It is a form of the evolution of the law of larceny, and therefore a modification of that crime. The act may be said to consist of a fraudulent misappropriation of another's [273] goods by one to whom their custody has been entrusted. It is purely a statutory offense, and the distinctive features of the crime must be gleaned from the various statutes which define it for each jurisdiction.

The law of the particular phase of the subject which we have in hand, so far as it has been determined and formulated by juristic science is tersely stated by a writer whose treatise has become a classic and an authority. We quote from the late Joel Prentiss Bishop's New Criminal Law, Vol. 2:

"The gist of common-law larceny is the felonious 'taking' of what is another's, with the simultaneous intent in the taker of misappropriating it. But in the statutory embezzlement there is no felonious taking, for the thing comes to the servant by delivery either from the master or a third person. . . . So that the question now is, by what act, after it is received, does the servant commit the embezzlement? . . .

"Our inquiry concerns the act, not the evidence. The rule of law appears only indistinctly in the books. Still we may infer from the authorities, and from the reasons inherent in the question, that if the servant intentionally does with the property under his control what one must intend to do with property taken to commit larceny of it, he embezzles it, while nothing else is sufficient. Or, assuming the needful criminal intent to exist, he must and need only do what in our civil jurisprudence is termed conversion, defined to be any dealing with the thing which impliedly or by its terms excludes the owner's dominion. To illustrate,—[274] if the servant, instead of delivering the property to his master or another, as required by his duty, pledges it for his own debt, or runs away with it, or neglects or refuses to account for it, or otherwise wrongfully diverts its course toward its destination to make it his own, he embezzles it. Yet much of even this is, when accurately viewed, rather evidence than the offense itself. For, to constitute the offense it is not necessary there should be a demand for the money alleged to be embezzled, or a denial of its receipt, or any false account, . . . or refusal to account." Sections 372, 373.

He treats of *the intent* as an ingredient of the crime, under the title "Larceny." The following excerpts will serve our purpose: "In strictness of language there are in larceny two intents; namely, to commit the asportation by trespass, and to make the felonious misappropriation of the thing stolen. Yet commonly and practically we mean by this term *the latter*. It is in this sense that the word is in the present subtitle employed. . . . It means the purpose to deprive the owner of his ownership in the thing taken; and whether or not for some advantage to the trespasser, or as other wise expressed for lucre, is one of the purposes of this sub-title to consider. . . . 'What is meant by felonious intention,' said Reade, J., 'is a question for the court; and after the court defines that, then it is for the jury to say whether the defendant had such intent.' But the law on this question of intent is difficult, and the authorities are in a measure conflicting. Yet relating to it there are some leading doctrines reasonably certain." Section 840.

[275] "Some have held that if one takes another's goods to pledge them, intending to redeem and return them afterwards, he does not commit larceny. Plainly a defendant to avail himself of this limitation of the intent must show it; for outwardly and *prima facie* these facts indicate theft. And Gurney, J., once said to a jury: 'I confess I think that if this doctrine of an intention to redeem property is to prevail, courts of justice will be of very little use. A more glorious doctrine for thieves it would be difficult to discover, but a more injurious doctrine for honest men cannot well be imagined.' Now, a man who pledges an article transmits an ownership which, though not perfect, will become so if he fails to perform to the pledgee the condition; this is very different from his merely holding it in his own temporary custody and using it. Probably, therefore, this taking is in principle larceny. So, at least, such a transaction would now generally appear to be regarded. And, both in principle and authority, the intent in larceny need not be to deprive the owner of the whole thing taken; it is enough that the purpose is to get from him the entire ownership of any part thereof. Thus, it is larceny to carry away any article of property to conceal it until the owner will offer a reward for its

return, and for the purpose of obtaining the reward." Section 841.

"We find it not infrequently said in the books that the taking must be *lucri causa*. . . . Blackstone mixes, thus: 'The taking and carrying away must be *felonious;* that is, done *animo* [276] *furandi;* or, as the civil law expresses it, *lucri causa*. . . . But this is by no means the only criterion of criminality; for in cases that may amount to larceny the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to recount all those which may evidence a felonious intent, or *animum furandi;* wherefore they must be left to the due and attentive consideration of the court and jury.' (4 Bl. Com. 232.) Now, these words of the commentator . . . really convey about as exact an idea as can be stated." Section 842.

"Some hold that the thief must intend to convert the thing to his own use. But the true view, where the rule of *lucri causa* is conceded, is simply that he should mean some advantage to himself, in distinction from mischief to another." Section 843. "We have intimations that if one taking an article tenders its value in money *prima facie* he is not guilty of larceny. Not necessarily will the offer of pay exempt him, but East says it is 'pregnant evidence' that the purpose was not felonious. (2 East P. C. 662, 3 Greenl. Ev. Sec. 157.) On various theories of a defense the court might in some circumstances be asked to submit such a fact to the jury." Section 845.

This lucid epitome of the law, so far as it has been developed by the decided cases, gives us a clew to the solution of the problem presented by the record in this case. Our author shows us, first, that the return of the property misappropriated by the trustee is only an *ex post facto* circumstance, which should go to the jury for what it may be worth as reflecting the motive of the trustee at the time of the appropriation; second, if the [277] criminal intent accompanied that act, the crime was complete, and demand and refusal to account and pay over were not necessary. Therefore, if the court of common pleas sustained the motion and directed a verdict of acquittal on the theory that the prosecutor failed in either or both of these particulars to state an offense, its ruling was wrong. It should at least have submitted the case to the jury with proper instructions as the evidentiary value and legal import of these two features.

The third proposition suggested by the author's summary is, that the temporary diversion of the fund to the trustee's use without the owner's consent is embezzlement. Therefore his repayment of the money would not purge his breach of trust of its felonious character, though he intended at the time of its misuse to deprive the owner of it only temporarily. Rarely does a defaulter intend to become a defaulter when he begins his speculations. How often has the sequel shown that the faithless custodian felt absolutely sure that he would be able to replace the fund before it would be called for? Who knows how many a defaulter relied with absolute certainty upon his ability to show that, when he shifted the funds from his custody or his trust account to a temporary use or his personal account, there was absolutely no danger of the funds being lost? Therefore how easily it may be shown that the ninety and nine who go astray had no intention of depriving the owner of his money. Nevertheless the theory advanced by the accused in this case, and adopted by the judge who acquitted him, is that mere [278] chance determines the criminality or innocence of the act; whether he is a felon or a guiltless man depends merely upon his ability to replace the money when he is called to account. By this theory his case is ruled by blind fate, not by blind justice. In other words, it is not the blameworthiness of the act or of the mind, but the result of the hazard, or the skill of the actor, in playing the game, which decides its legal quality. Such a doctrine offers temptation to a thousand-thousand custodians of trust funds, whose temptations are great enough at best; it encourages the reckless and unfortunate to commit crime, whereas the very purpose of the statute is to deter the tempted fiduciary from a breach of his trust and to protect society from the evils of a practice which has become wellnigh epidemic. If the law be given such a loose interpretation and be so feebly enforced, public faith and credit will be impaired and the stability of the financial institutions of the state will be in jeopardy.

In the case of the Board of Education v. Thompson, 33 Ohio St. 321, the board permitted the treasurer to use the fund in his business, pending litigation between the board and a special school district as to the custody of a fund in the township treasury, on his agreeing to pay interest. The object was to earn sufficient by such use to meet the interest which the board would be charged if the litigation should be decided against it. When the treasurer's term expired the loan was renewed and note with sureties was taken for the amount with interest. This court held that the transaction amounted to embezzlement under the statute [279] as it then existed (2 S. & C. 1610). The court said: "The purpose of this and other statutes, as was said of similar acts then in force, in State v. Buttles, 3 Ohio St. 321, is to operate on the agents, officers, and others

having charge of public moneys, and deter by fines and penalties, the commission of such acts. The power is denied them to make such contracts."

In the Buttles case, Ranney, J., made the following comments: "It is unnecessary for us to examine them [the statutes] in detail. We have carefully read them all, and are entirely satisfied, that the policy of the state has always been, what we have no hesitation in saying it should have been, to prohibit its officers and agents from loaning or dealing in its funds either on public or private account. . . .

"The first section subjects to the penalties prescribed by law for feloniously stealing property, any officer appointed or elected under the constitution or laws of the state, or any agent or servant of the state, who should convert to his own use, or use by way of investment in property or merchandise, or make away with or secrete, any money or valuable security received for safe keeping, disbursement, transfer, or other purpose, which might be in his possession, or over which he might have supervision, care, or control by virtue of his office or agency. . . . It seems to us, that the language and purpose of the section are both disregarded, when it is taken for anything less than an absolute prohibition to every officer, agent, or servant of the state, having public moneys in his hands, or under his control, to loan [280] them out, either on private or public account, without express authority of law. . . . We have no difficulty in saying that the whole object, spirit and design, is preserved when they [the statutes] are made operative between the state and its agents, in deterring the latter from the interdicted use of the public moneys. . . . Unwilling to trust the agents of the state, the legislature has seen fit to deny *them* the power to loan the public funds, and the better to secure obedience has prescribed penalties for the transgression of its instructions."

Again: It was said a county treasurer who should deposit the public moneys in a bank, with or without interest, though directed so to do by the county commissioners, would violate Section 6841, Revised Statutes (now Section 12873, General Code), and be guilty of embezzlement; and if the county commissioners should advise and direct such deposit to be made they would be equally guilty. Williams, J., State v. Ellet, 47 Ohio St. 90, 100, 23 N. E. 931, 21 Am. St. Rep. 772. See also Davis v. Gelhaus, 44 Ohio St. 69, 4 N. E. 593.

In a later case, speaking of Section 6846, Revised Statutes (now Section 12878, General Code), the court said the object of this statute is to punish as an offense the diversion, appropriation or *application of the funds* of a municipal corporation or a board of education *to a use other than that for which the funds were raised;* and a conversion of the money to his own use by an officer or agent of such corporation is a violation of Section 6841, Revised Statutes (now Section 12873, General Code), and makes him guilty of embezzlement [281] of public moneys. State v. Johnson, 53 Ohio St. 307, 41 N. E. 256.

The court below said that what constitutes wrongful conversion depends entirely upon the duties required by the trust; if the obligation is such that the trustee is required to account within a definite time, and he uses the money but later secures other money and pays to his principal according to his duty, he is not guilty of a breach of duty nor of a crime, *although he may have committed a moral wrong;* we cannot apply to such a situation the rule of law prevailing in larceny, where there is a wrongful taking by trespass and the crime is complete, though the money is afterwards returned.

The exception here intended to be made is of those trusts whose terms, express or implied, permit the trustee to commingle the funds of the trust with his own. The idea is that in such cases there is no default and therefore no breach of the trust till the trustee fails to account and pay over. Cases have been cited in argument where trust and private funds were permissively or innocently commingled, and the trust fund, by inadvertence, consumed by overdrawing in ignorance of the fact that the private fund was exhausted. This case has no semblance to that class. And the italicized clause, supra, betrays a subconscious recognition of the fact that this case does not fall within the exception, else why does the trustee commit a *moral wrong* when he uses the trust money, secures other money and pays it to his principal? The reason is that he had no right to use the public's money and did so wrongfully, and the payment [282] of other money after the conversion does not relieve him of culpability.

The court's distinction between this case and larceny is useless also. Whether it be trespass by wrongful *conversion* or by wrongful *taking*, the unlawful use of the money is an invasion of the owner's right of property —an infraction of law, just the same, which the statute penalizes. But the learned lower court finds the conversion to be a *moral wrong* only; the taking, a crime complete. Both wrongdoers have appropriated the owner's money—which the law forbids—and both return it. Why is not the latter absolved as well as the former? The former having lawfully got the money into his custody for safe *keeping*, puts it out of his custody for his own use. The latter unlawfully takes pos-

session of the money for his own use. There is, however, a difference; it is this: The former violates not merely the owner's right of property, but also the owner's trust and confidence; his crime is doubly heinous and damnable. But shall the repentance and return of the plunder by the embezzler acquit him while it does not acquit the thief?

Both of these distinctions are illegitimate. The first implies that the law ignores the moral obliquity of the act, if no money is lost. If the learned common pleas judge had in mind moral turpitude, the implication may be true, but it is irrelevant. If he had in mind conventional morality, the implication is false. True, the law is not for moral discipline; and we need not flounder in the metaphysics of the ethical basis of Law. This law condemns the act and punishes the offender, [283] because the act is hurtful to society, endangers the state, and therefore must be repressed. Whether the offender's motive be culpable or innocent, it does not excuse him, even though he did not intend to violate the law.

The second distinction is unsound, because it implies that one may use or invest what belongs to another, *for a short time*, if he gets the custody lawfully, though explicitly on trust that he will not use it or put it out of his custody, even though he convert it into something else of the same kind of equal value and surrender the equivalent upon demand. This proposition juggles with Truth, Time and Fate. It would sanction every species of gambling with public money by every officer in the commonwealth and by every custodian of trust funds in banks and all other institutions, secular and religious.

We do not assume the authority of enforcing the precepts of mere morality, Christian or Aristolean, nor is it our function to declare the laws of social ethics. But it is our duty to interpret the laws of the state in harmony with those maxims of practical morality, private and public, which are recognized by the enlightened common sense and good conscience of the people of the state. Those maxims are the mainsprings of the civil laws, for upon them the moral order, peace and prosperity of society depend; and unless they be implied as imbedded in the laws, civil authority will lack the sanction and support of public opinion and government will become impossible.

To say that an officer of state, who is entrusted with the custody of public funds, may secretly use [284] them to redeem securities pledged by him for his debt in New York, and then excuse his delinquency by showing that his luck has turned and the securities have been turned into money and the deficit has been made up before he is prosecuted, shocks the moral sense of mankind. Yet that is what the court below decided he may do. We cannot thus interpret the law. The law was made no less to deter those who are tempted to speculate with their trust than to punish those who violate it. To effect the former purpose and stop the too prevalent contagion, as well as to maintain public credit and confidence in our laws and institutions, is a most humane and important object to be kept in view by the courts who are called upon to execute this law.

That the unlawful appropriation of the property, though not with the intention of depriving the owner of it entirely or finally, constitutes the crime, is foreshadowed by the case of Berry v. State, 31 Ohio St. 219, 27 Am. Rep. 506, thus: "The wrongful taking and carrying away of the property of another, without his consent, with intent to conceal it until the owner offers a reward for its return, and for the purpose of obtaining the reward, is larceny." And that demand and refusal to restore are not requisite to make the offense, nor is restitution or the offer thereof a defense, is the doctrine of Baltimore, etc. R. Co. v. O'Donnell, 49 Ohio St. 489, 32 N. E. 476, 34 Am. St. Rep. 579, 21 L.R.A. 117, thus: "In a petition, in an action for conversion, which avers that the defendant converted the plaintiff's property to his own use, it is not necessary to allege a demand and a refusal to deliver; such a demand and refusal may afford satisfactory [285] evidence of a conversion, but are not the only evidence. It is no defense to this action for the value of the goods, that they were tendered after conversion; and the motive by which a party was controlled in the conversion of property is of no avail as a defense, though it may be shown when exemplary damages are claimed.

True, the latter is a civil action, but the delict is, by the very language of the statute (Section 12876), the same in this case as in that; the only difference is that in the cited case the private law is invoked to redress an injury to an individual, whereas in the case at bar the public law is invoked to denounce and punish a wrong to society and the state.

The question then remains: Had the accused, by the terms or the nature of the trust, the privilege of using the trust fund? If he had not, clearly neither his intention to replace it nor his replacing it, nor both together, will save him from the stigma of the crime, though by the innocent error of the learned lower court he has escaped punishment, because the Bill of Rights saves him from the jeopardy of another trial.

Now, neither the statement of facts made to the jury by the prosecutor nor the statute (Sections 742–6 to –12, General Code) which defines the terms and purpose of the trust,

shows that the accused had a right to use the money which came into his custody as superintendent of banks of the state. The suggestion is preposterous.

And the suggestion that the return of the money reflects back to the time of its conversion and raises an inference that the accused did not intend [286] an *unlawful* appropriation of it, is, under the circumstances of this case, no less preposterous. A man holding the responsible trust and high station of state superintendent of banks must be presumed to know the first simple, cardinal duty of his office as liquidator of financial institutions of the state. To permit the suggestion that Baxter did not know it was a breach of trust to purloin the funds in his custody and exchange them for securities in New York, on the hazard of being able to hypothecate the securities for money to replace the funds, would be to make a mockery of justice. The court below said it was a *moral* wrong. That is enough. If it was wrong it was a breach of trust, hence an unlawful conversion. Baxter knew, and the law will not permit him to say he did not know, that it was felony. He stands guilty on this record though he cannot be branded with his crime.

We hold that the fact that the accused returned the money, even if he intended to return it when he secretly appropriated it to his own use, did not bar the prosecution nor exonerate him from punishment. There are decided cases which support this judgment. We cite some of them: Robinson v. Com. 104 Va. 888, 52 S. E. 690; U. S. v. Gilbert, 4 O. F. D. 251, 17 Int. Rev. Rec. 54, 25 Fed. Cas. No. 15,205; Mangham v. State, 11 Ga. App. 427, 75 S. E. 512; State v. Summers, 141 N. C. 841, 53 S. E. 856; State v. Shuman, 101 Me. 158, 63 Atl. 665; Dean v. State, 147 Ind. 215, 46 N. E. 528; Fleener v. State, 58 Ark. 98, 23 S. W. 1; Com. v. Tenney, 97 Mass. 50; Com. v. Butterick, 100 Mass. 1, 97 Am. Dec. 65; State v. Leicham, 41 Wis. 565; People v. Butts, 128 Mich. 209, 87 N. W. 224; Com. v. Mason, 105 Mass. 163, 7 Am. Rep. 507.

[287] The learned judge below adverts to a *nisi prius* case, to which exceptions were denied by this court, also to some remarks (more or less *obiter*) made by members of this court in passing on cases under similar statutes, which seem to declare that there can be a conversion only where there has been a default by failure or refusal to pay over. He says this court "should be responsible for allowing that impression to go out which may deceive any lower court." However that may be, we do not find that this court has decided the law, for a case such as this, to be different from the decision we now make.

He further states that he followed "the rule of strict construction which applies to criminal statutes"—a humane rule justly designed to protect innocence, but too often resorted to as a subterfuge by criminal defenders to befog the judicial conscience. He reached this conclusion: "If there is not a remedy for what may be regarded as a moral wrong in such a case as this, it is for the legislature to create one and not for the court." The doubt thus engendered by that overworked rule was, by the court's taking what seemed the safer and humane side and following misleading expressions of some judges of this and other courts, resolved in favor of the accused and the jury was ordered to acquit him. This was error.

Exceptions sustained.

Nichols, C. J., Johnson, Donahue, Newman and Wanamaker, JJ., concur.

NOTE.

Restoration of Property or Settlement or Offer to Settle with Owner as Defense to Prosecution for Embezzlement or Larceny.

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I. Scope of Note.

It is the purpose of the present note to review the decisions involving the question of intent to restore or restoration of the property or an offer to settle with the owner as a defense to a prosecution for embezzle-

ment or larceny. In treating that subject, the note excludes the effect of a return by the finder of lost property; the taking of property under a claim of right; the taking of property to protect the taker's claim against the owner; the taking of property by mistake; and the necessity of a demand by the owner to constitute embezzlement.

II. Embezzlement.

1. Intent to Restore or Settle.

While to constitute the crime of embezzlement it is necessary that there shall be a criminal intent, yet when money or property is wrongfully and unlawfully appropriated so as to constitute the crime of embezzlement, the fact that there exists in the mind of the defendant an intent to restore the money or property or settle with the owner does not constitute a defense to the crime.

United States.—U. S. v. Harper, 33 Fed. 471; U. S. v. Gilbert, 17 Int. Rev. Rec. 54, 25 Fed. Cas. No. 15,205.

Arkansas.—Russell v. State, 112 Ark. 282, 166 S. W. 540.

California.—People v. Jackson, 138 Cal. 462, 71 Pac. 566.

Georgia.—Orr v. State, 6 Ga. App. 628, 65 S. E. 582; Mangham v. State, 11 Ga. App. 427, 75 S. E. 512.

Illinois.—Spalding v. People, 172 Ill. 40, 49 N. E. 993.

Indiana.—Fowler v. Wallace, 131 Ind. 347, 31 N. E. 53.

Iowa.—State v. Schumacher, 162 Ia. 231, 143 N. W. 1110.

Kentucky.—Metropolitan L. Ins. Co. v. Miller, 114 Ky. 754, 71 S. W. 921; Morrow v. Com. 157 Ky. 486, 163 S. W. 452; National L. etc. Ins. Co. v. Gibson, 101 S. W. 895, 31 Ky. L. Rep. 101, 12 L.R.A.(N.S.) 717.

Massachusetts.—Com. v. Tuckerman, 10 Gray 173; Com. v. Tenney, 97 Mass. 50.

Michigan.—People v. Butts, 128 Mich. 208, 87 N. W. 224.

Missouri.—State v. Pratt, 98 Mo. 482, 11 S. W. 977; Home Lumber Co. v. Hartman, 45 Mo. App. 647. *Compare* State v. Lentz, 184 Mo. 223, 83 S. W. 970.

New York.—People v. Meadows, 199 N. Y. 1, 92 N. E 128, *affirming* 136 App. Div. 226, 121 N. Y. S. 17; People v. Britton, 134 App. Div. 275, 118 N. Y. S. 989; People v. Shears, 158 App. Div. 577, 143 N. Y. S. 861, *affirmed* in 209 N. Y. 610, 103 N. E. 1129.

North Carolina.—State v. Summers, 141 N. C. 841, 53 S. E. 856.

Ohio.—State v. Meyer, 10 Ohio Dec. (Reprint) 746, 23 Cinc. L. Bul. 251.

Oklahoma.—State v. Duerksen, 8 Okla. Crim. 601, 129 Pac. 881, 52 L.R.A.(N.S.) 1013.

Texas.—Farmer v. State, 34 S. W. 620; Nesbitt v. State, 144 S. W. 944. *Compare* Taylor v. State, 50 Tex. Crim. 377, 97 S. W. 473.

Virginia.—Shinn v. Com. 32 Grat. 899.

Wisconsin.—State v. Leicham, 41 Wis. 565, 2 Am. Crim. Rep. 117.

Thus in Com. v. Tenney, 97 Mass. 50, the court said: "Perhaps in a majority of cases the party who violates his trust in such a manner does not expect or intend that ultimate loss shall fall upon the person whose property he takes and misuses. But no hope or expectation of replacing the funds abstracted can be admitted as an excuse before the law. The forger who means to take up the forged paper, the thief who contemplates making eventual restitution, and the man who embezzles money or bonds with the design of restoring them, all fall under like condemnation in courts of justice and wherever the rules of sound morality are respected." And in Fowler v. Wallace, 131 Ind. 347, 31 N. E. 53, it was said: "The authorities are well agreed upon the proposition that the intention to restore, repay or replace money or property wrongfully and unlawfully appropriated does not take from the act its criminal character."

An officer of a corporation who embezzles the funds of the corporation is criminally liable though he may intend to return them. People v. Butts, 128 Mich. 208, 87 N. W. 224.

Where a defendant converts seeders to his own use, the fact that he believes he will be able to pay the owners for them when required to account for them, and intends to do so, does not remove from the act of conversion its fraudulent and criminal character. State v. Leicham, 41 Wis. 565.

2. Offer to Restore or Settle.

It is no defense to a prosecution for embezzlement that the defendant has offered or agreed to return or settle for the embezzled property. People v. DeLay, 80 Cal. 52, 22 Pac. 90, 8 Am. Crim. Rep. 185; Meadowcroft v. People, 163 Ill. 56, 45 N. E. 991, 54 Am. St. Rep. 447, 35 L.R.A. 176; Dean v. State, 147 Ind. 215, 46 N. E. 528; State v. Eastman, 62 Kan. 353, 63 Pac. 597; State v. Alford, 135 La. 381, 65 So. 548, L.R.A.1915A 430; State v. Pratt, 98 Mo. 482, 11 S. W. 977; State v. McCawley (Mo.) 180 S. W. 869; People v. Britton, 134 App. Div. 275 118 N. Y. S. 989; State v. Dunn, 138 N. C 672, 50 S. E. 772. See also U. S. v. Forsythe, 6 McLean 584, 25 Fed. Cas. No. 15,133. Thus in People v. Britton, 134 App. Div. 275, 118 N. Y. S. 989, the court said: "Some time after the indictments were found, a composition agreement of some sort, the nature of which is not disclosed by the record, was

entered into between the defendants and the said corporation. That agreement was offered in evidence, and it is now claimed that the court erred in excluding it; that it was admissible as bearing upon the question of intent. But an offer to make restitution after a theft has been discovered can have no legitimate bearing on that question. It doubtless is true that the defendants expected to make good their misappropriations before they were discovered. The case is a typical one of this kind of crime, but it was no less stealing because the defendants hoped to make good their theft, and their offer to compose the difficulty had no bearing upon their criminal intent when the money was taken." And in Meadowcroft v. People, 163 Ill. 56, 45 N. E. 991, 54 Am. St. Rep. 447, 35 L.R.A. 176, wherein it appeared that a bank official, charged with embezzlement, had offered to restore the amount lost by a depositor, the court said: "It needs no citation of authorities to show that, as a matter of law, the restitution of money that has been either stolen or embezzled, or a tender or offer to return the same or its equivalent to the party from whom it was stolen or embezzled, does not bar a prosecution by indictment and conviction for such larceny or embezzlement. The effect of the tender and payment into court may be a discharge from the indebtedness for the deposit fraudulently received, so far as the depositor and his civil remedies are concerned; but the crime having been fully consummated before indictment found, it is not within the power of the banker and the depositor, or either of them, to compromise or take away the right of the state to insist upon a conviction for the crime committed. It is not to be presumed that in creating the offense and providing for its punishment it was the intention of the legislature to make the criminal courts of the state collecting agencies for collecting the debts due to depositors from insolvent banks and bankers."

The fact that a written agreement of indemnity is taken, in no wise affects the original embezzlement. People v. DeLay, 80 Cal. 52, 22 Pac. 90, 8 Am. Crim. Rep. 185.

3. Actual Restoration or Settlement.

The fact that things or money which have been embezzled are afterwards restored to their owner, or that a settlement is made, or that security is taken to protect the owner, does not purge the act of embezzlement of its criminal character.

United States.—U. S. v. Gilbert, 17 Int. Rev. Rec. 54, 25 Fed. Cas. No. 15,205. See also Coffey v. Harlan County, 204 U. S. 659, 27 S. Ct. 305, 51 U. S. (L. ed.) 666.

Alabama.—Wall v. State, 2 Ala. App. 157, 56 So. 57. See also Willis v. State, 134 Ala. 429, 33 So. 226.

Arkansas.—Fleener v. State, 58 Ark. 98, 23 S. W. 1; Russell v. State, 112 Ark. 282, 166 S. W. 540.

California.—See People v. Rowland, 12 Cal. App. 6, 106 Pac. 428.

Florida.—Thalheim v. State, 38 Fla. 169, 20 So. 938.

Georgia.—McCoy v. State, 15 Ga. 205; Hoyt v. State, 50 Ga. 313; Robson v. State, 83 Ga. 166, 9 S. E. 610. See also Orr v. State, 6 Ga. App. 628, 65 S. E. 582.

Illinois.—See Meadowcroft v. People, 163 Ill. 56, 45 N. E. 991, 54 Am. St. Rep. 447, 35 L.R.A. 176.

Indiana.—See Dean v. State, 147 Ind. 215, 46 N. E. 528.

Iowa.—State v. Pingel, 128 Ia. 515, 105 N. W. 58; State v. Schumacher, 162 Ia. 231, 143 N. W. 1110.

Louisiana.—State v. Pellerin, 118 La. 547, 43 So. 159; State v. Thompson, 32 La. Ann. 796; State v. Frisch, 45 La. Ann. 1283, 14 So. 132.

Massachusetts.—Com. v. Butterick, 100 Mass. 1, 97 Am. Dec. 65.

Mississippi.—*Compare* Richburger v. State, 90 Miss. 806, 44 So. 772.

Missouri.—State v. Noland, 111 Mo. 473, 19 S. W. 715; State v. Merkel, 189 Mo. 315, 87 S. W. 1186; Hanna v. Minnesota L. Ins. Co. 241 Mo. 383, 145 S. W. 412.

Montana.—*Compare* Smith v. Smith, 45 Mont. 535, 125 Pac. 987.

New York.—Fagan v. Knox, 66 N. Y. 525, *reversing* 40 Super. Ct. 41; People v. Shears, 158 App. Div. 577, 143 N. Y. S. 861, *affirmed* in 209 N. Y. 610, 103 N. E. 1129.

North Carolina.—State v. Summers, 141 N. C. 841, 53 S. E. 856.

North Dakota.—State v. Bickford, 28 N. D. 36, 147 N. W. 407.

Ohio.—State v. Cameron, 91 Ohio St. 50, 109 N. E. 584. See the reported case.

Oklahoma.—Flohr v. Territory, 14 Okla. 477, 78 Pac. 565; Hughes v. State, 7 Okla. Crim. 117, 122 Pac. 554.

Oregon.—State v. Chapin, 74 Ore. 346, 144 Pac. 1187.

South Dakota.—State v. Allen, 21 S. D. 121, 110 N. W. 92.

Texas.—Smith v. State, 34 Tex. Crim. 265, 30 S. W. 236; Butler v. State, 46 Tex. Crim. 287, 81 S. W. 743; Busby v. State, 51 Tex. Crim. 289, 103 S. W. 638; Goodwyn v. State, 64 S. W. 251. See also Nesbit v. State, 144 S. W. 944.

Virginia.—Robinson v. Com. 104 Va. 888, 52 S. E. 690.

Wisconsin.—Guenther v. State, 137 Wis. 183, 118 N. W. 640.

"If the crime was complete; if the prisoner had knowingly misused or misappropriated the funds of the state, his subsequent restitution of the fruits of his crime could not relate back so as to efface the wrong." Robinson v. Com. 104 Va. 888, 52 S. E. 690. And in Wall v. State, 2 Ala. App. 157, 56 So. 57, the court said: "There was no error in that part of the court's oral charge, under the evidence in this case, that the subsequent payment of the money did 'not wipe out the offense of embezzlement.'"

Thus the fact that the sureties of a public officer have reimbursed the state for his defalcation, is no defense. Robson v. State, 83 Ga. 166, 9 S. E. 610. Neither does the subsequent acquiescence of the prosecutor destroy the criminal element. Waters v. State, 15 Ga. App. 342, 83 S. E. 200. Likewise the fact that the party injured has received interest on the amount embezzled is no bar. Young v. People, 193 Ill. 236, 61 N. E. 1104.

III. Larceny.

1. Intent to Restore or Settle.

a. *In General.*

Since to constitute the crime of larceny the intent which accompanies the act of taking must be to deprive the owner of his property permanently, and an intent to steal must exist at the time of the taking, the general rule is that a taking for a temporary purpose, with the intent to return the property to the owner, does not constitute the crime of larceny.

England.—Rex v. Philipps, 2 East, P. C. 662; Rex v. Dickinson, R. & R. C. C. (Eng.) 420; Reg. v. Guernsey, 1 F. & F. (Eng.) 394; Reg. v. Trebilcock, Dears. (Eng.) 453, 4 Jur. N. S. 123, 7 Cox. C. C. 408, 27 L. J. M. C. 103, 6 W. R. 281. See also Reg. v. Bailey, L. R. 1 C. C. (Eng.) 347, 12 Cox. C. C. 129, 41 L. J. M. C. 61, 25 L. T. N. S. 882, 20 W. R. 391; Reg. v. Hore, 3 F. & F. (Eng.) 315.

United States.—See U. S. v. Durkee, McAll. 196, 25 Fed. Cas. No. 15,009.

Arkansas.—See Bailey v. State, 92 Ark. 216, 122 S. W. 497.

California.—People v. Stewart, 80 Cal. 129, 22 Pac. 124; People v. Brown, 105 Cal. 66, 38 Pac. 518.

Georgia.—Jackson v. State, 116 Ga. 578, 42 S. E. 750; Glaze v. State, 2 Ga. App. 704, 58 S. E. 1126.

Indiana.—Keely v. State, 14 Ind. 36; Robinson v. State, 113 Ind. 510, 16 N. E. 184; Stillwell v. State, 155 Ind. 552, 58 N. E. 709.

Kansas.—State v. Shepherd, 63 Kan. 545, 66 Pac. 236.

Kentucky.—Smith v. Com. 129 Ky. 433, 112 S. W. 615; Walklate v. Com. 118 S. W. 314.

Louisiana.—State v. Dillon, 48 La. Ann. 1365, 20 So. 913.

Massachusetts.—See Com. v. White, 11 Cush. 483.

Missouri.—Witt v. State, 9 Mo. 671. See State v. Shermer, 55 Mo. 83.

Montana.—Valley Mercantile Co. v. St. Paul F. etc. Ins. Co. 49 Mont. 430, 435, 143 Pac. 559, L.R.A.1915B 327.

Nevada.—State v. Slingerland, 19 Nev. 135, 7 Pac. 280, 7 Am. Crim. Rep. 338.

New Jersey.—State v. South, 28 N. J. L. 28, 75 Am. Dec. 250; State v. Davis, 38 N. J. L. 176, 20 Am. Rep. 367, 1 Am. Crim. Rep. 398.

New York.—Wilson v. People, 39 N. Y. 459; Parr v. Loder, 97 App. Div. 218, 89 N. Y. S. 823, appeal dismissed in 180 N. Y. 531, 72 N. E. 1146, and in 182 N. Y. 509, 74 N. E. 1121; People v. Kenney, 135 App. Div. 380, 119 N. Y. S. 854.

North Carolina.—State v. Gilmer, 97 N. C. 429, 1 S. E. 491.

Oklahoma.—Mitchell v. Territory, 7 Okla. 527, 54 Pac. 782.

South Carolina.—State v. Self, 1 Bay 242.

Tennessee.—Fields v. State, 6 Cold. 524.

Texas.—McDaniel v. State, 33 Tex. 419; Johnson v. State, 36 Tex. 375; Black v. State, 46 Tex. Crim. 107, 79 S. W. 311; Cain v. State, 49 Tex. Crim. 360, 92 S. W. 808; McMahon v. State, 50 Tex. Crim. 244, 96 S. W. 17; McCracken v. State, 6 Tex. App. 507; Knutson v. State, 14 Tex. App. 570; Saltillo v. State, 16 Tex. App 249; Schultz v. State, 30 Tex. App. 94, 16 S. W. 756; Brownfield v. State, 25 S. W. 1120; Smith v. State, 29 S. W. 785; Colwell v. State, 34 S. W. 615; Hartley v. State, 71 S. W. 603; Smith v. State, 146 S. W. 547; Brooks v. State, 151 S. W. 549. See also Bryant v. State, 25 Tex. App. 751, 8 S. W. 937; Hyatt v. State, 32 Tex. Crim. 580, 25 S. W. 291; Drummond v. State, 71 Tex. Crim. 260, 158 S. W. 549.

Utah.—People v. Flynn, 7 Utah 378, 26 Pac. 1114.

Wisconsin.—Stoddard v. State, 132 Wis. 520, 13 Ann. Cas. 1211, 112 N. W. 453.

Thus in Reg. v. Trebilcock, Dears. & B. (Eng.) 453, 4 Jur. N. S. 123, 7 Cox C. C. 408, 27 L. J. M. C. 103, 6 W. R. 281, Lord Campbell, C. J., said: "To constitute larceny there must be an intention to appropriate a chattel, and usurp an entire dominion over it. If it is taken with the intention of making a temporary use of it only, and then to let the owner have it again, that is not larceny, but merely a trespass." And in Schultz v. State, 30 Tex. App. 94, 16 S. W.

756, it was said: "Where the evidence requires it, the court should instruct the jury that if the defendant took the property with the intent at the time of appropriating it temporarily, but not permanently, they should acquit him." In Mitchell v. Territory, 7 Okla. 527, 54 Pac. 782, the court said: "The intent must be felonious, and must be to deprive the owner, not temporarily, but permanently, of the property. . . . A taking of personal property with the intent to deprive the owner temporarily of his property, and return the same to him, is not larceny, but is trespass."

A man is not guilty of horse stealing who publicly, in broad daylight, from the streets of a populous town, takes his neighbor's horse, leaving notice that he has done so, and rides him a few miles, with the intention, fairly manifested, of returning the horse to its owner. McDaniel v. State, 33 Tex. 419. And where a person is charged with the larceny of a skiff, it is competent for him to show that he took the skiff for the purpose of escaping arrest on another charge, and that he took along a friend to return the skiff to its owner, and it was so returned. State v. Dillon, 48 La. Ann. 1365, 20 So. 913. Likewise, it is not larceny to take an automobile for a "joy-ride," Valley Mercantile Co. v. St. Paul F. etc. Ins. Co. 49 Mont. 430, Ann. Cas. 1916A 1126, 435, 143 Pac. 559, L.R.A.1915B 327; or to appropriate the team of another for a pleasure ride, People v. Kenney, 135 App. Div. 380, 119 N. Y. S. 854. And where an automobile is taken for a temporary purpose, with no intent to deprive the owner permanently of his ownership, the fact that the trespasser carries persons for hire while the automobile is in his possession does not change the trespass to larceny. Smith v. State (Tex.) 146 S. W. 547.

Where a defendant takes a watch from another with the intention of holding it until the owner pays for a quart of whisky he has broken, it does not constitute stealing from the person. Brooks v. State (Tex.) 151 S. W. 549.

A defendant is not guilty of larceny where he hires a horse and after trading it to a third person takes it again from the latter with the intent of restoring it to the owner. Gooch v. State, 60 Ark. 5, 28 S. W. 510.

A custom of contractors to help themselves to each other's material is admissible in evidence to show a lack of criminal intent on a charge of larceny. Charles Kuhl Artificial Stone Co. v. Mack, 12 Ohio Cir. Dec. 177, 17 Ohio Cir. Ct. 663. And where the evidence showed that a person on two different occasions in open daylight, and in the presence of a number of persons, went into a building and took each time a small piece of lumber from a pile for which he had special use, and each time replaced it with lumber of his own, the value of the lumber being less than nineteen cents, it was held that his acts did not constitute the statutory crime of taking chattels from a building. Fletcher v. Com. 118 Ky. 351, 80 S. W. 1089.

However, the taking of a railway ticket with the intent to use it for the taker's own purpose, is none the less larceny though it is to be ultimately returned to the company at the end of the journey. Reg. v. Beecham, 5 Cox C. C. (Eng.) 181. See also Reg. v. Boulton, 1 Den. C. C. (Eng.) 508. And see the note to Patrick v. State, 14 Ann. Cas. 177. A fraudulent taking of personal property of another without his consent, and with no intent, at the time of the taking, to return it, is evidence of an intent to deprive the owner of his property. State v. Davis, 38 N. J. L. 176, 20 Am. Rep. 367, 1 Am. Crim. Rep. 398. In that case it appeared that some boys took a team and after driving a distance abandoned it. The court said: "It is not a mere temporary taking which may consist with an intent to return, but a taking what may result by a natural and immediate consequence in the entire loss and deprivation of the property to the owner. An abandonment to mere chance is such reckless exposure to loss that the guilty party should be held criminally responsible for an intent to lose. If a person take another's watch from his table, with no intent to return it, but for the purpose of timing his walk to the station to catch a train, and when he reaches there leaves it on the seat, for the owner to get it back or lose it, as may happen; if a man take another's axe with no intent to return it, but to take it to the woods to cut trees, and after he has finished his work cast it in the bushes, at the owner's risk of losing it, such reckless conduct would be accounted criminal. It is true that the probability of finding the horse and wagon may be greater than that of recovering the watch or axe, because they are larger and more difficult to conceal, but the intent is not to be measured by such nice probabilities; rather by the broader probability that the owner may lose his property, because the taker has no purpose of ever returning it to him."

b. *Taking with Intent to Pay.*

Where a person took several bundles of oats, and the evidence showed that he intended to pay for them, it was held that there was no larceny. Pylee v. State, 62 Tex. Crim. 49, 136 S. W. 464. And where a customer of a merchant took a gallon of beer with intent to pay for it the next day and in fact did offer to pay therefor, it was

held that he was not guilty of larceny. Mason v. State, 32 Ark. 238.

c. *Taking Mischievously.*

The taking of property mischievously, with the intent to return it to the owner, is not larceny. State v. Shepherd, 63 Kan. 545, 66 Pac. 236; Devine v. People, 20 Hun (N. Y.) 98; Black v. State, 46 Tex. Crim. 107, 79 S. W. 311; Colwell v. State (Tex.) 34 S. W. 615. See also U. S. v. Wilson, 44 Fed. 593. Thus the taking of a chicken in sport to make it squawk and then to let it go is not larceny. Colwell v. State (Tex.) 34 S. W. 615. And where a person, while drinking in a saloon, took money from the cash drawer as a joke while the bartender was not looking, making no attempt to secrete it, and it was at once returned, it was held that there was no larceny. Devine v. People, 20 Hun (N. Y.) 98. See also Black v. State, 46 Tex. Crim. 107, 79 S. W. 311.

d. *Taking from Drunken Companion.*

The taking of property from a drunken companion with the intent of keeping it until he is sober, and then returning it to him, is not larceny. Keely v. State, 14 Ind. 36; Wilson v. People, 39 N. Y. 459; State v. Gilmer, 97 N. C. 429, 1 S. E. 491; McMahan v. State, 50 Tex. Crim. 244, 96 S. W. 17; Brownfield v. State (Tex.) 25 S. W. 1120. See also Tanner v. State (Tex.) 44 S. W. 489.

e. *Pledging with Intent to Redeem and Restore.*

It has been held that the taking and pledging of the property of another with the intention of redeeming it and restoring it to the owner does not constitute larceny. Reg. v. Phetheon, 9 C. & P. 552, 38 E. C. L. 223; R. v. Wright, O. B. 1828, M. S. 38 E. C. L. 224, note. See also Reg. v. Wynn, 16 Cox C. C. (Eng.) 231, 52 J. P. 55, 56 L. T. N. S. 749. But the Kentucky court has qualified the rule by requiring the defendant to have a fair and reasonable expectation of being able to redeem and restore to the owner. Blackburn v. Com. 89 S. W. 160, 28 Ky. L. Rep. 96. And in Reg. v. Medland, 5 Cox C. C. (Eng.) 292, the rule was laid down that a person is guilty of larceny under such circumstances unless there is proof of both an intent to redeem and power to do so. The court said: "There is nothing in the evidence that will justify the jury in acquitting the prisoner, on the ground that she took this property with the intention of redeeming it. It would be very dangerous to hold that the suggestion of such an intent would be sufficient to constitute a valid defense. A person may pawn property without the slightest prospect of ever being able to redeem it, and yet there may be some vague intention of doing so, if afterwards the opportunity should occur, however improbable it may be that it will do so. But it can never be said that there is an intention to redeem under circumstances that render it very improbable, or at least uncertain that such ability will ever exist. A man may take my property, may exercise absolute dominion over it, may trade upon it and make a profit upon it for three months, and yet may say, when charged with stealing it, that he meant to return it to me at some time or another. I shall direct the jury, that for such a defense to be at all available there must be not only the intent to redeem, evidenced by similar previous conduct, but there must be proof also of the power to do so, of which the evidence here seems rather of a negative character." Where the borrower of a ring pawned it, and claimed that his intention was at first to redeem it, but believing he had been buncoed he changed his mind, it was held that if the defendant borrowed the money on the ring with the intent and purpose to redeem the ring, this would seem to exclude the idea of a fraudulent intent to deprive the owner permanently of the property, if not of a fraudulent intent altogether. Taylor v. State, 50 Tex. Crim. 377, 97 S. W. 473. But where there is a taking and pledging and no excuse is given for the act, the taker is guilty of larceny. Fields v. State, 6 Cold. (Tenn.) 524. And where an intention to redeem cannot be adduced from the facts and circumstances then the taker is guilty of larceny, even though he swears he intended to redeem. Truslow v. State, 95 Tenn. 189, 31 S. W. 987. In that case wherein it appeared that a bank cashier wrongfully took and pledged securities deposited in a bank, the following instruction was approved: "The state must also establish that the defendant intended, when he took these bonds, if he did take them, to deprive the true owner of them permanently. If he took them intending at the time to return them, he would not be guilty, and you should acquit him, etc. It is for you to determine, from the whole testimony in this case, what his intention was when he took them. To determine this, you will look to and consider all his conduct as shown by the testimony, when he took them, what he did with them, the amount of the debt to secure which they were deposited, what reasonable expectation he had of being able to pay that debt and get the bonds back, and what finally became of them. In making up your conclusions as to the motive and intent with which defendant took said bonds, you may also consider the length of time he had them at the First National Bank of Nash-

ville, whether or not he concealed that fact from Mrs. Johnson, and whether or not he concealed from her the fact that he had taken them from the drawer, and the manner in which he had taken them; what effort he made, if any, to pay the debt; what power he gave the bank to dispose of the bonds; what representations he made to the bank about them; whether or not he claimed them as his own when writing to the bank, etc. You cannot delve into the mind of the man to find out and know what his intentions were, but you can judge of and determine what a man intends by his conduct, or by what he does. The law presumes a man intends what he does, and the usual and natural consequences of his acts. Did he dispose of the bonds? Were they lost to Mrs. Mary Johnson? Did she ever get them back? If you find he intended to deprive Mrs. Johnson of them as hereinbefore explained, etc., and they were of some value, then you should convict the defendant."

If property is pawned with the consent of the owner, and then redeemed and carried away, it is larceny if an intent to deprive the owner of his property exists at the time of the redemption. Reg. v. Sparrow, 2 Cox C. C. (Eng.) 287.

f. *Taking to Use for Owner's Benefit.*

It has been held that an intent to use the stolen property for the benefit of the owner is no defense to a prosecution for larceny. Rex v. Morfit, R. & R. C. C. (Eng.) 307; Reg. v. Handley, C. & M. 547, 41 E. C. L. 298; Reg. v. Privett, 2 Cox C. C. 40, 2 C. & K. 114, 61 E. C. L. 114, 1 Den. C. C. 193. Thus where a servant made a false key to his master's granary and took beans therefrom for the purpose of feeding them to his master's horses, it was held that the purpose for which the prisoner intended to apply the beans did not vary the case. It was, however, said by some of the judges that the additional quantity of beans would diminish the work of the men who had to look after the horses, so that the master not only lost his beans, or had them applied to the injury of the horses, but the servant's labor was lessened, so that a "lucri causa" to give himself ease was an ingredient in the case. Rex v. Morfit, supra. And to the same effect are Reg. v. Handley, supra, and Reg. v. Privett, supra, wherein it appeared that grain was taken with the intention of feeding it to the master's horses.

g. *Taking to Return for Reward.*

Where property is taken with the intention of holding it until a reward is offered, and then returning it for the reward, the taking constitutes larceny. Reg. v. Spurgeon, 2 Cox C. C. (Eng.) 102; Reg. v. O'Donnell, 7 Cox C. C. (Eng.) 337; Slaughter v. State, 113 Ga. 284, 38 S. E. 854, 84 Am. St. Rep. 242; Com. v. Mason, 105 Mass. 163, 7 Am. Rep. 507; Berry v. State, 31 Ohio St. 219, 27 Am. Rep. 506; Dunn v. State, 34 Tex. Crim. 257, 30 S. W. 227, 53 Am. St. Rep. 714; Martin v. State, 44 Tex. Crim. 540, 72 S. W. 386. See also Reg. v. Peters, 1 C. & K. 245, 47 E. C. L. 245; Reg. v. Yorke, 2 C. & K. 841, 61 E. C. L. 841, 3 Cox C. C. 181, 1 Den. C. C. 335, 12 Jur. 1078, 18 L. J. M. C. 38, T. & M. 20; Currier v. State, 157 Ind. 114, 60 N. E. 1023; Davis v. State, 45 Tex. Crim. 132, 74 S. W. 544.

In Slaughter v. State, 113 Ga. 284, 38 S. E. 854, 84 Am. St. Rep. 242, the court said: "It is not necessary, to constitute larceny, that the property should be itself permanently appropriated. It is sufficient if the property be taken and carried away with the intent to appropriate any pecuniary right or interest therein, as where it is taken with the expectation of claiming a reward for its return." And see Dunn v. State, 34 Tex. Crim. 257, 30 S. W. 227, 53 Am. St. Rep. 714, wherein the court said: "It appears that the purpose here was not for a temporary use, but to hold the property itself until he should be paid for its restoration to the owner, and to that extent he must have intended to have deprived the owner of its value, and to appropriate it, pro tanto, to his own use and benefit; that is, he proposed to appropriate to his own use some interest or value in the horse itself."

Thus where an attorney's clerk left his bag in an outer room, and the defendant took it with the intention of exacting a reward for its return, it was held that the offense was larceny. Reg. v. Spurgeon, 2 Cox C. C. (Eng.) 102. And the taking of horses with the intent of concealing them until the owner offered a reward for their return and then returning them has been held to constitute larceny. Berry v. State, 31 Ohio St. 219, 27 Am. Rep. 506. Likewise it is larceny to take a trespassing horse and conceal it until the owner shall offer a reward or sell it cheaply as an estray. Com. v. Mason, 105 Mass. 163, 7 Am. Rep. 507.

But in a case where the theory of the defense was that the defendant had taken up a strayed horse and returned it to its owner for the purpose of receiving the reward offered by the owner, it was held that he was entitled to an instruction that "if the defendant took the horse with the intent to return him to . . . the owner, in order that he might receive the reward offered for the horse, then, in that event, he was guilty of no crime." Micheaux v. State, 30 Tex. App. 660, 18 S. W. 550.

Where a plumber wrongfully obtains possession of certain iron pipes, and refuses to

return them to the owner without the payment of a fictitious and fraudulent claim, the taking is felonious and constitutes larceny. Currier v. State, 157 Ind. 114, 60 N. E. 1023.

The taking of a check from the finder and withholding it from the owner with the expectation of obtaining a reward is not larceny. Reg. v. Gardner, 9 Cox C. C. (Eng.) 253, 8 Jur. N. S. 1217, 11 W. R. 96, 32 L. J. M. C. 351, 7 L. T. N. S. 471, L. & C. 243; State v. Arkle, 116 N. C. 1017, 21 S. E. 408.

h. *Taking to Obtain Compensation Fraudulently.*

The taking of property is larceny where it is taken with the intention of returning it to the owner in order to obtain compensation or credit fraudulently. Reg v. Hall, 13 Jur. 87, 18 L. J. M. C. 62, 2 C. & K. 947 note, 61 E. C. L. 947 note, T. & M. 47, 3 N. Sess. Cas. 407, 3 Cox C. C. 245, 1 Den. C. C. 381; Reg. v. Manning, 17 Jur. (Eng.) 28, 1 W. R. 40, 6 Cox C. C. 86, Dears. 21, 22 L. J. M. C. 21 (following Reg. v. Hall, supra); Fort v. State, 82 Ala. 50, 2 So. 477. *Compare* Reg. v. Poole, 7 Cox C. C. (Eng.) 373, 3 Jur. N. S. 1268, 6 W. R. 65, Dears. & B. 345, 27 L. J. M. C. 53; Rex v. Webb, 1 Moody (Eng.) 431; Reg. v. Holloway, 13 Jur. 86, 1 Den. C. C. 370, 3 N. Sess. Cas. 410, T. & M. 40, 2 C. & K. 942, 61 E. C. L. 942, 18 L. J. M. C. 60, 3 Cox C. C. 241. Thus a servant who takes fat from his master and then resells it to him as the property of another is guilty of larceny. Reg. v. Hall, supra. Likewise where a cotton picker took seed cotton from his master's warehouse and placed it with the cotton which he had picked but which had not been weighed with the intent to obtain compensation for picking cotton which he had not picked, he was held to be guilty of larceny. Fort v. State, 82 Ala. 50, 2 So. 477.

2. Offer to Restore or Settle.

Where property has been stolen the fact that the defendant offers to restore it or make compensation does not bar a prosecution for larceny. See Meadowcroft v. People, 163 Ill. 56, 45 N. E. 991, 54 Am. St. Rep. 447, 35 L.R.A. 176; People v. Gottschalk, 66 Hun 64, 20 N. Y. S. 777, *affirmed* in 137 N. Y. 569, 33 N. E. 339.

3. Actual Restoration or Settlement.

a. *In General.*

Where larceny has been committed, the fact that the defendant returns the stolen property or pays the owner for it does not bar a prosecution for the offense. Jenkins v. State, 58 Fla. 62, 50 So. 582; Currie v. State, 3 Ga. App. 309, 59 S. E. 926; Georgia v. Kepford, 45 Ia. 48; Cohoe v. State, 79 Neb. 811, 113 N. W. 532, *rehearing denied* in 79 Neb. 819, 114 N. W. 286; State v. Scott, 64 N. C. 586; Cheadle v. Buell, 6 Ohio 67. See also Reg. v. Poynton, 9 Cox C. C. (Eng.) 249, 8 Jur. N. S. 1218, 11 W. R. 73, L. & C. 247, 32 L. J. M. C. 29; Schafer v. State (Ala.) 8 So. 670; Meadowcroft v. People, 163 Ill. 56, 45 N. E. 991, 54 Am. St. Rep. 447, 35 L.R.A. 176; State v. Bolander, 71 Ia. 706, 29 N. W. 602; Eckels v. State, 20 Ohio St. 509; Truslow v. State, 95 Tenn. 189, 31 S. W. 987; Shultz v. State, 5 Tex. App. 390; Trafton v. State, 5 Tex. App. 480.

"Paying for stolen property will not purge the original taking of its felony or constitute any defense to a prosecution therefor, and hence evidence of that fact is properly excluded." Jenkins v. State, 58 Fla. 62, 50 So. 582.

Where a person took money from a letter with intent to steal it, it was held that the offense was complete, although the same money might have been afterwards replaced. Cheadle v. Buell, 6 Ohio 67.

b. *Statutory Mitigation of Punishment.*

Under a *Michigan* statute (2 Comp. L. § 5765) allowing a satisfaction to mitigate the offense of receiving stolen goods if the stealing consists of simple larceny, the statute cannot be invoked where the stealing constitutes an aggravated offense, such as burglary. Pitcher v. People, 16 Mich. 142.

By an *Oklahoma* statute, (Comp. Laws 1909, § 2618), it is provided that "the fact that the accused intended to restore the property embezzled is no ground of defense, or of mitigation of punishment, if it has not been restored before an information has been laid before a magistrate, charging the commission of the offense." State v. Duerksen, 8 Okla. Crim. 601, 129 Pac. 881, 52 L.R.A.(N.S.) 1013.

Under a *Texas* statute (Art. 738, Penal Code) it is provided that "if property, taken under such circumstances as to constitute theft, be voluntarily returned within a reasonable time, and before any prosecution is commenced therefor, the punishment shall be by fine," etc. (For a former statute in similar terms, see Pasch. Dig. § 2397.) The construction of this statute has given rise to numerous decisions and as was said by the court in Elkins v. State, 35 Tex. Crim. 206, 32 S. W. 1046, the decisions are in confusion on the subject. However, the following rules may be adduced from the authorities. The return must be voluntary, that is, willingly made—not made under the influence of compulsion, threats or fear of punishment.

Owen v. State, 44 Tex. 248; Bird v. State, 16 Tex. App. 528. *Compare* Bennett v. State, 17 Tex. App. 143. But if the return is made under the influence of repentance for the crime, and with a desire to make reparation to the injured owner, it will be deemed to be voluntary, although it may also be influenced by fear of punishment. Allen v. State, 12 Tex. App. 190; Bird v. State, 16 Tex. App. 528. *Compare* Stephenson v. State, 4 Tex. App. 591. Where a reward is offered for the return of the property and it is returned without demanding the reward, the return is voluntary. Stepp v. State, 31 Tex. Crim. 349, 20 S. W. 753. A return after detection is not voluntary. Harris v. State, 29 Tex. App. 101, 14 S. W. 390, 25 Am. St. Rep. 717; Boze v. State, 31 Tex. Crim. 347, 20 S. W. 752; Hyatt v. State, 32 Tex. Crim. 580, 25 S. W. 291; Elkins v. State, 35 Tex. Crim. 206, 32 S. W. 1046; Petty v. State, 59 Tex. Crim. 586, 129 S. W. 615. *Compare* Bennett v. State, 17 Tex. App. 143. The return must be made within a reasonable time. Ingle v. State, 1 Tex. App. 307; Bird v. State, 16 Tex. App. 528; Stepp v. State, 31 Tex. Crim. 349, 20 S. W. 753. The evening of the day of the theft is a reasonable time. Ingle v. State, 1 Tex. App. 307. And whether four months is a reasonable time under the circumstances is a question for the jury. Stepp v. State, 31 Tex. Crim. 349, 20 S. W. 753. The return must be made before a prosecution for the theft has been commenced. Bird v. State, 16 Tex. App. 528; Moxie v. State, 54 Tex. Crim. 529, 114 S. W. 375; Stubbs v. State, 71 Tex. Crim. 390, 160 S. W. 87. The return must be an actual and not merely a constructive return of the property into the possession of the owner. Brill v. State, 1 Tex. App. 572; Moore v. State, 8 Tex. App. 496; Bird v. State, 16 Tex. App. 528; Thorne v. State, 52 Tex. Crim. 309, 107 S. W. 831. Thus where stolen stock is turned loose and returns to its owner of its own volition, the return is not sufficient. Moore v. State, 8 Tex. App. 496; Thorne v. State, 52 Tex. Crim. 309, 107 S. W. 831. The property returned must be the identical property, unchanged, and all of it. Horseman v. State, 43 Tex. 353; Grant v. State, 2 Tex. App. 163; Trafton v. State, 5 Tex. App. 480; Bird v. State, 16 Tex. App. 528; Blount v. State, 34 Tex. Crim. 640, 31 S. W. 652; Powell v. State (Tex.) 24 S. W. 515; Johnson v. State, (Tex.) 55 S. W. 576. Thus where hogs are stolen and pork is returned, the milder punishment will not be imposed. Horseman v. State, 43 Tex. 353; Grant v. State, 2 Tex. App. 163. The same is true where the property is sold and the proceeds are turned over to the owner, Blount v. State, 34 Tex. Crim. 640, 31 S. W. 652; Johnson v. State (Tex.) 55 S. W. 576; or where the thief pays for the stolen property, Trafton v. State, 5 Tex. App. 480. And where fifty dollars was stolen and the defendant returned $28.75, some of which was of money of a different denomination and kind from that stolen, it was held that the return was insufficient. Powell v. State (Tex.) 24 S. W. 515. Where the issue of voluntary return is presented by the evidence the court must instruct on the law applicable to such a return. Guest v. State, 24 Tex. App. 530, 7 S. W. 242; Anderson v. State, 25 Tex. App. 593, 9 S. W. 43; Bennett v. State, 28 Tex. App. 342, 13 S. W. 142. But where there is no evidence of such a return no instruction on the subject is necessary. Wheeler v. State, 15 Tex. App. 607; Lane v. State, 41 Tex. Crim. 558, 55 S. W. 831. And it is error so to instruct where the jury may be misled thereby. Schultz v. State, 30 Tex. App. 94, 16 S. W. 756.

OSBORNE

v.

GRAND TRUNK RAILWAY COMPANY.

Vermont Supreme Court—October 13, 1913

87 Vt. 104; 88 Atl. 512.

Limitation of Actions — Effect of Bar — Statutory Right of Action.

Where a right of action is given by statute, which further provides that suit shall be commenced within a specified time, or the right of action shall be extinguished, the right to recover depends on the action being commenced within the time limited, and, if it is not, not only the remedy but the right is extinguished.

[See 95 Am. St. Rep. 658.]

What Law Governs.

Civ. Code Quebec, § 1053, provides that every person capable of discerning right from wrong is responsible for the damage caused by his fault to another, whether by positive act, imprudence, neglect, or want of skill, and article 17, § 11, declares that the word "person" includes bodies politic and corporate. The laws of Quebec also provide that an action for injuries under such statute shall be brought within one year. Held, that the limitation applied to the right as well as to the remedy, and hence, where plaintiff sued in Vermont under the statute for an injury occurring in Quebec, the action was governed by the lex loci, and, if not brought within the time specified, was unsustainable.

[See 2 Ann. Cas. 151.]

Same.

The prosecution of transitory actions in a state or country other than that in which the cause of action arose is based on the principle of enforcing a foreign right by comity, so that, if under the lex loci no right of action exists, none can be enforced in the jurisdiction of suit.

Limitations Applicable — Statutory Cause of Action.

It is not essential that a limitation affecting a statutory right of action not existing at common law should be incorporated in the act creating the right; but it is sufficient if the limitation in another statute is so directed to the new liability so specifically as to warrant the conclusion that it qualifies the right.

Pleading Statute — Waiver of Defect in Plea.

Where, in an action for injuries under a provision of the Canadian Code, defendant pleads generally that the action is barred by the laws of the province of Quebec requiring that the action be brought within a year, on which plaintiff joins issue, he cannot thereafter object that the plea was insufficient because it did not set out verbatim the statute relied on, though, if a demurrer had been filed to the plea, it would probably have been sustained.

Damages — What Law Governs.

Where plaintiff sues in Vermont for injuries sustained while working on defendant's railroad in Quebec, plaintiff's damages, if any, are to be assessed in accordance with the law of that province, and hence it is proper to refuse to charge that pain and suffering is not an element of damage, and submit the Canadian law on that branch of the case to the jury.

[See generally, 19 Ann. Cas. 1059; Ann. Cas. 1913D 537; 91 Am. St. Rep. 726.]

Evidence — Admissibility of Hospital Chart.

Entries of plaintiff's symptoms, etc., on a hospital chart by various nurses are not admissible in the absence of evidence that the nurses are unobtainable.

[See note at end of this case.]

Exceptions from Essex County Court: FISH, Judge.

Action for damages. John P. Osborne, plaintiff, and Grand Trunk Railway Company, defendant. Judgment for plaintiff. Defendant alleges exceptions. The facts are stated in the opinion. REVERSED.

Drew, Shurtleff & Morris and *Harry B. Amey* for defendant.

O. R. Powell, Robert W. Simonds and *J. Rolf Searles* for plaintiff.

[106] WATSON, J.—This action is brought upon section 1053 and article 17, section 11, of the Civil Code of the Province of Quebec, to recover for injuries received by the plaintiff when in the employ of the defendant, as conductor on one of the defendant's freight trains, in said Province, by reason of the negligence of the defendant. Section 1053 reads: "Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another whether by positive act, imprudence, neglect or want of skill." By article 17, section 11, "the word 'person' includes bodies politic and corporate." The defendant pleaded the general issue, and specially, that the happenings and events as alleged by the several counts in the plaintiff's declaration took place more than a year prior to the bringing of the plaintiff's writ, and that by the laws of the Province of Quebec in the Dominion of Canada, wherein said supposed cause of action arose, the plaintiff's cause of action was thereby extinguished. To this plea no replication was filed; but, no demurrer being interposed, a reply was required, and by Rule 12 of the county court a general denial is to be treated as filed.

At the time of the accident, July 3, 1910, and ever since, the plaintiff was, and has been, a resident of Island Pond, in this State. This suit was not brought until July 8, 1912.

In the course of the trial the defendant offered to show that by certain other articles of the Civil Code, as construed by the courts of the Province of Quebec, the right of action for bodily injuries, given by the sections of the Civil Code on which this suit is brought, becomes extinguished, unless the suit be commenced within one year after the injuries are received, and consequently the plaintiff has no right of action. This offer was excluded and an exception saved.

The law is well settled that where a right of action is given by statute, and the statute further provides that suit shall be commenced within a specified time or the right of action shall [107] be extinguished, the right of recovery depends upon the action being commenced within the time limited, and if not so commenced, not merely the remedy, but the right and the remedy are extinguished. In Hunt v. Fay, 7 Vt. 170, this principle was discussed at length and applied. There the defendant's intestate died in the State of New Hampshire, and the principal administration of his estate was there. By the statute of that State, when an estate was represented insolvent a commission issued, and all claims which might be, but were not exhibited, to the commissioners, were forever barred. The plaintiff, a resident of New Hampshire until after the commissioners made their return, omitted to present any claim against the estate to the commissioners. Afterwards, removing to this State, the plaintiff presented his claim before the commissioners appointed in an ancillary administration here, for allowance against the estate. The adminis-

trator pleaded in bar the statute of New Hampshire. The plaintiff contended that the statute affected only the remedy, and for that reason his claim might be enforced in any jurisdiction where a suit could be instituted. It was held, that the case fell within the principle that a discharge of a debt in the country where made, or where it is to be executed, is a discharge everywhere—that the effect was to discharge the debt, or extinguish the right of the creditor, not a mere suspension or extinction of the remedy; and that it was a bar to the claim when presented before the commissioners in this State, under the ancillary administration. The same distinction is recognized in Cartier v. Page, 8 Vt. 146; Sparhawk v. Buell, 9 Vt. 41, 100; Williams v. Vermont Mut. F. Ins. Co. 20 Vt. 222; Peck v. Hibbard, 26 Vt. 698, 62 Am. Dec. 605; Needham v. Grand Trunk R. Co. 38 Vt. 294.

In Cartier v. Page, the action was assumpsit on a promissory note executed in Canada to a resident there, by a resident of this State. The defendant pleaded in bar that by an act of the Provincial Parliament of the Province of Lower Canada, all notes on which no suit or action should be brought within a specified time after the note becomes due and payable, were taken and considered to be paid and discharged, setting forth the Act. The plaintiff replied, that the defendant, at the time of giving the note and ever thereafter, was and hath been an inhabitant of this State, and without the jurisdiction of the courts of the Province of Lower Canada. To this a demurrer [108] was interposed. The court said the question was, whether the Act of the Provincial Parliament pleaded in bar, was to be considered as governing the nature, validity, and legal effect of the contract declared upon, as a part of the *lex loci*, or as only a law regulating the remedy to be had, for enforcing the contract; that if the Act belonged to the former class, the contract, if discharged in Canada, was discharged everywhere; but if it belonged to the latter class, it had no effect here. In Needham v. Grand Trunk R. Co. an action brought by the personal representative of the deceased for the benefit of the widow and next of kin, the deceased, while a citizen of this State and in defendant's employment as a locomotive engineer, was injured and the cause of action accrued in the State of New Hampshire. At common law, the cause of action which accrued to the intestate in that state was extinguished by his death, and no right there existed in the personal representatives to recover for such injury. Consequently the action could be maintained, if at all, only upon the ground that the statute of this State has extraterritorial force. It was contended in behalf of the plaintiff, that statutes of survivorship of the right of action pertain simply to the remedy, and therefore that the question of such survivorship was to be determined by the *lex fori*. It was held that our statute furnishes a remedy where the cause of action accrued without this State, and is not discharged or extinguished, but still exists by the laws of the state where it accrued; but that a cause of action, which by the rules of the common law is extinguished by the death of the party, is by such death fully discharged, unless it survives by force of some statute law of the state where the cause of action accrued; and that when the cause of action of the intestate does not survive by the laws of the state or territory where it accrued, our statute does not apply. The fact that the intestate was a citizen of this State at the time of his injury, was held to be entirely immaterial in the decision of this question. In Slater v. Mexican Nat. R. Co. 194 U. S. 120, 48 U. S. (L. ed.) 900, 24 S. Ct. 581, the action was brought in the United States Circuit Court for the northern district of Texas by citizens and residents of Texas, against a Colorado corporation operating a railroad from Texas to the City of Mexico, to enforce the liability for a death by a wrongful act in Mexico, created by Mexican statutes. The court, speaking through Mr. Justice Holmes, said: "When such a liability is enforced in a [109] jurisdiction foreign to the place of the wrongful act, obviously that does not mean that the act in any degree is subject to the *lex fori*, with regard to either its quality or its consequences. On the other hand, it equally little means that the law of the place of the act is operative outside its own territory. The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an *obligatio*, which, like other obligations, follows the person, and may be enforced wherever the person may be found. . . . But as the only source of this obligation is the law of the place of the act, it follows that that law determines, not merely the existence of the obligation . . . but equally determines its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that the law would impose. . . . As the cause of action relied upon is one which is supposed to have arisen in Mexico, under Mexican laws, the place of the death and the domicil of the parties have no bearing upon the case." This case was followed by Davis v. Mills, 194 U. S. 451, 48 U. S. (L. ed.) 1067, 24 S. Ct. 692, the same Justice delivering the opinion. In Dennis v. Atlantic Coast Line R. Co. 70 S. C. 254, 49 S. E. 869, 106 Am. St. Rep. 749, the deceased, a resident

of South Carolina, while in the defendant's employ as an engineer, was killed when in the performance of his duties in North Carolina, more than one year before the action was commenced by his administratrix. It was held that the statute of the latter state requiring an action to be brought for wrongful death within one year, was not a statute of limitation, but that it extinguished the right conferred by the statute; and that it was incumbent on those seeking the benefit of the statute to show that their action conforms to all the requirements thereof, including that of commencing the suit within the time limited.

Moreover, the prosecution of transitory actions in a state or country other than that in which the cause of action arose, is based upon the principle of enforcing foreign right by comity. McLeod v. Connecticut, etc. R. Co. 58 Vt. 727, 6 Atl. 648; Peck v. Hibbard, cited above. From this it logically follows that, if under the *lex loci* no right of action was created, or if none there exists, then none exists anywhere, and none can be [110] prosecuted in another jurisdiction. O'Reilley v. New Orleans, etc. R. Co. 16 R. I. 388, 17 Atl. 171, 906, 5 L.R.A. 364, 16 R. I. 395, 19 Atl. 244, 6 L.R.A. 719; Pendar v. H. & B. American Mach. Co. 35 R. I. 321, 87 Atl. 1, L.R.A. 1916A 428; Two Rivers Mfg. Co. v. Beyer, 74 Wis. 210, 42 N. W. 232, 17 Am. St. Rep. 131.

It is further urged that a limitation like the one which the defendant offered to show, to be effective against a right of action not existing at common law, must be incorporated into the statute creating the right. Respecting this, we think, as is stated by the Federal Supreme Court in Davis v. Mills, already cited, that "The fact that the limitation is contained in the same section or the same statute is material only as bearing on construction. It is merely a ground for saying that the limitation goes to the right created, and accompanies the obligation everywhere. The same conclusion would be reached if the limitation was in a different statute, provided it was directed to the newly created liability so specifically as to warrant saying that it qualified the right." See also Negaubauer v. Great Northern R. Co. 92 Minn. 184, 99 N. W. 620, 104 Am. St. Rep. 674, 2 Ann. Cas. 150.

The plaintiff argues that the special plea is defective, in that it fails to state *verbatim* those parts of the Canadian Code upon which the defendant relies, for which reason the trial court could not do otherwise than exclude the evidence offered as to the Canadian law. Very likely the plea, if met by demurrer, would have been held insufficient. But instead of being so met, it stands as traversed and issue joined thereon. Inferentially and argumentatively the plea states what the law of the Province of Quebec is (1 Saund. Pl. & Ev. 672), and it being traversed, the fact of the law of that Province is put in issue. Woodham v. Edwardes, 5 Ad. & El. 771, 31 E. C. L. 436. Evidence supporting this issue could not be excluded on the ground of insufficiency of the plea. Barney v. Bliss, 2 Aikens (Vt.) 60; French v. Thompson, 6 Vt. 54; Chase v. Holton, 11 Vt. 347; Carpenter v. Welch, 40 Vt. 251; Batchelder v. Kinney, 4 Vt. 150. Under the rule of pleading requiring positions of fact to be alleged in an absolute form, and not leave them to be collected by inference and argument only (Steph. Pl. 384), if a necessary averment is alleged argumentatively, advantage thereof can be taken only by special demurrer. Woodward v. French, 31 Vt. 337; Sheridan v. Sheridan, 58 Vt. 504, 5 Atl. 494.

[111] Evidence of pain and suffering was received. The court refused to instruct the jury that pain and suffering was not an element of damages, and submitted the question of the law of the province of Quebec on this branch of the case to the jury. It is sufficient to say that if the plaintiff is entitled to recover, the damages are to be assessed in accordance with the law of that Province, and consequently this exception is without force. Northern Pac. R. Co. v. Babcock, 154 U. S. 190, 38 U. S. (L. ed.) 958, 14 S. Ct. 978; Slater v. Mexican National R. Co. noticed above.

Immediately after his injury the plaintiff was taken to the Sherbrooke Protestant Hospital at Sherbrooke, in the Providence of Quebec, where he remained more than a month, being treated by Dr. George L. Hume, assisted by another physician. Under a system which obtains in that institution the senior nurse in charge of the plaintiff was required to keep and did keep a hospital record of the case. One of the plaintiff's day nurses a part of the time, under Dr. Hume, was present at the trial and testified in keeping such a record as to the plaintiff, in which most of the symptoms noticed, and all medicine administrated, by her, were entered. It appeared that other nurses, especially night nurses, made entries on this record, and no evidence was introduced as to the accuracy of the entries made by any of them. The exceptions show nothing concerning the names or the whereabouts of such "other nurses," nor why they were not present as witnesses at the trial. According to the evidence, the purpose of the system is to show the attending physician any symptoms that may arise in a patient's condition in the absence of the doctor, and to keep a correct record of temperature, pulse, respirations, medicine administered, diet, and other details more or less important. The record was offered as independent evidence, and its exclusion is assigned

as error. Assuming, but not deciding, that such a record falls within the rule governing the admission of regular entries upon the principle of necessity, that rule requires that the person who made the entries "must be unavailable as a witness." 2 Wig. Ev. sec. 1521. "The ground," says Chief Justice Shaw in North Bank v. Abbot, 13 Pick. (Mass.) 465, 25 Am. Dec. 334, "is the impossibility of obtaining the testimony; and the cause of such impossibility seems immaterial." Here one of the nurses who made a part of the entries [112] was present at the trial, and the absence of the others was unaccounted for. In excluding the record offered, error does not appear.

Judgment reversed and cause remanded.

NOTE.

Hospital Chart as Evidence.

Chart Held Admissible.

A hospital chart is admissible as evidence in some jurisdictions. Barfield v. South Highland Infirmary (Ala.) 68 So. 30; Ribas v. Revere Rubber Co. 37 R. I. 189, 91 Atl. 58. Thus in the case first cited it appeared that hospital charts were offered in evidence in an action brought against a surgeon and an infirmary where he operated, alleging wrongful and negligent treatment. The court said: "The charts or records kept by the nurses were kept for the information of the attending physician or surgeon. Everything in them was proper for his information. They were duly proved. Defendant had a right to consider them in determining his treatment, and the jury were properly allowed to have these charts before them as part of the evidence in the case, though doubtless they signified little to any but the skilled professional mind." And in Ribas v. Revere Rubber Co. supra, the court said: "It appears from the evidence that it is a rule of the Rhode Island Hospital that a record shall be kept showing, among other things, the condition of the patient when received, his treatment while there, his condition from time to time denoting his progress towards recovery or otherwise, as the case may be, and of such other matters as may have a bearing upon or furnish needed information. Such a record relating to the plaintiff was kept by Dr. Peet, who was an interne or assistant surgeon at the hospital. This record embraces some matters which came under the personal knowledge of Dr. Peet, while other matters of record were communicated to him through doctors and nurses connected with the case. Dr. Peet, who made the record, was at the time of the trial without the jurisdiction of the court, and was not available as a witness. The record of Dr. Peet covered the case from June 14th to August 15th, 1912. It appears to have been his business, as the recording official, to place upon record such facts relating to the patient as were communicated to him by his associates and subordinates, as well as those which came under his personal observation. It also appeared that the record in question was written up by Dr. Peet every third day. These facts, explanatory of the record having all appeared in testimony, and it having also appeared that Dr. Peet was without the state and that the record was in his handwriting, it was offered in evidence by the defendant."

In *Massachusetts* there has been some conflict as to the admissibility of hospital charts on records, but by statute a duty is now imposed on certain hospitals to keep records and it is provided that they shall be admissible in evidence. See Delaney v. Framingham Gas, etc. Co. 202 Mass. 359, 88 N. E. 773. In the early case of Townsend v. Pepperell, 99 Mass. 40, the court held that the records of a hospital were properly admitted in evidence to show that there was nothing in the recorded condition or treatment of a certain patient to indicate that she was insane. But in Cashin v. New York, etc. R. Co. 185 Mass. 543, 70 N. E. 930, the court referring to Townsend v. Pepperell, supra, said that in that case the record was evidently admitted. "Upon the doctrine that, it being more than thirty years old, there was no need to show the death of the person who made it." Holding that in the case at bar the records were properly excluded, the court said: "In the case of the books which were offered as records of the respective hospitals, it was not contended that as to either institution the records were kept under any requirement of law. They were therefore not public records, and were not admissible unless supported by the testimony of the one who made them, if that person were still alive and capable of being produced to testify. . . . The judge may well have found upon the evidence as to each hospital, both that the records were imperfect and that there was no reason to suppose that the writers could not be produced." And in Delaney v. Framingham Gas, etc. Co. 202 Mass. 359, 88 N. E. 773, the court, holding that certain hospital records were not those described in the statute and were therefore inadmissible, said: "The records were produced by the witness Gabagan. It appeared that the records were made by her, and that she was the proper custodian of them. But it further appeared that she never had any personal knowledge of the facts stated therein; that she received slips of paper from Dr. Painter, the physician, and copied them into the record; and that was all she knew about them. The record was offered as evidence to

show that the statements therein made were true. As handed to the witness by the physician they were simply statements of the physician as to what the patient had said to him, or as to the diagnosis made by the physician. The records were comparatively recent. It was not shown that the physician was not living and within the jurisdiction of the court. No necessity was shown, therefore, for the introduction of this hearsay testimony. For aught that appeared there was better evidence. Under these circumstances the reason upon which the general rule was based, namely, that the record should be a record of facts of which the writer had personal knowledge, should be applied. The case is not within the above-mentioned exception to the general rule."

Chart Held Inadmissible.

In other jurisdictions a hospital chart or record is not admissible in evidence. Baird v. Reilly, 92 Fed. 884, 35 C. C. A. 78; McMahon v. Bangs, 5 Penn. (Del.) 178, 62 Atl. 1098; Griebel v. Brooklyn Heights, R. Co. 95 App. Div. 214, 88 N. Y. S. 767, *affirmed* 184 N. Y. 528, 76 N. E. 1096; Levy v. J. L. Mott Iron Works, 143 App. Div. 7, 127 N. Y. S. 506; Matter of Hock, 74 Misc. 15, 129 N. Y. S. 196. And see the reported case. See also Canadian Pac. R. Co. v. Quinn, 22 Quebec K. B. 428, 11 Dominion L. Rep. 600. *Compare* Liske v. Liske, 135 N. Y. S. 176. Thus in Griebel v. Brooklyn Heights R. Co. supra, it appeared that a chart was introduced in evidence during the examination of a hospital nurse. She described the paper as a "temperature chart, known in the hospital as bedside notes," and said that such notes were taken in each case where a patient was brought to the hospital. The court said: "We are not aware of any rule of evidence which makes such a paper, offered under such circumstances, admissible." And in Levy v. J. L. Mott Iron Works, 143 App. Div. 7, 127 N. Y. S. 506, the court said: "The hospital records of this case, part of which were made by Dr. Comte and part of which were made by the nurse, and the entries in either of which were proved to be correct or to have been known by the person making the entry to be correct when entered, were received and read in evidence over objection duly taken by counsel for defendant on the ground, among others, that they were incompetent, hearsay, and not the best evidence, and he duly excepted. The learned counsel for the plaintiff attempts to sustain this ruling on the ground that Dr. Comte had no recollection of the facts, and that his recollection was not refreshed by the records, and, therefore, they became the best evidence in so far as the recorded facts within his personal knowledge at the time, and he cites . . . authority for the general rule; but that contention cannot prevail here, for many of the important entries were made by the nurse and are not shown to be true, and there has been no opportunity afforded to cross-examine the nurse with respect thereto, and even in so far as they were made by Dr. Comte, he was not asked whether he knew them to be correct when entered or whether an inspection thereof refreshed his recollection and enabled him to testify from recollection. Counsel for plaintiff finally draws attention to the fact that Dr. Comte had, before the records were received in evidence, testified to the facts shown in the hospital records to quite an extent without objection, and that, therefore, the defendant was not prejudiced by their receipt in evidence. It did not appear until the cross-examination that the doctor was not testifying from recollection. The defendant should not be prejudiced because its counsel was not captious in objecting to the testimony of the doctor, which it finally appeared was based entirely on the records. Moreover, the principal difficulty with the case is that the testimony of the doctor, including his testimony of an expert nature, depends entirely on the hospital records as to which there is no presumption of correctness, and we have no evidence that they are correct, and, therefore, the plaintiff has failed to sustain the burden of proving that the injuries were the proximate cause of death." So in Canadian Pac. R. Co. v. Quinn, 22 Quebec K. B. 428, 11 Dominion L. Rep. 600, a chart of the plaintiff's case, verified by the superintendent of nurses and another nurse, containing entries, however, by a nurse not available as a witness, was held to be inadmissible.

Though a chart is not admissible in evidence it may be used by a witness for the purpose of refreshing his memory. Baird v. Reilly, 92 Fed. 884, 35 C. C. A. 78, wherein the court said: "It was proper to exclude from the consideration of the jury that part of the hospital record which consisted of the remarks of the nurse who attended the plaintiff. If she had been called as a witness, this part of the record might have been competent for use by her to refresh her memory. It was not competent as independent evidence of the truth of the statements." In McMahon v. Bangs, 5 Penn. (Del.) 178, 62 Atl. 1098, it appeared that the head nurse of a hospital was questioned by the plaintiff concerning a certain record of his case. This had been regularly kept by a nurse who had since been dismissed and was not present in court. On its being offered in evidence, counsel for the defendant objected thereto, on the ground that "the only person who could testify to said record so as to make it proper evidence

would be the person who made it." Boyce, J. said: "It seems to the court that the object of offering this paper in evidence is to show pain and suffering. For that purpose the nurses themselves might be called, and under proper circumstances this paper could be used to refresh their memories; beyond that we think it is not admissible." See to the same effect Matter of Hock, 74 Misc. 15, 129 N. Y. S. 196.

In the case of In re Flint, 100 Cal. 391, 34 Pac. 863, a will contest, the record made by a private nurse of events transpiring at the testator's sick bed was offered in evidence. The court said: "Its admission should not have been allowed. There was no question involved as to the right of the witness to refresh her recollection from the record, but it was offered as an independent piece of evidence in the case. It is difficult to see the purpose of the offer, for the witness was upon the stand ready to testify as to all competent and material matters occurring at the times she was engaged in the sick-room."

GRIFFIN

v.

STATE.

Georgia Supreme Court—November 11, 1914.

142 Ga. 636; 83 S. E. 540.

Banks — Insolvency — Presumption of Fraud — Validity of Statute.

Properly construed, Penal Code (1910) § 204, which provides for raising a presumption of fraud against the president and directors of an insolvent bank chartered in this state, is not violative of the fourteenth amendment of the Constitution of the United States, on the ground that it abridges the privileges and immunities of citizens of the United States, or deprives the president and directors of an insolvent bank of the equal protection of the laws, or deprives them of life, liberty, or property without due process of law, on the ground that similar provisions have not been made in regard to the president and directors of other corporations than banks.

That section is not violative of the fourteenth amendment of the Constitution of the United States for any of the reasons set out in the first question by the Court of Appeals.

Same.

The fifth amendment of the Constitution of the United States is not a limitation upon the power of the states, but operates upon the national government only. Accordingly section 204 of the Penal Code, is not invalid as being violative of that amendment.

Same.

Penal Code (1910) § 204 is not violative of article 1, section 1, paragraph 3, of the state constitution, which declares that "no person shall be deprived of life, liberty, or property, except by due process of law."

When Bank Is "Insolvent."

Within the meaning of Penal Code (1910) § 204, the insolvency of a bank is that condition in which its entire property and assets are insufficient to pay all of its debts.

(a) If the entire property and assets of a bank are sufficient to discharge its liabilities, it is not insolvent, within the meaning of Penal Code (1910) § 204, although it may not be able to pay its debts immediately as they become due, or to pay its depositors on demand.

(b) Civil Code (1910) § 2306, which provides for the winding up of a bank by the state bank examiner under certain circumstances therein declared, does not furnish a definition of insolvency to be applied in construing Penal Code (1910) § 204.

[See note at end of this case.]

(Syllabus by court.)

Certified questions from Court of Appeals.

Criminal action. J. W. Griffin charged with violation of statute. Questions certified by Court of Appeals to Supreme Court. QUESTIONS ANSWERED.

[637] The Court of Appeals certified to the Supreme Court the following questions (Case No. 5379):

"1. Is section 204 of the Penal Code of Georgia of 1910 violative of the provisions of the fourteenth amendment of the constitution of the United States, that 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws;' for the reason that the provision of this section of the code that every insolvency of a chartered bank shall be deemed fraudulent, and the president and directors shall be severally punished by imprisonment and labor in the penitentiary, abridges the privileges and immunities of citizens of the United States, or deprives the president and directors of such a bank of equal protection of the laws with like officers of other corporations, as to whom there is no law providing that insolvency of the corporation shall be deemed fraudulent, and that the president and directors, or other officers, shall be severally punishable by imprisonment and labor in the penitentiary on proof of insolvency of the corporation; or

for the reason that this provision of the code destroys or abridges the presumption of innocence which the law raises as evidence in behalf of every one charged with crime; or for the reason that it deprives the president and directors of an insolvent chartered bank of the right of presenting [638] their defense to the charge of fraudulent intent, especially since, under the law of this State, the defendant is deprived of the right of testifying in his own behalf; or for the reason that this section of the code declares insolvency of a chartered bank to be fraudulent and provides that the president and directors of the bank shall be punished, even though they had nothing to do with the management of the bank and though the insolvency was not brought about by their conduct or with their knowledge; or for any other reason suggested by the defendant's demurrer?

"2. Is section 204 of the Penal Code, for any of the reasons stated in the foregoing question, violative of the provision of the fifth amendment of the constitution of the United States, that 'No person shall . . . be deprived of life, liberty, or property, without due process of law?'

"3. Is section 204 of the Penal Code, for any of the reasons stated above violative of the provision of article 1, section 1, paragraph 3, of the constitution of the State of Georgia, that 'No person shall be deprived of life, liberty, or property, except by due process of law?'

"4. Is a bank insolvent, within the meaning of section 204 of the Penal Code, if the entire property and assets of the bank are sufficient to discharge its liabilities by process of liquidation, even though it may not be able to pay its debts immediately as they become due, or to pay its depositors on demand? In what respect, if any, is the meaning of the term 'insolvency,' as applied to a chartered bank, differentiated from the meaning of that term as applied to the financial condition of an individual? Are sections 2306 of the Civil Code and 204 of the Penal Code to be construed together, and is the test of insolvency indicated in the former section to be applied in construing the latter?"

The Penal Code (1910) § 204, to which reference is made in the preceding questions, reads as follows: "Every insolvency of a chartered bank, or refusal or failure to redeem its bills on demand, either with specie or current bank-bills passing at par value, shall be deemed fraudulent, and the president and directors shall be severally punished by imprisonment and labor in the penitentiary for not less than one year nor longer than ten years: Provided, that the defendant may repel the presumption of fraud, by showing that the affairs of the bank have been fairly and legally administered, [639] and generally with the same care and diligence that agents, receiving a commission for their services, are required and bound by law to observe; and upon such showing the jury shall acquit the prisoner."

Holden & Shackelford, Hamilton McWhorter, George C. Thomas, W. W. Armistead and *T. J. Shackelford* for plaintiff in error.

John B. Gamble and *Cobb & Erwin* for defendant in error.

LUMPKIN, J.—1. With certain limitations, the legislature may enact that when specified facts have been proved, they shall, even in a criminal case, be prima facie evidence of the guilt of the accused, and shift the burden of proof. On this power there are limitations, the principal one of which is that the fact or facts which will raise the presumption and shift the burden of proof must have some fair relation to, or material connection with, the main fact as to which the presumption is raised. The inference or presumption from the facts proved must not be merely arbitrary, or wholly unreasonable, unnatural, or extraordinary, but must bear some reasonable relation to the facts proved. To illustrate, if the legislature should declare that every man found wearing a straw hat in September should be presumed to have committed any forgery which took place in that month, such an act would be invalid, because there is no rational connection between forgery and wearing a straw hat, and the presumption would be purely arbitrary. But if the legislature should declare that one found in possession of stolen goods shortly after a larceny should be prima facie presumed to be the thief, and that the burden of rebutting the presumption should rest on him, this would be valid, the presumption not being purely arbitrary but there being a reasonable connection between the possession of the stolen goods and the commission of the larceny. Moreover, the presumption so raised must not be final, but the accused must be allowed a fair opportunity to make his defense and show all of the facts bearing on the issue, and to have the whole case submitted to the jury for decision, after considering all of the evidence as well as the prima facie presumption, if the facts from which it arises have been proved to exist. Banks v. State, 124 Ga. 15, 52 S. E. 74, 2 L.R.A.(N.S.) 1007, and note; Vance v. State, 128 Ga. 661, 57 S. E. 889; Wilson v. State, 138 Ga. 489, 493, 75 S. E. 619; 2 Jones, Ev. § 196; Mobile, etc. R. Co. v. Turnipseed, 219 U. S. 35, 31 S. Ct. 136, 55 U. S. (L. ed.) 78, 32 L.R.A. (N.S.) 226, Ann. Cas. 1912A 463 and note); State v. Thomas, 6 Ann. [640] Cas. 744, 746 and note, 144 Ala. 77, 40 So. 271, 2 L.R.A.

(N.S.) 1011, 113 Am. St. Rep. 17; 3 Enc. Ev. 291; 14 Id. 110.

The exercise of this power by the legislature in relation to chartered banks, so as to raise a prima facie presumption of fraud against the president and directors, upon proof of the insolvency of the bank, is not violative of the fourteenth amendment of the constitution of the United States on the ground that it deals with chartered banks and not with other corporations. Legitimate classification in such cases does not deprive persons within the class of the equal protection of the laws. If banks cannot be legitimately classified without including all other corporations in the legislation applicable to them, then all the banking laws of the country, National and State, would have to be declared invalid.

If the business of banking furnishes a legitimate basis for classification in many respects, is the presumption raised by Penal Code (1910) § 204 an arbitrary presumption, without legitimate basis? That section does not provide punishment for mere insolvency, but contemplates fraudulent insolvency of banks. The president and directors have duties to discharge in regard to the management of the bank and its affairs. The causes which bring about the insolvency of a bank are much more within the knowledge of its managing officials than of persons not connected with it. To impose on the State, in a prosecution for a fraudulent insolvency, the onus of proving all of the transactions of the bank and the acts of its officials, would place upon it a heavy burden. It is much easier for the managing officials of the bank to show that the insolvency was not fraudulent, but arose from other causes. The facts are peculiarly accessible to them, if they properly discharge their duties. The suggestion that the president and directors frequently take little or no part in managing a bank can have but little weight. It is the duty of directors to direct, though they may commit certain ministerial duties to authorized officers. We have recently had occasion, in regard to trading corporations generally, to declare that while such directors may commit the active management of the business to authorized officers, this will not relieve them from the duty of reasonable supervision, and it was said: "Unfortunately some directors appear to think that they have fully discharged their duties by acting as figureheads and dummies." McEwen v. Kelly, 140 Ga. 720, 79 S. E. 777. It is not meant that carelessness will [641] necessarily import guilt; but duties rest upon the president and directors of a chartered bank, in regard to the management of its affairs, which furnish a legitimate basis for a legislative act raising a presumption that they have been guilty of fraudulent mismanagement when the bank becomes insolvent.

Giving the statute a reasonable construction, the presumption was not intended to be conclusive. The argument that the expression "shall be deemed fraudulent" meant that it should be finally adjudged fraudulent is unsound. The latter part of the section provides for repelling "the presumption of fraud;" and the fair construction of the entire section is that the presumption raised is only prima facie, and subject to be rebutted. The raising of such a presumption upon proof of the fact that the bank was one chartered in this State, that the defendant was its president or a director, and that it had become insolvent, is not so arbitrary or irrational that it can be declared that the legislature had no legitimate foundation upon which to rest the presumption or to provide for a change in the burden of proof. Properly construed, the section does not authorize the punishment of the president and directors "even though they had nothing to do with the management of the bank and though the insolvency was not brought about by their conduct, or with their knowledge." The affirmative declaration that the defendant may repel the presumption of fraud, by showing that the affairs of the bank have been fairly and legally administered, and generally with the same care and diligence that agents, receiving a commission for their services, are required and bound by law to observe, and that upon such showing "the jury shall acquit the prisoner," does not exclude the president or a director of a chartered bank which has become insolvent from disproving, by any legitimate evidence, the presumption of fraudulent mismanagement which may have been raised against him. The fact that in this State the defendant cannot testify, but may make his statement not under oath, which the jury may believe in preference to the sworn evidence, does not render the act invalid, as held in the cases of Vance v. State, and Wilson v. State, supra.

We think that a fair and reasonable construction of the section of the Penal Code under consideration is, that, upon proof of certain specified facts, a presumption of fraudulent mismanagement would be raised against the president and directors of an insolvent [642] chartered bank; that if such management as is mentioned in the proviso should be shown, the jury would be required to acquit the prisoner or prisoners; but that this would not prevent the accused from rebutting the presumption by proof of other facts, such as that the insolvency was caused by an unexpected panic in the country, or by the speculation of some officer or agent, for which the accused was in no way responsible, or by other evidence rebutting the pre-

sumption of fraudulent conduct on his part. See, in this connection, Youmans v. State, 7 Ga. App. 101, 66 S. E. 383; Robertson v. People, 20 Colo. 279, 38 Pac. 326; Meadowcroft v. People, 163 Ill. 56, 67, 45 N. E. 303, 991, 35 L.R.A. 176, 54 Am. St. Rep. 447; State v. Beach, 147 Ind. 74, 78, 43 N. E. 949, 46 N. E. 145, 36 L.R.A. 179; State v. Sattley, 131 Mo. 464, 33 S. W. 41.

It follows from what has been said, that the prima facie presumption raised against the president and directors of a chartered bank, upon proof of its insolvency, that they have been guilty of fraudulent mismanagement, is not arbitrary, unreasonable, unnatural, or extraordinary, and that the code section under consideration does not attempt to deprive those officers of the right to be heard on the existence of the fact in issue, or their connection therewith, or to rebut the presumption against them by any legitimate evidence. So construed, the act is not unconstitutional for any of the reasons mentioned in the first question propounded by the Court of Appeals; and that question is answered in the negative.

2. It is well settled that the fifth amendment of the constitution of the United States is not a limitation upon the powers of the States, but operates on the national government only. Wilburn v. State, 141 Ga. 510 (2b), and citations (81 S. E. 444). Accordingly, Penal Code (1910) § 204 is not unconstitutional as being violative of that amendment.

3. What has already been said in the first division of this opinion in regard to the fourteenth amendment of the constitution of the United States applies also to the provision of the State constitution that "No person shall be deprived of life, liberty, or property, except by due process of law;" and section 204 of the Penal Code is not violative of that clause of the constitution.

4. The authorities are not in accord in defining insolvency. The underlying idea involved is an inability to pay debts. The general and popular meaning of the word is that condition in which a person [643] has not sufficient assets to pay his debts. Cohen v. Parish, 100 Ga. 335, 28 S. E. 122. In connection with bankruptcy and insolvency acts another definition has arisen as applicable to traders, which is the inability of a person to pay his debts as they become due in the ordinary course of business. And, as a bank was engaged in a business of a certain character, this definition came to be applied to the insolvency of banks. Clarke v. Ingram, 107 Ga. 565, 582, 33 S. E. 802; Black's Law Dic. Anderson's Law Dic. Bouvier's Law Dic. word "Insolvency;" 4 Words and Phrases, 3647, 3648, 3654. Nevertheless, as general deposits were held to be loans to the bank, payable on demand, and it was a matter of common knowledge that the business of banking involved lending out a large part of these deposits, and not merely holding them ready to pay every depositor if he should make demand therefor, various modifying expressions have been employed, to show that while a bank is ordinarily expected to pay depositors on demand in the usual course of business, sudden panics or emergencies may arise which would cause a temporary suspension of payments without conclusively showing insolvency. Thus one writer says that a number of courts now uphold what he declares to be the more reasonable rule that "a bank is solvent when it possesses sufficient solvent and marketable assets to meet all of its obligations within a reasonable time." Magee on Banks and Banking, 604. This definition has the defect of using the word "solvent" as a part of the definition of the same word. For other efforts to formulate a satisfactory definition of insolvency as applied to banks, see Tiffany, Banks and Banking, 346; Michie, Banks and Banking, § 73, p. 496; Zane, Banks and Banking, 603, 604; 5 Cyc. 559, 560.

We are not now concerned, however, with announcing a precise definition of insolvency as applied to banks, relatively to bankruptcy or insolvency laws; but are endeavoring to show that two meanings have been given to the word insolvency, and to determine which of them was intended in the act now being considered. The two meanings of the word insolvency were thus stated by Mr. Justice Field, in Toof v. Martin, 13 Wall. 46, 47, 20 U. S. (L. ed.) 482: "The term insolvency is not always used in the same sense. It is sometimes used to denote the insufficiency of the entire property and assets of an individual to pay his debts. This is its general and popular meaning. But it is also used in a more restricted sense, to [644] express the inability of a party to pay his debts as they become due in the ordinary course of business. It is in this latter sense that the term is used when traders and merchants are said to be insolvent, and as applied to them it is the sense intended by the act of Congress." The act of Congress mentioned was the bankrupt act of 1867. The bankrupt act of 1898 expressly defines the word as there used, and makes the definition conform closely to what has been declared to be the general and popular meaning. In determining whether the word is to be construed as having one meaning or the other, as employed in the Penal Code, § 204, there are several considerations which may aid us. In construing statutes the general rule is that the ordinary signification is to be applied to words, except words of art or those connected with a particular trade or subject-matter, unless there is some-

thing in the context to show that the legislature intended to use the word in a different sense. Civil Code (1910) § 4. Again, bankruptcy and insolvency laws are civil laws dealing with civil proceedings in certain cases, and looking to the protection of the creditors, and the taking charge and properly handling and distributing of estates of persons within their scope, the bankrupt law also providing for the discharge of the debtor. Such laws are to be construed in the light of their purpose and object. On the other hand, the law now before us is a penal law which may subject the president and directors of a bank to imprisonment in the penitentiary, upon conviction; and it raises a presumption of guilt from the insolvency of the bank. The rule of strict construction is usually applicable in criminal law. This act was a part of the Penal Code of 1833, and has been in force ever since. The legislature declared that "every insolvency of a chartered bank, or refusal or failure to redeem its bills on demand, either with specie or current bank-bills passing at par value, shall be deemed fraudulent," etc. This created two contingencies, either one of which would serve to raise a presumption of fraud; one was insolvency, the other failure or refusal of a bank of issue to redeem its bills. Insolvency under the act was not the same as failure or refusal to redeem. It was used in the ordinary and general sense of the word.

Several States have statutes which make it penal for the officers of a bank knowingly to receive deposits when the bank is insolvent or in failing circumstances. In 37 Cent. L. J. 147, a [645] writer discussed the meaning of the word "insolvent" as used in such a statute, and criticized a decision which had been rendered by the Supreme Court of Iowa. Among other things it was said: "While the foregoing are undoubtedly the popular and general meanings of solvency and insolvency, the courts, in administering the bankruptcy and insolvency laws and laws regulating assignments for the benefit of creditors, have given the words limited and restricted meanings. Under those acts insolvency means inability to pay one's debts in the ordinary course of business. Also under insolvent acts where it was necessary to protect the creditors and compel an equal distribution of the insolvent's estate. The main purpose of the bankrupt act was to compel a debtor to distribute his property equitably among all his creditors. . . . By the terms of the act [the bankrupt act of 1867] the creditor could not procure a preference if he knew of the failure of his debtor to meet obligations when due. The rule was applied particularly to traders, merchants, and bankers. And this limited meaning of 'insolvency' was first applied under the bankrupt act, and for the above reason and no other. By what line of reasoning, then, can the restricted meaning be applied to the word when used in the penal statutes under discussion? Clearly no purpose is intended to be served by these statutes kindred to the purpose of of the bankrupt acts. The objects of the two are entirely dissimilar. The penal statutes are supposed to prevent fraudulent banking. They are not intended to force all banks to keep all deposits in the vault ready for the depositor upon call. Statutes regulating banking expressly permit the loaning of deposits by requiring the bank to keep on hand a reserve of only 15 to 20 per cent. of their deposits. Does the legislature permit banks to loan 80 to 90 per cent. of deposits, and at the same time fix a heavy penalty for not having the same money on hand to pay out on demand?" This line of reasoning has been followed in some cases. Ellis v. State, 138 Wis. 513, 119 N. W. 1110, 20 L.R.A. (N.S.) 444, 131 Am. St. Rep. 1022; Fleming v. State, 62 Tex. Crim. 653, 139 S. W. 598. In Parrish v. Com. 136 Ky. 77, 123 S. W. 339, the same definition was adopted in a criminal case; but the majority of the court held, that, under a statute declaring that a reversal should only be granted for errors of law where the court was satisfied that the substantial rights of the defendant had been violated, the difference in the two [646] definitions was not so material as to require a reversal, in view of the evidence and argument. Hobson, J., dissented from this position. See also, in this connection, Youmans v. State, 7 Ga. App. 101, supra. In State v. Stevens, 16 S. D. 309, 92 N. W. 420, the definition of insolvency applicable to bankruptcy or insolvency proceedings was adopted. In California the same insolvency act was held to include both meanings of the word, according as the proceeding was voluntary or involuntary. Ruggles v. Cannedy, 127 Cal. 290, 53 Pac. 911, 916, 59 Pac. 827, 46 L.R.A. 371. We are not now discussing whether a failure or refusal to pay on demand might be proved as having evidential value on the subject of insolvency.

Civil Code (1910) section 2306 does not furnish a test of insolvency as that word is used in Penal Code section 204. The section first cited forms a part of the law relating to the bank bureau, enacted in 1907. It provides for a preliminary report of insolvency by the bank examiner, derived from certain data, a seizure of the bank's assets under order of the Governor, and a thorough examination into its affairs; and that whenever the examiner shall "become satisfied that such bank can not resume business or liquidate its indebtedness to the satisfaction of all creditors, including its shareholders,

he shall report the fact of its insolvency to the Governor," who shall thereupon instruct the attorney-general to institute proper proceedings. It is evident that the language of this section cannot be literally imported into section 204 of the Penal Code. The two examinations, and the becoming satisfied that the bank "cannot resume business or liquidate its indebtedness to the satisfaction of all creditors, including its shareholders," do not furnish a test of insolvency under the criminal statute. The one is a remedial proceeding by the State for the winding up of a bank under certain circumstances and in a specified manner. The other is a penal law for the punishment of fraudulent mismanagement by a president or directors in connection with the insolvency of a chartered bank.

It follows from what has been said, that, within the meaning of Penal Code (1910) § 204, a bank is not insolvent if its entire property and assets are sufficient to discharge its liabilities by process of liquidation, even though it may not be able to pay its debts immediately as they become due, or to pay its depositors on demand; and that in this statute there is no difference in the meaning of the [647] word "insolvency" as applied to a chartered bank and the meaning of the word as applied to the financial condition of an individual. Of course, we understand the process of liquidation mentioned in the question of the Court of Appeals to mean prompt liquidation duly carried out, and not after indefinite holding with the hope of appreciation in values.

All the Justices concur.

NOTE.

When Bank Is "Insolvent."

Introductory, 85.
In Criminal Action, 85.
In Civil Action, 87.

Introductory.

The word "insolvent," as used in various contexts with reference to a bank, has been held to be susceptible of two distinct meanings which may be designated as the restricted sense and the general or popular sense. In the majority of jurisdictions, the word is construed in the restricted sense, i. e., that a bank is insolvent when it is unable to meet its current obligations as they mature, though its assets may be greatly in excess of its liabilities. However, the popular or general meaning of the term, viz.: that the entire property and assets of the bank are insufficient to meet its liabilities by way of liquidation, though in this sense the term is usually applied to traders and those engaged in business and mercantile pursuits, has, in some jurisdictions, been held to apply to banks also.

In Criminal Action.

In a criminal prosecution of the officials of a bank for the violation of a statute prohibiting the receipt of deposits with knowledge that the bank is insolvent, the word "insolvent" has generally been construed in its restricted sense, viz., that the bank is insolvent when it is unable to meet its demands in the usual and ordinary course of business, even though it may have assets in excess of its liabilities. However, it is not essential within the meaning of the foregoing statement, that a bank should have on hand sufficient cash to pay all its depositors, or any considerable number of them, on the same day, or in case of a run on the bank or some extraordinary demand, but it is necessary only for it to have on hand cash or available assets sufficient to meet the demands that are usually made on it from day to day in the ordinary course of business. Skarda v. State, 118 Ark. 176, 175 S. W. 1190; Wilkin v. State (Ark.) 180 S. W. 512; State v. Cramer, 20 Idaho 639, 118 Pac. 30; State v. Cadwell, 79 Ia. 432, 44 N. W. 700; State v. Myers, 54 Kan. 206, 38 Pac. 296; State v. Burlingame, 146 Mo. 207, 48 S. W. 72; State v. Darragh, 152 Mo. 522, 54 S. W. 226; State v. Stevens, 16 S. D. 309, 92 N. W. 420. Thus, it has been said: "A bank is insolvent in contemplation of the statute under consideration when its assets and property are of such character and value that it is unable to meet its demands in the usual and ordinary course of business. It is not essential that the bank shall have on hand sufficient cash to pay all of its depositors or any considerable number of them on the same day, or in case of a run on the bank or some extraordinary demand. It is only necessary for it to have on hand cash or available assets sufficient to meet the demands that are usually made on it from day to day in the ordinary course of business. The amount owing by the bank to its stockholders as such or its capital stock should not be considered as a debt against the bank in determining its solvency." Wilkin v. State, supra. The capital stock and the surplus fund are not to be considered as liabilities of the bank in determining its solvency, but as resources. Skarda v. State, 118 Ark. 176, 175 S. W. 1190; Wilkin v. State (Ark.) 180 S. W. 512; State v. Cramer, 20 Idaho 639, 119 Pac. 30; State v. Myers, 54 Kan. 206, 38 Pac. 296. Thus in the case last cited the court said: "In a criminal prosecution . . . against an officer of a bank for knowingly receiving

deposits when his bank is insolvent, the capital stock and suplus fund cannot be considered as liabilities or debts in determining the insolvency; otherwise, the greater the capital of the bank and the larger its surplus fund, the more insolvent it will be. The contrary is the actual fact. The capital and surplus of a bank are its resources which may be used to pay its depositors and other creditors, when there have been losses by loans or otherwise. If a bank, by using its capital or surplus, or both, can pay promptly its deposits and other debts, as they become due in the ordinary course of business, it is not insolvent. Upon the books and in the official statements of a bank, capital stock and the surplus fund are denominated as liabilities, but they are resources of the bank with which to transact business. The more capital a bank has, the better able it is to meet its deposits and other debts. The more surplus on hand, the greater its ability to pay promptly its deposits and other debts. If a bank is able to pay promptly every depositor and every other creditor in the ordinary course of business, the bank . . . is solvent, whether there is any surplus or capital to be distributed afterward to stockholders or not."

But in some jurisdictions, in criminal proceedings against the officers of a bank for causing insolvency by their intentional fraudulent acts or for receiving deposits knowing the bank to be insolvent, a bank has been held to be "insolvent" only when there is an insufficiency of all its property and assets to pay all its just debts. Youmans v. State, 7 Ga. App. 101, 66 S. E. 383; Parrish v. Com. 136 Ky. 77, 123 S. W. 339; State v. Clements, 82 Minn. 434, 85 N. W. 229; Gass v. State, 130 Tenn. 581, 172 S. W. 305; Fleming v. State, 62 Tex. Crim. 653, 139 S. W. 598; Brown v. State, 71 Tex. Crim. 353, 162 S. W. 339; Ellis v. State, 138 Wis. 513, 119 N. W. 1110, 20 L.R.A.(N.S.) 444, 131 Am. St. Rep. 1022. And see the reported case. See also Roby v. State, 41 Tex. Crim. 152, 51 S. W. 1114. Thus, in Parrish v. Com. supra, the court said: "It is insisted that under instruction No. 3 ('a bank is insolvent within the meaning of these instructions when its property and assets are of such character and value that it cannot meet its demands in the ordinary course of its business') the jury had the right to find a verdict of guilty if they believed that the bank could not pay all of its depositors on demand; that this fact, according to the definition of 'insolvency,' was sufficient evidence that the bank was insolvent. If this was the fair meaning of the instruction, it would not be a correct statement of the law applicable to the case, and if we believed the jury so understood it, we would order a new trial. Although the law undoubtedly contemplates that when a depositor places money in a bank as a general deposit, he shall have the right to withdraw it upon demand, and that the refusal or inability of the bank to permit him so to do would be evidence of its failing condition, it is yet manifest that the mere fact that the bank does not have in its vaults sufficient cash to satisfy all its depositors, or any considerable number of them, on the same day, or in case a run was made on the bank, would not be proof of its insolvency within the meaning of the statute. A bank might not be able to pay its depositors on demand, and yet be perfectly solvent. It is only when all of its property and assets are not sufficient to satisfy its debts that it is insolvent. . . . Whenever a bank fails to discharge its obligations in the ordinary course of its usual and customary business, or closes its doors, or goes into liquidation, it is evidence of its insolvency, and a prosecution may at once be inaugurated. But there can be no conviction unless the evidence conduces to show that when the deposit was received, all of its property and assets were not sufficient to meet its demands. It is a matter of common knowledge that banks well managed never have on hand an amount of money equal to their deposits. They are not expected or required to do this, or to anticipate that all their depositors will want their money at the same time. It is a legitimate feature of good banking to lend out so much of the deposits as may not be necessary to meet the demands of depositors in the ordinary course of business, and the statute permits this by providing in section 584 that: 'Each bank shall keep on hand at all times at least fifteen per cent. of its total deposits and in cities with a population of over fifty thousand at least twenty-five per cent. of its total deposits; one-third of which reserve shall be in money, and the balance may be in funds, payable on demand, deposited in other banks.' In view of this statute allowing banks to lend out so large a per cent. of their deposit, it would be absurd to say that the failure to be able to pay all checks presented on demand would be proof of its insolvency. If this test were applied, every bank in the state would be insolvent, because no one of them could presently pay all of its depositors in full. No honest, prudent banker need feel apprehensive that he will be subjected to either indictment or prosecution because the cash on hand at any time is not sufficient to meet the claims of all depositors. And we may add that in no case that has come under our notice were criminal proceedings under statutes like ours instituted until the bank had closed its doors and gone into liquidation. When all of the property and assets of a bank—and these words include

every species of property owned by it—are not of sufficient value to pay its debts, there can be no doubt that the bank is insolvent. This is what the instruction means when fairly interpreted, and that this was the view of the law entertained by this trial judge, as well as counsel for the commonwealth and the accused, is amply demonstrated by the line of testimony offered in behalf of the commonwealth, as well as the defense on the trial of the case." In Ellis v. State, 138 Wis. 513, 119 N. W. 1110, 131 Am. St. Rep. 1022, 20 L.R.A.(N.S.) 444, it was said: "A bank is insolvent when the fair cash value of its assets, realizable within a reasonable time, in case of liquidation by the proprietors, as ordinarily prudent persons would ordinarily close up their business, is equivalent to its liabilities, exclusive of stock liability." And in Gass v. State, 130 Tenn. 581, 172 S. W. 305, the court said: "We shall now inquire when is a bank insolvent within the sense and meaning of the statute in question. There are two theories of the subject. One is that a bank is insolvent when it is unable to pay demands made upon it in the ordinary course of business when such demands fall due, a situation in which bankruptcy proceedings could be immediately instituted against it. The other theory is that the bank is insolvent when its assets are less in value than the amount of its debts, exclusive of capital stock, surplus, and undivided profits, allowing a reasonable time for the conversion of the assets into money. It is no doubt true that, when a bank is unable to pay its debts as they fall due in the ordinary course of business, it is subject to be proceeded against by a bill in equity for the appointment of a receiver for the administration of its assets. We do not believe, however, that this state or condition of the business was such as was contemplated by the statute in question. It cannot be true that a banker is guilty of a crime in receiving a deposit if at the time the assets of the bank fully equal in value the sum of its debts, even though it may require some time to realize on those assets. The gist of the matter is that a deposit is received by a banker knowing or having good reason to believe that the money will be lost to the depositor, by reason of the inability of the bank to return it; but if the assets on a fair valuation are amply sufficient to pay all depositors, including the one in question, and all other debts of the bank, exclusive of the capital stock, surplus, and undivided profits, the bank is not insolvent, nor is there any good reason to believe that it is insolvent. This meaning of insolvency is the ordinary signification of the word; that is, an insufficiency of assets to pay debts." In the reported case, which is a prosecution of the president of a bank for fraudulent mismanagement in connection with the insolvency of the bank, it is held that a bank is insolvent if its entire property and assets are insufficient to discharge its liabilities by way of liquidation; and that, if a bank's assets are sufficient to pay its debts after liquidation, it is not insolvent though it is unable to pay its debts immediately as they become due, or to pay its depositors on demand. It is also held that the language of the section of the Civil Code providing for examinations into the affairs of a bank, and for the closing of the bank on the examiner's becoming satisfied that the bank "cannot resume business or liquidate its indebtedness to the satisfaction of all creditors, including its shareholders," does not furnish a test of insolvency for use in construing the meaning of "insolvency" in an action under the criminal statute.

In Civil Action.

In a number of jurisdictions, it has been held in various civil actions that the insolvency of a bank does not mean that condition in which a business concern is placed when it is found that on the settlement of its affairs, it will not be able to pay its debts in full, but that it means a present inability to meet its current obligations as they mature. Hayden v. New York Chemical Nat. Bank, 84 Fed. 874, 55 U. S. App. 420, 28 C. C. A. 548, *affirmed* 174 U. S. 610, 19 S. Ct. 787, 43 U. S. (L. ed.) 1106 (action to recover payments made in contemplation of insolvency); Case v. Louisiana Citizen's Bank, 2 Woods 23, 5 Fed. Cas. No. 2,489 (action to have transfer declared void, as act in contemplation of insolvency); Stone v. Dodge, 96 Mich. 514, 56 N. W. 75, 21 L.R.A. 280 (action by receiver of insolvent bank to recover sum due at date of suspension of bank); Dodge v. Mastin, 17 Fed. 660 (action to secure deposit made when bank was insolvent; interpreting Missouri statute); Eads v. Orcutt, 79 Mo. App. 511 (suit by depositor against officers of bank to recover deposit made when bank was known to be insolvent); Stadler v. Helena First Nat. Bank, 22 Mont. 190, 56 Pac. 111, 74 Am. St. Rep. 582 (suit to set off certain deposits of plaintiffs against note made by them to bank and transferred by it to another); Com. v. Tradesmen's Trust Co. 237 Pa. St. 316, 85 Atl. 363 (proceeding for appointment of receiver); Livingstain v. Columbian Banking, etc. Co. 81 S. C. 244, 62 S. E. 249, 22 L.R.A.(N.S.) 445 (action for subrogation and to have money paid to petitioner at time of insolvency of bank declared not impressed with a trust in favor of other crediors); Minton v. Stahlman, 96 Tenn. 98, 34 S. W. 222 (suit by depositor to hold officers of bank individually liable for

loss of deposit claimed to have been made when bank was insolvent); Dewey v. St. Albans Trust Co. 56 Vt. 476, 48 Am. Rep. 803 (action to have bank declared insolvent and certain directors preferred). And see Harmanson v. Bain, 1 Hughes 188, 11 Fed. Cas. No. 6,072 (bill in equity to declare transfer of property void); In re Manufacturers' Nat. Bank, 5 Biss. 499, 19 Int. Rev. Rec. 20, 16 Fed. Cas. No. 9,051 (application for rule on national bank to show cause why it should not be adjudged bankrupt); Oakley v. Paterson Bank, 2 N. J. Eq. 173 (bill for injunction and appointment of receivers). *Compare* Earle v. Carson, 188 U. S. 42, 23 S. Ct. 254, 47 U. S. (L. ed.) 373 (action to recover amount of liability of stockholder of national bank on its suspension); Bank Com'rs v. Brest Bank, Har. (Mich.) 106 (motion for appointment of receiver). In Com. v. Tradesmen's Trust Co. 237 Pa. St. 316, 85 Atl. 363, it was said: "It is not insolvency in its popular sense that the law regulating banks and trust companies and kindred corporations deals with, but insolvency in its legal sense, which exists whenever such an institution as this, from any cause, is unable to pay its debts in the ordinary or usual course of its business." In Eads v. Orcutt, 79 Mo. App. 511, the appellate court in approving the instructions given by the trial judge, said: "They, taken together, point out in unambiguous language, what constitutes insolvency, confining such condition to an inability to meet the ordinary demands against the bank in the usual and ordinary course of business. They declared that an ability to pay in the future, or an excess of assets over liabilities, without a present ability to pay debts as they become due in the usual course of business, was not solvency." In Livingstain v. Columbian Banking, etc. Co. 81 S. C. 244, 62 S. E. 249, 22 L.R.A.(N.S.) 445, it was held that "a bank is insolvent when from the uncertainty of being able to realize on its assets, in a reasonable time, a sufficient amount to meet its liabilities, it becomes necessary for the control of its affairs to pass out of its hands." In defining "Insolvency" under the currency act, the court continued: "I know of no reason why a different meaning should be given to the word 'insolvency' as applied to banks in the currency act, from the meaning given the same word in the bankrupt act as applied to traders 'Insolvency, as used in the bankrupt act of 1867 [14 Stat. 534], when applied to traders, does not mean an absolute inability of the debtor to pay his debts at some future time, upon a settlement and winding up of his affairs, but a present inability to pay in the ordinary course of his business; or in other words, that a trader is insolvent when he cannot pay his debts in the ordinary course of his business, as men in trade usually do, and such must be the conclusion even though his inability be not so great as to compel him to stop business.' Wager v. Hall, 16 Wall. 599, [21 U. S. (L. e.) 504]. This definition of insolvency, in my judgment, is the meaning of the word in the currency act.

However, in other jurisdictions, it is held that a bank is insolvent when all of its property is insufficient to satisfy its debts: Exchange, etc. Co. v. Mudge, 6 Rob. (La.) 387 (action for rent); Kennedy v. New Orleans Sav. Inst. 36 La. Ann. 1 (action to have claims obtained by plaintiff with knowledge of defendant's insolvency and for purpose of securing preference, set off against indebtedness of former to latter). See also In re French Bank Case, 53 Cal. 495 (motion to vacate order appointing receiver); Clarke v. Ingram, 107 Ga. 565, 33 S. E. 802 (action to have conveyance made by insolvent bank declared void as being in fraud of creditors); State v. Mechanics,' etc. Bank, 35 La. Ann. 562 (action for forfeiture of charter and liquidation of affairs of bank). In Exchange, etc. Co. v. Mudge, 6 Rob. (La.) 387, in holding that a bank which had voluntarily gone or had been forced into liquidation, was not as a matter of course, insolvent, the court said: "It is only when the whole amount of the capital stock of a bank, together with its assets, is insufficient to meet its liabilities, that a bank can be said to be insolvent." And in Kennedy v. New Orleans Sav. Inst. 36 La. Ann. 1, the court said: "By being in insolvent circumstances is meant that the whole property and credits are not equal in amount, at a fair appraisement, to the debts due by the party. . . . Solvency is the ability to pay one's debts. He who cannot pay all that he owes, is not solvent."

In *New York*, the later cases, while not distinguishing between the two meanings or applications of the word, hold that a bank is not insolvent when its assets are sufficient to satisfy all claims against it, even though it may not be able to meet the every-day demands made on it. Livingston v. New York Bank, 26 Barb. (N. Y.) 304, 5 Abb. Pr. 338; Higgins v. Worthington, 12 App. Div. 361, 42 N. Y. S. 737; People v. Oriental Bank, 124 App. Div. 741, 109 N. Y. S. 509. But in the earlier cases, the term "insolvent," as applied to banks, was used in its restricted sense. In re Empire City Bank, 10 How. Pr. 498; Ferry v. Central New York Bank, 15 How. Pr. 445; Market Nat. Bank v. Pacific Nat. Bank, 30 Hun 50 (construing U. S. statute).

DUTTON

v.

STATE.

Maryland Court of Appeals—June 24, 1914.

128 Md. 373; 91 Atl. 417.

Appeal — Correction of Record.

On application to the lower court to have the record in that court corrected so as to properly state what occurred, the court below if satisfied from its own knowledge, or from the evidence adduced, that the clerk's docket entries were erroneous or incomplete, had the power and duty to have them corrected.

Same.

The action of the lower court, on an application for correction of the record and in reference to the changes requested, is final and not reviewable on appeal.

Scope of Review — Denial of New Trial.

The action of the lower court in overruling a motion for a new trial is not reviewable by the Court of Appeals.

Denial of Motion to Strike out Judgment.

The action of the lower court on a motion to strike out the judgment and sentence is reviewable by the Court of Appeals.

Criminal Law — Distinction between Felony and Misdemeanor.

Under Code Pub. Gen. Laws 1904, art. 27, § 17, providing the punishment for an assault with intent to rape, such offense is a misdemeanor, though punishable, in the discretion of the court, with death or imprisonment in the penitentiary for 20 years, and not a "felony," since the fact that a crime is punishable in the penitentiary or is infamous does not make it a felony, and is not even an "infamous crime," which depends on the character of the crime, and not upon the nature of the punishment; and hence it is not necessary that accused shall be arraigned.

[See 8 R. C. L. tit. *Criminal Law*, p. 55.]

Interrogation of Accused before Sentence.

It is not reversible error, even in a capital case, not to ask the prisoner if he has any reason why sentence should not be passed, unless it appears that he was or may have been injured by the omission, but the practice of inquiring any reason why sentence should not be passed is recommended in all cases in which either the death penalty or confinement in the penitentiary can be imposed.

[See note at end of this case.]

Same.

Even if it is indispensable in capital cases to ask the prisoner if he has anything to say before sentence, error in omitting the inquiry affects only the sentence and not the verdict; and in view of Code Pub. Gen. Laws 1904, art. 5, § 81, providing that if the Court of Appeals reverses for error in the judgment or sentence itself, it shall remit the record to the court below that it may pronounce the proper judgment, and especially where a motion for new trial and to strike out a judgment and sentence have been overruled, the Court of Appeals is not required to reverse the judgment and remit that the court below may first ask the prisoner if he has anything to say and then to re-sentence him.

[See note at end of this case.]

Same.

When the prisoner is asked if he has anything to say before sentence is passed the proper practice is to note such inquiry in the record.

[See note at end of this case.]

Cruel and Unusual Punishment.

Under Declaration of Rights, art. 16, declaring that no law to inflict cruel and unusual penalties shall be made, and article 25, declaring that cruel or unusual punishments shall not be inflicted by the courts of law, a judgment and sentence of capital punishment for the crime of assault with intent to rape, imposed under the discretion given the court in respect to such crime by Code Pub. Gen. Laws 1904, art. 27, § 17, is not unconstitutional.

[See 8 R. C. L. tit. *Criminal Law*, p. 262.]

Same.

Const. U. S. amend. 8, declaring that cruel and unusual punishments shall not be inflicted, is not a restraint upon and does not apply to the legislature of a state, but only to the national legislature.

Trial — Exclusion of Public.

In determining whether any part of the public shall be excluded from the trial of a criminal case the trial court is allowed some discretion, and no exclusion should be permitted which might injuriously and improperly affect the prisoner, and under no circumstances should a trial be so conducted as to have the appearance of a star chamber proceeding; and hence the trial of a charge of assault with intent to rape, held by the court in the petit jury room instead of the courtroom, and with the consent of defendant's attorney, where it does not appear that any one whom defendant or his attorney desired to be present was excluded, is not a deprivation of defendant's rights.

[See 20 Ann. Cas. 632; 28 Am. St. Rep. 308.]

Private Examination of Witness.

Under Declaration of Rights, art. 21, providing that in all criminal prosecutions every one has the right to be confronted with the witnesses against him, the examination of the prosecutrix in a trial for assault with intent to rape by the court out of the presence of the defendant, except as he was called to the door for identification, is a deprivation of right and reversible error.

Appeal from Circuit Court, Dorchester county: STANFORD and JONES, Judges.

Criminal action. James Dutton convicted of assault with intent to rape and appeals. The facts are stated in the opinion. REVERSED.

Thomas W. Simmons for appellant.

W. Calvin Trice and *Edgar Allan Poe* for appellee.

[375] BOYD, C. J.—The appellant was convicted of an assault with intent to rape, and was by virtue of section 17 of Article 27, Code of Public General Laws, as amended by Chapter 366 of Acts of 1908, sentenced to be hung. The record originally transmitted to this Court was defective, but on application of the appellant a writ of diminution was ordered. The appellant then applied to the lower Court to have the record in that Court corrected, so as to have what occurred properly stated. In Greff v. Fickey, 30 Md. 75, after a writ of diminution was issued by this Court, for the purpose of having [376] some alleged errors in the record corrected, a motion was made to have the docket entries in the lower Court amended and completed, but that Court overruled the motion because it was of opinion that the term having passed, and the Court of Appeals having ordered that the docket entries be returned as they actually stood upon the docket, it would be improper to grant the motion. This Court, through Bartol, C. J., said: "We think the learned judge was in error as to the purport and design of the writ, and his powers and duty in the premises. If satisfied either from his own knowledge of what had actually occurred in the progress of the cause, or from evidence adduced, that the docket entries as made by the clerk were erroneous or incomplete, it was within his power and his plain duty to have them corrected, so that a full, true and perfect transcript of the whole proceedings as they actually occurred in the progress of the cause might be set up, in obedience to the writ." That course was also approved in Hays v. Philadelphia, etc. R. Co. 99 Md. 413, 58 Atl. 439, and Koch v. Wimbrow, 111 Md. 21, 73 Atl. 896.

The lower Court accordingly very promptly and properly granted the motion of the appellant in this case, and has made certain corrections which we will insert in this opinion, so that it may be seen how the record now stands.—the action of that Court in reference to the changes requested being final and not subject to review on appeal. Greff v. Fickey, supra. By an order in writing signed by the two judges who sat below, the clerk was directed to and did make the changes, additions and corrections in the docket entries and record, so as to now read as follows:

"Plea and traverse. Whereupon the said James Dutton, traverser, cometh to the bar of the Court here in his proper person, and forthwith being demanded concerning the premises in said indictment above specified and charged upon him, how he will acquit himself thereof, he waived arraignment and he said, 'Not Guilty,' and 'Traverse before the Court,' and the said V. Calvin Trice, Esquire, State's Attorney [377] of Dorchester, aforesaid, who for the said State of Maryland in his behalf prosecuteth, doth the like.

"That the consent of the attorneys for the State and for the traverser having been first given, thereupon the trial in this case was adjourned to and held in the petit jury room, immediately adjoining the court room proper, including the taking of all testimony, and the same being taken in the presence of the Court, the Clerk with his docket and other Court officers, the said attorneys for the State and traverser, and all witnesses, but without the presence of said traverser during any part of the testimony of the chief prosecuting witness, Margaret Gillis, who testified while said traverser was in said adjoining court room, with the door of communication closed, and in custody of the Sheriff, except for the interval when said traverser was brought to said communicating door then opened, and identified by said witness, the said door being immediately thereafter closed until said witness left the stand and the traverser brought into said petit jury room to testify in his own behalf, where he then remained until the conclusion of said trial.

"The Court, having heard evidence, thereupon directed the Clerk of the Court to enter in the proceedings in said case, 'The Court finds the party guilty.'

"Sentence. Whereupon all and singular the premises being seen, and by the Court fully understood, it is thereupon considered by the Court that James Dutton, prisoner at the bar, be taken to the jail of Dorchester County from whence he came, and from thence to the place of execution," etc.

A motion for a new trial was made "short" the day the appellant was sentenced (November 14th, 1913), and on November 18th a formal motion in writing was filed. On December 23rd that motion was overruled, and on January 24th, 1914, which was during the same term of Court, a motion to strike out the judgment and sentence was made, which was overruled, and this appeal was taken to this Court. [378] That the action of the Court in overruling the motion for a new trial is not subject to review by us is too well settled to require or justify the citation of authorities, but its action on the motion to strike out the judgment and sentence is reviewable by us. The ruling on such a motion was reviewed by us in Hommer v. State, 85 Md. 562, 37 Atl. 26, and other cases which might be cited, but we are confined to what

appears on the face of the record itself, and there is no bill of exceptions, agreed statement of facts, or substitute for either of them. We will consider the questions referred to in the motion, but in somewhat different order from that in which they are therein stated.

1. Objection is made that the appellant was not arraigned. An assault with intent to rob, murder or commit a rape is not a felony in this State. The punishment for those crimes is provided for in one section of the Code, and has been for many years—being now section 17 of Article 27. In Hollohan v. State, 32 Md. 399, it was said: "Robbery, murder and rape are felonies. To constitute either of these crimes, the felonious *act* and felonious *intent* must concur. An assault with intent to commit either of these crimes is not a felony, but to bring an assault within this Article and section and subject the party charged to the punishment provided, it must be charged and proved to have been committed with an *intent* to commit a crime, which is a felony. If the intent had been effectuated by the act, a felony would have been committed. Only because it was not effectuated, the crime sinks from the grade of a felony to that of misdemeanor." See also State v. Dent, 3 Gill & J. (Md.) 12..

The distinction made in some jurisdictions that crimes punishable by death or confinement in the penitentiary are felonies, and others misdemeanors has never existed in this State, but here only those are felonies which were such at common law, or have been so declared by statute. The fact that a crime is punishable in the penitentiary or is "infamous" does not make it a felony in this State. It was said in State v. Bixler, 62 Md. 360: "The General Court of this [379] State in 2 H. & McH. 378, Clarke v. Hall, defined 'infamous crime' to be one which rises at least to 'the grade of felony.' This is, however, too narrow, for perjury is a misdemeanor, but by all authority is 'infamous.'" On the same page it is also said: "There are many misdemeanors punishable by confinement in the penitentiary, which clearly are not "infamous crimes' within the meaning of the common law or of the Constitution. If, for example, the prisoner has been convicted of any of the assaults with intent, mentioned and punished by the Code, and had been sentenced to the penitentiary and served his time out there, without being pardoned by the Governor, he would not be chargeable with having committed 'an infamous crime.'" In Garitee v. Bond, 102 Md. 379, 5 Am. Cas. 915, 62 Atl. 631, 111 Am. St. Rep. 385. Judge Schmucker, in delivering the opinion of the Court, referred to the case of Ex p. Wilson, 114 U. S. 422, 5 S. Ct. 935, 29 U. S. (L. ed.) 89, where the Supreme Court held that the provision in the United States Constitution which prohibits prosecution for "a capital or other infamous crime unless on a presentment or indictment of a Grand Jury" must be considered not merely from the standpoint of the character of the crime, but also from the nature of the consequences to the accused, if he should be found guilty, and went on to say: "But even in Wilson's case it was held that at common law prior to the Declaration of Independence 'it was already established law that the infamy which disqualified a convict to be a witness depended upon the character of his crime and not upon the nature of his punishment.'" Again it was there said: "The authorities generally, though not with entire uniformity, hold that the infamous nature of a crime was determined at common law by the character of the act itself, and not by the penalty inflicted for its commission," and after referring at length to State v. Bixler, supra, it was distinctly held that the crime considered in Garitee v. Bond could not be regarded as infamous merely because it was punishable at the discretion of the Court in the penitentiary.

[380] So whatever may be the law elsewhere, it is clear that an assault with an intent to commit a rape is not a felony and is not even an "infamous crime" as that term is understood in this State. It is not now and never has been so far as we are aware customary or necessary to arraign one accused of a misdemeanor—even though if convicted he could or must be punished by confinement in the penitentiary. The Legislature in authorizing the Court, in its discretion, to impose the death penalty or confinement in the penitentiary for not less than two nor more than twenty years on one convicted of the crime of assault with intent to commit a rape, did not declare it to be a felony, and in our judgment did not make it such by providing for the death penalty in the discretion of the Court. In Gibson v. State, 54 Md. 447, the first count charged that the accused "*feloniously*, wilfully and maliciously did set fire to and burn a certain barn," etc. One ground for a motion in arrest of the judgment was "Because the jury have found him guilty of a felony and the offense committed is only a misdemeanor by the laws of Maryland." In the course of the opinion it was said: "The argument of the Attorney-General, that the offense charged in the first count is legally a felony, because the common law attached the character of felony to all offenses punishable by death, however well founded according to the English authorities, does not apply to offenses where the punishment of death is in the discretion of the Court, and this Court having decided, in Black v. State, 2 Md. 376, that such offenses

are misdemeanors, we are not disposed to disturb that decision." In Salfner v. State, 84 Md. 299, 35 Atl. 885. Chief Judge McSherry said: "It is unnecessary that a party accused of a misdemeanor should be arraigned; but it is indispensable that a plea should be entered to the indictment or that the record should show he waived a plea."

So without deeming it necessary to further discuss this branch of the case, or to refer to authorities out of the State as to when the accused must be arraigned, we hold that it [381] was not necessary to arraign the appellant, and there was no error in not doing so, and hence the effect of a waiver of arraignment becomes immaterial.

2. The reason alleged that the defendant never, either in person or by his attorney, pleaded the plea of "Not Guilty" which appears in the docket entries—it having been entered without the order or authority of the defendant or his attorney, and without his having been called upon to plead,—is not sustained by the record. We have quoted above what the record states on that subject, and as it shows that he did plead "Not Guilty," and as there is nothing in conflict with that statement, it is unnecessary to further discuss the question.

3. Another reason assigned in support of the motion is that sentence of death was pronounced against the defendant without first asking him if he had anything to say. The authorities are not entirely uniform on the subject, although it may be admitted that the greater number of them hold that at least in capital cases the accused should be asked if he had anything to say why sentence should not be pronounced. The question has not heretofore been passed on by this Court, and we have no statute on the subject, as many States have. There can be no doubt that most of the reasons originally given for the adoption of that practice are not applicable in this State. In the first place the prisoner is not only allowed counsel, but the Courts always appoint counsel to defend those who are unable to employ them, in capital cases. Again, the rules of Courts generally fix the time within which a motion for a new trial or motion in arrest of judgment can be filed, and in the absence of such rules, the time allowed at common law is applicable. Even if sentence should be passed before the expiration of such time, without having given the prisoner an opportunity to then speak, such a motion would be afterwards entertained if made within the time allowed. In Heiskell v. Rollins, 81 Md. 397, 32 Atl. 249, a judgment was entered by the clerk in a civil case the day the verdict was rendered, and on the same day a motion for a [382] new trial was filed. We dismissed the appeal without prejudice, in order that the appellant could take steps to have the entry of judgment which was improperly entered stricken out and a final judgment then entered from which an appeal could be taken. The case was here on a second appeal, as reported in 82 Md. 14. Such a practice being adopted in a civil case, the Court would be all the more careful to see that a prisoner under the sentence of death did not suffer by reason of a premature judgment and sentence.

Then under our practice a motion can be made to strike out the judgment and sentence at any time during the term, as was done in this case. It would be practically impossible for the prisoner to suffer from this omission because he desired to present a pardon. If a pardon had been granted by the Governor before sentence, it is impossible to conceive of a case under our system and practice, in which the Court could fail to be informed of it, because of the omission to ask the prisoner whether he had anything to say. So we might look to the various reasons originally given for this practice, without finding a substantial one under existing conditions for setting aside a judgment and sentence in a criminal case because of the omission of this inquiry.

The decisions of the various Courts which hold that omission to be reversible error differ as to the effect of such an error, but even if we were inclined to hold that it was indispensable in capital cases to ask the prisoner if he had anything to say, we would not hestitate to hold that the error would only affect the sentence and would not affect the verdict. In State v. Hoyt, 47 Conn. 518, 36 Am. Rep. 89, one of a number of reasons given by that Court for declining to hold it to be necessary, was that it would only affect the sentence and the weight of authority is to that effect. But in this State we have a statute (Sec. 81 of Art. 5 of Code) which provides that if this Court shall reverse a judgment for error in the judgment or sentence itself, it shall be then the duty of this Court to "remit" the record to the Court below, in order that it may pronounce the proper judgment. In this case a [383] motion for a new trial was made and overruled, as was the motion now under consideration, and it would seem peculiar, to speak mildly, if the rules of practice required us to reverse the judgment and send it back to the same Court which passed the sentence in order that it might first ask the prisoner if he had anything to say and then re-sentence him.

Inasmuch as we will reverse the judgment for another reason, and order a new trial, it is perhaps unnecessary to discuss this point at such length, but as it was fully argued

and thoroughly considered by us, we concluded to state our views on the subject. We are of the opinion that it is not reversible error, even in capital cases, not to ask the prisoner if he has any reason to give why sentence should not be passed, unless it is apparent that the prisoner was or may have been injured by the omission. But we do strongly recommend and advise that the practice be followed in all cases in which either the death penalty or confinement in penitentiary can be imposed. In capital cases the practice, so far as we are aware, has been followed throughout this State, and in most of the Circuits in all penitentiary cases. In Givens v. State, 76 Md. 485, 25 Atl. 689, Judge Briscoe said: "In Com. v. Roby, 12 Pick. (Mass.) 514, the Court said, that the constant practice of the Commonwealth should be observed and followed unless good reason can be assigned for the change. The forms adopted in a criminal trial are of importance, inasmuch as they have a strong tendency by their solemnity, to impress upon all who are engaged in it, the interesting and highly responsible nature and character of the duties which devolve on them respectively."

No more responsible duty can rest upon an officer of the law than the exercise of the discretion vested in the judges of this State in reference to this and some other crimes, by which they are called upon to determine whether a convict shall be sentenced to death or be imprisoned in the penitentiary. It is an exceedingly unpleasant duty in any case to impose the death penalty, and before exercising the discretion, every Judge should be glad to have all the information [384] he can properly consider. It may be possible that something can be said before sentence which might influence the Court in the exercise of its discretion, and, as we have already indicated, if it be apparent that such was or might have been the case, and the prisoner had not had an opportunity to be heard, we would feel called upon to remand the case in order that he might be re-sentenced, after the inquiry was made of him. Moreover, if the proceedings are conducted with the solemnity with which they should be when a sentence of death is about to be imposed, the prisoner may say something which will make his case a warning to others, even if his remarks are not of service to himself. So although we would not reverse a judgment unless we could see that the prisoner was or may have been injured by the omission, we repeat that in our judgment the practice, which we supposed was always followed in capital cases in this State, of making the inquiry, should be adopted in all cases in which the death penalty may be imposed, and ordinarily in all other cases in which the defendants may be confined in the penitentiary.

It may be well to add that when it is done the proper practice is to have the fact so noted in the record. In this case, we are not satisfied that any injury was done the appellant, by the omission to make the inquiry, and at any rate, as the judgment itself will be reversed, there is no occasion to remand the case for a new sentence. It will not be out of place to conclude the discussion of this branch of the case by referring to 19 Enc. of Pl. & Pr. 456, where it is said, "there seems to be a growing tendency, even where capital punishment is inflicted, to dispense with this ceremony, or at least to consider it not essential, on the ground that the reasons for its existence are not applicable at the present day."

4. It is also alleged that the judgment and sentence in this case impose a cruel and unusual punishment, and also that the sentence imposed is out of proportion to the crime charged in the indictment, and too severe a penalty for said crime. [385] The facts proven in the case are not presented by the record, but we cannot hold that the penalty authorized by the statute to be imposed for such a crime is in violation of the Constitutional provisions. Article 16 of the Declaration of Rights of our present Constitution declares that "No law to inflict cruel and unusual pains and penalties ought to be made in any case or at any time hereafter," and Article 25 is, "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted by the Courts of law." It would hardly be contended that the punishment provided by our statute for the crime of rape—death or confinement in the penitentiary for not less than eighteen months, or more than twenty-one years—is in conflict with those provisions, and when the Legislature changed the penalty, for an attempt to commit the crime, to death or confinement in the penitentiary, in the discretion of the Court, it is probable that it took into consideration, the fact that it is often difficult to prove whether the crime of rape was actually consummated. Under some circumstances the outrage upon the particular woman and upon society can scarcely be said to be less because the prisoner did not succeed in accomplishing his purpose than if he had. If a revolting crime of this nature is so frequently repeated as in the judgment of the Legislature to call for such punishment, we cannot declare it to be contrary to such provisions of the constitution. It is said in Foote v. State, 59 Md. 269: "For the prevention of crime, which is the true end of all punishment, the law giver may properly consider the frequent and easy opportunities of committing the crime and the difficulty of guarding against it, and may grade his punishment accordingly." In passing it may be said that in that case the Court referred

to the fact that "The eighth amendment to the Constitution of the United States is not a restraint upon, and does not apply to, the Legislature of a State, but only to the National Legislature, and, therefore, has no application to this case. Pervear v. Massachusetts, 5 Wall. 470, 18 U. S. (L. ed.) 608." In Mitchell v. State, 82 Md. 527, 34 Atl. 246, the traverser was convicted [386] of an attempt to carnally know and abuse a woman child under the age of 14 years, that being a common law offense and not covered by our statute. He was sentenced to imprisonment in the city jail for fifteen years, and it was contended that it was contrary to the Declaration of Rights, but this Court in considering the case said: "Our law inflicts pain, not in a spirit of vengence, but to promote the essential purposes of public justice. Severity is not cruelty. The punishment ought to bear a due proportion to the offense. Crimes of great atrocity ought to be visited with such penalties as would check, if not prevent, their commission." Again on page 534 the Court said: "If the punishment is grossly and inordinately disproportionate to the offense, so that the sentence is evidently dictated not by a sense of public duty, but by passion, prejudice, ill-will, or any other unworthy motive, the judgment ought to be reversed, and the cause remanded for a more just sentence. But no such instance of judicial misconduct has ever occurred in our good old State, and we trust that the day may never come when it will be witnessed. When the discretion which the law confers is exercised with a sedate and conscientious judgment under the influence of a love of public justice, and a desire to promote it, the Judge is acting in the legitimate discharge of his duty and his sentence is not subject to reversal." So without further discussing this subject, no ground for reversal for the reason now being considered is shown by the record.

5. This brings us to the action of the lower Court for which we reversed the judgment by a *per curiam* order heretofore filed. The quotation above shows how the case was conducted, and that the witnesses for the prosecution were examined out of the presence of the prisoner. Article 21 of the Declaration of Rights provides, "That in all criminal prosecutions every man hath a right to be informed of the accusation against him; to have a copy of the indictment or charge in due time (if required) to prepare for his defense; to be allowed counsel; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses [387] for and against him on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty." In determining whether any part of the public should be excluded from the trial of a criminal case, some discretion must be allowed the trial Court. Under no circumstances should a trial be so conducted as to have the appearance of a Star Chamber proceeding, but cases sometimes occur which have a demoralizing influence on the spectators and to some extent on the community. It has always, so far as we are aware, been the practice in this State to exclude minors in such cases, and if women are not excluded they are often at least warned that the character of testimony will be such as to make it undesirable for them to be present. Of course no exclusion should be permitted which might injuriously and improperly affect the prisoner, but there may be cases where the prosecuting witness can be protected without doing the prisoner any harm. To require a refined, virtuous woman to relate the facts of a felonious assault upon her in the presence of a large audience inflicts a great punishment on her, and oftentimes does the accused more injury than if she were examined under other circumstances, for she may get in such a distressing condition as to improperly arouse the sympathies of the jury and possibly to cause counsel for the prisoner to refrain from a cross-examination which might have helped his client. The testimony of an outraged woman is calculated to create a bitterness against the accused amongst the audience, the effect of which is sometimes difficult to keep from the jury, as spectators may by their looks or manner even unconsciously betray their bitterness of feeling. The danger is that the horror of the crime may cause the hearers too readily to connect the accused with the commission of it. It is undoubtedly oftentimes better for the accused to have the trial conducted with less publicity than cases ordinarily are, and in a case such as this we are not prepared to say that the rights of the appellant were violated by having the trial in the petit jury room, instead of the Court room. The case was tried before the [388] Court, which, under our Constitution, the accused has the right to elect instead of a jury, and while the record does not show how many persons were in the room, it is not suggested that any one whom the prisoner or his counsel desired to be present was excluded. It does show that the trial was held there with the consent of the attorney for the traverser and no objection was made to it being held there instead of in the Court room. We can see no reason why the prisoner or his attorney for him could not agree to have the case tried where it was. We are aware that under some decisions, in other jurisdictions, that might not be allowed, but there is nothing in our Constitution or statutes to prohibit it, and we are satisfied that it may be in the interest of justice and for the good of the commun-

ity to permit the trial Court to hear a case of this character outside of the hearing of the general public, provided there are enough persons present to secure protection to the accused against any possible advantage being taken of him or injury done to him, and that it is done with his consent or that of his attorney under such circumstances as show his consent. The general rule is thus stated in Cooley's Constitutional Limitations, side page 312: "It is also requisite that the trial be *public*. By this is not meant that every person who sees fit shall in all cases be permitted to attend criminal trials; because there are many cases where, from the character of the charge, and the nature of the evidence by which it is to be supported, the motives to attend the trial on the part of portions of the community would be of the worst character, and where a regard to public morals and public decency would require that at least the young be excluded from hearing and witnessing the evidences of human depravity which the trial must necessarily bring to light. The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility, and to the importance of their functions; and the requirement is fairly met with, if, without [389] partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether."

But we are of the opinion that there was error in taking the testimony out of the presence of the appellant. Whether or not that could be expressly waived by the accused himself is unnecessary to determine, as the record does not show that it was. He had the constitutional right to be confronted by the witnesses, and although his attorney must have known that he was not present and may, so far as he could, have consented to let the traverser remain in the Court room while the witnesses were being examined, we are of opinion that that could not bind the appellant. It is quite possible that one on trial may be able to make valuable suggestions to his attorney during the examination of witnesses,—particularly the prosecuting witness in a case of this kind,—as it matters not how well an attorney may have prepared for the trial of a case, it is impossible for him to anticipate all that may be said, or to know all the details a witness on the opposite side will testify to. It might be that in the course of her examination in the presence of the accused the prosecuting witness would discover that she had made a mistake in the identity of the party committing the crime. Other reasons suggest themselves to show the importance of the accused being present, but it has so far as we are aware been the uniform practice throughout the State to require the presence of the accused in capital cases during the examination of witnesses, and this is the first instance which has been brought to the attention of any of us where that practice has been departed from. We have no doubt that the lower Court was induced by the best of motives to adopt the course it did, but we cannot hesitate to hold that it committed a grave error in permitting the testimony to be taken—especially that of the chief prosecuting witness,—out of the presence of the [390] accused. In Johns v. State, 55 Md. 360, Judge Alvey in considering an objection to the introduction of the Comptroller's Certificate, said: "It is only where the prosecution is to be maintained by the testimony of living witnesses that they are required to be produced in Court, confronted with the accused, and deliver their testimony under the sanction of an oath, and be subject to cross-examination. In other words, no witness shall give his testimony in secret or out of the presence of the accused; and no party shall be put upon his trial upon mere hearsay evidence; but the witness shall be produced, and be subject to all the tests that the law has devised for the full disclosure of the truth."

We do not overlook the fact that the crime of which the appellant is accused is a misdemeanor, but while that is true, he was liable to be sentenced to death, if convicted, as he in fact was, and he was entitled to the full protection of this constitutional provision. That he had the right to be confronted with the witnesses cannot be denied, and, if it be conceded, that he could waive that right, the record does not show that he did, and in our judgment his counsel could not waive it so as to bind him. It is too important a right for this Court to permit it to be waived by implication, by counsel, or by anything short of an express waiver by the prisoner, even if that is to be permitted, which need not be determined in this case.

For the error referred to the judgment was reversed by the per curiam order heretofore filed.

NOTE.

Effect of Failure to Ask Convicted Person if He Has Anything to Say before Sentence.

In Capital Case, 96.
In Case Other than Capital:
Felony, 97.
Misdemeanor, 99.

In Capital Case.

The holding of the reported case to the effect that it is not reversible error to fail to ask a person convicted of a capital offense whether he has anything to say before sentence, finds support in a number of decisions. State v. Hoyt, 47 Conn. 518, 36 Am. Rep. 89; Sarah v. State, 28 Ga. 576; Warner v. State, 56 N. J. L. 686, 29 Atl. 505, 44 Am. St. Rep. 415; State v. Johnson, 67 N. C. 55; Kinsler v. Territory, 1 Wyo. 112. The courts which take this position proceed on the theory that there is no longer any good reason for the observance of the common-law custom of making such an inquiry, which is known as the "allocutus" or "allocution." Thus in State v. Hoyt, supra, the court said: "Anciently in England a person on trial for a felony was not allowed counsel. The presiding judge in theory was his counsel, but did not represent the accused in the sense that counsel do with us. If therefore the judge omitted anything which was the right or privilege of the accused, it was considered the act of the court, which could in no wise prejudice the prisoner, and the rights of the latter could not be waived as may now be done. If we compare the rules and practice that obtained in England with our own it will readily be suggested that the reasons that made the inqury of the prisoner so essential do not apply at all in this state. Here the accused has always had counsel to represent him, vigilant to guard every right and claim every privilege deemed essential to his deliverance. The counsel well know that the verdict does not include the prisoner—they know all the remedies for ulterior relief and when and how they must be instituted. They are present when the prisoner, on motion of the Attorney for the State, is set at the bar to receive his sentence. They know that the court is open to hear any request, motion or objection, and that if the accused desires to say anything the court will grant him the privilege if he or they should so indicate. Under our practice what possible harm can be occasioned to the prisoner by such an omission on the part of the court? He can have no pardon to plead, for that can only come from the legislature after sentence, no attainder to save, no benefit of clergy to pray for." So in Warner v. State, 56 N. J. L. 686, 29 Atl. 505, 44 Am. St. Rep. 415, it was said: "Under the conditions of affairs existing in this state, however, the reason for the form has entirely disappeared. The defendant is represented by counsel who needs no invitation to interpose any legal objection at any stage of the proceedings. Counsel know the occasion when it is proper to assert the right of the defendant, and so the query of the court, whether regarded as an instruction to the defendant as to his rights, or as an invitation to assert them, is an unmeaning ceremony."

On the other hand there are numerous cases which take the opposite view and hold that a person convicted of a capital offense should be asked whether he has anything to say why judgment should not be pronounced, and that a failure so to inquire is reversible error. Rex v. Geary, 2 Salk. (Eng.) 630; Rex v. Speke, 3 Salk. (Eng.) 358, 3 Mod. 265; Ball v. U. S. 140 U. S. 118, 11 S. Ct. 761, 35 U. S. (L. ed.) 377; Keech v. State, 15 Fla. 591; State v. Jennings, 24 Kan. 642 (statute); State v. Ikenor, 107 La. 480, 32 So. 74; James v. State, 45 Miss. 572; Dodge v. People, 4 Neb. 220 (statute); Territory v. Herrera, 11 N. M. 129, 66 Pac. 523, *overruling* Territory v. Webb, 2 N. Mex. 147; Graham v. People, 63 Barb (N. Y.) 468; Messner v. People, 45 N. Y. 1; People v. Faber, 199 N. Y. 256, 20 Ann. Cas. 879, 92 N. E. 674 (statute); People v. Nesce, 201 N. Y. 111, 94 N. E. 655; Hamilton v. Com. 16 Pa. St. 129, 55 Am. Dec. 485; McCue v. Com. 78 Pa. St. 185, 21 Am. Rep. 7; Com. v. Preston, 188 Pa. St. 429, 41 Atl. 534; State v. Trezevant, 20 S. C. 363, 47 Am. Rep. 840; State v. Jefcoat, 20 S. C. 383.

But as the error, if it is such, occurs after the trial is ended and affects only the sentence, it has been held, in every case in which the matter has been discussed that the proper procedure where the inquiry has not been made is to reverse the judgment as to the sentence only and to send the case back to the trial court for the purpose of having the question propounded and the sentence re-imposed, provided no reason is given for not imposing a sentence. Keech v. State, 15 Fla. 591; State v. Jennings, 24 Kan. 642; James v. State, 45 Miss. 572; Dodge v. People, 4 Neb. 220; Territory v. Herrera, 66 Pac. 523, *overruling* Territory v. Webb, 2 N. M. 147; People v. Nesce, 201 N. Y. 111, 94 N. E. 655 (*modifying* Messner v. People, 45 N. Y. 1); McCue v. Com. 78 Pa. St. 185, 21 Am. Rep. 7; Com. v. Preston, 188 Pa. St. 429, 41 Atl. 534; State v. Trezeant, 20 S. C. 363, 47 Am. Rep. 840; State v. Jefcoat, 20 S. C. 383. See also Keffer v. State, 12 Wyo. 49, 73 Pac. 556. And see the reported case. In People v. Nesce, supra, the court said: "The right of a defendant to speak for himself, after conviction in capital cases, is one of substance and should be carefully guarded. It is the last opportunity that the law affords him of speaking for himself and showing cause, if he is able to do so, why judgment should not be pronounced against him. This right, given by the common law and now incorporated into our statute, compels the courts to accord him the privilege and no court has the right to deprive him of it. The trial, however, terminates with the verdict of the jury.

The statute then steps in and gives the defendant two days' time to determine whether further legal proceedings should be taken in arrest of judgment, unless it should be the last day of the term of court, or he consents to waive the statutory time. . . . The error which was committed in the passing of judgment occurred after the trial and the verdict of the jury. We, therefore, are of opinion that, under the increased powers of this court given by the legislature, it no longer becomes necessary to grant a new trial for errors of this character and that all of the rights of the defendant may be fully protected by a reversal of the judgment and a remitting of the case to the Supreme Court to proceed upon the verdict in accordance with the requirements of the law."

Where it appears by the record that the court "after hearing the defendant" proceeded to pronounce sentence of death it will be assumed that the accused was accorded an opportunity to state why sentence ought not to be pronounced. Edwards v. State, 47 Miss. 581.

It has been held that where an accused person made, and the court heard, motions for a new trial, and in arrest of judgment, and these were the only modes by which a reason could be shown why sentence should not be pronounced, it was held that an opportunity to be heard before sentence was given as a stereotyped question was not necessary. State v. Cheney, Man. Unrep. Cas. (La.) 394.

It has been held that the record in a capital case must show that the question was asked. James v. State, 45 Miss. 572; Messner v. People, 45 N. Y. 1; Dougherty v. Com. 69 Pa. St. 286; McCue v. Com. 78 Pa. St. 185, 21 Am. Rep. 7; Com. v. Preston, 188 Pa. St. 429, 41 Atl. 534. But in Aaron v. State, 39 Ala. 684, it was held that a presumption will arise that the question was asked where the record is silent on the subject.

In Schwab v. Berggren, 143 U. S. 442, 12 S. Ct. 525, 36 U. S. (L. ed.) 218, it appeared that, on appeal, the judgment of a trial court, wherein a sentence of death had been pronounced, was affirmed and that a new day had been fixed for the execution of the defendant, as the day originally fixed had passed. The prisoner was not asked when this new day was named, whether he had anything to say why the sentence should not be pronounced against him, and it was contended that this was error. It was held that the rule of the common law which required the inquiry to be made applied only to the court of original jurisdiction which pronounced the sentence, and not to an appellate court which, on review of the proceedings of the trial court, merely affirmed the final judgment and did not render a new judgment.

In Case Other than Capital.

FELONY.

By the great weight of authority, it is held not to be necessary on conviction of a felony other than a capital offense, to inquire of the defendant whether he has anything to say why judgment shall not be pronounced against him.

Georgia.—Grady v. State, 11 Ga. 253.

Illinois.—Bressler v. People, 117 Ill. 422, 8 N. E. 62; Gannon v. People, 127 Ill. 507, 21 N. E. 525, 11 Am. St. Rep. 147; Harris v. People, 130 Ill. 457, 22 N. E. 826; Gillespie v. People, 176 Ill. 238, 52 N. E. 250; Lamb v. People, 219 Ill. 399, 76 N. E. 576.

Indiana.—McCorckle v. State, 14 Ind. 39; Ayers v. State, 88 Ind. 275; Lillard v. State, 151 Ind. 322, 50 N. E. 383.

Louisiana.—State v. Avery, Man. Unrep. Cas. 257; State v. Sims, 117 La. 1036, 42 So. 494; State v. Taylor, 27 La. Ann. 393, 21 Am. Rep. 561; State v. Bradley, 30 La. Ann. 326; State v. Shields, 33 La. Ann. 991; State v. Askins, 33 La. Ann. 1253; State v. Smith, 33 La. Ann. 1414.

Massachusetts.—Jeffries v. Com. 12 Allen (Mass.) 145.

Michigan.—People v. Palmer, 105 Mich. 568, 63 N. W. 656.

Mississipi.—Jones v. State, 51 Miss. 718, 24 Am. Rep. 658.

New Jersey.—West v. State, 22 N. J. L. 212; Lodge v. State, 24 N. J. L. 456.

New Mexico.—U. S. v. Sena, 15 N. M. 187, 106 Pac. 383.

Oregon.—State v. Sally, 41 Ore. 366, 70 Pac. 396.

Tennessee.—State v. Henry, 6 Baxt. (Tenn.) 539.

The courts which hold this view justify it on the ground that the propounding of such an inquiry is a mere form which can be omitted under modern court practice without depriving a prisoner of any substantial right. Thus in Jeffries v. Com. 12 Allen (Mass.) 145, the court said: "The seventh error assigned is, that there is a total omission on the record of the allocutus, or demand of the defendant 'what he has to say why judgment should not proceed against him.' The attempt to avoid a judgment by a writ of error for such omission is novel in this commonwealth, and is so strongly urged as to require of us a full consideration. As to the practice of propounding such a question, as well as the introduction of the names of the jurors in an indictment, and other forms of proceedings in conducting criminal trials, we must be governed by our own well settled rules, rather than by those of the English courts, or those of the states that have followed the English precedents. No such recital on the record

has been deemed necessary here, nor has such fact usually been stated, except in capital trials. We do not understand that in felonies not capital any formal question corresponding to that stated is required to be put to the defendant upon his conviction by the jury and before sentence. Practically, full opportunity is to be given for assigning reasons why judgment should not proceed against him, and the opportunity is secured by the course of proceedings in each case. Sentence is not pronounced until the party has had ample opportunity to move for a new trial for any proper cause, and to file his exceptions to the rulings in matters of law, or a motion in arrest of judgment. . . . Independently of any practice of our own in this matter, the recitals on this record do show all that can be necessary. They establish the fact either of such demand, or a waiver of it, as the defendant did attempt to show cause why judgment should not proceed against him. He moved the court for a new trial upon the ground that the verdict was against the evidence and against law. He filed successively a motion in arrest of judgment for alleged insufficiency of the indictment, and a bill of exceptions, and upon all these was fully heard." And in People v. Palmer, 105 Mich. 568, 63 N. W. 656, it was said: "Ten days after the conviction, the respondent was brought into court, and sentenced. The record does not show that the respondent was asked what he had to say why judgment should not be pronounced upon him, and for this reason it is urged that the judgment must be reversed, and a new trial ordered. The respondent's counsel was present, and made no objection to the proceeding. There had been ample time to move for a new trial or an arrest of judgment. This was never regarded as essential except in capital cases. . . . Whatever good purpose this practice may have served in England when parties charged with crime were not allowed counsel, it is now a mere idle ceremony." The case of People v. McGeery, 6 Park Crim. (N. Y.) 653, which held that the propounding of the question was not necessary in any case not capital has been made nugatory by statute. See Code Crim. Pro. § 480.

It was held in Territory v. Watanabe Masagi, 16 Hawaii 196, that as no ruling was made by a trial court as to whether the defendants should be asked whether they had anything to say why sentence should not be pronounced, the subject could not be considered on appeal where the only exception taken was to the judgment and no grounds therefor were stated in the bill.

In Ex p. Salge, 1 Nev. 449, it appeared that a prisoner, before sentence, was asked "whether he had any legal cause to show why judgment should not be pronounced." It was held that the omission of the words "on him" was immaterial.

However, in some jurisdictions, it has been held that where the crime for which an accused is to be senteneed is a felony other than a capital offense, it is reversible error not to ask the defendant if he has anything to say before sentence shall be pronounced. Perry v. State, 43 Ala. 21; Crim v. State, 43 Ala. 53; Mullen v. State, 45 Ala. 43, 6 Am. Rep. 691; Croker v. State, 47 Ala. 53; Bryant v. State (Ala.) 68 So. 704; Dougherty v. Com. 69 Pa. St. 286. See also Aaron v. State, 39 Ala. 684; Wright v. State, 103 Ala. 95, 15 So. 506. So far as the cases which hold it to be reversible error not to propound the inquiry to an accused discuss the subject, they decide that the error affects the sentence only and that where it appears that the defendant has not been interrogated the case shall be sent back to the trial court and sentence re-imposed after the inquiry has been made, provided the defendant's answer does not disclose a good reason why he should not be sentenced. Bryant v. State (Ala.) 68 So. 704. See also Spigner v. State, 58 Ala. 421.

In *Nebraska* a statute provides that "before sentence is pronounced the defendant must be informed by the court of the verdict of the jury and asked whether he has anything to say why judgment should not be pronounced against him." This provision has been held to be mandatory and a failure to comply therewith will result in a reversal of the judgment and a remanding of the case for the rendition of a valid judgment. McCormick v. State, 66 Neb. 337, 92 N. W. 606. See also Tracey v. State, 46 Neb. 361, 64 N. W. 1069. In the case first cited, the court said: "While we may question the wisdom of such a statute or doubt that its requirements serve any useful purpose in criminal procedure as conducted in the present age, yet the statute remains to be followed to its provisions, the mandatory character of which cannot be questioned. If the reason for the statute has passed away and become obsolete, and it no longer serves any beneficial purpose, it is for the legislature and not the court to abrogate it. The error in passing judgment on the defendant having occurred subsequent to the verdict of the jury on which the judgment was rendered, the same must be reversed and the cause remanded for the rendition of a valid judgment."

In *Missouri* one section of a statute provides that a defendant must be asked whether he has any legal cause to show why judgment shall not be pronounced against him, and the next succeeding section declares that the first section shall be deemed directory merely if a defendant has been heard on a motion for a new trial or in arrest of judgment in cases

of felony, and in all cases where the crime charged is a misdemeanor, and that the failure to put the inquiry to a prisoner under such circumstances shall not invalidate the judgment or sentence of the court. It has been held in cases of felony that where the provisions of the statute have been complied with as to hearing a motion for a new trial or in arrest of judgment, there is no ground to remand a cause in order to have a prisoner sentenced against, where it appears that he was sentenced without being inquired of as provided for in the statute. State v. Nagel, 136 Mo. 45, 37 S. W. 821; State v. Kanupka, 247 Mo. 706, 153 S. W. 1056. If however, it appears that the question has not been asked, and a prisoner has not been heard on a motion for a new trial or in arrest of judgment, the cause will be remanded with directions to the trial court to bring the defendant into court and to pronounce judgment in accordance with the law. State v. Kile, 231 Mo. 59, 132 S. W. 230. In the early case of State v. Ball, 27 Mo. 324, wherein no allusion was made to a statute on the subject, it was held that the omission to ask a defendant whether he had anything to say before sentence, was unimportant in a case not capital in nature.

Where a statute provides that before sentence a defendant must be asked whether he has anything to say why judgment shall not be pronounced against him, it has been held that where the record in a prosecution for gaming is silent as to whether the inquiry has been made and there is no bill of exceptions showing an omission of the statutory duty, it will not be presumed that there was such an omission, when the matter is not essential to a complete record. Carper v. State, 27 Ohio St. 572. And where the record shows that after the verdict was brought in the prisoner made a motion in arrest of judgment and another for a new trial, which motions were overruled by the court, it will be presumed that the question was in substance propounded to him. Spigner v. State, 58 Ala. 421.

Where it is not required that a sentence shall show that before it was pronounced a statute requiring the asking of a defendant whether he had anything to say why sentence should not be pronounced against him, has been complied with, and it does not appear that the prisoner has been refused the privilege of the question and the right to answer it in a legal manner, it will be presumed that the trial court has obeyed the directions of the law in pronouncing the sentence. Johnson v. State, 14 Tex. App. 306.

It has been held that conduct amounting to a waiver of the statutory right of a defendant to have the question asked was shown where it appeared that the prisoner and her counsel agreed that, to save time, she should be sentenced immediately after a plea of guilty. Hill v. State, 9 Okla. Crim. 629, 132 Pac. 950.

In State v. Ross, 32 La. Ann. 854, it was held that a prisoner had no right to complain because the clerk of the court instead of the judge put the question.

In Reynolds v. State, 68 Ala. 502, it appeared that a defendant who had been convicted of manslaughter was sentenced without having been inquired of as to whether, he had anything to say why judgment should not be pronounced against him. This irregularity was pointed out to the court and the prisoner was recalled to the bar and sentenced again. It was held that he had no right to complain of such a proceeding, which although irregular, infringed none of his rights.

In *California* a statute provides that in felony cases the defendant "must be informed by the court, or by the clerk under his direction, of the nature of the charge against him, and of his plea, and the verdict, if any, thereon, *and must be asked whether he has any legal cause to show why judgment should not be pronounced against him.*" It has been held that these provisions are mandatory and must be complied with substantially, and where it appears that such a procedure was not carried out, although the minutes of the trial erroneously state to the contrary, orders denying motion to vacate the judgment and to correct the minutes will be reversed and the cause remanded with directions to the trial court to arraign the defendant again for judgment. People v. Walker, 132 Cal. 137, 64 Pac. 133.

MISDEMEANOR.

The law is settled that in misdemeanor cases there is no need of asking a defendant before sentence whether he has any legal cause to show why judgment shall not be pronounced against him. Turner v. U. S. 66 Fed. 289, 30 U. S. App. 104, 13 C. C. A. 445; Hancock v. Rogers, 140 Ga. 688, 79 S. E. 558. State v. Lund, 51 Kan. 1, 32 Pac. 657.

Where a statute declares that a defendant must be asked, before sentence, whether, he has any legal cause to show why judgment shall not be passed against him, and it is further provided that in misdemeanor cases a failure to comply with such a law "shall not invalidate the judgment or sentence of the court" it has been held that on a conviction for the misdemeanor of selling intoxicating liquor unlawfully it is not necessary to make the statutory inquiry of the prisoner. State v. Clinkenbeard, 232 Mo. 539, 134 S. W. 537.

And where a statute provides that a defendant must be asked whether he has any

legal cause to show why judgment shall not be pronounced against him, and also that in a conviction for misdemeanor judgment may be pronounced in his absence, it has been held that a failure to ask one who has been convicted of a misdemeanor whether he has any legal cause to show why judgment shall not be pronounced against him, is not reversible error. People v. Kaminsky, 208 N. Y. 389, 102 N. E. 515, *affirming judgment* 137 App. Div. 941, 122 N. Y. S. 687.

It has been held that in a trial for a misdemeanor the record need not show that a defendant has been asked if he has any legal cause to show why judgment shall not be pronounced against him. State v. Stiefle, 13 Ia. 603.

TANNER

v.

SINALOA LAND AND FRUIT COMPANY.

Utah Supreme Court—May 8, 1913.

43 Utah 14; 134 Pac. 586.

Partnership — Power of Partner to Bind Firm.

Where two of three partners, engaged in forming a corporation, to take over land on which they had an option, assure purchasers of interests therein that the partnership will attend to the detail work and bear the expense of forming a corporation to take over the land, such agreement is within the scope of the firm business and is binding upon the third partner.

[See 12 Am. St. Rep. 304.]

Corporations — Liability on Contracts of Promoters.

Where plaintiff, one of three partners engaged in selling interests in a tract of land on which they had an option and in organizing a corporation to take over such land, prepared the articles of incorporation without any promise that he would be paid therefor or without any assumption of liability therefor by the directors, which service was more in the interests of the partnership than of the corporation, he must be assumed to have rendered such services in pursuance of a representation by his partners that the incorporation would be without expense to purchasers, so that he cannot recover therefor against the corporation; since, while a corporation may adopt the contracts of its promoters, especially those necessary to effect its creation, promoters cannot, in the absence of any adoption of their acts, bind the corporation by their contracts made before it was incorporated.

[See note at end of this case.]

Corporate Employees — Right to Compensation for Extra Services.

Plaintiff, while drawing a salary of $100 per month as general manager of a corporation which he with others had organized to take over land on which they had an option, is not entitled to compensation for his services in preparing or copying a contract for use by the corporation, since these services are such as a business manager is ordinarily expected to perform for his company.

[See 7 R. C. L. tit. *Corporations*, p. 464; 136 Am. St. Rep. 922.]

Appeal from District Court, Salt Lake county: RITCHIE, Judge.

Action by H. S. Tanner, plaintiff, against Sinaloa Land and Fruit Company, defendant. Judgment for plaintiff. Defendant appeals. REVERSED.

[15] H. S. Tanner, plaintiff herein, and two other parties, C. D. Harding and J. M. Barlow owned and held an option on [16] a tract of land containing 4,338 acres situate in the State of Sinaloa, Republic of Mexico. These parties, preparatory to forming a corporation to take over the land at a price that would insure them a profit of more than $13,000 on the deal, solicited and procured purchasers each of whom purchased a small equitable interest in the option referred to in the bill of exceptions as "acre interests." At the time these various parties subscribed for and purchased interests in the option, they, in connection with the promoters Tanner, Harding, and Barlow, signed a written agreement referred to in the bill of exceptions as the "subscription list" which, so far as material here, is as follows:

"It is understood and agreed that said 4,338 acres of land represents 4,338 undivided acre parts, and that each undivided acre part free from incumbrance shall cost the subscriber $5.50, 50 per cent. of said amount to be paid upon demand and the balance to be paid in 60 days from date of this agreement. The undersigned hereby agrees that upon the completion of the subscription to the above acre parts a corporation shall be organized to receive and hold title to above said land, also to develop or sell said land for the benefit of these subscribers. It is further understood that upon the completion of above said subscription a meeting of the subscribers shall be called to elect the officers of the corporation and determine the purposes of the organization and the general nature of the business to be transacted."

In July, 1908, a corporation, defendant herein, was organized. Each subscriber to the foregoing agreement thereby became en-

titled to have issued to him shares of the captial stock of the corporation in lieu of the interests purchased by him in the land mentioned. H. S. Tanner, plaintiff, was sworn as a witness and testified in part as follows:

"There were in the neighborhood of 50 subscribers (for acre interests in the land). . . . The land was turned over at $5.50 an acre. The compensation received by Mr. (H. S.) Tanner, Harding, and Barlow was $3 per acre. We sold the land to the company (corporation) at a flat acreage rate. We were responsible for the turning over of [17] the land to the company, and the company was responsible to us for $5.50 per acre."

The amount of the individual subscriptions for interests in the option varied from 10 to 300 "acre interests." Plaintiff retained 300 acre interests for himself, and when the corporation was formed he was made a director and also president of the company. Plaintiff, a short time after the incorporation of the company, was made its general manager. It appears that plaintiff, who is an attorney at law, assisted in preparing and drafting the articles of incorporation under and in pursuance of which the company became incorporated. Regarding the circumstances under which the articles of incorporation were prepared and drafted, plaintiff testified in part as follows:

"I don't know who it was that suggested that I prepare the articles, but it was suggested at the first meeting that I prepare them. . . . Submitted them to Mr. Jones (defendant's counsel herein), who was interested, to see if they suited him; and there were one or two provisions that he suggested some changes in; and also to Mr. Shipp (a stockholder in the corporation), . . . and he suggested some changes. I think Mr. Kimball likely made some suggestions. . . . Then I talked over these different provisions with various members, that is, the contemplated members of the company—the stockholders—to get their views . . . to see if the articles I had prepared met their views. And I drafted the articles some two or three times, and worked out the provisions in detail of different articles before they were finally acceptable to all concerned."

A short time after the company was organized and office rooms secured for the transaction of its business, plaintiff made out a bill of $250 against the company for legal services performed in preparing the articles of incorporation and placed the account on file with other bills of the company in the company's desk, and according to his testimony to which we shall refer later on, it was not presented to the company for more than three months thereafter. When the bill was finally presented to the company for payment, one [18] of the board of directors was absolutely opposed to paying it. The other four directors, of whom plaintiff was one, neither allowed nor rejected the claim, and its consideration was postponed from time to time, and finally it was rejected by the board of directors and payment refused on the ground that it was not a proper charge against the company. The board of directors some time in August, 1908, during the time plaintiff was president, general manager and a director, adopted for use by the corporation in its business a certain contract which it copied from a form of contract that seems to have been in general use in the section of the country in which the company was carrying on its operations and doing business. This contract was designated in the bill of exceptions as "guaranteed harvest certificates." For services rendered in preparing this contract plaintiff charged the corporation $50. He did not present this claim to the company for payment until a short time before the commencement of this action. The company refused to pay the bill or any part thereof. Plaintiff, on cross-examination, testified concerning that transaction in part as follows:

"Q. Now, isn't it a fact that Shipp and Kimball (two of the directors, one of whom, Shipp, was an attorney at law) did more in the preparation of these harvest share certificates than you did? A. So far as the certificates are concerned, they did the supervision of them. I simply did the legal work. . . . Q. Didn't you in fact think out, shape up, and form this harvest share certificate? A. No, sir; I did not. They used a general form of that from some other company. I do not remember now which it was taken from. . . . I made no claim to the conception of the form of that draft or printing, whatever you call it, on that contract. It was the legal work. . . . Q. As a matter of fact, Mr. Tanner, didn't you substantially copy, or cause to be copied, the form almost verbatim of the Mexican Rubber Company for this certificate? A. I rather think so. Q. Well, I put in your hand this blank form of Mexican Rubber Company's harvest share certificate and ask you to examine it and see whether the face of the contracts are not the same with a difference of the names. A. [19] It is practically the same. . . . Q. You were in the employ of this company—the defendant corporation—for a few months shortly after its organization and drew a salary as its manager, did you not? A. In the fall succeeding its organization I was manager and drew a salary of $100 a month as manager of the company for three months. Q. Did you ever make the presentation of either of these claims (referring to

the claim for preparing the articles of incorporation and copying the contract mentioned) to the directors while you were manager and drew that salary? A. I did not. . . . Q. But no one ever promised to pay it (claim for preparing articles of incorporation), did they? A. No, sir."

Harding and Barlow, who were associated with Tanner in promoting the land deal, were called as witnesses for defendant and testified that it was expressly agreed between them and Tanner that no charges should be made against the prospective stockholders or the company when incorporated for any services rendered by them or either of them in organizing the corporation. And much evidence was introduced tending to show that plaintiff had but little, if anything, to do with the copying and the adoption by the corporation of the guaranteed harvest share certificates. This evidence was, in general terms, denied by plaintiff. The evidence, however, without conflict, does show that, after plaintiff, Harding, Kimball, Shipp, Jones and other prospective stockholders had decided upon the draft or form of the articles of incorporation, N. V. Jones employed at his own expense a Miss Dansie to copy (typewrite) them.

Some time in June, 1909, N. V. Jones succeeded Tanner as president and general manager of the company. The company, on or about November 1, 1911, levied an assessment of four dollars per share on its outstanding capital stock. This (the company's fourth assessment) was made payable December 6, 1911. Plaintiff owned 101 shares of stock. His assessment was therefore $404. He made a demand on the company that his claims for legal services above referred to, amounted to $350, with interest thereon from August, 1908, be allowed, and that the same be paid by giving him credit [20] for that amount on the assessment made on his stock. This the company refused to do, whereupon plaintiff commenced this action. Before the cause was tried plaintiff's stock was advertised, sold, and bought in by the company for the assessment. Plaintiff thereupon filed a supplemental complaint setting forth the facts leading up to and which culminated in the sale of his stock as above stated. The relief prayed for in his complaint is "that it be ascertained, decreed, and determined that the defendant, at the time this action was commenced, was indebted to plaintiff in the sum of $444, and that the plaintiff is entitled to have so much thereof as is necessary credited against any demand the defendant may have against the plaintiff on account of the assessment levied on the capital stock, . . . and the said pretended sale of the said stock by the defendant . . . be set aside, and that plaintiff's title to said stock be declared and adjudged good and valid."

The court, so far as material here, found that plaintiff prepared "the articles of incorporation of defendant company, . . . and that said service was reasonably worth the sum of $250," and that he prepared the "guaranteed harvest certificate," and that "said service was reasonably worth the sum of $50." As a conclusion of law the court found "that plaintiff is entitled to judgment against the defendant for $380.13 to be credited and offset against the defendant's demand of $405.40 against the plaintiff." Judgment was rendered in favor of plaintiff in accordance with the prayer of his complaint and the foregoing conclusion of law. Defendant appeals.

N. V. Jones for appellant.
D. D. Houtz for respondent.

McCARTY, C. J. (*after stating the facts*). —Counsel for appellant contends with much earnestness that the judgment is not only unsupported by, but is contrary to, the evidence, and that it is against law. Viewing the facts in the light most favorable to respondent, they wholly fail to establish any legal liability on the part of the corporation for the services which he claims that he rendered it in preparing the articles of incorporation and the contracts mentioned in the foregoing statement of facts. We will first consider the [21] merits of the claim of respondent for $250 for services which he claims he rendered the corporation in preparing the articles of incorporation. The record shows that, after respondent Harding and Barlow obtained the option on the land mentioned in the above statement of facts, they, the three promoters, formed a partnership for the purpose of disposing of the option in small interests to prospective purchasers; each of the three partners retaining a small interest therein. Harding and Barlow did most of the soliciting for purchasers in their business ventures, and they represented to the parties whom they solicited and induced to purchase interests in the land covered by the option that the partnership, comprising Tanner, Harding, and Marlow, would attend to the incorporation of the company, and that each purchaser "would receive his stock without any additional expense." On this point, Harding testified: "The stockholders looked to the partnership to have the company incorporated. Q. How do you know they did? A. We represented it that way. Q. Who did? A. Mr. Barlow represented it." Mr. Barlow testified, in part, as follows: "I will further state that we so informed the members on that point; at least I did, and I am satisfied Mr. Harding did, because we worked together a great deal." And again he said: "I will state

further that we so told these subscribers that they should secure their stock without any further expense."

It thus appears that at least two of the three members of the partnership agreed with a considerable number of the subscribers for interests in the land covered by the option that the partnership would attend to the detail work and bear the expense of forming a corporation to take over the land mentioned. This agreement being within the scope of the partnership business, Tanner, respondent, was bound thereby; he being a member of the partnership in whose interest the agreement was made. Respondent, in answer to the following question. "You three (Tanner, Harding, and Barlow), wasn't it a part of your plan and scheme to incorporate so as to turn the land over to the company and [22] thereby make your profit?" said, "That is what we did." While respondent testified that he prepared the articles of incorporation at the request of some of the subscribers, parties who had purchased interests in the land covered by the option, and with the expectation of being paid a reasonable fee for his services, he nevertheless admitted that no one promised him that he would be paid for the work. Nor is there any evidence tending to show that the board of directors, by resolution or otherwise, assumed the payment of the obligation, if it can, under the circumstances, be called an obligation. There is a conflict in the authorities regarding the circumstances under which a corporation is or may become liable for contracts entered into by its promoters before the corporation comes into existence. Some courts have held that services rendered in the drawing and filing of the articles of incorporation and the expenses necessarily incurred in its creation are proper charges against a corporation, provided the services were rendered and the expenses incurred with the understanding and expectation that they would be paid for by the company when incorporated. Low v. Connecticut, etc. R. Co. 45 N. H. 370; Farmers' Bank v. Smith, 105 Ky. 816, 49 S. W. 810, 88 Am. St. Rep. 341; Freeman Imp. Co. v. Osborn, 14 Colo. App. 488, 60 Pac. 730.

It has also been held that, in order to bind a corporation by contracts made in its behalf before it comes into existence, the making of such contracts must be authorized by at least a majority of the promoters. Bell's Gap R. Co. v. Christy, 79 Pa. St. 54, 21 Am. Rep. 39; Tift v. Quaker City Nat. Bank, 141 Pa. St. 550, 21 Atl. 660.

The great weight of authority, however, holds that parties who undertake to organize a corporation cannot bind the corporation by their contracts and agreements made before the company is incorporated. The authorities, however, practically all agree that a corporation may by corporate action adopt the contracts of its promoters, especially those that were necessary to effect its creation. In Cook on Corporations, section 707, the author says:

[23] "Great difficulty has arisen in determining whether a corporation is liable on contracts made in its behalf by its promoters before the incorporation took place. The decided weight of authority holds that the corporation is not bound thereby. Any other rule would be dangerous in the extreme, inasmuch as promoters are proverbially profuse in their promises, and, if the corporation were to be bound by them, it would be subject to many unknown, unjust, and heavy expenses. The only protection of the stockholders, and of subsequent corporate creditors, against such a result lies in the rule that the corporation is not bound by the contracts of its promoters. The rule is just and should not be weakened. . . . It is entirely legal, however, for the corporation to ratify, confirm, or adopt the contracts of its promoters. A promoter's contract may be adopted by the corporation in any way in which a contract may be made by the corporation."

In 10 Cyc. 262, 263, the rule is stated as follows:

"Those who undertake to organize a corporation are not in any sense its agents before it comes into existence. They cannot affect it by their declarations or representations, or bind it by their engagements made in its behalf; but after coming into existence the corporation may make their engagements its own by express agreement or by ratification; and this ratification or adoption may be by express corporate action or by any of the other modes by which corporations may ratify or adopt the unauthorized or officious acts of others made in their behalf, as where the corporation voluntarily accepts the benefits accruing to it from the engagement of its promoters, after full knowledge, and having full liberty to decline the same."

In 1 Cl. & Mar. Pri. Corps. section 101a, it is said:

"Since a corporation has no existence, and cannot have an agent, until it has been created or organized, to such an extent, at least, as to become a corporation *de facto*, it necessarily follows that until then it cannot engage in business or enter into a contract. Its promoters are not its agents, and cannot contract for it. A corporation, therefore, when it has been organized, and has thus acquired corporate existence, is not liable upon a contract made by its promoters, or by agents appointed by them, before its organization, even though the contract may have been made in its name and with the understanding that it would perform the same, unless it

has expressly or impliedly ratified or adopted the same since its organization, or unless liability is imposed upon it by its charter or by some other statute. It can make no difference in the application of this principle that the promoters who made the contract are the [24] only stockholders or members of the corporation; for the corporation, as we have seen, is a legal entity and artificial person distinct from its stockholders or members as individuals."

In Tuttle v. George A. Tuttle Co. 101 Me. 287, 64 Atl. 496, 8 Ann. Cas. 260, this rule, which is a wholesome one and which rests upon sound legal principles, is tersely stated in the following language:

"A corporation is not liable in the absence of ratification or adoption or of a charter or statutory provision imposing liability, for the salary of a superintendent or other person for services performed for it before its organization under a contract made by its promoters, although the contract may have been made on its behalf and with the understanding that it should be bound, and although the promoters who made it have become its stockholders and officers."

This doctrine was recognized and followed by this court in the case of Wall v. Niagara Min. etc. Co. 20 Utah 474, 59 Pac. 399. See, also, Long v. Citizens' Bank, 8 Utah 104, 29 Pac. 878; Schreyer v. Turner Flouring Mills Co. 29 Ore. 1, 43 Pac. 719; Sullivan v. Detroit, etc. R. Co. 135 Mich. 661, 98 N. W. 756, 64 L.R.A. 673, 106 Am. St. Rep. 403; Rockford, etc. R. Co. v. Sage, 65 Ill. 328, 16 Am. Rep. 587.

We invite attention to a somewhat elaborate discussion of the subject found in a note to Tuttle v. Tuttle, supra, reported in 8 Ann. Cas. 262, where the leading English and many American cases are cited in which the doctrine as announced in Tuttle v. Tuttle is upheld. The annotators in their discussion of the question say:

"Prior to its existence a corporation can have no agents or representatives, and it would be impossible for a promoter to bind the corporation by contracts made prior to its incorporation. The courts of law have uniformly held that a corporation is not bound to perform a contract entered into by its promoters on its behalf and in contemplation of its organization. And the corporation afterwards formed will not be held liable in law on such contracts, unless there can be shown some intervening circumstances occurring subsequently to the incorporation that would impose the liability. . . . While a contract entered into between the promoters of a proposed corporation and third parties has no binding effect upon the corporation thereafter formed, yet it usually lies within the power of the corporation to adopt the contract and thereby to make, in effect, a new contract with such third parties."

[25] Applying the foregoing principle of law to the facts in this case viewed in the light most favorable to the respondent, it necessarily follows that he cannot recover from appellant for services rendered in preparing the articles of incorporation. Moreover, the record affirmatively shows that there was no agreement whatever to the effect that the corporation should pay respondent for those services. And it further clearly appears that the purpose of these three promoters, respondent, Harding, and Barlow, in organizing the corporation, was, primarily, to create a purchaser for the land covered by their option. From the sale of this land to the corporation the partnership expected to and did in fact realize a profit of more than $13,000. Therefore what these parties did towards organizing a corporation was more in the interest of the partnership than it was in the interest of the prospective stockholders. In other words, the creating of the corporation, so far as they were concerned, was merely carrying out the scheme of the partnership by which it intended to and in fact did dispose of the land mentioned. And the undisputed evidence shows that in furtherance of this scheme respondent's copartners, Harding and Barlow, as an inducement to others to subscribe and pay for interests in the land covered by the opinion, promised these prospective stockholders that when the corporation was organized they should receive their pro rata of shares of the capital stock without cost other than the price paid for the respective interests. Therefore whatever service were rendered by respondent in organizing the corporation must be deemed to have been rendered in pursuance of that agreement, and under no rule of law can the services be held to be a proper charge against the corporation.

We are also of the opinion that respondent's claim for services rendered in the copying or having copied the "guaranteed harvest certificates" is as groundless as his claim for services rendered in the drawing up of the articles of incorporation. As we have pointed out in the foregoing statement of facts, the services rendered by him in preparing the certificates were rendered during the time he was president and general manager of the company. And [26] the evidence shows that during the time he was drawing a salary of $100 per month as general manager of the company at least a portion of the services was rendered. Furthermore, his own evidence, which we have set forth in the statement of facts, shows that about all respondent did in the preparation of the certificates was to see to it that copies were

made from a form furnished by him by two of the directors. On direct examination respondent testified on this point as follows:

"I prepared these contracts; that is, the legal part of them. Mr. Kimball and Shipp prepared the form of the paper."

It thus clearly appears from his own testimony that the services were of the character that a business manager would ordinarily be expected to perform for his company.

The judgment is reversed. The admitted facts in this case absolutely preclude respondent from recovering anything from the corporation for the services alleged in the complaint or any part thereof. The trial court is therefore directed to dismiss the action. Cost to appellant.

Straup and Frick, JJ., concur.

NOTE.

Liability of Corporation to Third Parties on Contracts of Its Promoters.

Introductory, 105.
At Law, 105.
In Equity, 106.
Adoption of Contract by Corporation, 106.
Liability Imposed by Charter, 109.

Introductory.

It is the purpose of this note to discuss the recent cases involving the liability of a corporation to third persons on the contracts of its promoters. The earlier cases are collected in the notes to Tuttle v. George A. Tuttle Co. 8 Ann. Cas. 260, and Moore, etc. Hardware Co. v. Towers Hardware Co. 13 Am. St. Rep. 23.

At Law.

At law a corporation is not liable to third persons on the contracts of its promoters entered into in its behalf. Previous to incorporation, as it has no existence, it can have no representatives and cannot be bound. The occurrence of some intervening circumstance after incorporation is necessary to impose liability.

England.—Kelner v. Baxter, L. R. 2 C. P. 174; North Sydney Invest, etc. Co. v. Higgins, [1899] A. C. 263.

Canada.—See Clergue v. Humphrey, 31 Can. Sup. Ct. 66; Thomson v. Feeley, 41 U. C. Q. B. 229; Crane v. Lavoie, 22 Manitoba L. Rep. 330, 4 Dominion L. Rep. 21 West L. Rep. 313.

United States.—Weiss v. Arnold Print Works, 188 Fed. 688; Kline v. Royal Ins. Co. 192 Fed. 378; In re Ballou, 215 Fed. 810. See also In re Quality Shoe Shop, 212 Fed. 321.

California.—Peek v. Steinberg, 163 Cal. 127, 124 Pac. 834; Rideout v. National Homestead Assoc. 14 Cal. App. 349, 112 Pac. 192.

Florida.—See Sumner-May Hardware Co. v. Scally, 66 Fla. 93, 62 So. 900.

Georgia.—Mitchell v. Gifford, 133 Ga. 823, 67 S. E. 197.

Indiana.—Cushion Heel Shoe Co. v. Hartt, 181 Ind. 167, 103 N. E. 1063, 50 L.R.A.(N.S.) 979.

Iowa.—See Marshalltown First Nat. Bank v. Church Federation, 129 Ia. 268, 105 N. W. 578.

Missouri.—Van Noy v. Central Union F. Ins. Co. 168 Mo. App. 287, 153 S. W. 1090; Quinn v. American Bankrs' Assur. Co. 183 Mo. App. 8, 165 S. W. 823. See also Richard Brown, etc. Contracting Co. v. Bambrick Bros. Const. Co. 150 Mo. App. 505, 131 S. W. 134; Taylor v. St. Louis Nat. L. Ins. Co. 181 S. W. 8.

New Jersey.—Atlantic City R. Co. v. Wood, 78 N. J. Eq. 298, 81 Atl. 1132, *affirming* decree Seacoast R. Co. v. Wood, 65 N. J. Eq. 530, 56 Atl. 337; Hudson Milling Co. v. Higgins, 85 N. J. L. 268, 88 Atl. 1079.

New York.—Horowitz v. Broads Mfg. Co. 54 Misc. 569, 104 N. Y. S. 988.

Pennsylvania.—See Fell v. Schlieper, 21 Pa. Dist. 989. *Compare* Girard v. Case Bros. Cutlery Co. 225 Pa. St. 327, 74 Atl. 201.

Texas.—American Home L. Ins. Co. v. Jenkins, 138 S. W. 424; Exline-Reimers Co. v. Love Star L. Ins. Co. 171 S. W. 1060. See also Commonwealth Bonding, etc. Ins. Co. v. Thurman, 176 S. W. 762.

Utah.—See the reported case.

Virginia.—*Compare* Strause v. Richmond Woodworking Co. 109 Va. 724, 65 S. E. 659, 132 Am. St. Rep. 937.

Thus in Peek v. Steinberg, 163 Cal. 127, 124 Pac. 834, the court said: "It is quite apparent that the judgment against The Greater City Lumber Company cannot be sustained. The Corporation was not a party to the agreement, and the writing, on its face, did not assume to bind any one but the three individuals who executed it. The concluding words of the paper indicate that the signers contemplated that a further contract, between Peek and the corporation, should be made. But it is not alleged that this provision was carried out." And in Cushion Heel Shoe Co. v. Hartt, 181 Ind. 167, 103 N. E. 1063, it was said: "It is certain that, under ordinary circumstances, a corporation cannot be sued successfully on a contract made for its benefit by its projectors before its corporation. Contracts of this character, however, are not void but voidable and it is well settled in nearly all jurisdictions that in so far as they are not ultra vires, such contracts may become binding on the corporation if

ratified by it, either expressly or by implication, after its organization." So in Quinn v. American Bankers' Assur. Co. 183 Mo. App. 8, 165 S. W. 823, the court said: "The rule is, that although the corporation can incur no liability until it has an existence—that is, until the breath of corporate life is infused into it—for that, until then it may have no authorized agent to enter into contracts, it may nevertheless subsequently, when the organization is complete, adopt obligations created for its benefit by the promoters." Likewise in Sumner-May Hardware Co. v. Scally, 66 Fla. 93, 62 So. 900, it was said: "The settled general rule is that contracts made for a corporation by its promoters prior to its creation are not enforceable by or against the corporation after its organization." But in Strause v. Richmond Woodworking Co. 109 Va. 724, 65 S. E. 659, 132 Am. St. Rep. 937, wherein the evidence consisted of oral statements and correspondence tending to show the intentions of the contracting parties as to the liability for supplies furnished to a corporation, the trial court gave an instruction to the jury directing their attention to the written evidence only, ignoring the oral testimony and authorizing a verdict on this evidence. Holding the giving of that instruction to be reversible error, the appellate court said: "Upon the soundest reasoning, the tendency of the courts in recent years is to an adherence to the doctrine, that those dealing with promoters should be left with the double security of the promoter and the company when one is formed, unless it clearly appears that the liability of the promoter was not intended, or that it was intended to be released when the liability of the corporation began."

In Equity.

In equity the courts refuse to enforce against a corporation a contract made on its behalf by its promoters, unless there appears to be some sound equitable reason demanding its enforcement. Bloom v. Home Ins. Agency, 91 Ark. 367, 121 S. W. 293; Bobzin v. Gould Balance Valve Co. 140 Ia. 744, 118 N. W. 40; Pond v. Atlantic Terra Cotta Co. 137 App. Div. 671, 122 N. Y. S. 425; Weathersby v. Texas, etc. Lumber Co. (Tex.) 146 S. W. 243, 180 S. W. 735. See also Hawkeye Gold Dredging Co. v. State Bank, 157 Fed. 253; In re Lance Lumber Co. 224 Fed. 598; Mantle v. Jack Waite Min. Co. 24 Idaho 613, 135 Pac. 854, *affirmed on rehearing* 24 Idaho 639, 136 Pac. 1130; Swarthmore Lumber Co. v. Parks, 72 W. Va. 625, 79 S. E. 723. Thus in Bond v. Atlantic Terra Cotta Co. 137 App. Div. 671, 122 N. Y. S. 425, the court said: "The law is well settled that the promoters could make no contract for the corporation and that it came into existence unfettered by any contract obligations, and could become bound by said agreement only by subsequent acts of its board of directors or officers within the apparent scope of their duties by ratifying or accepting or adopting it."

Adoption of Contract by Corporation.

A contract entered into between the promoters of a proposed corporation and third persons is not binding on the corporation thereafter formed, but it usually lies within the power of the corporation to adopt the contract and thereby make, in effect, a new contract with such persons. Bloom v. Home Insurance Agency, 91 Ark. 367, 121 S. W. 293; Peek v. Steinberg, 163 Cal. 127, 124 Pac. 834; McCally v. Blue Ribbon Gum Co. 173 Ill. App. 66; Van Noy v. Central Union F. Ins. Co. 168 Mo. App. 297, 153 S. W. 1090; Quinn v. American Bankers' Assur. Co. 183 Mo. App. 8, 165 S. W. 823; Stilwell v. Spokane Alarm Co. 66 Wash. 703, 120 Pac. 85. And see the reported case. See also Rideout v. National Homestead Assoc. 14 Cal. App. 349, 112 Pac. 192; Mitchell v. Gifford, 133 Ga. 823, 67 S. E. 197; Henry Gold Min. Co. v. Henry, 25 Idaho 333, 137 Pac. 523; Marshalltown First Bank v. Church Federation, 129 Ia. 268, 105 N. W. 578; Teeple v. Hawkeye Gold Dredging Co. 137 Ia. 206, 114 N. W. 906; Richard Brown, etc. Contracting Co. v. Bambrick Bros. Const. Co. 150 Mo. App. 505, 131 S. W. 134; American Home L. Ins. Co. v. Jerkins (Tex.) 138 S. W. 424. Thus in McCally v. Blue Ribbon Gum Co. 173 Ill. App. 66, it appeared that the plaintiff, an attorney at law, brought suit for money paid out and services rendered at the request of two promoters. It was shown by the minutes of the corporation that at the first meeting of directors, held four days before the company was authorized to do business, the secretary by a vote was instructed to "draw an order on the treasurer for the payment of all bills for expense of incorporating, for the sale of certificates of stock and records incidental thereto." Following this was a statement, not dated, signed by the full board of directors, that "the above and foregoing minutes are hereby ratified, affirmed and approved." The court said: "The foregoing facts are sufficient to evidence the adoption and assumption by the company of the indebtedness due plaintiff, and the judgment is therefore affirmed."

The English and Canadian rule is that a contract made by a promoter with third persons cannot be adopted by the corporation after its creation, but that the corporation must enter into a new and original contract

in order to be bound. Kelner v. Baxter, L. R. 2 C. P. 174; North Sydney Invest. etc. Co. v. Higgins [1899] A. C. 263. See also Thomson v. Feeley, 41 U. C. Q. B. 229; Crane v. Lavoie, 22 Manitoba L. Rep. 330, 4 Dominion L. Rep. 175, 21 West. L. Rep. 313. Thus in Kelner v. Baxter, L. R. 2 C. P. 174, Erle, C. J., said: "I agree that if the Gravesend Royal Alexandra Hotel Company had been an existing company at this time, the persons who signed the agreement would have signed as agents of the company. But as there was no company in existence at the time, the agreement would be wholly inoperative unless it were held to be binding on the defendants personally. The cases referred to in the course of the argument fully bear out the proposition that, where a contract is signed by one who professes to be signing 'as agent,' but who has no principal existing at the time, and the contract would be altogether inoperative unless binding upon the person who signed it, he is bound thereby: and a stranger cannot by a subsequent ratification relieve him from that responsibility. When the company came afterwards into existence it was a totally new creature, having rights and obligations from that time, but not rights or obligations by reason of anything which might have been done before. It was once, indeed, thought that an inchoate liability might be incurred on behalf of a proposed company, which would become binding on it when subsequently formed: but that notion was manifestly contrary to the principles upon which the law of contract is founded. There must be two parties to a contract; and the rights and obligations which it creates cannot be transferred by one of them to a third person who was not in a condition to be bound by it at the time it was made." And in North Sydney Invest. etc. Co. v. Higgins [1899] A. C. 263, the court said that it did "not think that the adoption and confirmation by directors of a contract made before the formation of the company by persons purporting to act on behalf of the company creates any contractual relation whatever between the company and the other party to the contract, or imposes any obligation whatever on the company towards that party."

An express ratification was held to be necessary in Cushion Heel Shoe Co. v. Hartt, 181 Ind. 167, 103 N. E. 1063, wherein it was contended that the corporation was bound on an implied contract by an acceptance of the benefits of the services rendered. The court said: "We believe that the better reason and the weight of authority support the holding that, in the absence of statutory or charter provisions, a corporation will be held liable for services rendered by its promoters before incorporation only when, by express action taken after it has become a legal entity, it recognizes or affirms such claim." However, in Van Noy v. Central Union F. Ins. Co. 168 Mo. App. 287, 153 S. W. 1090, the court said: "After becoming a legal entity the corporation has the option of repudiating contracts for its benefit made by its promoters and the exercise of such option may be manifested as well by the acceptance and retention of the benefits of such contract as by an express formal ratification." And in the case of In re Quality Shoe Shop, 212 Fed. 321, it appeared that a promoter, already engaged in the sale of shoes, intending that the corporation should take over his business entered into a lease for the premises occupied on behalf of the corporation. Holding that the lease was impliedly ratified by the corporation, the court said: "The lease was never formally assigned to the corporation, and the corporation never accepted it by any formal official action. But neither of these steps was essential. The substance and reality of this family transaction appear to be plain enough. When Cohen signed the lease, he was acting as promoter and agent of a corporation then on the point of being formed, and (while he may have bound himself also by the execution of the lease) I have no doubt that he intended to bind the corporation, and I find as a fact that he was acting in its behalf. That the corporation could ratify this previously unauthorized act done for its benefit is a proposition that needs no citation of authority to support it; and that such ratification might be proved by the company's conduct as completely as by a formal corporate act is I think equally plain." See to the same effect, Central Trust Co. v. Lappe, 216 Pa. St. 549, 65 Atl. 1111.

Where a contract is made by promoters, in behalf of and for the benefit of a corporation to be formed thereafter, and the corporation after its organization, with full knowledge of all the facts, enters into the enjoyment of the contract or receives the benefits accruing thereunder, it will be held liable as on an original contract. The corporation cannot accept and retain the benefits of the contracts of its promoters without taking on itself the burdens and liabilities thereof. Hawkeye Gold Dredging Co. v. State Bank, 157 Fed. 253; In re Ballou, 215 Fed. 810; Mantle v. Jack Waite Min. Co. 24 Idaho 613, 135 Pac. 854, *affirmed on rehearing* 24 Idaho 639, 136 Pac. 1130; Maryland Apartment House Co. v. Glenn, 108 Md. 377, 70 Atl. 216; Bobzin v. Gould Balance Valve Co. 140 Ia. 744, 118 N. W. 40; Van Noy v. Central Union F. Ins. Co. 168 Mo. App. 287, 153 S. W. 1090; Pearsall v. Tennessee Cent. R. Co. 2 Tenn. Ch. App. 682. See also Jones v. Allert, 161 Cal. 234, 118 Pac. 794; Exline-Reimers Co. v.

Lone Star Ins. Co. (Tex.) 171 S. W. 1060. *Compare* Cushion Heel Shoe Co. v. Hartt, 181 Ind. 167, 103 N. E. 1063. Thus in Hawkeye Gold Dredging Co. v. State Bank, 157 Fed. 253, the court held that where promoters have purchased property before incorporation, on a transfer and acceptance by the corporation of the property, it must pay the purchase price, when by its articles of incorporation it has the authority to incur and pay the liabilities for property so acquired. And in the case of In re Ballou, 215 Fed. 810, the court said tersely: "If a corporation after it is organized adopts such a contract, it is bound thereby and, if it accepts the benefits of the contract, it thereby adopts it." So in Van Noy v. Central Union F. Ins. Co. 168 Mo. App. 287, 153 S. W. 1090, the court said: "Defendant became a corporate entity for the purpose of entering into contracts for the sale of its capital stock on April 2, 1910, when it received its first certificate . . . and in accepting the benefits of the contracts its promoters had procured from plaintiff, it adopted those contracts as its own and took them with all their burdens and infirmities." Likewise in Kline v. Royal Ins. Co. 192 Fed. 378, it was said: "In the case at bar the corporation certainly ratified the contract on December 16, 1908, when Kline's accounts were passed. Moreover, even if, as president and manager of the company, Kline could not virtute officii take out insurance, the corporation ratified the policies by inaction after the corporation was formed, for they were in the corporation's possession. It is of no consequence, however, to determine when the ratification occurred at the earliest, for it certainly occurred before any fire." In Bradshaw v. Jones (Tex.) 152 S. W. 695, it appeared that the plaintiff's services, contracted for by promoters, were actually rendered for the corporation after its inception. The court held that the plaintiff had a right of action against the corporation and not against the promoters. So in Girard v. Case Bros. Cutlery Co. 225 Pa. St. 327, 74 Atl. 201, it appeared that the plaintiff entered into the service of a corporation and so continued for some time in pursuance of a contract made with the promoter. The court said that the contract "would be binding upon the present corporation unless it was renounced and disapproved by its directors." And it was held that there was "no evidence in the case that the new corporation took any official action expressing its disapproval of the contract made between the plaintiff and the promoters."

In Marshalltown First Nat. Bank v. Church Federation, 129 Ia. 268, 105 N. W. 578, it appeared that a promoter contracted with a third person to pay him a commission for the procurement of members to the organization contemplated. The court said: "The association could not ratify an agreement which it was prohibited from originally making. It was organized under chapter 9 of the title 9 of the Code, and section 1833 provides that 'such associations shall not employ paid agents in soliciting and procuring members, except in the organization or building up of subordinate bodies or granting members inducements to procure new members.' . . . He undertook to do something which the statute prohibited the association from employing him to do, and for this reason, the contract to compensate him was ultra vires, and therefore not subject to ratification." In Exline-Reimers Co. v. Lone Star L. Ins. Co. (Tex.) 171 S. W. 1060, it appeared that after the charter of a corporation was filed the corporators attempted to assign it to a promoter. He thereafter selected a board of directors, who in turn selected officers, one of whom accepted certain material necessary to the conduct of the business and promised that the corporation would pay for it. In affirming a judgment for the corporation, the court said that there was nothing in the act under which it was created, which would by reasonable deduction or inference authorize the corporators by simple assignment of the charter to confer on others even the authority conferred on them, much less authorize their assignee to do that which the state denied the original corporators the right to do; and that without in the least restricting the authority conferred on the corporators, it was clear that their authority, after the charter was approved, was to do the things specified by the act; i. e., sell stock, invest same, call a meeting of the stockholders, and to do any and all other incidental or necessary things thereto or reasonably to be inferred. *Compare* Bobzin v. Gould Balance Valve Co. 140 Ia. 744, 118 N. W. 40.

However, in Rideout v. National Homestead Assoc. 14 Cal. App. 349, 112 Pac. 192, it was said: "It is incumbent upon a party claiming a resulting benefit to show actual ratification, or *some affirmative act* from which it may be inferred. Ratification will not be presumed, even when the corporation has received benefits, unless actual knowledge of the specific contract out of which the benefits arose is made to appear . . . and the same knowledge is essential in considering the question of estoppel." In Teeple v. Hawkeye Gold Dredging Co. 137 Ia. 206, 114 N. W. 906, the court said: "Assuming that ratification may be implied from an acceptance and retention of the proceeds or benefits of such a contract, still two things in addition to the fact that the benefits of the contract came into the hands of the company are essential to be proven—the ratification

must be by the officer or governing body having authority to make or enter into such a contract, and the ratification must be upon full knowledge."

Liability Imposed by Charter.

In Hawkeye Gold Dredging Co. v. State Bank, 157 Fed. 253, wherein it appeared that the articles of incorporation, binding when executed, provided for the assumption of liabilities incurred before incorporation, the corporation was held to be liable to pay for property acquired by its promoters of which it had accepted a transfer.

REIRDEN

v.

STEPHENSON ET AL.

Vermont Supreme Court—February 6, 1914.

87 Vt. 430; 89 Atl. 465.

Partnership — Power of Partner to Bind Firm.

A partner may bind the firm when acting therefor within the scope of the partnership business.

[See 12 Am. St. Rep. 304.]

Power of Majority of Partners.

In case of a diversity of opinion regarding the internal affairs of a partnership, partnerships act by a majority, and such a majority, when acting in good faith and within the scope of the partnership business, binds the firm.

[See note at end of this case.]

Same.

A majority of the members of a partnership engaged in manufacturing butter tubs which had sold its plant and most of its personal property, but which still had some personal property and some debts due it, and which so far as appeared had not gone out of business, have implied authority to employ a person to examine the books and affairs of the partnership and ascertain its financial standing and to fix his compensation either before or after the work is completed.

[See note at end of this case.]

Same.

In an action against a partnership by a person employed by a majority of the members to examine its books and affairs and ascertain its financial standing, where, though it appeared that it had sold most of its property, there was no finding that it had gone out of business, or that the firm was not to continue, this cannot be assumed in order to hold a judgment for plaintiff erroneous on the ground that such members of the firm had no authority to bind it.

[See note at end of this case.]

Exceptions from Orleans County Court: STANTON, Judge.

Action on account stated. W. W. Reirden, plaintiff, and Stephenson, et al., defendants. Judgment for plaintiff. Defendants allege exceptions. The facts are stated in the opinion. AFFIRMED.

Fred S. Wright for defendants.
W. W. Reirden for plaintiff.

[431] POWERS, C. J.—The action is general assumpsit on an account stated. The defendants were partners in the manufacture of butter packages. Stephenson had but little to do with the affairs of the firm; Valley worked for the firm as a laborer, and knew but little regarding its business affairs; Wright kept the books and seems to have been the business man of the concern. About March 1, 1910, the firm sold its plant and most of its personal property. Some personal property and some debts due the firm remained as assets of the partnership. In May of the same year, Stephenson and Valley, acting for the partnership, employed the plaintiff to examine the books and affairs of the partnership and ascertain its financial standing. Both represented to the plaintiff that they were acting for the partnership, and the plaintiff understood that his engagement was for and in behalf of the firm. The court below did not find that Wright specifically agreed to the plaintiff's employment, but did find that he knew that the work was being done by the plaintiff and gave some assistance therein.

After the work was completed, Stephenson and Valley agreed with the plaintiff that there was due him from the partnership for this service the sum of $200. Valley died and Stephenson went into bankruptcy before this suit was brought. Judgment below was for the plaintiff and Wright excepted.

A partner may, by force of the relation, bind his firm when acting therefor within the scope of the partnership business. It was said by this Court in Scott v. Shipherd, 3 Vt. 104, that a partner could bind his firm by a contract when the subject matter thereof is consistent with the business of the partnership. In case of a diversity of opinion regarding their internal affairs, [432] partnerships act by a majority, and such a majority, when acting in good faith and within the scope of the partnership business, binds the firm.

The case in hand comes within these rules. The busines for which the plaintiff was en-

gaged was within the scope of the firm's business. To be sure, it was not a part of the actual processes of manufacturing butter tubs, or selling personal property, or collecting outstanding bills. But it none the less pertained to the affairs of the partnership, and the contrary not appearing, we must assume that it was warranted by the exigencies of the business and beneficial thereto. It was much like the employment of extra help to take an inventory of a mercantile business. In the case of a going concern, there could not be much doubt of the character of this service. But Wright contends that this firm had gone out of business, to all intents and purposes. In this claim, he is outside the findings. For aught that appears, the firm was to continue, and the investigation contracted for required to determine the scope of its future business. We can make no assumptions to find error.

Inasmuch as Stephenson and Valley had implied authority to make the contract on behalf of the firm, we need not consider the effect of Wright's knowledge of and participation in the work.

And since they had authority to employ the plaintiff, they had authority to fix his compensation. Waite v. Windham County Mining Co. 37 Vt. 608. This they could do in advance of the work, or after it was completed. Woodworth v. Downer, 13 Vt. 522, 37 Am. Dec. 611, is not to the contrary, for there the partnership had been dissolved before the act in question, while here the partnership continued in force.

Judgment affirmed.

NOTE.

Power of Majority of Partners to Bind Firm.

General Rule.

The act of a majority of partners in a transaction with third persons with respect to a matter within the scope of the partnership business is binding on a minority which objects thereto. Cotton Plant Oil Mill Co. v. Buckeye Cotton Oil Mill Co. 2 Ark. 271, 122 S. W. 658; Johnston v. Dutton, 27 Ala. 245; Western Stage Co. v. Walker, 2 Ia. 504, 65 Am. Dec. 789; Staples v. Sprague, 75 Me. 458; Nolan v. Lovelock, 1 Mont. 224; Kirk v. Hodgson, 3 Johns. Ch. (N. Y.) 400; Clarke v. Slate Valley R. Co. 136 Pa. St. 408, 20 Atl. 562, 10 L.R.A. 238. And see the reported case. See also Copp v. Longstreet, 5 Colo. App. 282, 38 Pac. 601; Steele v. Joliet First Nat. Bank, 60 Ill. 23; Matthies v. Herth, 31 Wash. 665, 72 Pac. 480. *Compare* Potter v. McCoy, 26 Pa. Pa. St. 458. "Whenever a partnership is formed by more than two persons, we think that, in the absence of any express provision to the contrary, there is always an implied understanding that the acts of the majority are to prevail over those of the minority, as to all matters within the scope of the common business; . . . The rule, as thus laid down, is certainly more reasonable and just, than to allow the minority to stop the operations of the concern, against the views of the majority. We do not say that it would be deemed a bona fide transaction, so as to bind the firm, if the majority choose wantonly to act without information to or consultation with the minority (Story on Part. sec. 123); but when, as in the present case, the one partner has given notice, and expressed his dissent in advance, there could be no reason or propriety in requiring him to be consulted by the other two. . . . Our conclusion is, that the act, being concurred in by two of the partners, was, under the circumstances, the act of the firm; and that the charge, asserting the proposition that the dissent of one partner against the other two would necessarily exonerate him, was properly refused." Johnston v. Dutton, 27 Ala. 245.

In Kneisley Lumber Co. v. Edward B. Stoddard Co. 131 Mo. App. 15, 109 S. W. 840, a contract made by the two active partners of a firm and not ratified by a dormant partner was held to be inforceable against the firm though it was outside the scope of the partnership business. In Johnston v. Dutton, 27 Ala. 245, a note given by a majority of the members of a firm for supplies for a sawmill operated by the partnership was held to bind the firm. In Nolan v. Lovelock, 1 Mont. 224, it was said of the power of the majority of a mining partnership to bind the firm: "It devolves upon the firm to show that they had an express agreement with each other, that one should not contract for what was useful or necessary without the express consent of the others, and that the party contracting with any member of the firm had notice of this agreement. Without this the law gives authority to each member of a mining copartnership to bind the rest for what is useful and necessary in their undertaking." In Kirk v. Hodgson, 3 Johns. Ch. (N. Y.) 400, it was held that the action of a majority of partners in continuing the employment of a clerk after he had overdrawn his account bound the firm. In Walker v. Yellow Poplar Lumber Co. (Ky.) 35 S. W. 272, it was held that a compromise of partnership claims made by a majority of the partners was binding on all of the members of the firm, it not appearing that there was any fraud in the transaction. In Burns v. Russell (Tex.) 146 S. W. 707, it appeared that there were three individuals associated as partners in the busi-

ness of real estate brokerage. Two of the partners purchased a tract of land from a client and agreed that the vendor should not pay a commission on the sale to the firm. It was held that the agreement not to charge a commission was binding on the third partner as to the vendor. In Staples v. Sprague, 75 Me. 458, it was held that the action of a majority of partners in making a sale of the partnership property in good faith bound the firm. See also Western Stage Co. v. Walker, 2 Ia. 504, 65 Am. Dec. 789. And in Williams v. Kemper, etc. Dry Goods Co. 4 Okla. 145, 43 Pac. 1148, it was said that a deed of trust of partnership property executed by two of the three members of a firm binds the firm by force of a statute.

Exception to Rule.

A majority of the members of a firm cannot by an act which is fraudulent or for their individual benefit bind the firm as to third persons having knowledge of the facts. Brobston v. Penniman, 97 Ga. 527; 25 S. E. 350, Western Stage Co. v. Walker, 2 Ia. 504, 65 Am. Dec. 789. See also Staples v. Sprague, 75 Me. 458. In the case first cited it appeared that a partnership was entered into between the president of a bank, its cashier and a third person. The third person agreed to convey certain land to the firm and the other partners agreed to contribute a certain sum which they raised by borrowing from the bank of which they were officers on a note executed in the firm name. In an action on the note brought by the receiver of the bank against the firm it was held that the plaintiff was not entitled to recover. The court said: "We have no difficulty whatever in holding that the plaintiff was not entitled to a recovery in this case. It was the duty of Lloyd and Cunningham to raise, on their own account, the money which they had agreed to contribute to the partnership business. It is perfectly obvious that the partnership itself had no immediate concern in this matter, it not being in any sense a transaction for its benefit, but one exclusively for the benefit of the two members who contracted for the loan. The debt created by the giving of the note was not a partnership debt, and therefore, upon general principles, it should not be made liable for its payment. It was insisted, however, that as the note was executed by a member of the firm who had authority, as a partner, to make and deliver notes in the partnership name, the bank ought to be protected, because it in good faith advanced its money upon the note in ignorance of the fact that the note was not really given to raise money for the partnership, but for the private benefit of two of its members to enable them to meet their obligations to it in accordance with their agreement with Mrs. Penniman. If this proposition had any foundation in truth, the position of the plaintiff would be unanswerable; but it is perfectly clear, from the facts recited, that the truth of the matter was fully known to the bank, and therefore it does not occupy the position claimed for it. Lloyd and Cunningham represented the bank in making the loan and taking the note. Lloyd was its alter ego, and Cunningham its special agent for the purpose of negotiating loans. It was within the immediate scope of their business and authority, as the representative of the bank, to make just such transactions as the one in question; and it follows beyond doubt that whatever they actually knew with reference to this transaction while engaged in the very act of making it, must be chargeable to the bank itself." In Western Stage Co. v. Walker, 2 Ia. 504, 65 Am. Dec. 789, it was held that whether a sale of partnership property by a majority of the partners on the dissolution of a partnership, passed the interest of a dissenting partner depended on the good faith of the transaction. See also Staples v. Sprague, 75 Me. 458.

In Chapple v. Cadell, Jac. 537, 23 Rev. Rep. 138, 37 Eng. Rep. (Reprint) 953, it was held that a sale of the partnership property assented to by a majority of the members of the firm did not pass title to the whole, but only to the shares of the partners assenting to the sale. It appeared in that case that the partnership agreement provided for the management of the affairs of the partnership by a committee of five. The agreement also provided that if any member of the firm desired to dispose of his share it should first be offered to the committee to be purchased for the general body of the remaining members. There were thirty-one members of the firm and the sale was made against the wishes of two of the partners.

PEOPLE

v.

PARISI.

New York Court of Appeals—January 18, 1916.

217 N. Y. 24.

Bail — Forfeiture — Necessity of Notice to Surety to Produce Principal.

Though a person bound over before a magistrate may be indicted and tried either in

the county court or the supreme court, a surety on his bail bond is not entitled to a notice of the time and place at which the principal must appear as a condition precedent to a forfeiture of the bond.

Enforcement of Forfeiture — Defenses.

A surety on a forfeited bail bond cannot urge as a defense that he should have had notice of the time and place at which the principal was required to appear, as that should have been presented by a motion to relieve from the forfeiture.

Interest on Penalty.

Interest should not be allowed on the amount of the penalty of a bail bond from the date of the forfeiture of the bond.

[See note at end of this case.]

People v. *Parisi*, 164 N. Y. App. Div. 900, modified.

Appeal from Appellate Division of Supreme Court, Second Judicial Department.

Action to recover penalty of forfeited recognizance. State of New York, plaintiff, and Louis Parisi, defendant. Judgment for plaintiff in trial court. Judgment affirmed by Appellate Division of Supreme Court. Defendant appeals. The facts are stated in the opinion. MODIFIED.

Thomas C. Whitlock for appellant.

James C. Cropsey, Hersey Egginton and *Ralph E. Hemstreet* for respondent.

[26] HISCOCK, J.—This action was brought to recover with interest the penalty of a forfeited recognizance.

One Sullivano was held by a city magistrate in the borough of Brooklyn to await the action of the grand jury upon a charge of violating section 410 of the Penal Code. Thereupon the appellant Parisi in accordance with the provisions of section 568 of the Code of Criminal Procedure executed an undertaking whereby he undertook that said Sullivano should "appear and answer the charge above mentioned, in whatever court it might (may) be prosecuted; and should (shall) at all times render himself amenable to the orders and process of the court, and if convicted should (shall) appear for judgment . . . or if he fail to perform either of these conditions that he would (will) pay to the People of the State of New York one thousand dollars."

Sullivano having been indicted upon said charge and having been duly called to answer at a term of the Supreme Court in Kings county failed to appear or answer and thereupon his default was taken and an order made declaring appellant's undertaking forfeited and this action was brought to recover the penalty of said undertaking with interest from the date when said order of forfeiture was entered. By a motion made on the trial to dismiss the complaint as not stating a cause of [27] action and by objections duly taken appellant raised two questions which are now argued.

These questions involve the propositions that it was necessary that appellant should be notified of the indictment of his principal and of the court in which he should be produced to answer said indictment, which was not done, and, secondly, that no interest should be allowed on the penalty fixed in the recognizance.

In support of the first proposition it is urged that the principal, after being held by the magistrate, could have been indicted and tried either in the County Court or in the Supreme Court, and that it was reasonable and necessary that the surety should have been informed where an indictment had been found and would be brought to trial before he could be expected to produce his principal or become in default for not doing so.

It seems to be settled that a surety who has given an undertaking for the appearance of his principal to answer to an indictment at a given term of court is responsible for his appearance, not only on the first day of the term, but on any subsequent day thereof without notice. (People v. Blankman, 17 Wend. (N. Y.) 252; People v. Kurtz, 16 Daly 188, 9 N. Y. S. 745; Rubush v. State, 112 Ind. 107, 13 N. E. 877.)

While compliance with this principle is more burdensome where the surety has given an undertaking which makes his responsible for the appearance of his principal in either of two or more courts instead of one, I do not think that the rule is thereby changed but that he undertakes the obligation to produce his principal at whichever term of court becomes proper. I assume that, as a matter of practice, no district attorney would be inclined to take advantage of the default of a surety who, through innocent inadvertence, mistake or ignorance, had failed to produce his principal at the proper time and place, and if such a case should occur the court would doubtless find it easy to relieve the surety from his default under the ample provisions of section 594 and 597 of the Code [28] of Criminal Procedure. In this case there is no indication that appellant's default was due to any innocent inadvertence or failure to learn the court wherein his principal was bound to appear.

But if I am wrong in the view thus expressed, I think there is still another answer to appellant's claim on this branch of the case. Under section 593 of the Code of Criminal Procedure on default of the surety an order of forfeiture was duly entered by the court and thereby his recognizance became fully and completely forfeited and his obliga-

tion to pay the amount therein fixed accrued and became absolute. The order was entered in the Supreme Court and its jurisdiction to declare the forfeiture and enter the order must be presumed, and so long as this order remains in force it is conclusive upon the appellant of such forfeiture. If there was sufficient excuse for his failure to produce his principal, the court, under the provisions of the Code already referred to, had power to relieve him from his default and vacate said order, and in the absence of such action it is not permissible to him to go back of the order and insist that he should have had some notice before default was taken and the same was entered. (People v. Blankman, supra, 252, 257; People v. Bennett, 136 N. Y. 482, 32 N. E. 1044.)

We then come to the second question, whether the trial court erred in allowing a recovery of interest on the penalty of the recognizance from the date of forfeiture. Our attention has not been called to any decision authoritatively settling this question, and we are assured that there has been more or less confusion of practice in the trial courts, sometimes a recovery of interest being allowed and at other times not.

Section 595 of the Code of Criminal Procedure in force at the time in question provided: "If the forfeiture be not discharged, . . . the district attorney may, at any time after the adjournment of the court, . . . proceeed against any surety upon his undertaking."

[29] Section 1966 of the Code of Civil Procedure provided: "Where a recognizance to the people is forfeited, and the district attorney of the county in which it was taken, brings an action to recover the penalty thereof, it is not necessary, in such an action, to allege or prove any damages, by reason of the breach of the condition; but where the people are entitled to judgment therein, they must have judgment absolute, for the *penalty* of the recognizance."

This latter section was a substantial reenactment of the provisions of the Revised Statutes (2 R. S. 485, section 29), which provided: "Whenever any recognizance to the people of this state shall have become forfeited, the district attorney of the county in which such recognizance was taken, shall prosecute the same, by action of debt for the penalty thereof; and the proceedings and pleadings therein, shall be the same in all respects, as in personal actions for the recovery of any debt, except that it shall not be necessary to allege or prove any damages by reason of a breach of the condition of such recognizance; but on such breach being found or confessed, or upon a judgment by default being entered against the defendants, the judgment shall be absolute for the *penalty* of the recognizance."

We think that a reasonable interpretation of these sections standing by themselves indicates a legislative intent to limit the recovery in such a case as this to the penalty of the recognizance and without any addition of interest. But if there were any uncertainty in the interpretation of these statutory proceedings considered by themselves, we think this uncertainty is removed by a consideration of general principles applicable to their interpretation and by a consideration of other kindred and subsequent statutory enactments.

This recognizance is executed under a statute for the purpose of securing and insuring the performance of an act and not for the payment by the principal of moneys and in such a case the general rule seems to have been [30] early established both in England and in this state that the recovery should be limited by the penalty. (Lyon v. Clark, 8 N. Y. 148.)

This principle finds expression in section 1915 of the Code of Civil Procedure, that in an action upon a penal bond damages to be recovered for a breach or successive breaches of the condition "cannot, in the aggregate, exceed the penal sum, except where the condition is for the payment of money; in which case, they cannot exceed the penal sum, with interest thereupon, from the time when the defendant made default in the performance of the condition."

In addition, since the execution of the recognizance and the forfeiture thereof upon which this action is based, section 595 of the Code of Criminal Procedure has been so amended as to provide that in the case of the forfeiture of a recognizance similar to the present one the recognizance "together with a certified copy of the order of the court forfeiting the same, shall be filed by the district attorney in the office of the clerk of the county wherein such order shall have been made, and thereupon the said clerk shall docket the same in the book kept by him for docketing of judgments and enter therein a judgment against the surety or sureties in said recognizance named for the *amount of the penalty* of said recognizance, and the recognizance, and the certified copy of the order forfeiting the recognizance, shall constitute the judgment roll."

This section clearly limits the amount of the judgment to be entered to the penalty and while it provides so far as concerns a case arising in the county where this one did, a new method of entering judgment upon the recognizance, there is no reason to believe that it was intended to change the amount for which said judgment should be entered or to adopt any different rule of practice in that

respect than was understood by the legislature to be in effect at the time the amendment was adopted. I think [31] in this manner it amounted in some degree to a legislative interpretation of the statutory provisions theretofore governing this subject.

These views are confirmed by the decisions in U. S. v. Broadhead, 127 U. S. 212, 8 S. Ct. 1191, 32 U. S. (L. ed.) 147, and People v. Hanaw, 106 Mich. 421, 64 N. W. 328.

In the former case it was held, in a suit brought upon a bond in the penal sum of five thousand dollars conditioned for the appearance of the principal, in the District Court of the United States, to answer to an indictment, that no interest could be recovered; and in the latter case, which interpreted a statute not seeming to differ materially from our own, it was held that the allowance of interest upon the penal sum of the recognizance from the date of its forfeiture was error.

In accordance with these views I recommend that the judgment appealed from be modified by striking therefrom the amount allowed by way of interest upon the recognizance from the date of forfeiture, and as modified affirmed, without costs.

Collin, Hogan, Cardozo, Seabury and Pound, JJ., concur; Willard Bartlett, Ch. J., not voting.

Judgment accordingly.

NOTE.

Allowance of Interest on Forfeited Bail Bond.

This note is intended to discuss the allowance of interest on a forfeited recognizance or bail bond given in a criminal prosecution only. As being related generally to the topic under discussion, see the note to Empire State Surety Co. v. Lindenmeier, Ann. Cas. 1914C 1189, wherein is considered the liability of a surety for interest when the effect is to exceed the penalty of a bond.

The reported case holds that it is error to allow the recovery of interest against a surety on the penalty of a recognizance bond from the date of its forfeiture declared by an order of court, and this conclusion is reenforced by the consideration that the bond in question was executed under a statute for the purpose of securing and insuring the performance of an act and not for the payment by the principal of money, the general rule in such a case being that the amount of recovery is limited by the penalty. This view finds support in People v. Hanaw, 106 Mich. 421, 64 N. W. 328, wherein it was held that interest cannot be recovered against the sureties on a bail bond from the date of the forfeiture, the court saying: "We think error was committed in entering judgment for interest on the amount of the recognizance from the date of forfeiture. Section 8457, 2 How. Stat. provides that the judgment shall be for the amount of the penalty of the recognizance." And in U. S. v. Broadhead, 127 U. S. 212, 8 S. Ct. 1191, 32 U. S. (L. ed.) 147, wherein it appeared that the penalty of a bail bond alone was not equal to the jurisdictional amount, it was held that the court could not take jurisdiction since no interest (presumably between the time of the forfeiture and the proceedings in the appellate court) could be recovered against the sureties on a forfeited bail bond executed in criminal proceedings by the United States against the principal. The court said: "These cases are suits brought upon two bonds given by John F. Broadhead and his sureties, conditioned for his appearance in the District Court of the United States for the District of California, to answer two separate indictments for making and forging checks on the Assistant Treasurer of the United States at San Francisco. The penalty of each of these bonds was five thousand dollars, and, according to well settled principles, no interest can be recovered in such suit as this, nor can any recovery be had beyond the amount prescribed in these instruments, except for costs. . . . As the act of 1875, above cited, requires that there shall be an amount in controversy, exclusive of costs, exceeding five thousand dollars, and as no such recovery can be had in the cases now under consideration, the writs are dismissed."

But it has been held that interest from the date of the judgment of forfeiture of a bail bond is recoverable by the state. Swerdsfeger v. State, 21 Kan. 475; State v. Sullivan, 12 La. Ann. 720; State v. Frazier, 52 La. Ann. 1305, 27 So. 799; Kinney v. State, 14 Ohio Cir. Ct. 91, 7 Ohio Cir. Dec. 97. Thus in State v. Sullivan, supra, the court said: "The only point on which appellants rely in this court, is as to the legality of that part of the judgment which allows interest from the day of judgment. They contend, that the amount of the bond is a penalty which the law imposes on them; that its exact amount is prescribed by law, and the lower court had no right to make it more onerous by obliging them to pay interest. They further aver, that there is no analogy between this and civil cases, in which the law expressly provides that interest shall be paid on a debt from the time it is due. We are of opinion that the judgment is correct. It is true, that the exact amount of the bond is fixed by the Judge, who bails a prisoner, and the security signs for a particular sum, but when the bail bond is forfeited, it then becomes a debt due the state. There is no reason why the state should not be entitled to the same privileges

as its citizens, with relation to the right of receiving interest on debts due it. There is nothing in the law which excepts the state from the benefit of the statute, which declares that all debts shall bear interest at the rate of five per cent from the time they become due, unless otherwise stipulated. As then the bail bond when forfeited, is a debt due the state, it bears legal interest from the date of its forfeiture, for then it became due. This does not render the surety responsible beyond the amount of his obligation; for when he signed the bond, he is supposed to have known the law, and to have been aware that he was contracting not only to pay the amount of the bond, in the event of its forfeiture, but also legal interest thereon from the time the judgment of forfeiture rendered it a debt due the state." Similarly in State v. Frazier, 52 La. Ann. 1305, 27 So. 799, in upholding a similar recovery from the date of the rendition of the judgment of forfeiture, the court said: "In answer to the appeal, the District Attorney prays an amendment of the judgment so as to allow the state legal interest from the date of its rendition until paid. That the state is entitled to recover interest on a forfeited bond from the date of the judgment of forfeiture, was expressly so held in State v. Sullivan, 12 La. Ann. 720. It is, therefore, ordered and decreed that the judgment appealed from be so amended as to allow legal interest on the amount thereof from February 8, 1900, until paid, and as thus amended the said judgment be affirmed at the cost of the appellant." Likewise in Swerdsfeger v. State, 21 Kan. 475, which was an action against the surety on a forfeited criminal recognizance, it was held that under the Kansas statutes (laws 1871, p. 250, sec. 1) interest from the day of forfeiture was properly allowed by the trial court. And in Kinney v. State, 14 Ohio Cir. Ct. 91, 7 Ohio Cir. Dec. 97, wherein it was held that the state could recover against the surety interest on a bail bond from the date of its forfeiture, the court said: "It is also said there was judgment here for interest but we are inclined to believe that is correct. It is said or stated that this sum is not fixed, that is to say, it is within the power of the court to reduce it. The statute authorizes in two different sections that the court on presentation of a case like this may reduce the bond or amount, or in one section provides that they may reduce it entirely if defendant appears and in the other the court may reduce it in accordance as the facts may show right and justice to be, but that is not a sufficient reason for holding that the bond does not draw interest. It is a promise to pay the money on condition broken and we think draws interest from the time when due."

WEILBACHER

v.

J. W. PUTTS COMPANY

Maryland Court of Appeals—April 8, 1914.

123 Md. 249; 91 Atl. 343.

Negligence — Erection of Scaffold — Injury to Pedestrian — Independent Contractor.

The owner of a building contracted with a painter to paint it, he to furnish the appliances and employ the labor therefor, the owner not retaining any supervision of the work or any control over the men, and the contractor used a stage fastened by guy lines which were not tight enough, and which allowed the stage to slip, so that he fell therefrom and struck plaintiff as she was passing on the sidewalk below. Held, that the negligence was the negligence of an independent contractor, for which the owner was not liable.

[See note at end of this case.]

Same.

The owner of a building employed an independent contractor to paint it, and the contractor negligently fastened the guy ropes so that the stage on which he was painting slipped, and he fell and struck plaintiff on the sidewalk below. It appeared that the work was done in the usual way, and there was no evidence that it was customary to erect guards over sidewalks above which men were painting from a suspended stage during the work. Held, that, while an abutting owner causing a nuisance to be erected on his property is not excused from liability for an injury therefrom to a person using the street because he employs an independent contractor to do the work, yet, as the suspension of the stage above the sidewalk was not such a menace to the safety of those using it as to amount to a nuisance, the owner was not liable.

[See note at end of this case.]

Same.

Such conditions were not such that the injury might have been anticipated by the owner as the probable consequence of the work if he failed to take proper precaution to prevent it, and hence the owner was not liable; although, if the injury had been such that he should have anticipated it, he would have been liable.

[See note at end of this case.]

Same.

The duty of the owner of property abutting on a highway not to create a nuisance on the highway endangering the public use thereof does not make him an insurer against injury to the public or require him to provide against all possible injury, and does not require him, on employing an independent contractor to paint the building, to see that

the guy ropes used by the contractor to fasten a stage are properly tied.

[See note at end of this case.]

Same.

The question whether an injury might reasonably have been anticipated by the owner of a building abutting on a public street as a probable consequence of work, such as painting and repairing, which he has done by an independent contractor is generally a question of fact for the jury.

[See note at end of this case.]

Independent Contractor — Liability of Owner — Burden of Proof.

Plaintiff, in an action for injury from being struck by an independent contractor who fell from a painter's stage suspended from defendant's building over the sidewalk, by reason of his negligent fastening of the guy ropes, has the burden of showing that defendant owner was guilty of negligence; and the mere fact that the contractor fell and injured him will not justify an inference of defendant's negligence.

Res Ipsa Loquitur.

The maxim "res ipsa loquitur," meaning that, although there must be reasonable evidence of negligence, yet where the thing is shown to be under the management of defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those in control use proper care, affords reasonable evidence, in the absence of explanation, that the accident arose from want of care, does not apply to the owner of a building who had no control over a contractor engaged in painting it, through whose negligence plaintiff was injured.

Admissibility of Evidence.

In an action for damages by being struck by an independent contractor who fell from a staging suspended over the sidewalk by reason of his own negligence in fastening the guy ropes, where the president of the defendant owner testified for plaintiff that the contract for painting was given to the contractor and that the owner had nothing to do with the work, did not employ the men engaged in it, or control the methods, the plaintiff has a right to ask on redirect examination who owned the appliances used in the work, but not to inquire whether defendant took any precaution to safeguard travel on the sidewalk below; since the latter question does not relate to any matter covered by the cross-examination.

Same.

Evidence as to whether witness had ever known paint buckets, brushes, or ropes to fall from ladders or scaffolds used in painting buildings is irrelevant and inadmissible.

Expert Evidence — Subjects of Opinion Evidence — Ultimate Issue in Case.

Where witnesses stated that it is not generally necessary to erect barriers on the sidewalk to prevent persons from using it when painting from a suspended stage, and that he had never seen a man fall from a stage, his opinion as to whether the suspension of the stage above the sidewalk made the sidewalk dangerous or more dangerous is incompetent, since it is the very question the jury has to decide on all the evidence in the case.

[See 7 Ann. Cas. 463.]

Harmless Error — Exclusion of Opinion Evidence.

The exclusion of such opinion, if error, is harmless, where it appears that the witness had seen a man fall from a different kind of scaffold, which fact would not have aided the jury in determining whether there was any reason for defendant to anticipate injury from the falling of a man from a staging such as was used in the present case.

Appeal from Baltimore City Court: HARLAN, Judge.

Action for damages. Carrie P. Weilbacher, plaintiff, and J. W. Putts Company, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. AFFIRMED.

R. Lee Slingluff and *Thomas Foley Hisky* for appellant.

Clarence A. Tucker, *Samuel J. Harman*, *Charles H. Knapp* and *Joseph N. Ulman* for appellees.

[251] THOMAS, J.—This suit was brought to recover for injuries alleged to have been caused by the negligence of the J. W. Putts Company, a corporation, the defendant below and appellee in this Court, and as the case was withdrawn from the jury at the close of the plaintiff's testimony on the ground that there was no "evidence in the case legally sufficient to entitle the [252] plaintiff to recover under the pleadings," it will be necessary to refer to the pleadings and evidence.

The declaration contained three counts, each one of which was demurred to. The Court below overruled the demurrers to the first and third counts and sustained the demurrer to the second count. The second count was amended, and the case was tried on the issues joined on the first, third and amended second counts with the result stated.

The first count alleges that the defendant was, on the 25th of September, 1911, the owner and in possession of the store and premises on the northwest corner of Park avenue and Lexington street, two of the public streets of Baltimore City, and, for the purpose of repairing and painting the building, caused "a large ladder or scaffold to be suspended from the roof of said building, over and above the sidewalk along said building on Park avenue, in a negligent and unskilful manner in that the defendant, its servants and agents, neglected to make said scaffold fast by proper guy lines," and that, as a result of such neglect, the ladder or scaffold slipped and one of the defendant's servants, who was working

on the ladder, was precepitated to the sidewalk, and, in falling, struck the plaintiff, who was passing along the sidewalk, and seriously and permanently injured her.

The amended second count charges that the injury to the plaintiff was caused by the negligence of the defendant, "its agents and servants, in erecting, using and operating said ladder or scaffold in that the defendant, its agents and servants in charge thereof negligently failed and omitted to properly fasten said ladder or scaffold with guy lines," by reason of which negligence the defendant's servant "slipped and fell from said ladder" to the sidewalk and struck the plaintiff.

The third count avers that the defendant caused the ladder or scaffold to be suspended from the roof of the building over and above the sidewalk for the purpose of painting the building; that the erection and use of the ladder or scaffold [253] "endangered the travel" on the sidewalk and that it became the duty of the defendant to "guard said work" and sidewalk for the protection and safety of person using the sidewalk, which the defendant failed to do, and that by reason of said failure on the part of the defendant the plaintiff, while passing along the sidewalk, "was struck by the defendant's servant in falling from said ladder" and seriously injured.

It appears from the evidence in the case that the appellee owned and was conducting a store in the building on the northwest corner of Park avenue and Lexington street, two of the public streets of Baltimore City, and in August, 1911, contracted with Crooks, Zick & Co. for the painting of the outside or exterior wood and metal work of the building. Crooks, Zick & Co. submitted, in writing, a bid for the work, on the 24th of August and the bid was accepted by the defendant verbally. The building was six stories high, and the painting was done in the usual way from a "stage" or scaffold about twenty-four by thirty feet long (which resembles a ladder in a horizontal position with boards on it), suspended on the outside of the building above the sidewalk by ropes fastened to each end of the stage and attached to L-shaped hooks, which were hooked to the cornice of the building and kept in place by guy lines extending over the roof and tied to a chimney. On the day of the accident, Zick, a member of the firm of Crooks, Zick & Co., the contractors, and two employees of the firm were engaged in doing the painting. After working in the morning they changed the position of the stage, so that at the time of the accident the stage was at the top of the fourth floor of the building, just outside of and about on a level with the cornice of a bay window which extended beyond the building line and over the sidewalk. Zick and one of the employees of the firm were on the stage, and Zick was kneeling with one knee on the stage and the other knee on the top of the bay window, when the rope slipped, one end of the stage was slightly lowered, and Zick lost his balance and fell to the sidewalk. The [254] man on the stage with Zick did not fall nor did anything fall from the stage, and the other employee of Crooks, Zick & Co., who was painting from the cornice above, testified that the lowering of one end of the stage, which caused Zick to lose his balance, was due to the fact that the guy rope was "not tied tight enough," that is, it was not taut, and that as soon as it was "stretched tight enough" the stage stopped; that shortly before the accident he was on the roof of the building and noticed that the guy line was not "tied tight enough," and that when he went down he told Mr. Zick so. In falling from the stage Zick struck the plaintiff's foot as she was walking along the sidewalk and seriously injured her. The evidence further shows that the stage extended beyond the building line and over the sidewalk; that the defendant knew of the position of the stage and did not erect any barrier on the street or "rope the street off" to prevent persons walking on the pavement under the stage; that defendant did not employ the men engaged in painting the building, had nothing to do with the methods used in the performance of the work, did not exercise any control "over the appliances, methods or men used or engaged in the work," and that the appliances belonged to Crooks, Zick & Co.

As we have said, the case was withdrawn from the jury at the close of the testimony offered by the plaintiff, so that in reviewing that ruling we are dealing with the case as presented by the pleadings and the plaintiff's evidence.

The first and amended second counts of the declaration declare that the injury complained of was caused by the negligence of the *defendant's* servants in failing to make the stage or scaffold fast by "proper guy lines," and in neglecting to "properly fasten" the scaffold "with guy lines." The evidence shows that the accident was, as alleged, due to the fact that the guy lines were not properly fastened or, as the witness expressed it, were not "tied tight enough," but it also shows that the work was not done by the defendant but by Crooks, Zick & Co. who contracted to do it and furnish [255] the appliances and employed the labor for that purpose, and that the defendant did not have supervision of the work or any control over the men engaged in it. The negligence of which the plaintiff complains in the first two counts was not, therefore, the negligence of the defendant or its servants, but the negligence of the servants of an independent contractor, for which the defendant is not liable, unless the injury to the plaintiff resulted from its

disregard or neglect of some duty that it owed to her and other persons using the sidewalk on which she was injured. Deford v. State, 30 Md. 179; City, etc. R. Co. v. Moores, 80 Md. 348, 30 Atl. 643, 45 Am. St. Rep. 345; Smith v. Benick, 87 Md. 610, 41 Atl. 56, 42 L.R.A. 277; Decola v. Cowan, 102 Md. 551, 62 Atl. 1026; Philadelphia, etc. R. Co. v. Mitchell, 107 Md. 600, 69 Atl. 422, 17 L.R.A. (N.S.) 974.

The free and unobstructed use of the public streets is a right that belongs to the public, and it is the duty of those owning and occupying property abutting on a highway to so use their property and keep it in repair as not to endanger the public while in the exercise of that right. If, therefore, an abutting owner causes a nuisance to be erected on his property and injury to a person using the street follows as the result of the *existence* of the nuisance, the ower is not absolved from liability because of the fact that he employed an independent contractor to do the work. In other words, if the injury be caused by the thing contracted to be done, the owner is responsible, but he is not liable for the negligence of the employees of the contractor in a matter collateral to the contract. Again, the person for whom work is done will be liable when the injury is such as might have been anticipated by him, as the probable consequence of the work, and he failed to take the proper precaution to prevent it, or where it results from his neglect to discharge a duty that he owes to third persons or the public in the execution of the work.

In Deford's Case, according to the evidence offered by the plaintiff, the wall on the defendant's property, fronting on a public street, was erected in such a defective and dangerous [256] manner that it constituted a nuisance, and Judge Alvey said: "If this be so, it (the wall) constituted a nuisance, for which the defendant would be liable. And the fact that the wall was erected by others, under contract, and to whom he did not bear the relation of master, will not excuse him; for, as was said by Lord Campbell in Ellis v. Sheffield Gas Consumers Co. 2 El. & Bl. (Eng.) 767, 75 E. C. L. 767, it is a proposition absolutely untenable that in no case can a man be responsible for the act of a person with whom he has made a contract. If the contractor does the thing which he is employed to do, the employer is responsible for that thing as if he did it himself." Judge Alvey then adopts the statement of Baron Wilde in Hole v. Sittingbourne, etc. R. Co. 6 H. & N. (Eng.) 488: "The distinction appears to me to be that, when work is being done under a contract, if an accident happens, and an injury is caused by negligence in a matter entirely collateral to a contract, the liability turns on the question whether the relation of master and servant exists." In City, etc. R. Co. v. Moores, supra, the Court speaking through Judge Boyd, said: "Even if the relation of principal and agent, or master and servant, do not, strictly speaking, exist, yet the person for whom the work was done may still be liable if the injury is such as might have been anticipated by him, as a probable consequence of the work let out to the contractor, or if it be of such character as must result in creating a nuisance, or if he owes a duty to third persons or the public in the execution of the work." In Mitchell's Case the late Judge Schmucker, after referring to Deford's Case and others, said: "As a result of these cases it may now be said to be settled in this State that although, when the work is being done by an independent contractor, the employer will not be liable for an injury caused by negligence in a matter collateral to a contract, he will be liable if the injury be caused by the thing contracted to be done, or if it be such as might have been anticipated, as a probable consequence of the work let out to the contractor, and he took no precaution to prevent it." [257] And in the case of Baltimore v. O'Donnell, 53 Md. 110, 36 Am. Rep. 395, where the appellee was injured by reason of the fact that there was no light nor signal to warn persons of the dangerous condition of the street, the Court held that the primary obligation was upon the city to keep the street in a safe condition, and that it could not commit that duty to a contractor so as to avoid liability for injury resulting from a failure to maintain a proper warning of danger.

Now applying these well-established rules to the facts of this case, it is apparent that the plaintiff, much as her painful and serious injury is to be regretted, is not entitled to recover from the defendant unless we are to hold that the suspension of the stage or scaffold above the sidewalk was such a menace to the safety of those using the street as to amount to a nuisance, or that the injury was one that might have been anticipated by the defendant, as a probable consequence of having its building painted from a suspended stage or scaffold.

The evidence shows that the work was done in the usual way in which buildings located on public streets are painted; that the stage or scaffold was a good one, and that the accident was due entirely to the negligence of the servant of Crooks, Zick & Co. in not tieing the guy line tight enough. There was no evidence to show that it was a common occurrence for painter to fall from a suspended stage, or that it was customary to erect guards or covers over sidewalks above which men are engaged in painting a building from a suspended stage, or to "rope" the street so as to prevent persons from using the side-

walk during the progress of the work. On the contrary, the only evidence reflecting upon this feature of the case was the testimony of the witness, Israel, who was engaged in painting the building at the time of the accident, and who testified that he had had forty-three years' experience in such work and that he had never seen a man fall from a painter's stage, and had never seen a stage fall to the sidewalk; that it was not necessary as a general thing [258] to erect barriers to prevent people from walking under the stage, and that after the accident he went back to work and used the same stage and same guy lines, and the testimony of James L. Thomas, who stated that he was a member of a firm engaged in house painting and decorating, and that the firm employed from twenty-five to sixty-five men; that he had been engaged in the business for thirty-three years, and that he had seen one man fall from a scaffold but had never seen a painter fall from a swinging scaffold. This evidence not only tends to show that the suspended stage was not a nuisance, but also shows that there was no reason why the defendant should have anticipated or provided against injury to persons using the sidewalk.

In Deford's Case the plaintiff was injured by the falling of the wall of a house which was in course of erection by an independent contractor for Deford. There was no suggestion in that case that the erection of a building fronting on the sidewalk of a public street was a nuisance, but Deford's liability was based by the Court upon the evidence that the particular wall in question was constructed in such a *dangerous* and *defective manner* that it became and was a nuisance. And in Decola's Case the plaintiff was injured by a brick that fell from a house which Cowan, the contractor, was erecting for and on the property of the North Baltimore Construction Company. The suit was abandoned as to the owner of the property, and this Court said that there was no evidence in the case to make the company liable for the injury. The Court could not have decided as it did in those cases if the erection of a house fronting on the sidewalk of a public street is a nuisance, yet it is a matter of common knowledge that the erection of such buildings is attended with *some risk*, and that appliances extending over and above the sidewalk are employed in the execution of the work. In the case of Boomer v. Wilbur, 176 Mass. 482, 57 N. E. 1004, 53 L.R.A. 172, the owner of a house employed a contractor to repair a chimney, and the plaintiff was injured by the falling of a brick [259] during the performance of the contract. The Court there said: "The instructions to the jury allowed them to find a verdict for the plaintiff . . . upon the ground that the work of repair called for by the contract was necessarily a nuisance, within the rule stated in Woodman v. Metropolitan R. Co. [149 Mass. 335], *ubi* supra, and other similar cases. The work called for was the repair of chimneys. At most, the brick were to be taken off for a few feet and relaid. The work which was to be done was not such as would necessarily endanger persons in the street. It did not involve throwing the brick into the street, or causing or allowing them to fall so as to endanger persons traveling therein. It is plain that, unless there was negligence in the actual handling of the brick, there could be no injury to the passing traveler. . . . This is not a case where the work, if properly done, creates a peril, unless guarded against as in the cases relied upon by the plaintiff. The accident was caused by the act of the contractor in doing what it was not necessary for him to do, what he was not expected to do, and what he did not intend to do. If it had been necessary for him to topple the chimney over into the street, or to remove the bricks by letting them fall into it, or the contract had contemplated such action, the instructions would not have been objectionable; but, as this was not necessary or intended, the work could not be classed as work which, if properly done, was ordinarily attended with danger to the public. The negligence, if any, was in the mere detail of the work. The contract did not contemplate such negligence, and the negligent party as the only one to be held." In the case of Laffery v. U. S. Gypsum Co. 83 Kan. 349, Ann. Cas. 1912A 590, 111 Pac. 498, 45 L.R.A. (N.S.) 930, the Court, after referring to the general rule which exempts the employer from liability where the work is done by an independent contractor, and to the exception to that rule in cases where the work is intrinsically dangerous, however skillfully performed, said: "No effort will be made to define precisely the expressions 'intrinsically dangerous' or 'inherently dangerous,' or like phraseology, as used in the [260] authorities. Regard must be had to the reason of the principle and the consequences flowing from its application in the given situation. The mere liability to injury from doing the work cannot be the test, for injuries may happen in any undertaking, and many are attended with great danger if carelessly managed, although with proper care they are not specially hazardous." After stating further that although the erection of buildings in cities is attended with hazards, such work has not been regarded as coming within the rule applicable to work intrinsically dangerous, the Court quotes with approval the statement of Mr. Chief Justice Cockburn in Bower v. Peate (1876), 1 Q. B. D. (Eng.) 321, that, "There is an obvious difference between committing work to a

contractor to be executed from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted." In the case of Geist v. Rothschild, 90 Ill. App. 324, the defendant employed a contractor to paint the wall of his store. The painting was done from a scaffold suspended from the top of the building, and the scaffold was lowered and raised by ropes at the end of the scaffold. The plaintiff was injured by the falling of the ropes, the slack ends of which were coiled on the scaffold and were in some way knocked off and struck the plaintiff. The Court there said that it was a daily occurrence in large cities like Chicago for the walls of buildings on its streets to be painted, and that the fact that it was necessary to suspend a scaffold over the street in order to do it did not make it a nuisance if the scaffold was securely suspended; that there was nothing inherently dangerous in doing the work, provided it was done by competent persons in the usual and ordinary way, and that there was no question of fact for submission to the jury in that connection. In the case of Sartirana v. New York County Nat. Bank, 139 App. Div. 597, 124 N. Y. S. 197, the plaintiff was struck by a platform which was being lowered by means of a derrick on a building in course [261] of construction by an independent contractor. The Court held that the bank, the owner of the property, was not liable, and said: "The work being done here was no more intrinsically dangerous than the construction of a building along a public street usually is. . . . The building was not of extraordinary height or at all out of the ordinary, so far as exterior construction was concerned, and unless the owner is in every case bound to guard against possible injuries to passersby, which is not the law, the bank could not be held liable for the negligence of a contractor." See also Mehler v. Fisch, 65 Ohio 549, 120 N. Y. S. 807.

Without meaning to go to the full extent of some of the authorities cited in the application of the rules announced, applying the principles there established to the facts of this case we cannot hold that the suspension of the stage or scaffold from the cornice of the defendant's building created a nuisance, or that the use of the stage in painting the building rendered the work so dangerous as to require the defendant to erect covers or guards over the sidewalk in order to protect persons walking thereon, or to erect barriers to prevent persons from using the sidewalk during the progress of the work. To do so would impose a useless burden upon property owners in cities, and subject the public to unnecessary inconvenience. Of course, there is *some* risk incident to the projection of any object over a highway, but the duty of the owner of abutting property does not require him to provide against all *possible* injury, and it is only such injury as may be reasonably anticipated that he is bound to take precautions to prevent.

The appellant relies largely upon Mitchell's Case and the cases of Doll v. Ribetti, 203 Fed. 593, C. C. A. and McHarge v. Newcomer, 117 Tenn. 595, 100 S. W. 700, 9 L.R.A.(N.S.) 298. In Mitchell's Case the alleged injury was inflicted by a hammer which fell from a bridge being erected over one of the public streets of Havre de Grace and struck the plaintiff's umbrella as she was passing along the street under the bridge, and the Court said: [262] "There is evidence in the record tending to show that in the construction of such bridges, when the workmen are engaged in riveting the ties and braces between the girders composing the span they are compelled to work with great rapidity in order to put the rivets in place and clench them while at a white or red heat, and as a result rivets, tools and other articles handled with such rapidity frequently fall to the ground beneath and render it unsafe for travel unless properly guarded. There is like evidence that in the construction of the bridge now in question such objects did in fact frequently fall upon the street below it and that no precautions were taken to hinder the public from passing under the bridge or to prevent the falling of the objects from it." In the case of McHarge v. Newcomer, supra, the plaintiff while passing along the street was struck by a heavy awning roller which was "allowed by a party repairing the awning, in some way not shown, to suddenly fall upon her." The defendants offered no evidence explaining the falling of the roller, but introduced proof to show that the awning was being repaired by an independent contractor. The Supreme Court of Tennessee held that the awning was a nuisance, and held further "that the work contracted for involved a thing intrinsically dangerous to the public, from which injuries to those using the street were probable and might reasonably be anticipated by the proprietor," and in conclusion said: "The awning of the defendants, so far as it appears from this record, was being repaired by that contractor, over a much frequented street, in a populous city, and at a place where persons were constantly coming and going and standing, upon the invitation of the defendants, for the purpose of trading with them and taking the street cars, without any precautions taken to prevent portions of the awning, material or tools from falling on those below." In the case of Doll v. Ribetti, supra, the syllabus contains the following statement: "Where defendant, a tenant of a building

erected flush with the sidewalk, permitted the servant of an independent contractor to stand [263] on the window ledges to clean windows on the outside without providing scaffolding or other safety appliances, and the servant fell and injured the plaintiff, who was walking past the building, whether the tenant was negligent in not providing scaffolds or safety appliances was for the jury." The statement of claim in that case charged, "That in the city of Pittsburgh, it had been a custom to have the windows of such buildings cleaned by persons standing on the outside of the sash or sills of the windows, secured from falling by a stout belt worn about the waist, with a strap on each side thereof, fastened to a hook or other fixture set for the purpose in the side frames or casing of each window." It further averred "that the building occupied by the defendant was not and never had been provided with such hooks, or with any other fit or appropriate fixtures for the purpose stated," and that the defendant, long prior to the day of the accident, 'knew, or by the exercise of reasonable care should have known, that the windows of the building were not equipped with the customary hooks or other appropriate fixtures," etc., and that while the servant of the contractor was engaged in cleaning the window on the fourth floor of the building, he accidentally lost his balance and fell upon the plaintiff, who was walking upon the sidewalk below. The Court said that the facts alleged in the statement of claim were for the most part undisputed, "and that there was evidence tending to support all of the allegations of fact upon which were based the charge of negligence of the defendant." In that case, therefore, the negligence of the defendant alleged and shown by the evidence was his failure to furnish the appliances and safeguards usually provided by the owner or occupier of a building to prevent those engaged in washing the windows from falling.

The distinction between those cases and the case at bar is obvious. Here the evidence shows that the accident was due to the failure of the servants of Crooks, Zick & Co. to properly fasten or tie the guy lines. There is no evidence to [264] show that the defendant neglected to provide any safety appliance that was customarily supplied by the owner of the building, or that it was a common occurrence for painters to fall from a suspended stage or scaffold.

The appellant contends that the defendant owed an absolute duty to the public not to interfere "with their right to the safe and unimpeded use of the sidewalk." The duty that the owner of property on a highway owes to the public is not to create a nuisance on the highway, and to take proper precautions to prevent injuries that may be anticipated as a *probable* consequence of work in which he, or his contractor, is engaged. But that duty did not make the defendant an insurer against injury to the public, or require him to provide against all possible injury, however remote, nor did it require the defendant to go on the top of its building to see that the guy lines used by the contractor were properly tied. In City, etc. R. Co. v. Moores, supra, the plaintiff was injured by reason of her horse becoming frightened at a steam engine which was being used by White, an independent contractor, in the execution of certain work on a turnpike. After referring to the rule stated in O'Donnell's Case, supra, and Water Co. v. Ware, 16 Wall. 566, 21 U. S. (L. ed.) 485, Judge Boyd said: "But the evidence shows that the injury was sustained by the negligent use of the engine in not stopping it and in blowing the whistle as she (the plaintiff) approached. It would be carrying the obligation of the Turnpike Company beyond that required or authorized by the authorities to hold that its duty to the public required it to see that the servants of White were not thus negligent, although the use of the steam engine was not a nuisance *per se* and could be operated so as not likely to do any injury to anyone using the road. It would be requiring too much of it to make it take such precautions against accidents when letting out lawful work to an independent contractor. It must be admitted that the work to be done was lawful and the company had the right to assume that there would be no such negligence as that [265] complained of, which was entirely collateral to and not a probable consequence of the work contracted for. To hold the company to such a strict liability would practically forbid it from having such work done by contractors as it would have to keep its own agents on engines to see that there was no negligence on the part of the contractors or their servants." This statement of Judge Boyd's was quoted at length and approved in the later case of Symons v. Road Directors, 105 Md. 254, 65 Atl. 1067.

It is also urged on behalf of the appellant that the question whether the injury might reasonably have been anticipated by the defendant as a probable consequence of the work contracted to be done was one of fact for the jury. That, of course, is the general rule (Bonaparte v. Wiseman, 89 Md. 12, 42 Atl. 918, 44 L.R.A. 482; Philadelphia, etc. R. Co. v. Mitchell, supra), but here we are considering the legal sufficiency of the plaintiff's evidence, the burden being upon her to show that the defendant was guilty of negligence. There was no evidence to show that the injury might have been anticipated as a probable consequence of the work in which the contractor was engaged. On the con-

trary, as we have said, the work was done in the usual way, and all the evidence tends to show that there was no reason why the defendant should have anticipated any injury to persons using the sidewalk. The mere fact that the servant of the contractor fell and injured the plaintiff would not justify an inference that the injury was caused by the negligence of the defendant, especially as it was shown to have been due entirely to the negligence of the contractor's servant, which the defendant had no reason to anticipate. Joyce v. Flanigan, 111 Md. 481, 74 Atl. 818. The maxim *res ipsa loquitur* cannot aid the plaintiff in this case. The man who fell and injured her did not fall from the defendant's building, but from the stage or scaffold which was not under its management or control. The case most frequently referred to in this State as containing the true statement of the rule is the case of Scott v. London, etc. Docks Co. 3 H. & C. (Eng.) 596, where [266] it is said: "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or its servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." Howser v. Cumberland, etc. R. Co. 80 Md. 146, 30 Atl. 906, 45 Am. St. Rep. 332, 27 L.R.A. 154; Decola v. Cowan, supra; Walter v. Baltimore Electric Co. 109 Md. 513, 71 Atl. 953, 22 L.R.A.(N.S.) 1178; Chesapeake Iron Works v. Hochschild, 119 Md. 303, 86 Atl. 345.

Albert C. Putts, the president of the defendant, was called as a witness for the plaintiff and was asked if the painting that was done on the defendant's building was not done by the defendant, and he answered, "Yes." He was then asked, "Your company was having the building painted?" to which he replied, "Yes, we gave the contract to have it painted." On cross-examination he was asked by counsel for the defendant to whom the appliances used in connection with the painting belonged. The plaintiff objected to the question, but the Court overruled the objection, and the witness answered that they belonged to Crooks, Zick & Company. After stating further that the defendant had nothing to do with the work, did not employ the men engaged in it, and had no control over them or the appliances and methods used in doing the work, the witness was asked on redirect examination by counsel for the plaintiff if the defendant took "any precaution to safeguard the travel on the sidewalk" or did anything "to protect the pedestrians walking along the street under the ladder," which questions were objected to by the defendant, and the Court refused to permit the witness to answer them. These rulings formed the subject of the first three exceptions. The witness having stated in his examination-in-chief that the painting "was done by" the defendant, and that the defendant "gave the contract to have it painted," the defendant had a right to have him explain and to interrogate him as to the extent of the defendant's connection [267] with the work. The questions asked in the second and third exceptions did not relate to any matter referred to in the cross-examination, and there was, therefore, no error in either of those rulings.

The fourth, fifth, sixth and tenth exceptions are to the refusal of the Court below to permit the witnesses to say whether they had ever known paint buckets, brushes or ropes to fall from ladders or scaffolds used in painting buildings. We see no error in these rulings. The plaintiff was not injured by the falling of a paint bucket or brush, and even if proper care required the defendant to provide against injuries from such causes, it would not follow that it was its duty to anticipate injury from the falling of a man from the scaffold. Mr. Israel stated that it was not necessary as a general thing to erect barriers on the sidewalk to warn persons against using it when a building is being painted from a suspended stage, and that with forty-three years' experience he had never known a man to fall from a stage. Mr. Thomas, who had been a painter for thirty-three years, testified that he had never seen a man fall from a swinging scaffold. They were asked by the plaintiff's counsel whether, in their opinion, the suspension of a stage above a sidewalk "made the use of" the sidewalk more dangerous or dangerous, and the seventh, eighth and ninth exceptions are to the refusal of the Court to permit those questions to be answered. The burden was on the plaintiff to show that the injury was such as might reasonably have been anticipated, as a probable result of the work that was being done, and that could not be shown by the opinion of the witnesses that the suspended stage rendered the use of the sidewalk more dangerous or dangerous. That was the very question the jury had to decide upon all the evidence in the case, and it was incumbent upon the plaintiff to produce evidence from which the jury could infer that the suspension of the stage made the "use of" the sidewalk dangerous. There was nothing in the conditions surrounding the scene of the accident that would suggest the [268] propriety of allowing a witness, who was familiar with those conditions, to express an opinion as to whether the suspension of the stage rendered the use of the sidewalk unsafe, and the rule that allows a witness to state that a particular road, with which he is familiar, is in

a dangerous condition, should not, for obvious reasons, be applied in this case. But even if this is not so, it is not probable that the plaintiff was prejudiced by the rulings, for the witnesses had already stated that they had never known a man to fall from a swinging scaffold. Mr. Thomas was asked in the examination-in-chief if he had ever known a man to fall from a painter's scaffold and he answered, "Yes." On cross-examination it developed that he did not mean that he had seen a man fall from a suspended scaffold, but that he had seen one fall from a different kind of scaffold, and the defendant then moved that his statement that he had seen a man fall from scaffold be stricken out, and the eleventh exception is to the granting of that motion. The question in the case was whether there was any reason to anticipate injury from the falling of a man from a ladder such as was used in painting the defendant's building, and the fact that a man had been known to fall from a different kind of scaffold would not have aided the jury in determining that question. It would not follow because a man had been known to fall from a different kind of ladder that a painter would likely fall from one of the kind referred to in this case. It might very well be that one could be used without any risk of injury to persons on the sidewalk while the other could not.

Finding no error in the rulings of the Court below, the judgment will be affirmed.

Judgment affirmed, with costs to the appellee.

NOTE.

Liability of Owner of Building for Injury to Pedestrian Resulting from Erection of Scaffold for Repairing or Painting Building.

In General, 123.
Act of Independent Contractor:
General Rule, 123.
Exception to Rule, 125.

In General.

It seems that the owner of a building is liable for an injury to a pedestrian resulting from the carelessness of his employees in using a scaffold while making repairs to the building. Keyes v. Bangor Second Baptist Church, 99 Me. 308, 59 Atl. 446. It appeared in that case that the defendants were engaged in making repairs to a church building owned by them, and that the plaintiff was injured by a board which fell from a scaffold. It was held to be a question for the jury whether the defendants had erected proper barriers or given proper warning to pedestrians. The defendants claimed that they were not liable because the work of enlarging the church was given to an independent contractor but the court in disposing of this contention said: "The contract of the defendants with Otto Nelson . . . does not state, nor can it be reasonably implied from its terms, that Nelson was 'employed to do a job of work.' He and his men, in express terms, were hired by the day. No time was specified in which he should complete the work; no specifications as to what work or how it should be done. The defendants so far as the contract itself shows not only had the right, but must necessarily have controlled and directed not only Nelson's men, but Nelson himself, with respect to everything that was to be done upon that church, for the contract does not refer to any plans, specifications, architect or any person, even, to whom Nelson should go for instructions. All the contractor could have done under this bare contract, without any other information or directions, when he and his men arrived at the church ready for duty, would have been to remain idle and wait, until some person vested with proper authority, directed them what to do. Under the contract Nelson was to furnish the labor and the materials, and every thing else essential to the performance of the work, was, by necessary implication, to be furnished by the defendants. . . . The evidence taken in connection with the written contract of Nelson conclusively shows that Nelson instead of 'not acting,' did act under the direction and control of his employers, 'and did not determine' for himself in what manner the work should be done. He was compelled to so act, if he worked at all, and did so act. We are also unable to see any reason why, at any time if they so desired, the defendants could not have discharged Nelson and all his men without subjecting themselves to any liability whatever, for breach of contract. Nelson was not an independent contractor and the ruling of the presiding justice must stand."

As to the liability of a person maintaining an awning, sign or similar object suspended over a street, for personal injuries caused by its fall, see the notes to Waller v. Ross, 10 Ann. Cas. 715, and McCrorey v. Thomas, 17 Ann. Cas. 373.

Act of Independent Contractor.

GENERAL RULE.

The owner of a building is not liable for an injury to a pedestrian caused by the negligence of an independent contractor in the use or erection of a scaffold put up for the purpose of painting or repairing the building. Geist v. Rothschild, 90 Ill. App. 324; Davis v. John L. Whiting, etc. Co. 201 Mass. 91,

87 N. E. 199; Regan v. Superb Theater, 220 Mass. 259, 107 N. E. 984; Mehler v. Fisch, 65 Misc. 549, 120 N. Y. S. 807. And see the reported case. See also Hurlstone v. London Electric Ry. 30 Times L. Rep. (Eng.) 398; McCarty v. Second Parish, etc. 71 Me. 318, 36 Am. Rep. 320. In Geist v. Rothschild, supra, it appeared that defendant made a contract for the doing of certain carpentry and painting work on its department store building. The contractor agreed to furnish all labor and materials and provide all necessary scaffolding and implements necessary therefor. The contractor sublet the painting part of the contract and retained no supervision over that work, which was done under the general supervision of an architect selected by the defendant, though he in no way controlled or directed the men doing the painting, or the manner of doing it, or directed the appliances to be used. While the plaintiff, a pedestrian, was passing the building, one of the slack ends of the rope by which the painter's scaffold was suspended, and which had been coiled up thereon, fell and struck her, causing serious injuries. It was held that the owner of the building was not liable. The court said: "No case has been cited by counsel, nor have we been able to find any authority which holds that there is such a primary duty or obligation upon the owner of a building to persons passing along on an adjoining public sidewalk, or to prospective customers who are going toward his premises where he conducts a public business, that he is liable in damages for the negligence of an independent contractor to such persons, when the injury occurs while they are going along such public sidewalk, or to such customers before they actually come upon the premises where he is conducting his business, or into some passageway or entrance way used as a part of the owner's premises. . . . It is claimed by counsel for plaintiff that the owner is only relieved from liability for the negligence of his contractor whom he employs to perform work upon his premises by an independent contract, when the entire and exclusive control of the premises is surrendered to such contractor. We cannot give our assent to this contention, as in our opinion, it is not sustained by authority to the extent claimed. . . . The fact that the work was to be inspected by the architect to see that it was done according to the contract, does not make the defendant liable."

In Regan v. Superb Theatre, 220 Mass. 259, 107 N. E. 984, it appeared that the suit was brought to recover for personal injuries received by the plaintiff from the upsetting or tipping over of a stage erected by the employees of an independent contractor, for use by them in connection with the painting of a marquee over the entrance to the defendant theater. At the time of its tipping over it stood on the sidewalk, parallel to the entrance to the theater and somewhat nearer to the entrance than to the curbstone. The men who worked on it had left it ten or fifteen minutes before, unwatched and unguarded. The plaintiff left her home to see the performance at the theater. She passed by the side of the staging, arrived in front of the entrance, and was about to enter, when the staging, seemingly lifted by a gust of wind, tipped over on her and threw her into a corner of the doorway. The staging was built of two trestles, each eight or nine feet high, standing eight or nine feet apart, connected by one or two boards or planks nine inches wide and one and a half or two inches thick, and not at either end fastened to the trestles. The ends of the boards or planks rested on the second rung from the top of the trestles, and the horizontal line of the plank was about seven feet above the sidewalk. The staging could be moved about as needed. The court in holding that the owner of the building was not liable said: "In the furnishing and erection of this staging the defendant had no part. In the painting it was interested only to see that the contract was performed in accordance with its terms. There was no occasion to anticipate that injurious consequences necessarily might follow from the placing and use on the sidewalk of a staging adequate for the work expected or required to be done by men who were to paint the marquee which was to be placed over the entrance to the theater building. In fact no harm came from the form of the structure, from the manner of its use, or from the careless acts of men in the execution of work while upon it. No one could foresee that the men would leave the staging unwatched and unguarded in the middle of a crowded sidewalk for more than a momentary period of time. . . . There was no liability on the part of the defendant, and the verdict for the defendant was rightly ordered."

In Davis v. John L. Whiting, etc. Co. 201 Mass. 91, 87 N. E. 199, it appeared that the defendant contracted with a painter to paint the iron shutters of a building occupied and kept in repair by the defendant. In the performance of the work, a light ladder scaffold was used, and while this was being raised by tackle hung from the cornice, it came in contract with the bottom of a shutter which had been carelessly left open and raised it off its hinges, so that it fell on a passer-by in the street. The defendant was held not to be liable, the court saying: "The jury were instructed to answer this question: 'Was the work of painting the shutters on the building necessarily attended with danger to persons passing along Belcher Lane?' They answered it in the affirmative. If the ques-

tion meant, 'Was there such risk of accident from the probable negligence or want of skill of some of the workmen as necessarily to involve an appreciable danger of injury to persons passing below,' there was evidence to warrant the finding. But the finding of this fact would not create a liability on the part of the defendant." In Mehler v. Fisch, 65 Misc. 549, 120 N. Y. S. 807, the petition alleged that the defendant, her agents, and employees were engaged in painting the front wall of the defendant's house, and while so engaged the defendant, her agents, and employees conducted the work so negligently that a scaffold fell and injured the plaintiff. At the trial it was shown by the evidence that the painting was being done, not by the defendant's servants, but by independent contractors. The trial justice submitted the case to the jury on the theory that the defendant was liable for the acts of the contractors if the jury believed that, in spite of her contract that the work should be performed by independent contractors, she, through her husband, supervised and took part in the work, or if the defendant did not exercise care in the selection of experienced and competent contractors. There was a verdict for the plaintiff and the appellate court in deciding whether the judgment could be sustained on the theories under which the case was submitted, said: "Upon the first point the justice's charge was correct, but there is not sufficient evidence to sustain a verdict for the plaintiff upon this point. The plaintiff claims that he heard the defendant's husband order the contractors to hoist the scaffold; but he does not state that the defendant's husband was even present at the time of the accident. Plaintiff's own witnesses do not corroborate him on this point, and his testimony is directly and circumstantially denied by the husband and by both contractors. I do not think that the respondent could seriously contend that the plaintiff has borne the burden of producing a preponderance of evidence upon this point. Nor can the judgment be sustained upon the theory that the owner did not exercise due care in engaging competent contractors. Even if the owner is under a duty, the plaintiff has not shown any failure to perform it. The work done here was not hazardous, nor requiring great skill. The contractors, while not long in this country and only just beginning to work for themselves, testify that they have had long experience as journeymen in work of this kind. Absolutely the only evidence of incompetence is the fall of the scaffold. Under such circumstances a judgment against the defendant could be sustained only upon the theory that the exemption of liability of an employer for the acts of an independent contractor is an exception to the rule of respondeat superior, and that the defendant must show facts which will bring him within the exception. I do not think that that is the law. The employer is not liable for the acts of the contractor, because the relation of principal and agent does not exist. If he is liable in this case, it is only for his own acts, and the plaintiff must show that he owed him a duty and has failed to perform such duty."

In McCarthy v. Second Parish, etc. 71 Me. 318, 36 Am. Rep. 320, it appeared that one who was engaged in business as a "slater" was employed to repair the roof of a church. While he and his employees were at work, they carelessly allowed a ladder which they used to get on and off the roof to be blown down by the wind and injure a passer-by. It was held that the owners of the church were not liable on the ground that the negligent act was the act of an independent contractor. See to the same effect Press v. Penny, 242 Mo. 98, 145 S. W. 458.

EXCEPTION TO RULE.

The owner of a building is liable for the negligence of an independent contractor in the use of a scaffold or ladder while engaged in painting or repairing the building where the negligence consists in the failure to perform a duty which the owner of the building cannot delegate. Moore v. Townsend, 76 Minn. 64, 78 N. W. 880. See also Press v. Penny, 242 Mo. 98, 145 S. W. 458. And see the reported case. In Moore v. Townsend, supra, it appeared that a painter who had been employed to paint the defendant's building placed one end of the ladder which he was using in the street, inclined it over the walk and rested the upper end against the building. The ladder was left in this position after the work had been completed for a period of thirteen days when it was blown down by an unusual blast of wind and injured a passer-by. The owner of the building was held to be liable. The court said: "The occupants and the owner of the building, without surrendering control over it, permitted the painter to create a nuisance in the public street when they allowed him to put the ladder in a position over the walk where it was a continual menace to all persons within its reach should it fall down. . . . By employing an independent contractor the owner or occupants of the building could not relieve themselves of the continuing duty which they owed to the public not to create or maintain a public nuisance on their premises. Nor could the village absolve itself of a like duty in respect to permitting a nuisance to be maintained, partly or wholly, in its streets. If a ladder placed over the sidewalk, as this was, could be allowed to en-

danger the lives and limbs of passers-by, the keeping open of a coal hole in a sidewalk could be defended on the same grounds. . . . There is nothing in the claim that defendants were not guilty of negligence, because the ladder was blown down by an unusual wind. The negligence of the defendants, owner and occupants, in allowing the ladder to be inclined and to remain across the walk, and of the village, after its officers had knowledge of the fact, was the efficient cause of the injury to plaintiff. The fact that some other cause operated in connection with this negligence could not relieve defendants from liability. The original negligence concurred with another cause, and, operating at the same moment, produced the injury. The original negligent act of placing one end of the ladder in the public street, inclining it over the walk, and resting the upper end against the building, thus creating a public nuisance, was the proximate cause of the accident, and without this act plaintiff's injuries would not have been received."

STATE

v.

NIPPER ET AL.

North Carolina Supreme Court—March 26, 1914.

166 N. Car. 272; 81 S. E. 164.

Convicts — Corporal Punishment.

Laws 1909, c. 281, § 6, applicable to Wake county, provides that convicts sentenced to hard labor shall be under the control of the county commissioners, who shall have power to enforce all needful regulations for the successful working of convicts on the highways, and may authorize the supervisors in custody to use such discipline only as may be necessary to carry out the regulations to the same extent as is allowed by law to the authorities of the penitentiary as to convicts employed in the state's prison. It is held that, since there is no law authorizing the authorities of the state's prison to enforce the discipline by flogging, supervisors in charge of a camp of convicts working on the roads in Wake county are not authorized by mere custom or otherwise to flog a convict under their charge, to enforce discipline and compel him to work.

[See note at end of this case.]

Appeal from Superior Court, Wake county: COOKE, Judge.

Criminal action. J. M. Nipper et al., convicted of assault and appeal. The facts are stated in the opinion. AFFIRMED.

Attorney General Bickett and *Assistant Attorney General Calvert* for State.

R. N. Simms, Armistead Jones & Son and *J. W. Bunn* for defendants.

[273] CLARK, C. J.—The defendant Nipper was supervisor in charge of a camp of convicts working upon the roads of Wake County, and the defendant Johnson was a guard at said camp. They were charged with assaulting, beating, and wounding one Dan Gallagher, a convict under their charge and supervision, with a leather strap 16 inches long and 3½ inches wide, attached to a wooden handle 5 inches long, whereby he was badly beaten and bruised. Said Gallagher was a man between 40 and 45 years of age. He was flogged on his bare flesh. A few hours later he was taken ill, and died that afternoon. The county physician testified that he did not think the death of the said Gallagher was attributable in any way to the whipping. The chastisement was inflicted for refusal to work when ordered to do so. It was in evidence that "chastisement with a strap as a means of discipline for prisoners had been in general use and adoption and had been generally practiced in Wake County for more than a generation."

The court stated from the bench, before the argument began, that "after full consideration of the subject, he had reached the conclusion that under the Constitution and laws of this State the authorities who have control over convicts have no right to administer whippings to them for causes of discipline, and that this feature was eliminated from the further discussion of the case." The exception to this presents the controversy before us. The jury found the defendants guilty, and his Honor imposed a fine of $10 and costs on each defendant.

The indictment was not for homicide, but for assault. It was doubtless due to the fact that there was absence of all evidence of malice, the testimony of the physician above stated, and the further evidence that the use of such punishment had always been customary, that his Honor imposed so light a punishment.

The Attorney-General presents for our consideration the fact that the Constitution, Art. XI, sec. 1, declares that "Death, imprisonment [274] with or without hard labor, fines, removal from office, and disqualification to hold office" shall be the only punishments known to the laws of this State. Previous to 1868 we had retained the common-law punishments by which many corporal punishments could be inflicted, such as branding for manslaugh-

ter, cropping the ears for perjury, setting in the stocks, and flogging. The Constitution of 1868 intended by the above provisions to restrict the sentences which might be imposed by the courts upon conviction of crime to those above enumerated.

This constitutional provision has no direct application to the discipline required in our jails and penitentiaries, for if so it would prevent solitary confinement, restriction of rations, and other reasonable punishments that are in customary use in prisons and penitentiaries.

The question whether flogging can be used as part of the discipline in our State and county prisons depends not alone upon the constitutional provision, but also upon the question whether it is reasonable or authorized. Laws 1909, ch. 281, sec. 6, provides: "The convicts sentenced for hard labor shall be under the control of the county commissioners of said county, and said authorities shall have power to enact and enforce all needful rules and regulations for the successful working of all convicts upon the highways, and commit to the superintendent or supervisors the custody of the whole and any part of the convict force. And they may authorize and empower them to use such discipline only as may be necessary to carry out the rules and regulations in the working of the highways to which said convicts may be put by the order of the county commissioners *to the same extent as is allowed by law to the authorities of the penitentiary in the custody and control of convicts committed to the State's Prison.*" This act is applicable only to Wake County.

We find no rule or regulation of the county commissioners authorizing the flogging of convicts, and as we find no authority of law given the State's Prison authorities to inflict such punishment, such regulation by the county commissioners would be void and no protection to the defendants, if it had been made.

It is true that flogging has been customary in the State's Prison, and also in the county convict camps; but that is no defense, since there is no statute authorizing it, unless such discipline is reasonable and necessary. In the absence of such statute, [275] whether any given measure of discipline can be authorized by those in charge of the State and county prisoners depends upon whether the measure of discipline is reasonably necessary. In view of the enlightment of this age, and the progress which has been made in prison discipline, we have no difficulty in coming to the conclusion that corporal punishment by flogging is not reasonable, and cannot be sustained. That which degrades and embrutes a man cannot be either necessary or reasonable.

Originally, flogging was recognized as a proper punishment in the armies and navies of the world. But it has long since been abolished in those services everywhere, notwithstanding the protests of officials who declared that the result would be mutiny and disorganization. Flogging has been long since abolished as a part of prison discipline by all the great and enlightened nations of the world, except Russia. In England, France, Germany, Austria, Italy, Belgium, Holland, Switzerland, Spain, and by the government of the United States, and even in Mexico and in most other civilized countries, the lash as an adjunct of prison discipline has long since been forbidden. In Mexico, in 1903, Art. 385 was adopted: "The lash or any other violent physical punishment shall not be employed" either as a sentence of the court or as a part of prison discipline. This has been taken substantially from the statutes obtaining in the more advanced countries.

The statute in New York provides: "No guard in any prison shall inflict any blows whatsoever upon any prisoner, unless in self-defense or to suppress a revolt or insurrection." Statutes or regulations to the same effect abolishing flogging prevail in all the northern and western States, 32 out of 48, and it is there looked upon as a survival of barbarism. In many of the southern States, as in Maryland, District of Columbia, West Virginia, Oklahoma, Tennessee, Texas, and others, it has also been abolished and prohibited. This is one of the very few States in which it has been retained, and here not by authority of law, but as a matter of custom, and is the survival, doubtless, of a former condition of society, and it has lingered here, probably, owing to the fact that an unusually large part of our criminal population are colored.

The growing humanity of the age demands that punishment for crime, however justly inflicted, should be humanely administered, [276] with due regard to the rights of the prisoner. About a century and a quarter ago, when the celebrated John Howard visited the prisons of Europe, he awoke the world to a realization of evils inflicted upon prisoners in England, and in other countries. He found that "the prisons were for the most part pestiferous dens, overcrowded, dark, foully dirty, not only ill-ventilated, but deprived altogether of fresh air. The wretched inmates were dependent for food upon the caprice of their jailers or the charity of the benevolent; water was denied them except in the scantiest proportions; their only bedding was putrid straw. Every one in durance, whether tried or untried, was heavily ironed. All alike were subject to the rapacity of their jailers and the extortions of their fellows. Jail fees were levied ruthlessly; also a contribution was paid by each individual to a

common fund to be spent by the whole body generally in drink. Idleness, drunkenness, vicious intercourse, sickness, starvation, squalor, cruelty, chains, awful depression, and everywhere culpable neglect. In these words may be summed up the state of the jails at the time of Howard's visitation. At this time prisons were primarily places of detention, not of punishment, peopled by accused persons still innocent in the eyes of the law, and debtors guilty of breaches of the financial rules of a commercial country, framed chiefly in the interest of the creditor. Freedom from arrest was guaranteed by Magna Carta, save on a criminal charge; yet thousands were committed to jail on legal fictions and retained indefinitely for costs far in excess of the original debt. The impecunious were locked up and deprived of all hope of earning means to obtain enlargement; while their families and persons dependent on them shared their imprisonment and added to the overcrowding. The prisons were always full. Jail deliveries were a rare occurrence, and even when tardy trial ended in acquittal, release was delayed until illegal charges in the way of fees had been satisfied." Encyclopedia Britannica, Art. "Prison." Our Constitution of 1868 abolished imprisonment for debt as well as all corporal punishment.

We also know from the history of those times that even in England prisoners had no allowance from the Government for food, and were indebted to the contributions of charity or to the consideration of the jailer for their daily sustenance, and that when acquitted or discharged they were detained by the jailer [277] till the debt for their support was liquidated by their friends. When it was proposed in Parliament that the Government should pay the jailers a salary, and should afford food for the prisoners at the public expense, a most serious and prolonged opposition was made against the incurring of such expense by the public.

Under the agitation begun by the investigations of Howard and maintained by the ability of Jeremy Bentham, a reform of prison discipline was begun which has alleviated to some extent the tyranny often inflicted upon those who were till then treated as if deprived of all rights as human beings because deprived of their personal liberty. It has been found that it is unsafe and unjust to intrust to the discretion of men, often of bad judgment and sometimes of evil passions, the infliction of corporal punishment upon helpless prisoners who, protected by no publicity and without any trial for breaches of discipline, are subjected to the arbitrary power of those in charge of them.

Further back in the so-called days of chivalry, throughout Europe every baron and lordling had beneath the lower floor of his castle a cellar into which he cast without trial, and often without food, in the mire and ooze, any one who displeased him. Their only avenger were the diseases which, rising from such pollution, often devasted the families of those on the upper floors, who spent their time in dancing and revelry while the unhappy victims, without light, often without food, were groaning in the underground receptacles, where, amid pollution and filth, they passed to miserable death. From that state of things to the condition found by John Howard was a gradation, but very far from what now obtains generally throughout civilized countries. The usual appeal for the maintenance of abuses is to the usages of the common law and of past ages, but cannot be maintained.

In 9 Cyc. 877, it is said: "A convict who violates any of the prison regulations may be subjected to solitary confinement or such other reasonable punishment as the statute may authorize (Boone v. State, 8 Lea (Tenn.) 739); but corporal punishment cannot lawfully be inflicted without legislative sanction. Smith v. State, 8 Lea (Tenn.) 744." The survival of flogging in a few of the Southern States only is doubtless due to the public attitude as to this matter which has descended to us from a former state of society. It is utterly tabooed elsewhere. Delaware and Maryland retain flogging, not as a part of prison discipline, [278] but as a court sentence for "wife beaters"—admirable arrangement and a most just application of the *lex talionis*.

There can be no analogy to the corporal punishment which is sometimes inflicted on pupils in the public schools. In those cases there is the utmost publicity as a deterrent against abuse and the protection of the parent, or other relatives, of the pupil. Still less is there any analogy to the punishment of a child by its parent. In that case, besides the protection of public sentiment, there is the safeguard of natural affection. The common-law right of a husband to chastise his wife was held as late as State v. Rhodes, 61 N. C. 453, 98 Am. Dec. 78, where a husband was held not guilty upon a special verdict that he "whipped his wife without provocation, with a switch as large as his finger, but no larger than his thumb," citing State v. Black, 60 N. C. 263, 86 Am. Dec. 436, which held that if there was no permanent injury nor excessive violence, the law permitted the husband to thrash her "to make her behave herself," and that if the courts intervened it would "encourage insubordination" on the part of wives. But in 1874, in State v. Oliver, 70 N. C. 60, without any intervening statute, it was held that we had "advanced beyond that barbarism." Yet the wife had the protection of the affection of her

husband and of public opinion. There is no protection to prisoners in jail. They are under a cloud, and receive small sympathy from any one. The discipline is necessarily peremptory, and when punishment is inflicted by flogging, whether it is justly imposed or not rests in the bosom of the officer who orders it. There is no inquiry or publicity, either as to the justice of the punishment or of its extent as commensurate with the offense. The extent of punishment, if legal, is committed to the arbitrary power of men who may happen to be unjust or of bad judgment. Their action is irreviewable except when in some cases of gross excess the matter may possibly be brought to public attention, and then the victim is at every disadvantage. The punishment, if by flogging, has already been inflicted, whether justly or not, and the suffering and degradation cannot be removed. The victim is usually ignorant and always impecunious and generally without friends. His fellow convicts often dare not testify in his behalf, and their testimony will not carry the weight given to statements made by those in authority. In such circumstances, abuse is easy and almost invited. And reparation is impossible when [279] wrong has been done. Suppose a young man of otherwise good record is sentenced in a recorder's court without a grand jury and without a jury trial for carrying a concealed weapon or for an affray or other offense not involving moral turpitude, and while in jail or on the roads he should violate some order of the prison authorities, shall he be flogged as Gallagher was, and disgraced for life? We have no decision sustaining the right to flog prisoners to be overruled, as in the case of husband and wife, above cited.

In view of these considerations and the impolicy of subjecting men without trial, at the arbitrary will of other men, to a punishment whose effect must be to destroy the self-respect of the victim and harden and embrute him, it is no wonder that the intelligence and humanity of the age has abolished flogging, in all but a few States of this country, as any part of prison discipline. While our constitutional provision against the infliction of corporal punishment as a part of the sentence of the courts does not directly prohibit its infliction in prison discipline, its spirit is certainly against the longer use of flogging for that purpose.

The smallness of the sentence imposed in this case (a fine of $10 each and the costs) indicates that the humane and just judge who tried this cause deemed that the act of the defendants was without aggravation, and that they were only following the custom which has been observed in this State up to this time. We have been, however, discussing the legal rights of prisoners, and we find no authority for its longer continuance.

In at least two of the States, where the parole system obtains, it has been found that prisoners can be worked, with some exceptions, by humane methods which require the imposition of no punishment and by the hope of reward and by the shortening of their sentences for good conduct. In others a modification of that system has been successful. These are matters, however, which rest with the Legislature and the prison authorities.

We may note that the act of 1911, ch. 64, prescribing that persons sentenced to work on the public roads for misdemeanors shall not wear felon's stripes, is an indication that the Legislature did not intend that prisoners should be subjected to any unnecessary degradation. We are constrained to say that there is no statute or decision in this State that authorizes the infliction of flogging as a part of prison discipline, and that it is contrary [280] to the spirit, at least, of the constitutional provision referred to. Such being the case, we must hold that the flogging of Gallagher was inflicted illegally and without authority of law.

No error.

HOKE, J. (*concurring*).—I concur in the disposition made of this appeal and am of opinion that the laws of North Carolina applicable to the subject do not refer the control and discipline of prisoners to the unregulated discretion of subordinate administrative officials. The general statute on the subject of working convicts on the public roads, Rev. 1905, sec. 1356, provides that "The county authorities shall have power to enact all needful rules and regulations for the successful working of convicts on the public roads," etc., and the law of 1909, the statute specially applicable to Wake County, confers like power on the authorities of that county, with the limitation that the regulations made shall be in accord with those which prevail in the State's Prison—a limitation which does not obtain unless and until the authorities of the State's Prison shall have made such rules. These statutes clearly contemplate that the control and discipline of convicts and particularly in reference to their punishment, corporal or other, shall be pursuant to rules formally made and published by the board of county commissioners, or their duly authorized agents, and I would not hesitate to hold that these rules should be humane, reasonably designed to affect the well ordered governance of convicts, and that, in their prominent features, they should be made known beforehand to each and every prisoner, that they may live and act with knowledge of the penalties attendant on disobedience. In applying such a standard, I am not prepared to say that never, under any circumstances, is corporal punishment permissible, or that carefully prepared rules, looking to such

result, are, in all instances, unlawful; but the question is not presented on this appeal, for there is no proof or suggestion that there were any rules or regulations of any kind which authorized the punishment inflicted in the present case. I am of opinion, therefore, that acts of defendants were without warrant of law and that they have been properly convicted.

Walker, J., and Brown, J., concurring in this opinion.

NOTE.

Right to Inflict Corporal Punishment on Convict.

The right to inflict corporal punishment on a convict is governed largely by the statutes of the different jurisdictions regulating the care, discipline, and treatment of convicts. The rule laid down in Westbrook v. State, 18 Ann. Cas. 295, that, in construing those statutes, the tendency of the courts is to discountenance corporal punishment, is supported by the recent cases.

Thus in the reported case, the court construes a North Carolina statute (Laws 1909, ch. 281, § 6) which provides as to convicts in the county where the cause of action arose, as follows: "The convicts sentenced for hard labor shall be under the control of the county commissioners of said county, and said authorities shall have power to enact and enforce all needful rules and regulations for the successful working of all convicts upon the highways, and commit to the superintendent or supervisors the custody of the whole and any part of the convict force. And they may authorize and empower them to use such discipline only as may be necessary to carry out the rules and regulations in the working of the highways to which said convicts may be put by the order of the county commissioners to the same extent as is allowed by law to the authorities of the penitentiary in the custody and control of convicts committed to the State's prison." The court adverts to the absence of any rule or regulation of the county commissioners authorizing the flogging of convicts, and says that such a rule would be void if made, as there is no authority of law given the prison authorities to inflict such punishment. The corporal punishment of convicts by flogging, the court holds, is unreasonable and cannot be sustained.

Likewise, in State v. Morris, 166 N. C. 441, 81 S. E. 462, wherein it appeared that there were no written rules or regulations and there was no evidence that the county commissioners had formulated or adopted any rules or regulations for the discipline of convicts, in affirming the conviction of the superintendent of a chain gang for whipping a convict, the decision of the court in the reported case was held to be controlling, and though there was a difference of opinion among the members of the court on some of the questions raised in the reported case, it was agreed by all that in the absence of rules and regulations by the county commissioners, guards had no right to whip convicts.

In Stephens v. Conley, 48 Mont. 352, Ann. Cas. 1915D 958, 138 Pac. 189, which was an action for damages by a convict, against the warden of the penitentiary, the complaint alleged that the defendant as warden, caused him to be (a) confined in a cell with an insane Italian and (b) with a negro, (c) to be shackled, manacled and placed in a dungeon and confined on a bread and water diet, and (d) assaulted, beaten and wounded, his collarbone broken, and his head and chest cut and bruised. It was held that he could not recover for such treatment, where it appeared that (a) the Italian's insanity was not known to the prison officials, and the plaintiff did not complain or request a change; (b) that on account of the crowded condition of the prison it was necessary to confine some one in the cell with the negro; (c) that the punishments enumerated above were a species of punishment provided for by the state prison board, pursuant to statutory authority, in certain rules and regulations made by them for the management of the penitentiary and the discipline of the convicts, and that the infliction of the punishment on the prisoner was necessary to compel his submission to the prison authority; and (d) that the injuries complained of, were received in the quelling by the prison guards of a riot and attempt to escape from the prison, in which the plaintiff took a leading part, actually participating in the murder of the deputy warden and an assault on the warden, which occurred at that time.

For a discussion of the personal liability of a prison officer to a convict for tort, see the note to Stephens v. Conley, Ann. Cas. 1915D 958.

BONDI

v.

MACKAY.

Vermont Supreme Court—December 10, 1913.

87 Vt. 271; 89 Atl. 228.

Fish and Game — Requirement of License to Hunt — Persons Entitled to License — Alien.

Acts 1912, No. 201, § 47, provides that, if the applicant for a hunter's license is a bona

fide resident of the state, or owns improved realty listed for taxes at $1,000, he shall pay 75 cents. Section 48 provides that, if he is a nonresident, and does not own improved realty of a certain valuation, he shall pay $10. Section 1 provides that the word "resident" as used in the act is intended to cover "all citizens of the United States who have lived in this state for not less than six months" before applying, and that the term "nonresident" shall include all persons not coming within the definition of "resident." Section 4, subd. 3, provides that game or fish protected by law, if taken by a nonresident, may be transported without the state as provided. Held, that one who had for 14 years been a bona fide resident and taxpayer of the state, though not on real estate of the required value, but was not a citizen of the United States, being a subject of Italy, was not entitled to a license.

Validity of Statute.

Const. c. 2, § 63, provides that the inhabitants of a state shall have liberty in seasonable times to hunt on their own lands and others not inclosed, and take fish in all waters under proper regulations, and chapter 1, art. 5, provides that the "people of this state by their legal representatives have the sole . . . right of governing and regulating the internal police of the same." Held, that article 5 authorized the enactment of Acts 1912, No. 201, requiring hunting licenses, section 1 of which provides that the word "resident" as used in the act which provides that, if applicant is a bona fide resident or owner of improved realty of a certain taxable value, he shall pay a certain fee shall "cover all citizens of the United States" living in the state for not less than 6 months, even though the section is construed to exclude a resident alien.

[See note at end of this case.]

Same.

Wild game belongs to the people of the state in their collective capacity except so far as private ownership is acquired under the Constitution.

[See note at end of this case.]

Same.

The legislature may regulate the right to take game, with respect to its decrease as well as its preservation and increase.

[See note at end of this case.]

Same.

Acts 1912, No. 201, § 1, providing that the word "resident" as used in the act which requires one hunter's license fee of a bona fide resident or property owner, and another in case of a nonresident, shall cover all citizens of the United States living in the state for 6 months, does not contravene Const. U. S. amend. 14, relating to the equal protection of the law, even if construed to exclude a resident alien and taxpayer from obtaining a license.

[See note at end of this case.]

Same.

A hunting license fee of $10.50 required by Acts 1912, No. 201, § 48, of nonresidents is not unreasonable.

[See note at end of this case.]

Treaties — Right of Resident Alien — Exclusion from Privilege of Hunting.

The treaty between the United States and Italy (Feb. 26, 1871, 17 Stat. 845) providing that citizens of each country shall enjoy the same rights and privileges which are granted to the natives is not violated by Acts 1912, No. 201, § 1, providing that the word "resident" as used in the act which related to hunters' licenses is intended to include all citizens of the United States, though the section construed excludes from obtaining a license an Italian subject who is both a resident and a taxpayer.

Construction of Treaty.

Treaties conferring rights upon the subjects of a foreign nation partake of the nature of municipal law, and will be treated and construed as a statute, if the right can be enforced by the courts, and the treaty prescribes a rule for its determination.

Same.

A treaty provision should receive a reasonable construction with reference to the purpose of the treaty and the intention of the parties.

Original petition for mandamus. Abramo Bondi, petitioner, and James MacKay, defendant. The facts are stated in the opinion. PETITION DISMISSED.

Richard A. Hoar for petitioner.

Rufus E. Brown, John G. Sargent and *Henry B. Shaw* for State.

[273] MUNSON, J.—Our fish and game statute provides, with certain exceptions not material here, that "no person shall at any time hunt, trap, shoot, pursue, take or kill wild animals, wild fowl or birds in this State, nor use a gun for hunting the same, . . . without having first procured a license therefor. . . ." The license is to be issued by town clerks under such rules and regulations and in such form as may be prescribed by the fish and game commissioner. The statute requires the payment of a license fee, the amount of which depends upon the classification of the applicant. "If the applicant is a *bona fide* resident of this State or owns improved real estate therein and pays taxes thereon, on the listers' appraised valuation of not less than one thousand dollars," he is to pay seventy-five cents. "If the applicant is a non-resident and does not own improved real estate upon which he pays taxes on the appraised valuation by the listers of not less than one thousand dollars," he is to pay ten dollars and a clerk's fee of fifty cents. Acts 1912, No. 201, §§ 47, 48. Section one of the same act provides as follows: "The word resident as used in this act is intended to cover all citizens of the United States who have lived in this State for not less than six months prior to date of making application for a license."—"The term non-resident as

used in this act, shall include all persons not coming within the definition of resident as set forth in this act."

It appears from an agreed statement of facts that the petitioner is now, and for the past fourteen years has been, a *bona fide* resident and taxpayer of the city of Barre; but that he does not now own, and has not owned, improved real estate within this State upon which he now pays, or has paid, taxes on the listers' appraisal of one thousand dollars. The petitioner was born in Italy, and has never been naturalized. The petitionee is the clerk of the city of Barre. The petitioner applied to the petitionee for a resident hunter's license, and offered to comply with all the prescribed regulations, including the payment of the seventy-five cents fee. The petitionee refused to issue to the petitioner a resident hunter's license, solely on the ground that he was not a citizen of the United States or of this State, [274] and did not own improved real estate upon which he paid taxes on an appraised valuation by the listers of one thousand dollars.

The first question is whether the petitioner is a *bona fide* resident of this State within the meaning of the statute. It is not necessary to inquire regarding the meaning of the word "resident" as used in statutes relating to the qualification of voters or the support of the poor. The meaning of the word as used in this statute is determined by the statute itself. The word resident "is intended to cover all citizens of the United States who have lived in this State" the required period, and is intended to exclude all persons who are not within this definition, as is manifest from the accompanying definition of non-resident. This plainly confines the class who are entitled to the cheaper license to citizens of the United States. It is agreed that the petitioner has been a *bona fide* resident of this State the prescribed period, but this is immaterial in his case because of his want of United States citizenship. It is not necessary, in this branch of the inquiry, to consider the word "resident" as synonymous with or distinguished from the word "inhabitant" on the one hand, or the word "citizen" on the other hand. It will not avail the petitioner to treat the word "resident" as used in § 48 as synonymous with "inhabitant," unless the word "citizen" as used in the definition contained in § 1 is given the force of "inhabitant." If this were done, the provision would be that all inhabitants of the United States who had been *bona fide* inhabitants of this State for six months were entitled to a license on payment of the smaller fee. But it is not to be supposed that the Legislature, in referring to citizens of the sovereignty which has the exclusive power of converting aliens into citizens, used the word "citizens" in the sense of "inhabitants."

Subdivision C of § 4 of the statute provides that "wild game or fish protected by law if taken by a non-resident may be transported by him from a point within the State to a point out of the State," under certain regulations; and the petitioner argues that this is virtually a definition of the term "non-resident." It might easily be so treated in the absence of a more specific provision; for the association of the right of removal from the State with persons designated as non-residents, taken by itself, points to the use of the term in its ordinary sense. But this provision is to be construed in connection with a special statutory definition, the controlling effect of which has already been indicated. [275] The petitioner's want of the citizenship which is acquired by naturalization will be fatal to his claim, unless the statute is in conflict with some constitutional or treaty provision.

The petitioner contends that if the word resident as used in § 48 is restricted to citizens by force of the definition in § 1, the statute is in conflict with the constitution of this State, and also with the Federal constitution. In considering this objection as applied to our State constitution, the nature of the property had in wild game and the status of the petitioner with reference to it must first be determined. In citing Chapter II of our constitution the references are to the sections as recently renumbered, unless otherwise indicated.

It will be well to refer at the outset to Chap. II, § 39 of the early constitutions,—a section adopted and readopted while Vermont was exercising the powers of an independent State. That section, now embodied in part in Chap. II, § 62, was as follows: "Every person of good character, who comes to settle in this State, having first taken an oath or affirmation of allegiance to the same, may purchase, or by other just means acquire, hold and transfer land, or other real estate; and after one year's residence shall be deemed a free denizen thereof, and entitled to all rights of a natural born subject of this State, except that he shall not be capable of being elected Governor, Lieutenant Governor, Treasurer, Councillor, or Representative in Assembly, until after two years' residence." The first clause of this provision was needed to secure to an alien some of the rights enumerated, but was not well adapted to the status of one who had taken an oath of allegiance to the State in which he had become a resident. The use of the word "denizen" to designate one entitled to all the rights of a natural born subject shows a lack of technical exactness which might justify, if occasion required, some latitude in the construction of other words pertaining to the same subject. But no question arises directly upon this section, for there has been no taking of the prescribed oath.

Chap. II, § 63 of the constitution reads as follows: "The inhabitants of this State shall have liberty in seasonable times, to hunt and fowl on the lands they hold, and on other lands not enclosed, and in like manner to fish in all boatable and other waters (not private property) under proper regulations, to be made and provided by the General Assembly." Another source of legislative power over this subject is found in Chap. I, Art. 5; [276] which provides, "That the people of this State by their legal representatives, have the sole, inherent, and exclusive right of governing and regulating the internal police of the same." The petitioner claims that the power to adopt proper regulations, given to the Legislature in the last clause of § 63, applies only to fishing, and that the Legislature can regulate hunting only in respect to the seasons. A different view was taken in Zanetta v. Bolles, 80 Vt. 345, 67 Atl. 818, where the restrictive provision of the second clause was applied directly to the liberty to hunt and fowl. But if this were held otherwise, the regulation would be a valid exercise of the police power of the State under Chap. I, Art. 5, above quoted. State v. Theriault, 70 Vt. 617, 41 Atl. 1030, 43 L.R.A. 290, 67 Am. St. Rep. 695.

The nature of all property interests in wild game is fully set forth in our decisions. "The wild game in the State belongs to the people of the State in their collective and sovereign capacity, and not in their individual and private capacity, except so far as private ownership may be acquired therein under the constitution. . . ." Zanetta v. Bolles, 80 Vt. 345, 67 Atl. 818. See also State v. Niles, 78 Vt. 266, 62 Atl. 795, 112 Am. St. Rep. 917; Payne v. Sheets, 75 Vt. 335, 55 Atl. 656; State v. Haskell, 84 Vt. 429, 79 Atl. 852, 34 L.R.A.(N.S.) 286. The right of the Legislature, in the exercise of the police power, to take measures for the preservation and increase of this common property is fully recognized. State v. Theriault, 70 Vt. 617, 41 Atl. 1030, 43 L.R.A. 290, 67 Am. St. Rep. 695. It is equally within the power of the Legislature to provide for and regulate its decrease, if its development becomes injurious to other property rights.

So the relation of an inhabitant of the State, in his individual capacity, to the State in its sovereign capacity, as regards this common property, is determined by Chap. II, § 63, in connection with Chap. I, Art. 5. If we treat the word "resident" as used in § 48 of the act in question as synonymous with "inhabitant," no difficulty is created; for the inhabitants of the State, in the broader sense, are the people of the State, and the meaning of the latter term in the constitutional provisions affecting this subject is derivable from the constitution itself. "The inhabitants of this State" who are secured rights in game by Chap. II, § 63, are the same as "the people of this State" who are given the power to regulate those rights by Chap. I, Art. 5; and these last are the people who act "by their legal representatives;" [277] a designation which plainly points to the native-born and naturalized inhabitants of the State—the citizen body from which the electorate is taken.

But the petitioner claims that the act conflicts with the Fourteenth Amendment to the Federal Constitution, which secures to all persons the equal protection of the laws. Here the petitioner's claim is to be considered with reference to what he really is, and not with reference to what the statute arbitrarily calls him. He is clearly an actual resident of this State, and the act distinguishes him from others who are residents in a different sense. The petitioner claims that the distinction made between citizens and resident aliens is an unjust and arbitrary discrimination, which renders void the provision regarding licenses. We think the distinction between residents who are citizens and those who are not, made with reference to the acquirement of individual interests in property which belongs to the State, affords a just basis for classification, and that a reasonable discrimination may properly be made against an alien who becomes a permanent resident without taking upon himself the full obligations of citizenship. But the petitioner says that the license fee of ten and one-half dollars is unreasonable and excessive. We think it is not so disproportioned to the privilege as to be in any sense prohibitory. See State v. Norton, 45 Vt. 258.

The petitioner urges further that the provision as we construe it is in conflict with the treaty between the United States and Italy, in that it denies him rights and privileges to which the treaty entitles him. The provision in question is, in substance, that the citizens of each country shall receive in the states and territories of the other the most constant security and protection for their persons and property, and shall enjoy in this respect the same rights and privileges which are granted to natives, provided that they submit themselves to the conditions imposed on natives. The treaties of the United States are the law of the land, superior to the constitution and statutes of any State, and binding upon all courts. U. S. Con. Art. VI. Treaty provisions which confer rights upon the subjects of another nation residing in this country partake of the nature of municipal law; and when the right conferred is one that can be enforced in a court of justice, and the treaty prescribes a rule by which the right is to be determined, the court resorts to the treaty

for the rule of decision as it would to a statute. [278] Head Money Cases, 112 U. S. 580, 28 U. S. (L. ed.) 798, 5 S. Ct. 247. The provision under consideration is to receive a reasonable construction, having reference to the purpose of the treaty and the intention of the contracting parties. Under this provision the Italians residing here are to receive complete protection for the property they have or may acquire, and are to have in respect to such property the rights and privileges granted to natives. But there is nothing in this which entitles them to share equally with the natives in such privileges as the Legislature may grant in the wild game of the State, and nothing which seems intended to protect them from the minor discriminations incident to the ordinary exercise of the police power.

Our conclusion is that the petitioner, although by the agreed statement a resident of Barre, is not entitled to a resident hunter's license, because not a citizen of the United States and of this State.

Petition dismissed with costs.

NOTE.

Validity of Statute Requiring License to Hunt Game.

As a general rule a statute requiring a license to hunt game is valid. In re Eberle, 98 Fed. 295; Kyle v. People, 226 Ill. 619, 80 N. E. 1081; State v. Morgan, 133 La. 1033, 63 So. 509; State v. Snowman, 94 Me. 99, 46 Atl. 815, 80 Am. St. Rep. 380, 50 L.R.A. 544; State v. Kirby, 34 S. D. 281, 148 N. W. 533, *opinion modified* 34 S. D. 497, 149 N. W. 168; State v. Niles, 78 Vt. 266, 62 Atl. 795, 112 Am. St. Rep. 917. And see the reported case. See also Lewis v. State, 110 Ark. 254, 161 S. W. 154; Harper v. Galloway, 58 Fla. 255, 19 Ann. Cas. 235, 51 So. 226, 26 L.R.A.(N.S.) 794; Cummings v. People, 211 Ill. 392, 71 N. E. 1031; State v. Holcomb, 80 Kan. 243, 101 Pac. 1072; State v. Koock, 202 Mo. 223, 100 S. W. 630; Ex p. Helton, 117 Mo. App. 609, 93 S. W. 913. Thus in State v. Kirby, 34 S. D. 281, 148 N. W. 533, *opinion modified* 34 S. D. 497, 149 N. W. 168, the defendant was convicted of the offense of hunting game birds without having procured a license. It was contended on his behalf that the purpose of the act, under which the conviction was had, was to extort money for private use and to penalize the failure to pay a tax for the ancient right to hunt and fish. The court affirming the judgment, said: "He entirely loses sight of the proposition that the fundamental purpose of the act is the protection and preservation of the game and fish for the people of the present as well as for posterity. That the police power of the state is adequate to accomplish this result cannot be questioned. . . . In so far, therefore, as the natural right to hunt and fish is abridged, the law is clearly within constitutional limits." Likewise in Kyle v. People, 226 Ill. 619, 80 N. E. 1081, wherein the defendant was convicted of unlawfully hunting rabbits without obtaining a license to do so, the court said: "The prosecution was under section 25 of chapter 61, (Hurd's Stat. 1905, p. 1114). . . . Section 25 was originally passed in 1903 and contained no reference to rabbits, but provided that no person should pursue or kill with a gun any of the wild animals, fowl or birds that are protected during any part of the year, without the person so killing first obtaining a license. In 1905 this section was amended as above, by inserting the word 'rabbits.' It was manifestly the purpose and intention of the legislature by the amendment to specifically protect rabbits and bring them within the provision requiring hunters to obtain a license before killing them. . . . But, . . . no provision of the Constitution has been pointed out which the statute violates. The power of the legislature to enact statutes if plenary, except in so far as that power has been limited by the Constitution, and every presumption is in favor of the validity of legislative enactments. They will only be declared unconstitutional and void when they are clearly violative of some express constitutional limitation. There is nothing whatever shown in this case against the validity of the section of the statute under which plaintiff in error was found guilty." So in State v. Snowman, 94 Me. 99, 46 Atl. 815, 80 Am. St. Rep. 380, 50 L.R.A. 544, the defendant was found guilty of a violation of the public laws, in acting as a guide for fishing or hunting without having caused his name, age and residence to be recorded in a book kept by the commissioners of inland fisheries and game, and in not having procured from the commissioners a certificate setting forth that he was deemed suitable to act as a guide. Overruling the exceptions as to the constitutionality of the statute the court said: "The privilege of hunting and fishing is granted by the state freely and without price; and it is reasonable and proper that all who avail themselves of such privilege, whether they be fisherman, hunters or guides, should conform and be amenable to such regulations as the state may impose. We are of opinion that the legislature has the constitutional power to regulate the employment of guides in fishing and hunting as provided in the statute in question. The learned counsel for the respondent further contends that, assuming the statute to be otherwise constitutional, the requirement that each person registered and certified under the

provisions of the act, shall pay a fee of one dollar, is repugnant to the constitution, and that the statute is for that reason unconstitutional and void. We do no sustain that contention. It is well settled that when the state issues a license to any person to carry on any business or to engage in any vocation, it may exact a reasonable fee therefor. . . . The fee is one placed upon the defendant; and it is not, and in the very nature of things cannot be, contended that the restriction invades any constitutional right of his. It is not the right of any person to hunt on the lands of another without the consent of the owner; and one hunting without consent is a trespasser, subjecting himself to a civil action for the offense."

An act requiring the payment of a license by a nonresident to hunt is valid. In re Eberle, 98 Fed. 295; State v. Miles, 78 Vt. 266, 62 Atl. 795, 112 Am. St. Rep. 917.

In State v. Holcomb, 80 Kan. 243, 101 Pac. 1072, the court, without discussing the validity of an act requiring license, interpreted the statute for the guidance of public officials, as to the proper disposition of license fees when collected from hunters. And in State v. Koock, 202 Mo. 223, 100 S. W. 630, the validity of an act requiring a hunter to have a license was not discussed, but the court construed the statute and held that "the legislature never intended that a hunter's license should first be obtained in order to authorize a person to hunt in the county in which he resided." See to the same effect Ex p. Helton, 117 Mo. App. 609, 93 S. W. 913. In Lewis v. State, 110 Ark. 254, 161 S. W. 154, wherein the issue was the validity of an act requiring licenses to hunt from residents only of certain counties, the court substantially acknowledged the right of the state to pass laws of that kind but said that this must be done on the same terms to all people, and that the law under consideration was invalid for failure so to do. For a further consideration of this point see the note to Harper v. Galloway, 19 Ann. Cas. 235, wherein the question of the constitutionality of a game law discriminating between persons or classes as to the right to hunt game is discussed.

In Hyde v. State, 155 Ala. 133, 46 So. 489, the court held that an act of the legislature which made it unlawful for a person to hunt on the lands of another without obtaining his written permission was not unconstitutional. It was contended that the section of the game law requiring of the landowner a written, as distinguished from an oral, permission, transcended the power of the state. The court said: "The argument in support of the contention proceeds on the theory, not that any right of the hunter is restricted, but that the right of the landowner in the use of his property is unduly restricted. Assuming, from this point of view, that the defendant is in position to bring in question the constitutionality of the act, which right in defendant may well be doubted. . . . We are of the opinion that his contention is untenable. It is clear to our minds that, instead of the laws being an invasion or an undue abridgement of any right of the landowner in the use of his property, it operates as a protection to it against trespassers. The only restriction, it seems to us, required by this statute is certainly reasonable, being no more than is sufficient to defray the expense of registering and certifying and maintaining necessary supervision. We, therefore, hold that the statute under which the respondent is indicted is not repugnant to the constitution of the state, but is constitutional and valid."

GREGG

v.

KING COUNTY.

Washington Supreme Court—June 26, 1914.

80 Wash. 196; 141 Pac. 340.

Wharves — Personal Injury from Defect — Liability.

Whether a county maintaining a public dock was negligent in leaving a fender pile loose and insecure, contrary to its own plan of construction adopted three or four years before an accident to a person on the dock, held for the jury.

[See note at end of this case.]

Negligence — Question for Jury.

The question of negligence is for the jury where minds of reasonable men may differ as to its existence.

Wharves — Personal Injury from Defect — Liability.

A county maintaining a public dock under Rem. & Bal. Code, § 8114, for public use and convenience, must exercise reasonable care for the safety of the public and all persons having occasion to use it.

[See note at end of this case.]

Same.

Where a county maintains a public dock for public use and convenience, a child entering on the dock is not a trespasser, but he has the same right to be on the dock as he has to be on a public road contiguous thereto.

[See note at end of this case.]

Same.

A child six years old going on a county public dock with an elder brother visiting the dock to receive a newspaper is not a trespasser, but is legally thereon connected with a purpose for which it was intended, and

the county cannot escape liability for injury to the child on the ground that he was a trespasser,

[See note at end of this case.]

Same.

A county maintaining a public dock for public use and convenience is chargeable with notice that it may be used as a public street or other public place by any member of the public, including young children, especially in view of the presence of a confectionery store on the dock constituting an implied invitation to children and others to visit the dock, and it cannot escape liability for injuries to a child on the dock on the theory that it could not anticipate the presence of the child thereon.

[See note at end of this case.]

Contributory Negligence — Children.

In the absence of evidence to the contrary, a child of six or seven years of age is presumptively incapable of contributory negligence.

[See Ann. Cas. 1913B 492.]

Imputed Negligence.

The contributory negligence of a parent is not imputed to a child six years old suing for a personal injury.

[See Ann. Cas. 1912D 521.]

Same.

Where a mother was ill and the father was away from home at the time a child six years old accompanied his elder brother to a public dock without the knowledge of either the mother or father, the parents are not as a matter of law guilty of any negligence defeating a recovery by the child for injuries while on the dock.

Wharves — Personal Injury from Defect — Liability.

The degree of care required by a county maintaining a public dock for public use and convenience must be considered with reference to the uses and purposes for which the dock was constructed, maintained, and operated, and open to all classes of people, including children, who may be drawn there by curiosity or interest in the arrival of boats or who may be sent there on errands for their parents.

[See note at end of this case.]

Damages — Excessiveness — Personal Injury.

A verdict for $3,202 for injuries to a child is not excessive, where his left hand was so injured that it was necessary to amputate the little finger, and where the hand became stiff and lacked the power of gripping, and where it is doubtful whether the hand will ever be as strong as a normal hand.

[See Ann. Cas. 1913A 1361.]

Appeal from Superior Court, King county: TALLMAN, Judge.

...

Action for damages. Alton Louis Gregg, plaintiff, and King county, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. AFFIRMED.

John F. Murphy and *Robert H. Evans* for appellant.

B. J. Shipman and *Dudley G. Wooten* for respondent.

[197] ELLIS, J.—This action was brought to recover damages for injuries sustained by the plaintiff, a boy between six and seven years old, through the alleged negligence of the defendant in the construction and maintenance of its dock, at Juanita, on the eastern shore of Lake Washington.

The facts are practically undisputed. The dock in question was owned and operated by the county for the use of the public in connection with boats touching at Juanita. It was constructed on wooden piles, driven into the bed of the lake. The floor was of planking, and was bounded on its outer edge by a line of beams or "stringers," rising about ten inches above the floor. These, at the southerly side of the dock, where the accident occurred, were flush with the edge of the dock. At that side were driven piles about a foot in diameter, called "fender-piles," the purpose of which was to receive the impact of boats and to protect the wharf. The pile causing the injury was driven into the bottom of the lake eight or ten feet, and rose alongside the dock to a height of about a foot and a half above the stringer. It was not bolted to the dock, and there was a space of four or five inches between it and the dock.

A few feet east of this fender pile was a small warehouse for storing freight, and a few feet west was a slip or incline for the convenience of persons going to and from the boats. A few feet north of the warehouse was a small confectionery store. Contiguous to the wharf on the shore side, and constructed upon a trestle on a level a little above the floor of the wharf, ran the road from Juanita to Kirkland. A line of [198] boats ran to this dock regularly, making four or five landings a day to receive and discharge freight and passengers.

The dock was regularly used by the public in meeting, embarking upon, and leaving boats. Among the persons thus using the dock, were the older brother and sister of the plaintiff, one of whom was sent there daily by their parents to meet the boat arriving at five o'clock in the afternoon and receive the Seattle paper. On August 9, 1912, the plaintiff's older brother, aged nine, accompanied by the plaintiff, visited the dock for this purpose, arriving a few minutes in advance of the boat. They seated themselves in the narrow space between the warehouse and the slip, and on the stringer running along the edge of the dock, their feet resting upon the floor. The plaintiff was sitting behind the fender-pile above mentioned, his right arm around the pile, and his left arm hanging

down between the pile and stringer upon which he was seated. He remained in this position, watching the incoming boat, until the vessel struck the fender-pile, driving it against the dock, and mashing his left hand between the pile and the stringer. The hand was crushed so that it was necessary to amputate the little finger, the skin from the palm of the hand and on the forearm was badly lacerated, and the whole hand was severely bruised. After the arm was healed, a large scar remained, and the hand was stiff and lacked the power of gripping. Physicians who examined the boy testified that the injured hand does not perform its normal functions, that it is doubtful whether or not the hand will ever be as strong as a normal hand, and that the scar on the arm will be permanent. The plaintiff resided with his parents over a quarter of a mile from the dock and had been repeatedly warned by his parents not to go upon or play upon the dock.

It is undisputed that, if the fender-pile in question had been bolted to the dock, this accident would not have happened, and it appears that many of the piles about this dock were bolted at the time of the accident. There was [199] some dispute as to whether a bolted pile would be as adequate a protection to the dock as a loose one; but the county inspector of docks and bridges, a witness for the defendant, testified that, about four years before the trial, the county engineer's office had adopted the plan of bolting the fender-piles to the county docks in order to keep them in place. Another witness, a structural engineer, who had had charge of the construction of bridges and docks for Kings county during the year 1912, and under whose direction the dock here in question had been repaired in May and June of that year, testified that he had constructed and repaired seventy-five or eighty docks and that, according to the approved and safe method of construction, a fender-pile such as that which caused the injury should be bolted to the dock, and that a pile not so bolted would be dangerous.

At the close of the plaintiff's case in chief, the defendant moved for a nonsuit, which was denied. The jury returned a verdict upon all the evidence and the court's instructions, for the sum of $3,202 and costs. The defendant appealed.

The appellant assigns as errors: (1) the overruling of the motion for a nonsuit; (2) the giving of certain instructions and the refusal to give certain requested instructions; (3) the refusal of a new trial because of these things and because of excessive verdict.

I. The appellant claims that its motion for a nonsuit should have been granted because no actionable negligence on its part was shown. It is argued that the function of a given structure controls the plan of construction; that the wharf here in question was built only to accommodate travel and traffic on the lake; that its construction was reasonably safe for that purpose; that it was not intended as a lounging place or playground for trespassing children and that the fact that it was unsafe for that purpose was no evidence of negligence, since the presence of children on the dock and an injury such as occurred could not have been anticipated. The vice of this argument consists in the initial assumption [200] that the wharf, as constructed, was, as a matter of law, reasonably safe for all things connected with traffic and travel. Let us suppose that this child had gone on to the wharf with his elder brother or, for that matter, with his parents, for the purpose of taking passage upon the boat, and, while waiting alongside the slip for the boat to make a landing, the child had been injured just as he was injured. Eliminating, for the present, the question of contributory negligence, it is clear that, under the evidence, the question of the appellant's negligence in leaving the fender-pile loose and insecure, contrary to its own plan of construction adopted three or four years previously, would have been a question for the jury. The question of primary negligence, like that of contributory negligence, is always a question of fact for the jury and not a question of law for the court, whenever the minds of reasonable men might differ as to its existence. Richmond v. Tacoma Ry. etc. Co. 67 Wash. 444, 122 Pac. 351; 1 Thompson, Negligence (2d ed.) § 425.

The second phase of this argument is also unsound in assuming that, as a matter of law, the child who was injured was a trespasser not using the dock for, or in connection with, any purpose for which it was intended. The argument overlooks the fact that this dock was a public dock, intended for the use of all members of the public, children as well as adults. While we have held that a public dock is not a highway in such sense as to extend the right of eminent domain conferred by statute for the acquiring of rights of way for highways to the acquiring of dock sites, such statutes being strictly construed, and not extended by mere analogy (State v. Superior Ct. 68 Wash. 660, 124 Pac. 127, Ann. Cas. 1913E 1076), it is none the less true that a public dock is a public place, maintained by the county under statutory authority (Rem. & Bal. Code, § 8114, P. C. 533 § 9), for the public use and convenience. There is, therefore, the same duty upon the county to exercise reasonable care for the safety of the public and all persons having [201] occasion to use such docks as is found in case of public highways, since both are, broadly speaking, public ways. Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola, 134 N. Y. 461,

31 N. E. 987, 30 Am. St. 685; 2 Shearman & Redfield, Negligence (6th ed.) § 333. As further sustaining this view, the statute above referred to authorizes the construction and maintenance of such wharves only at the termination of a county road at or near the shore of navigable waters or water courses, thus recognizing a use of such wharves in connection with, and impliedly coextensive with, the use of such roads.

It would seem, therefore, that the child here in question had the same right upon this dock that it would have had upon the trestle forming the road immediately contiguous thereto. Unquestionably, had this child been injured in passing along the trestle, which constituted the public road at this point, by reason of a structural defect in the trestle, he would have had the right to recover from the county for such injury. Eskildsen v. Seattle, 29 Wash. 583, 70 Pac. 64. Moreover, even assuming that a child six years of age is capable of trespass in the strict legal sense—a thing upon which we have more than once expressed doubt (Haynes v. Seattle, 69 Wash. 419, 125 Pac. 147; Bjork v. Tacoma, 76 Wash. 225, 135 Pac. 1005, 48 L.R.A.(N.S.) 331; 1 Thompson, Negligence (2d ed.) § 1026),—this child was not a trespasser under the circumstances shown by the evidence. He visited the wharf in company with his brother on an errand connected with the purpose for which the wharf was intended. Even taking the appellant's restricted view of the matter, visiting the dock to receive a newspaper was as lawful an errand as a visit to receive freight or to meet a friend. True, the boy was not sent on this errand with his brother, but his presence would have been no more necessary had he been sent by his parents with the brother. Obviously, the mere circumstance of such sending could have no effect upon the quality of his act. It could not change a trespass to an [202] innocent visit, yet we have held, in effect, that a child six years old sent by a parent with an older sister to the post office in a populous city was rightfully on the street. Tecker v. Seattle, etc. R. Co. 60 Wash. 570, 111 Pac. 791, Ann. Cas. 1912B 842.

Nor are we impressed with the assertion that the presence of young children on the dock could not have been anticipated. Being a public dock, the appellant was chargeable with notice that it might be used, just as a public street, road or other public place may be used, by any member of the public. It is not claimed that any notice was given or measures of any kind taken to exclude children. Under such circumstances, it has even been held that the use of a public wharf for recreation is such lawful use that a parent may recover for the death, caused by a structural defect in the wharf, of a boy eight years old so using it with the parents' knowledge. Delaney v. Pennsylvania R. Co. 78 Hun 303, 29 N. Y. S. 226; see, also, Gluck v. Ridgewood Ice Co. 56 Hun 642, 9 N. Y. S. 254. No decision of any court has been cited to the contrary. In addition to this, the presence of the confectionery stand upon the dock, which it must be assumed was there with the appellant's permission, was an implied invitation to children and others to visit the dock for purposes not strictly connected with its function as a wharf. The appellant can hardly be heard to say that the presence of children could not reasonably have been anticipated. Harriman v. Pittsburgh, etc. R. Co. 45 Ohio St. 11, 12 N. E. 451, 4 Am. St. Rep. 507. "The liability in such a case should be coextensive with the inducement or implied invitation." Plummer v. Dill, 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463; Sweeney v. Old Colony, etc. R. Co. 10 Allen (Mass.) 368, 87 Am. Dec. 644. Under the circumstances disclosed by the evidence, we are clear that the question of the appellant's negligence was properly submitted to the jury.

The appellant intimates, rather than argues, that the nonsuit should have been granted because of contributory negligence [203] on the child's part. Contributory negligence was charged in the answer, and the court gave the usual instruction as to the affirmative nature of this defense and that to be available the defense must be established by the evidence. No evidence was offered as to the capacity of this child. In the absence of evidence to the contrary, a child of six or seven years of age "is everywhere presumed to be incapable of contributory negligence." 1 Shearman & Redfield, Negligence (6th ed.) § 73a. The motion for a nonsuit was properly overruled.

II. The court instructed the jury to the effect that no act of negligence on the part of the parents of the child, whether of omission or commission, could prevent a recovery by the child if, under the evidence and other instructions, the jury was of the opinion that the defendant was liable for the injuries sustained by the child; that the rights of the parties must be judged without regard to acts of negligence on the part of the child's parents, and that:

"It would not necessarily be negligence in law for the parents to send the plaintiff, aged six years, along with his older brother, aged ten years, to the public dock at Juanita, to meet the boat for the purpose of getting a newspaper or to permit him to go with the older brother, but even if the facts should be such as to lead the jury to believe that the parents were negligent in that regard, that can make no difference as to the right of the plaintiff to recover if the facts as shown by a preponderance of the evidence and the law as

given you by the court entitled him to a verdict at your hands."

The appellant contends that, in these instructions, the court went entirely too far in exonerating the parents from any duty in the custody and control of the child. The whole argument in this connection is based upon the doctrine of imputed negligence. The only logical basis for the doctrine of imputed negligence is tersely stated by Shearman & Redfield as follows:

[204] "The ethical proposition at the basis of the legal theory is that the person to whom the negligence of another is imputed, owing to the relation between them, ought to be held responsible for the conduct of such other in respect to the cause of the injury." 1 Shearman & Redfield, Negligence (6th ed.), § 65*a*.

In cases of injury to, or wrongful death of, a child, where the action is brought by a parent for his own benefit, the contributory negligence of the parent, the actual plaintiff, will, of course, bar a recovery. It is obvious that such cases afford no support to the doctrine that the negligence of the parent is to be imputed to the child. Both the ethical basis of the rule of imputed negligence and sound authority sustain the view that, where the child is the real plaintiff in an action for his own injury, the parent's contributory negligence is no defense. This is certainly sustained by reason, and is now supported by the great weight of authority. 1 Shearman & Redfield, Negligence (6th ed.), § 71. Bellefontaine, etc. R. Co. v. Snyder, 18 Ohio St. 399, 98 Am. Dec. 175; Bellefontaine R. Co. v. Snyder, 24 Ohio St. 670; Western Union Tel. Co. v. Hoffman, 80 Tex. 420, 15 S. W. 1048, 26 Am. St. Rep. 759; Pratt Coal, etc. Co. v. Brawley, 83 Ala. 371, 3 So. 555, 3 Am. St. Rep. 751; Atchison, etc. R. Co. v. Calhoun, 18 Okla. 75, 11 Ann. Cas. 681, 89 Pac. 207; Robinson v. Cone, 22 Vt. 213, 54 Am. Dec. 67. At any rate, this court is committed to that view. Roth v. Union Depot Co. 13 Wash. 525, 43 Pac. 641, 44 Pac. 253, 31 L.R.A. 855; Eskildsen v. Seattle, 29 Wash. 583, 70 Pac. 64. There was no evidence in this case from which it could be held, as a matter of law, that the parents were guilty of any negligence. The mother was ill and the father was away from home. The child who was injured accompanied his elder brother to the dock without the knowledge of either parent, but even had the parents known of the fact, or had they sent the child to the dock with his brother on the errand in question, that would not have constituted negligence as a matter of law, even in a suit for the parents' benefit. [205] Tecker v. Seattle, etc. R. Co. supra. We find no error in the instructions above referred to. They correctly stated the law of the case as applied to the facts presented.

The court also instructed the jury as follows:

"In this case the degree of care and prudence required by law of the defendant must be considered with reference to the uses and purposes for which the dock or wharf where the accident occurred was constructed, maintained and operated. It is admitted by the pleadings that this dock was a public one, owned and operated by the county, the defendant, and as such you are instructed that it was open to be visited by all classes of people, including children who might be drawn there by curiosity or interest in the arrival and departure of boats, or who might be sent there on errands for their parents."

It is urged that this instruction was erroneous in that it was contrary to the theory of the respondent's complaint. We find it unnecessary to enter into a lengthy analysis of the complaint. It must suffice to say that the complaint alleged that this dock was a public dock, owned and operated by the county. From what we have already said in discussing the question of nonsuit, it is clear that the instruction correctly states the law relative to such places. We find it unnecessary to discuss in detail the instructions requested by the appellant. They were addressed to a theory of the law in direct antagonism to that upon which the instructions were given, and which we have found correct. They were properly refused.

III. Finally, it is urged that the verdict is excessive. While, on first impression, the recovery may seem large in view of the nature of the injuries, yet, when we consider that this child must go through life with a maimed hand, we cannot say that it is so large as to indicate passion or prejudice on the part of the jury. A careful consideration of the evidence convinces us that the injuries are permanent and that the child will never have the same use of the injured hand that it would have enjoyed of a normal hand. One of the [206] physicians testified that certain operations might tend to relieve the hand of its stiffened condition, but even he did not predict such a result with any degree of certainty.

We find nothing in the record before us warranting a reversal of the judgment, or a reduction of the recovery.

The judgment is affirmed.

Crow, C. J., Main, and Grose, JJ., concur.

NOTE.

Injuries to Persons On or About Wharves, Docks, or Piers.

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I. Generally.

As a general rule, a wharfinger or the proprietor of a wharf, dock, or pier is liable in damages to a person rightfully on or about the premises for an injury sustained by reason of an unsafe or defective condition negligently caused or permitted to exist, if the person injured is not guilty of contributory negligence or is not a bare licensee or a trespasser.

England.—Smith v. London, etc. Docks Co. L. R. 3 C. P. 326, 18 L. T. N. S. 403, 16 W. R. 728, 37 L. J. C. Pl. 217.

Canada.—York v. Canada Atlantic Steamship Co. 22 Can. Sup. Ct. 167; Johnson v. Port Dover Harbour Co. 17 U. C. Q. B. 151. See also Borlase v. St. Lawrence Steam Nav. Co. 3 Quebec 329; McMullin v. Archibald, 22 Nova Scotia 146.

United States.—Plant Inv. Co. v. Cook, 74 Fed. 503, 41 U. S. App. 109, 20 C. C. A. 625. See also Onderdonk v. Smith, 27 Fed. 874, 23 Blatchf. 562; Cleary v. Oceanic Steam Nav. Co. 40 Fed. 908.

California.—Wilson v. Union Iron Works Dry Dock Co. 167 Cal. 539, 140 Pac. 250. See also Grundel v. Union Iron Works, 141 Cal. 564, 75 Pac. 184.

Florida.—King v. Cooney-Eckstein Co. reported in full, post, this volume, at page 163; Cooney-Eckstein Co. v. King, 67 So. 918.

Illinois.—See Buckingham v. Fisher, 70 Ill. 121; Grand Tower Mfg. etc. Co. v. Hawkins, 72 Ill. 386.

Indiana.—Jeffersonville v. Gray, 165 Ind. 26, 74 N. E. 611.

Louisiana.—Cristadoro v. Von Behren, 119 La. 1025, 44 So. 852.

Maine.—Low v. Grand Trunk R. Co. 72 Me. 313, 39 Am. Rep. 331; Bacon v. Casco Bay Steamboat Co. 90 Me. 46, 37 Atl. 328; Track v. Hallowell Granite Works, 106 Me. 458, 76 Atl. 919. See also Barrett v. Black, 56 Me. 498, 96 Am. Dec. 497.

Maryland.—Baltimore, etc. R. Co. v. Rose, 65 Md. 485, 4 Atl. 899; Albert v. State, 66 Md. 325, 7 Atl. 697, 59 Am. Rep. 159.

Missouri.—See Burke v. St. Louis Southwestern R. Co. 120 Mo. App. 683, 97 S. W. 981.

New Jersey.—Owens v. Associated Realties Corp. 81 N. J. L. 586, 80 Atl. 325; Miller v. Delaware River Transp. Co. reported in full, post, this volume, at page 165. See also Furey v. New York Cent. etc. R. Co. 67 N. J. L. 274, 51 Atl. 505.

New York.—Swords v. Edgar, 59 N. Y. 28, 17 Am. Rep. 295, *affirming* 1 Thomp. & C. 23, Addenda; Newall v. Bartlett, 114 N. Y. 399, 21 N. E. 990 *affirming* 1 N. Y. St. Rep. 718; Stinson v. Edgewater Saw Mills Co. 139 App. Div. 169, 123 N. Y. S. 745. See also Hart v. Delaware, etc. R. Co. 76 Hun 296, 27 N. Y. S. 761; Malloy v. Staten Island Rapid Transit Co. 78 Hun 166, 28 N. Y. S. 979; Delaney v. Pennsylvania R. Co. 78 Hun 393, 29 N. Y. S. 226, *affirming* 144 N. Y. 718, 39 N. E. 857; Downes v. Elmira Bridge Co. 41 App. Div. 339, 58 N. Y. S. 628; De Boer v. Brooklyn Wharf, etc. Co. 51 App. Div. 289, 64 N. Y. S. 925; Cottsberger v. New York, 9 Misc. 349, 29 N. Y. S. 592.

Washington.—See Morgan v. Morley, 1 Wash. 464, 25 Pac. 333.

Wisconsin.—See Taylor v. Northern Coal, etc. Co. reported in full, post, this volume, at page 167.

In Buckingham v. Fisher, 70 Ill. 121, the court said: "They [the proprietors of a wharf] were not occupying the relation of common carriers, to whom persons and property are entrusted for transportation. In that class of employments, the law has imposed higher obligations, and demands a greater degree of diligence than in ordinary pursuits. Persons engaged in the usual avocations of life are only held to reasonable care and diligence, while carriers are held to the highest degree of care which the mind is capable of exercising, for the safety of persons entrusted to their care to be carried, that is consistent with the exercise of their business, and a carrier of property is an insurer against all casualties, except the acts of God or the public enemy. But an ordinary warehouseman is only liable for ordinary care—such care as prudent men usually exercise over their own property. Thus it is seen there is a broad difference between the liability of a carrier and a warehouseman, as to the custody of goods. The same difference seems to exist as to the means of approaching the warehouse, or the vessel, train, or other means of transportation. A railway company is bound to not only provide safe engines, cars, track and other machinery and servants, but they are bound to provide and maintain safe

platforms and approaches to the cars on their road. Carriers by water are also required to furnish safe approaches to their vessels. Again, a wharfinger is not distinguishable, on principle, from a warehouseman, and has not been distinguished in adjudged cases; whilst the case of a carrier has always been treated as an excepted case, turning on principles peculiar to public policy. Story on Bailments, § 452. If, then, appellants be treated as warehousemen, or as wharfingers, their obligation was only that of ordinary care for property entrusted to them. We have been referred to no case in which a warehouseman has been held liable for failing to provide safe approaches to his warehouse, nor is it believed that any can be found. It would not be consistent with the analogies of the law, to hold that a person, who is only held to ordinary care in conducting his business, should be held to an extraordinary degree of care in protecting persons coming to his place to transact business with him. He, like a merchant, blacksmith, miller, or other person engaged in business, is only liable for ordinary care in the structure of their buildings and their appurtenances. If such persons should construct approaches they knew to be defective, or were to have trap-doors known to be unsafe, and such defects were not apparent, but concealed, where their customers would necessarily pass, and injury were to result therefrom, they would probably be liable, but otherwise, if reasonable care was employed in their construction."

In Campbell v. Portland Sugar Co. 62 Me. 552, 16 Am. Rep. 503, it was held that a wharf, by reason of the change of the positions of the vessels docked there, is in its nature a passageway in nearly every direction and due care should be observed to keep its surface in safe condition. The court said: "A wharf used for the loading and discharge of the cargoes of vessels, is in its very nature a passageway over which, in all directions, the exigencies of business may take those people who have business to transact in connection with the vessels and those on board of them. To suffer a man-trap like this hole into which the plaintiff stepped, to remain as this had done for months, until an accident had demonstrated the necessity of replacing the worn out covering, might well be deemed a want even of ordinary care. The opening a way through the shed, when other access to the vessel lying there was prevented by piles of lumber, was no such unusual use of the property by the tenant, as would in any manner affect the liability of the owner. Had the accident occurred in the shed itself, (which was not the case) it would still have been in a passage to which the plaintiff had been impliedly invited in the prosecution of the common business. . . . The business to be done was the loading and unloading of vessels, including, necessarily, the transportation to and from them, not only of seamen's chests, but of all such articles as make up their multiform outfit for sea voyages. A covering to the wharf that would be secure in any and all parts of it for the varying exigencies of such business, was an imperative necessity, and the wharf proprietors, so long as they kept the wharf open, and occupied or rented it for such business, were bound as to all whom the proffered facilities should bring there, to use due care to furnish it. Vessels frequently change their position at a wharf for their own convenience or that of others, and all parts of the wharf where they are allowed to lie, which are not actually covered by closed structures, are liable to come in use as ways of access, and due care should be used by the owners for the security of those having business there accordingly."

The state courts have exclusive jurisdiction of a suit to recover damages for injuries suffered by a person on a public pier consequent on the collision of a boat with the pier, and the federal statute permitting limitation of liability has no application to such a case. Elwell v. Bender, 79 Hun 243, 29 N. Y. S. 357. For a full discussion of the jurisdiction of admiralty in tort, see the note to Cleveland Terminal, etc. R. Co. v. Cleveland Steamship Co. 13 Ann. Cas. 1215.

This note purports to deal only with physical injuries to persons on or about wharves, docks and piers. Furthermore, the cases that treat of the liability of a master for injuries received by his servant while in his employ on premises which he owns or has control of have been excluded.

II. Persons to Whom Duty Is Owed.

1. Duty to Invitee.

a. *Generally.*

A proprietor or wharfinger owes to invitees the duty of exercising ordinary care to see that the wharf, dock, or pier is in a reasonably safe condition. Smith v. London, etc. Docks Co. L. R. 3 C. P. (Eng.) 326, 18 L. T. N. S. 403, 16 W. R. 728, 37 L. J. C. Pl. (Eng.) 217; York v. Canada Atlantic Steamship Co. 22 Can. Sup. Ct. 167; Johnson v. Port Dover Harbour Co. 17 U. C. Q. B. 151; Wilson v. Union Iron Works Dry Dock Co. 167 Cal. 539, 140 Pac. 250; Low v. Grand Trunk R. Co. 72 Me. 313, 24 Am. Rep. 331; Trask v. Hallowell Granite Works, 106 Me. 458, 76 Atl. 919; Owens v. Associated Realties Corp. 81 N. J. L. 586, 80 Atl. 325; Miller v. Delaware River Transp. Co. reported in full, post, this volume, at page 165; Swords v. Edgar, 59 N. Y. 28, 17 Am. Rep. 295, *affirm-*

ing 1 Thomp. & C. 23, Addenda; Newall v. Bartlett, 114 N. Y. 399, 21 N. E. 990 *affirming* 1 N. Y. St. Rep. 718; Stinson v. Edgewater Saw Mills Co. 139 App. Div. 169, 123 N. Y. S. 745. See also Furey v. New York Cent. etc. R. Co. 67 N. J. L. 274, 51 Atl. 505; McMullin v. Archibald, 22 Nova Scotia 146. Thus a boy who has not paid money for admission to an amusement pier, but has been given the privilege of admission in exchange for services rendered to the concessionaires, is not a trespasser but an invitee, and the duty of exercising ordinary care toward him is incumbent on the owner of the pier. Owens v. Associated Realties Corp. 81 N. J. L. 586, Ann. Cas. 1912D 45, 80 Atl. 325, wherein the court said: "In this action the plaintiff recovered damages for injuries sustained by him while he was upon the amusement pier of the defendant, in Atlantic City, by coming into contact with certain high tension electric wires maintained in the cupola of the pier, as a result of which plaintiff's body was burned. . . . Plaintiff's right to visit that part of the pier where he was injured must rest, if at all, upon an invitation, express or implied, from the owner. Upon this point the case shows that the defendant owned and controlled a large structure know as 'The Million Dollar Pier,' extending for a distance of one thousand feet or thereabouts into and over the waters of the Atlantic ocean, and there conducted amusements and exhibitions of various kinds, and that the pier was open to the public upon payment of admission fees. There was evidence from which the jury was warranted in finding that employees of defendant in charge of admissions to the pier had given to the plaintiff (who was a boy about fifteen years of age) the privilege of entering the pier and visiting the various parts of it without paying the ordinary admission fee, in compensation for services performed by him as an attendant upon some of the exhibitions held upon the pier. It was objected that those who had given to the plaintiff this permission had no right to give it, because not authorized by the defendant to do so. The evidence, however, if believed, showed such continued practice of employing the plaintiff and compensating him as mentioned that it was open to the jury to infer that those who gave him the admission privilege had the implied authority of the defendant to give it in exchange for the services that plaintiff rendered. Since he was there by defendant's invitation, the law imposed upon the defendant the duty of exercising care for his safety while going about upon the pier within the scope of invitation. As to this, we think the evidence does not show limitation of the invitation to the ground floor or to any other particular part of the pier, but that it was open to the jury to find that it extended to the tower of the cupola. There was also, we think, clear evidence of negligence on the part of the defendant in permitting highly-charged electric wires to be in such a position that one going into the tower, as the plaintiff went, might come into contact with the wires and receive a harmful electric shock."

b. *Custom Officer.*

Custom officers injured on or about a wharf while discharging their duties are invitees and may recover for the damages caused by reason of the failure of the proprietor or wharfinger to exercise ordinary care to provide reasonably safe premises. Wilson v. Union Iron Works Dry Dock Co. 167 Cal. 539, 140 Pac. 250; Low v. Grand Trunk R. Co. 72 Me. 313, 39 Am. Rep. 331; Stinson v. Edgewater Saw Mills Co. 139 App. Div. 169, 123 N. Y. S. 745. Thus where it is customary for custom officers to board a vessel engaged in foreign trade and to precede the passengers in disembarking, a dry dock company owes such an officer the duty of exercising reasonable and ordinary care to provide a safe gangplank. Wilson v. Union Iron Works Dry Dock Co. 167 Cal. 539, 140 Pac. 250. Similarly, a custom officer sent to pass the night on a vessel having on board dutiable articles is an invitee, and may recover for an injury occasioned by falling through a defective plank, while he is crossing the wharf to which the vessel is moored. Stinson v. Edgewater Saw Mills Co. 139 App. Div. 169, 123 N. Y. S. 745. Likewise in Low v. Grand Trunk R. Co. 72 Me. 313, 24 Am. Rep. 331, it was held that it was not an exercise of ordinary care to leave a gangway, which cut the direct passage along the wharf transversely and was six or eight feet deep, without a railing at its sides, or a light at night, when a recently arrived ship was lying there, and that a custom officer in the discharge of his duties on a wharf where foreign vessels landed, being an invitee, could recover for his injuries sustained by falling. The court said: "The counsel for defendants, while recognizing as sound law the general principle that 'an owner is bound to keep his premises in a safe and suitable condition for those who come upon and pass over them, using due care, if he has held out any invitation express or implied, by which they have been led to enter there in,' stoutly contend that this custom house officer, who on the night of the accident was upon the defendants' wharf, in the regular course of his duty to watch for smugglers and prevent smuggling from the steamer which was just hauling into the dock there from a foreign port, had no such invitation, but was a mere licensee. We cannot so regard him. His presence there was

made necessary by the business to which the defendants had devoted their wharf, the reception of cargoes from foreign going vessels."

c. *Passenger on Boat or Train.*

It seems that a wharfinger or proprietor of a wharf is required to exercise only ordinary care to keep the premises used by intending or disembarking passengers on boats landing at the wharf, in a reasonably safe condition, they being under the circumstances no more than invitees. Plant Inv. Co. v. Cook, 74 Fed. 503, 41 U. S. App. 109, 20 C. C. A. 625; Bacon v. Casco Bay Steamboat Co. 90 Me. 46, 37 Atl. 328. See also Wilson v. Union Iron Works Dry Dock Co. 167 Cal. 539, 140 Pac. 250; Borlase v. St. Lawrence Steam Nav. Co. 3 Quebec 329. *Compare* Knight v. Portland, etc. R. Co. 56 Me. 234, 96 Am. Dec. 449. Thus in Plant Inv. Co. v. Cook, supra, wherein appeared that a woman while in the act of walking along a dock for the purpose of taking passage on a steamer, slipped and fell by reason of the presence of cotton-seed meal saturated with water which was left on the planks of the dock, it was said by the court that substantially the following charge should have been given to the jury: "If you find from this evidence that the slip over which the plaintiff was passing to the steamer, upon which she was to take passage, was not in an ordinary safe condition—(such as the nature of the commercial business, shipping, etc., for which the slip, necessarily, was being daily used by the defendant company, as should or would be reasonably required for the safety of passengers going aboard of its steamers)—because or on account of any slippery substance being thereon; and you find that such condition, if faulty, in the sense of legal negligence, was chargeable to the defendant company; and you further find rom the evidence that such slippery substance, being on said slip, was the proximate cause of the injury to plaintiff, and that the plaintiff, at the time of her injury, was not guilty of contributory negligence,—then you should find for the plaintiff." Similarly in Bacon v. Casco Bay Steamboat Co. 90 Me. 46, 37 Atl. 328, wherein it was held that the liability of a steamboat company as a common carrier of passengers did not extend to a person awaiting as an intending passenger on its wharf, and that it owed him only the duty to exercise ordinary and reasonable care to keep the wharf in a safe condition and sufficiently lighted, the court said: "We are not aware, however, that the plaintiff contends that the ordinary standard of care was not correctly and sufficiently defined by the court, but the contention is that more than ordinary care, really extraordinary care, should have been exercised by the company, in order to insure absolute safety for the plaintiff in his going and coming, and the able counsel for the plaintiff relies on scattered cases in the reports where may be found expressions, like that contained in the requested instruction to the effect that the company was bound to keep its wharf and its approaches safe and convenient. Such language is not altogether inappropriate, but it is not exact enough, when applied to the present case, and only means, in most cases, that carefulness and prudence must be exercised to effect security or safety, but not that such a result shall positively and absolutely be secured. . . . Furthermore, the force of the distinction between common or ordinary care and extraordinary care, the highest degree of care, a distinction found in the civil law and adopted by English and American courts principally as applicable to the law of bailments, has been greatly diminished in modern times for the reason that extraordinary diligence is no more than an ordinary requirement in extreme situations and conditions. The tendency with many courts is to call all cases of the kind simply cases of negligence, ignoring the ancient classification. In all cases the amount of care bestowed must be equal to the emergency, however the standard be denominated. We do not mean to say that the distinction between ordinary and gross negligence, or between ordinary and extraordinary care does not still exist, but, in reply to the suggestion made by the plaintiff's counsel that the same extreme degree of care should be exercised by the defendants when wharfingers, or tenants of a wharf used in conjunction with their boats, as is imposed on them while common carriers of passengers, we do not mean to say that we perceive no reason for imposing so extreme an obligation upon the defendants when they have completed their trip and ceased to be longer performing the duties of common carriers; and the authorities do not support any such application of the rule of extraordinary care as is contended for." In Wilson v. Union Iron Works Dry Dock Co. 167 Cal. 539, 140 Pac. 250, it was said that a dry dock company owes the duty to passengers disembarking from a steamer at its dock the duty to exercise at least reasonable and ordinary care to provide a safe gangplank and safe fastenings for the steamer at the dock, the court saying: "Under these circumstances, it is clear that the defendant owed to all persons lawfully and properly on board such vessel on arrival at the dock and there wishing to leave it, the duty of providing a safe and sound gangplank for their use. These gangplanks were provided by the defendant and were kept by it for the purpose for which this one was used on this occasion and as a regu-

lar part of its business. People were expected to walk over it from the ship to the dock. For their safety, a sound gangplank was required with props therefor if such were necessary on account of the weakness of the plank or the length of the span from the dock to the ship. It was, therefore, incumbent upon the defendant to use at least ordinary care to provide sound gangplanks and see that they were properly shored. It is not necessary here to determine whether it was, to that extent, a carrier of passengers, and bound as such to use the utmost care and diligence for their safe carriage as provided in section 2114 of the Civil Code. It was, at all events, bound to exercise reasonable and ordinary care for the safe carriage of those whom it had reason to expect would avail themselves of that means of leaving the vessel." And in Burke v. St. Louis Southwestern R. Co. 120 Mo. App. 683, 97 S. W. 981, it was held that a man injured while on a "cradle," a species of adjustable wharf, for the purpose of boarding a steamer, could recover from the railroad company operating the steamer and owning the landing for his personal injuries occasioned by the failure to exercise ordinary care to keep the way safe. The court said: "The main instruction for plaintiff is assigned for error on the ground that it assumes the relationship of carrier and passenger existed between plaintiff and defendant when the former was hurt; whereas it is agreed that he was not a passenger, having neither paid his fare not signified to defendant an intention to take passage on the boat. Whether plaintiff was a passenger as yet or not, it is apparent that this criticism is immaterial; for the instruction speaks of plaintiff proceeding down the inclined way 'for the purpose of getting on the boat as a passenger.' Moreover, the instruction held defendant liable for failure to exercise ordinary care in providing a reasonably safe way for plaintiff to use in going on the boat; not the high care a carrier must observe for the safety of a person who has already put himself in its charge as a passenger. If plaintiff was not a passenger, but was walking along a way which it was defendant's custom to permit the use of in taking passage on its boats, and plaintiff was using it for that purpose, defendant is liable for the injury he suffered if due to its failure to employ, at the least, ordinary care to keep the way safe; and that is all we need to say in this case."

However, in Knight v. Portland, etc. R. Co. 56 Me. 234, 96 Am. Dec. 449, it was held that a railroad company owes the duty to a passenger traveling on a through ticket to exercise the highest degree of practicable care to maintain in a safe condition a wharf owned and used by it as a passageway to a connecting steamer, the court saying: "The depot and the grounds around the depot belonging to the defendant corporation, and used in connection therewith, should be in safe condition for those who, in the course of travel, are obliged to pass over them. The defendants own the wharf. It is in their use for the purpose of their business as carriers. The cars containing the baggage for the steamboat, with which the defendant corporation is connected, pass over it. The cars, with passengers for the steamboat, formerly passed over it, though they are now discontinued. The wharf is used by the railroad and in connection with the boat. The passengers for the boat pass over it on their way to the boat. It is the way provided. It is the way passengers in the cars are directed to take. The train arrives in the evening. Passengers from the cars to the boat pass rapidly over the intervening distance. The wharf should be lighted. The servants of the defendant corporation should be in readiness to point out the way. The wharf should be safe. The defendants should be justly held responsible for any neglect of their servants, or for any deficiencies in the wharf, which, with due care, might be avoided. If the defendants had carried the plaintiff over the wharf, as heretofore, in their cars, and she had been injured in consequence of the neglect of the defendants, she would have been entitled to recover. Her rights are none the less because she walks over the wharf to reach the steamboat, than if she had been borne over it, if, on the way, she is injured through the negligence of the defendants by leaving the wharf in an unsafe and dangerous condition. The defendants are not released from liability because, for their convenience, she used her own limbs, when she might be entitled to the use of their cars. Their liability did not cease the moment the cars reached the depot. It continued, equally as if at the depot, while she was on her way over the defendants' wharf, and, by their direction, to the steamboat, and until, in the ordinary course of her passage, she should reach the point where the liability of the steamboat company commences. The passage contracted for was from Lawrence to Belfast. The plaintiff was in itinere from the point of departure to the destined point of arrival. The defendants must, at any rate, be deemed liable from the place where they received the passenger to the place where she was to be transferred to the next agent in the course of transmission to the place of her destination. These views seem to be in accordance with the general principles of law established in similar cases. The proprietors of a railroad, as passenger carriers, are bound to the most exact care and diligence, not only in the management of their trains and cars, but also in the structure and care of their track, and in all subsidiary arrangements

necessary to the safety of passengers. . . . Assuredly, a safe passage way to and from the cars is a subsidiary arrangement which passengers have a right to require to be safe. The wharf was this passage way for those going to the boat from the cars or coming to the cars from the boat."

For a discussion of the liability of the owner of a ferry to passengers injured on or about the ferry slips, see the notes to Hopkins v. West Jersey, etc. R. Co. 17 Ann. Cas. 370, and Rizzo v. Winnisimmet Co. Ann. Cas. 1915C 1003.

d. *Person Meeting Passenger or Receiving Freight.*

Persons going to meet a passenger on an incoming steamer operated by the occupants of a wharf are implied invitees and to them is owed the duty of exercising ordinary care to keep the premises in a reasonably safe condition. And while a wharf owner is under no obligation to erect barriers around his wharf with a view to prevent persons from falling into the water, a place is manifestly dangerous (res ipsa loquitur) where it is unlighted and a sudden turn has to be made to prevent falling into the water. York v. Canada Atlantic Steamship Co. 22 Can. Sup. Ct. 167, wherein the court said: "I am of opinion that, under the evidence, the plaintiff and his wife were lawfully upon the wharf. The deceased went upon the wharf with the permission and upon the implied invitation of the company for the purpose of meeting her mother, who was in fact a passenger, and assisting her home. In view of the practice which had long previously prevailed she was right in presuming an invitation on the part of the company to go there and assist her friends in disembarking from the steamer. She had equally a right to expect that the means of approach to the steamer were safe for any one using ordinary care, and the company were, I think, under an obligation to see that they were safe. . . . The company, carrying on the business of carriers of passengers by water, inviting as they do the public to use their vessel were bound to use all reasonable efforts to secure the safety of persons who might lawfully come upon their premises. I agree with Mr. Justice Weatherbe that no wharf owner is under any obligation to erect barriers around his wharf with a view to prevent persons from falling into the water; a wharf surrounded by such a structure would cease to be a wharf; nor do I think they were under this obligation as respects the jog where the accident occurred; but the place on the night in question was manifestly a dangerous one; there were no lights near it; it was somewhat in the nature of a trap; the fact that both the husband and wife fell in is some evidence at least that it was dangerous (res ipsa loquitur); and the jury having found that there should have been a light there I am not disposed to disturb their finding on that point."

In Miller v. Delaware River Transp. Co. reported in full, post, this volume, at page 165, wherein it appeared that a person injured by falling into a hole on a wharf had been accustomed for a long period of time, both during the day and at night, to receive shipments made to him on the river end of the wharf directly from the boat, especially when the boat was late and the weather was cold, it was held that he was on the wharf by implied invitation, and could recover damages for the injuries sustained by reason of the failure to exercise ordinary care to keep the premises in a safe condition.

e. *Persons Having Business with Officer on Boat.*

Persons having business with the officers on board of a vessel are invitees and the wharfinger or proprietor of the wharf at which the vessel is docked owes them the duty of exercising ordinary care in providing for their safety. Smith v. London, etc. Docks Co. L. R. 3 C. P. (Eng.) 326, 37 L. J. C. Pl. 217, 18 L. T. N. S. 403, 16 W. R. 728; Campbell v. Portland Sugar Co. 62 Me. 552, 16 Am. Rep. 503. Thus in the case last cited it was held that the driver of a job wagon employed by the mate of a brig to take his chest aboard a vessel lying at a wharf loaded and nearly ready for sailing, was an invitee to whom the duty of exercising ordinary care was owed, the court saying: "The distinction which runs through the cases between the relations which the owners of real estate bear to those who have been induced to enter upon the property of such owners by an appropriation of it to business purposes and to uses from which such owners derive profit, and the relations which they bear to mere licensees who are suffered, but not invited directly or indirectly, to pass over it at their own will and risk—where there is nothing to raise an implication that the property is fit for the use to which it is put, and that one may use it with confidence that no negligence on the part of him who derives a profit or advantage from such use has made or left it unsafe, was carefully observed at the trial. That a proprietor does not and ought not to stand in the same position with respect to injuries received on his premises towards mere licensees, . . . as he does towards one who is there by invitation, express or implied, for the transaction of a business out of which the proprietor gets his gain or income, is very certain. . . . The plaintiff was not a mere licensee. He went to the wharf in the prosecution of his own calling, it is true, but upon business directly connect-

ed with that for the transaction of which the wharf was built, and held out by the owners as well to the public as to those more immediately negotiating with themselves, as a safe and suitable place for the transaction of such business. To all who had occasion to transact such business there, whether with themselves directly, or with their tenants, or with those on board the vessels lawfully lying there by the permission of the proprietors or their tenants, the owners of the wharf owed a duty, their neglect of which has been productive of serious injury. The act in which the plaintiff was engaged was a necessary and common incident of the business for which the wharf was constructed and let. It is not necessary that the defendants should have had a direct interest in the transaction itself." Similarly in Smith v. London, etc. Docks Co. L. R. 3 C. Pl. (Eng.) 326, 37 L. J. C. Pl. 217, 18 L. T. N. S. 403, 16 W. R. 728, it was held that a dock keeper engaged in the business of providing berths for ships for hire, and providing a gangplank as the only means of access to the ships, was responsible in damages to an optician who went on board of a ship to show an officer some nautical instruments, and in returning fell by reason of the gangplank having been moved. The court said: "The defendants contend that they were under no duty to the plaintiff, because he had no business with the defendants themselves, and that they are not therefore answerable to him for any negligence in their mode of keeping the gangways. But since the defendants carry on the business of a dock company, and that business consists partly in providing access to the ships in the docks, it seems to me that the use of the access provided by them is as much business with the defendants as placing a ship in the docks would be, and they are, in truth, paid for it, not necessarily by every person who goes there, but by the owners of the ships on behalf of all who use it. It is not one person in ten who goes on board a ship in a dock for the purpose of transacting business in which the dock company are interested, in any other sense than that he goes upon the business of the vessel or of those on board, and it would seem strange if persons who may be obliged to go on board the ship, as, for example, the baker or butcher who supplies the ship, could receive no compensation for injuries received through the negligence of the company's servants. But, moreover, the gangway being provided by the defendants, and paid for by the shipowner, and being for the use of all persons having business on board the ship, and the only access to it, it seems to me that it amounts to an invitation to all persons having business on board the ship to go upon it. It has been contended that if the defendants are under any liability to the plaintiff, they must be equally so to every one who comes into the docks for the mere purpose of hawking goods; but to that I cannot agree. If a person who enters the docks be a mere volunteer, there may be no duty towards him on the part of the defendants; but if he has business on board the ship, then it seems to me the case assumes a different aspect, even independently of the fact that he will be then coming upon the business of the dock company in the sense I have described; for the gangway being placed there as the means of access to all persons having business on board the ship, it amounts to an invitation to persons having business on board the ship to go upon it. . . . The case then comes within the principle that persons inviting others on to their premises are answerable for anything in the nature of a trap. On these grounds I think that there was a duty upon the defendants towards the plaintiff."

f. Employee of Third Person.

Persons in the employ of others than those charged with the duty to keep wharves, docks, or piers in safe condition are invitees if they are on the premises by reason of their employment and the invitation derived through their master. Trask v. Hallowell Granite Works, 106 Me. 458, 76 Atl. 919; Swords v. Edgar, 59 N. Y. 28, 17 Am. Rep. 295, *affirming* 1 Thomp. & C. 23, Addenda; Newall v. Bartlett, 114 N. Y. 399, 21 N. E. 990, *affirming* 1 N. Y. St. Rep. 718; Johnson v. Port Dover Harbor Co. 17 U. C. Q. B. 151. See also Anderson v. The E. B. Ward, 38 Fed. 44; Baltimore, etc. R. Co. v. Rose, 65 Md. 485, 4 Atl. 899; Furey v. New York Cent. etc. R. Co. 67 N. J. L. 274, 51 Atl. 505; McMullin v. Archibald, 22 Nova Scotia 146. For example, persons employed on vessels moored to a wharf, dock, or pier are invitees to whom is owed the duty of exercising ordinary care to provide for their safety. Johnson v. Port Dover Harbor Co. 17 U. C. Q. B. 151. See also Anderson v. The E. B. Ward, 38 Fed. 44; Baltimore, etc. R. Co. v. Rose, 65 Md. 485, 4 Atl. 899; McMullin v. Archibald, 22 Nova Scotia 146. *Compare* Quinn v. Staten Island Rapid Transit R. Co. 170 App. Div. 509, 156 N. Y. S. 568. So the owners of a wharf are liable in damages to a sailor on a vessel docked there for the purpose of receiving and discharging its cargo who is injured by falling through a defective plank which in the exercise of ordinary care should have been repaired. Johnson v. Port Dover Harbour Co. 17 U. C. Q. B. 151. Similarly in Baltimore, etc. R. Co. v. Rose, 65 Md. 485, 4 Atl. 899, it was held that the steward on a vessel lying at the pier of a railroad company used for the accommodation of vessels discharging and taking on cargo

was an invitee except as to parts of the pier the use of which was prohibited. The court said: "Undoubtedly under the arrangement existing between the two companies, persons employed on board the steamer had a right of transit over the property of the defendant. If there was no particular road or pathway designated and set apart for their use, they were constrained to seek such route as they found open and convenient, and the only obligation resting on them was the observance of due care and caution in the avoidance of danger. The defendant, however, had a right, if it saw fit, to inhibit the use of the trestle, and restrict the passengers to the use of the ground below. There is evidence that this was done by a notice placed in a conspicuous position, but this evidence is met by countervailing proof, and the fact thus in dispute, should necessarily be left for ascertainment by the jury. The obligation of the defendant to keep any property, over which other persons have a right to pass, in a safe condition, cannot be questioned. . . . But this principle is qualified and restricted in its application by another which is obviously just and proper. If the defendant, as soon as he is informed of the existence of the nuisance, takes the proper steps to remove it, and, in order to prevent injury to any one, gives warning of the danger by placing a barrier of any sort so that no prudent person would cross it, he is clearly not liable if rash and reckless individuals disregard the intimations of danger thus given. The evidence of defendant on this point is, that the steps were broken down on Sunday, in the afternoon, and that very soon after the occurrence of this accident a rope was extended across at each entrance to the steps, and a light suspended at the top, so as to warn persons of the existence of danger and that, notwithstanding this warning, the plaintiff passed under the rope and was thus injured by his own recklessness. The whole of this evidence is contradicted by testimony offered on the part of the plaintiff, and, these material facts being in dispute, could only be properly determined by the jury." In McMullin v. Archibald, 22 Nova Scotia 146, it was said that an oiler on a government steamer was to be regarded as an invitee in using a pier at which his vessel was coaling, but as it was not negligence for the owner of the pier to fail to light the pier or provide a watchman, there could be no recovery for personal injuries sustained by falling off the pier, even though the way was partially obstructed by a car, there being a space of ten feet left to the edge of the pier. And in Newall v. Bartlett, 114 N. Y. 399, 21 N. E. 990, *affirming* 1 N. Y. St. Rep. 718, it was held that a man carrying ashore the trunk of a passenger in the course of his employment on the steamer could recover for injuries caused by a door on the wharf being defectively hung.

However, in Quinn v. Staten Island Rapid Transit R. Co. 170 App. Div. 509, 156 N. Y. S. 568, it was held that the captain of a coal barge moored alongside of a pier for the purpose of being loaded with coal, who walked to the shore on Sunday, and fell into the water by reason of the flooring coming to an end, was not an invitee, the court saying: "He had no necessity, arising out of the business upon which he was engaged, to walk along the pier at all, and did so purely for purposes of his own. It is apparent that plaintiff, if not a trespasser upon the pier, was at the most merely a licensee, toward whom the defendant owed no care beyond the very slightest, and no legal duty except not to wilfully or intentionally injure him. . . . This rule is reiterated and supported by a great number of cases in this state. No act of affirmative negligence is charged against defendant or shown by the proof, and obviously the nature of the construction of the lower deck of the pier was such that no invitation to use it as a passageway could be inferred. The pier was apparently properly constructed for the purpose for which it was intended to be used, and certainly the portion upon which plaintiff elected to walk was apparently not intended to be used as a way of passage. Plaintiff simply took his chance of finding a hole or an obstruction, for 'an open hole which is not concealed otherwise than by the darkness of night is a danger which a licensee must avoid at his peril.'" In Trask v. Hallowell Granite Works, 106 Me. 458, 76 Atl. 919, it was held that the owner of a wharf owes the duty to the employees of a third person working on its wharf to exercise ordinary care to provide reasonably safe appliances in the form of hoisting machines and the duty cannot be delegated. And in Swords v. Edgar, 59 N. Y. 28, 17 Am. Rep. 295 *affirming* 1 Thomp. & C. 23, Addenda, it was held that a longshoreman though not in the employ of the lessor of a pier was an invitee by implication, to whom was owed the duty of maintaining the pier in a reasonably safe condition. The court said: "We think it is clear that the intestate was lawfully upon the south half of the pier. It may be that it was not a public place or highway in the fullest sense of those terms. It was, indeed, private property to a certain degree. . . . Though private property, it was held as such for public objects. There is an implied license to vessels upon navigable waters, to enter and occupy piers built into or lying adjacent to such waters, in the manner and for the purposes contemplated by their erection. The keeping of such a pier is likened to the keeping of an inn; and a general license is given to all persons to occupy it for lawful and ac-

customed purposes. . . . One prime purpose is for the vessel to discharge its cargo thereupon. As it may not discharge its cargo without the aid of laborers, all persons hired and acting as such, are upon the pier by right for a lawful purpose. The owner or occupant of a pier may terminate this general license, or may withhold permission to enter from a particular person. . . . There is no pretence that in this case there had been such action. The piers in New York city are not different in these respects from those elsewhere. . . . It was, however, thrown open for entrance upon, by all persons of the calling of the intestate. By the use to which it was put by the tenants and occupants (a use which was contemplated and intended by them and their lessors), from which a profit to them was directly or indirectly derived, and which persons of the calling of the intestate aided, there was a license and an invitation given to him to come and go over this pier, and to remain thereon in the following of his employment." In Furey v. New York Cent. etc. R. Co. 67 N. J. L. 274, 51 Atl. 505, it was held that there might be an implied invitation to a person on a pier in the course of his employment as a painter to use the wharf generally but not to use the opening between cars standing on a pier. The court said: "Implied invitation, therefore, is part of the law of negligence by which an obligation to use reasonable care arises from the conduct of the parties; its essence is that the defendant knew, or ought to have known, that something that he was doing or permitting to be done might give rise in an ordinarily discerning mind to a natural belief that he intended that to be done which his conduct had led the plaintiff to believe that he intended. It is not enough that the user believed that the use was intended; he must bring his belief home to the owner by pointing to some act or conduct of his that afforded a reasonable basis for such a belief. Applying these definitions and tests to the circumstances of the present case, it is incumbent upon the plaintiff either to show that the opening between the cars was, in fact, designed to be used as he used it, or else to bring home to the defendant some act or conduct signifying that the place was so prepared or adapted which might naturally lead the plaintiff to suppose that he might properly and safely so use it. For these purposes, three lines of proof are available—first, as to the openings themselves; second, as to the use made of them by the employees of the defendant, and third, as to the use suffered to be made of them by the plaintiff and his associates. With respect to the openings themselves, it is an established fact that they resulted, not from design, but from the exigencies of the business transacted on the pier, and that they varied from day to day with the physical conditions that gave rise to them, viz., the placing of each car opposite to a door in the side of the shed. The use of these openings by the stevedores and train hands employed about the defendant's business was not evidence of any expectation or willingness on the part of the defendant that persons not so employed should use the openings. The fact that the plaintiff and his coservants had repeatedly, without molestation, crossed the track through the openings in the broken freight trains could not, in the absence of any sign of preparation or adaptation, have evinced to them that the openings were intended for their convenience, or that the general system from which the openings resulted was operated for their accommodation or had their safety in view. The character of the traffic and the obvious conditions that necessitated the breaking of the trains forbade such an implication in any ordinarily discerning mind. The plaintiff and his associates, by taking advantage of a constantly changing condition of things that evidently arose from causes unconnected with their presence upon the premises, could not impose upon the defendant a relationship to which it had, by no act of omission or commission, in anywise contributed. Knowledge is an element of invitation only when it is capable of throwing light upon the object with which a given use may have been permitted. Standing alone, it implies permission, but not invitation. . . . That the present case is wholly within the former of these classes is clear from several considerations—first, the condition of which the plaintiff took advantage was obviously part of an existing traffic system and presented no indications of being designed for any other purpose; second, the fact that there were on the ground none of the ordinary indications of a crossing, or any sign of preparation or adaptation to induce the belief that persons not there employed were either provided for or expected; third, the temporary and constantly shifting character of the openings between the cars forbade any reasonable person from assuming without further assurance that provision had been made for his safe conduct between the cars of the broken train. If, therefore, it be assumed that the defendant knew that unauthorized persons were passing between its standing cars, it owed to them no other duty than 'to refrain from acts wilfully injurious to them.' Whether the failure of the defendant to have given the customary signal before closing the train would have been a violation of this duty need not now be discussed. The trial judge before whom the testimony was taken instructed the jury that there was no dispute that such warning was given—and this is the result of my examina-

tion of the case. The conclusion reached upon this branch of the case is that the defendant was not guilty of the breach of any duty that it owed to the plaintiff, and was entitled to the nonsuit for which it asked."

2. DUTY TO LICENSEE.

A wharfinger or proprietor of a pier owes the duty to a licensee thereon to refrain from acts of wanton or wilful injury or active negligence rendering the wharf, dock, or pier unsafe. Taylor v. Northern Coal, etc. Co. reported in full, post, this volume, at page 167. See also Downes v. Elmira Bridge Co. 41 App. Div. 339, 58 N. Y. S. 628; De Boer v. Brooklyn Wharf, etc. Co. 51 App. Div. 289, 64 N. Y. S. 925. Thus a ship carpenter engaged in repairing the side of a ship is not a trespasser, and even if nothing but a licensee, his representatives may recover from the owner of the dock for his death caused by a lump of coal falling on him by reason of a defective hoisting apparatus used on the dock. Taylor v. Northern Coal, etc. Co. reported in full, post, this volume, at page 167. Similarly in Downes v. Elmira Bridge Co. 41 App. Div. 339, 58 N. Y. S. 628, it appeared that a government weigher, having the choice of two routes from the place of his employment, one over a passageway used by wagons and for pedestrians when necessary, and the other over a private wharf to the use of which the public had a license, selected the latter though he knew that it was used at the time for the unloading of heavy bridge material and consequently dangerous. It was held that he was at best a licensee to whom the only duty owed was to refrain from wilful or wanton injury. The court said: "The wharf and the property adjacent were used in connection with piers for the purpose of unloading merchandise from vessels and the delivery of merchandise thereto for shipment. In normal condition this property, wharf and piers, was used by the general public for the purpose of the business usually carried on at such places. The property, however, was private, and the right of the public therein was as licensees. . . . This brings us to a consideration of what the plaintiff's right was at this place, and to arrive at this we must consider the nature of the defendant's obligation to him. The defendant had the right to make use of the dock for the very purpose of doing what it was at the time engaged in doing. This being private property, and the condition of the dock being such as to indicate that the public right of use was interrupted, the obligation of the defendant was quite different from what it would have been had the work been prosecuted in a public street. In the latter case reasonable care is required to be observed, and as this is to be determined by the surroundings, when the use is of a public place, great precaution is necessary to meet the requirement, and in the absence of notice of the particular danger to be encountered, the rule of res ipsa loquitur applies. (Hogan v. Manhattan R. Co. 149 N. Y. 23, 43 N. E. 403; Reed v. McCord, 18 App. Div. 381, 46 N. Y. S. 407.) In the former case the prosecution of the work is the exercise of a legal right, and while under ordinary conditions the plaintiff would be considered as being upon the dock under an implied invitation from the owner, and consequently entitled to protection, so far as the exercise of reasonable care by defendant would insure the same, yet the disarranged condition of the dock, and the character of the work being prosecuted thereon, exclude the implication of an invitation to the plaintiff to come thereon, and under such circumstances no duty was imposed to take affirmative steps to guard from danger persons who trespass thereon or who are there by sufferance. . . . The plaintiff's right, therefore, was to be protected from wanton and wilful injury; beyond this the defendant owed him no obligation. . . . There is not even plausible pretext for saying that in anything which the defendant did it was guilty of a wanton act or of a wilful intent to inflict injury. It was required by its contract with the wharf and warehouse company to expedite the work with all dispatch, and there is not a scintilla of evidence which tends to establish that, in the manner and method of the movement of the girder, the defendant did not adopt the usual means and take the usual precautions for the prosecution of such work. It is not contended but that it was proper to place it upon the rollers, to jack it up, to move it with the winch and to let it down so that it might slide on to the rails prepared for that purpose, in precisely the manner adopted by the defendant at the time the injury was inflicted. There was, therefore, no reasonable basis upon which the court was authorized to submit, and the jury to find, that the defendant was guilty of negligence in anything which it did. The plaintiff was perfectly well informed of the surroundings; he knew of the torn-up condition of the dock; he saw, or ought to have seen what was plainly visible and what his companions saw, and he knew, or was chargeable with knowledge, that the girder, when he passed it, was liable to be moved at any time." Likewise in De Boer v. Brooklyn Wharf, etc. Co. 51 App. Div. 289, 64 N. Y. S. 925, it was held that a wharf company operating a railroad over a part of its wharf which had been used by the public for at least twenty-eight years as a thoroughfare owed the duty to a child even if it was only a bare licensee to exercise reasonable care to prevent accidents in operating dangerous instrumentalities. The court said: "As-

suming that this use is only by implied license, and that no duty of active vigilance is thereby imposed on the defendant to protect the licensees from injury, yet as the movement of the trains is necessarily attended with the danger to life unless reasonable care is exercised, the law does require that the defendant shall exercise such care, and holds it to liability for its absence. There is no difference in this respect between the case of the defendant and that of a public railroad company in either practice or principle, and the authorities on the subject are numerous and uniform. . . . It is needless to say that the counsel for the respondent cite no case in support of the proposition upon which this nonsuit rests, viz., that the defendant is under no legal obligation to exercise any care in the running of its trains so far as the traveling public is concerned. On the contrary, they appear to admit that on the theory that the plaintiff's intestate was a licensee "the measure and limit of the defendant's duty was reasonable care to avoid doing anything out of the ordinary and usual course of its business from which an accident or an injury might reasonably have been anticipated." The accident did not occur because of anything connected with the ordinary and usual course of the conduct of the defendant's business, but because of carelessness and negligence in the conduct of the train in question, which, we assume, has not been the ordinary and usual course of the defendant in the operation of its road."

3. Duty to Trespasser.

No duty is owed to a trespasser on a wharf, dock, or pier except to refrain from injuring him wilfully or wantonly, and for injuries to him arising from the mere failure to exercise ordinary care, he cannot recover. Grundel v. Union Iron Works, 141 Cal. 564, 75 Pac. 184; Malloy v. Staten Island Rapid Transit Co. 78 Hun 166, 28 N. Y. S. 979. See also Onderdonk v. Smith, 27 Fed. 874, 23 Blatchf. 562; Morgan v. Morley, 1 Wash. 464, 25 Pac. 333. Thus the owner of a wharf is not responsible for injuries caused by leaving a dangerous place unguarded, where the person injured is not on the premises by permission or on business or other lawful occasion and has no right to be there. See Onderdonk v. Smith, 27 Fed. 874, 23 Blatchf. 562. Similarly in Malloy v. Staten Island Rapid Transit R. Co. 78 Hun 166, 28 N. Y. S. 979, it appeared that a man while fishing on a private wharf was injured by a boat coming into the slip and striking his legs which were hanging over the edge of the wharf. It was held that he could not recover for his injuries, the court saying: "While originally the wharves and exterior streets which were constructed at the expense of or by riparian owners were made public and open to the commerce of the port and free access of the people, later legislation has modified the prohibitions and restraints of the earlier law. And now many of the piers and wharves on the river front are occupied by steamship and railroad companies and by private individuals by titles which are for the time being practically that of private ownership. Under the allegations and admissions of the pleadings, and in the absence of any evidence as to the source or character of the defendant's title, we must assume that the wharf in question was a private pier. It was inclosed from the street, and the plaintiff had no right there. The defendant had no notice that he was there and was under no duty or obligation to him in reference to the management of its boat. He went upon the wharf in a roundabout way, getting access from adjoining property, and must be treated as a trespasser. Under such circumstances there was no negligence upon the part of the defendant, and the complaint was properly dismissed." Likewise in Grundel v. Union Iron Works, 141 Cal. 564, 75 Pac. 184, it was held that an allegation that the plaintiff's intestate had "business to perform" on a vessel at a wharf did not show that he was not a trespasser on the wharf. The court said: "The allegations show that the Union Iron Works had caused a vessel in its possession to be tied to its private wharf, and had placed a gangplank between the wharf and the vessel. It is alleged that Grundel, 'having business to perform upon the vessel,' attempted to board it by means of the gangplank. There is no pretense that Grundel was in the employ of the Union Iron Works, that he had been invited by the Union Iron Works to enter upon its premises, or to go upon the vessel, or that his business was in any way connected with the defendant. It is not even pretended that he had permission of the Union Iron Works to be upon the premises. His business, for aught that appears, might have been wholly foreign to any of the interests of the Union Iron Works, or even in hostility to it. It is not shown, therefore, that he was not a trespasser, and, under the most favorable view which could be taken of the pleading, he was at the best a mere licensee. As such licensee, the defendant owed him no duty to keep its premises or its passageways in safe condition, and no duty being owed by defendant to plaintiff, no negligence can be imputed to the former."

4. Duty to Invitee or Licensee on Public Wharf.

Public wharves or piers are required to be kept in a reasonable safe condition, and a person injured by reason of defects negligently permitted to exist therein, may recover

damages. Jeffersonville v. Gray, 165 Ind. 26, 74 N. E. 611; Harris v. Bremerton, reported in full, post, this volume, at page 160; Belles v. Tacoma, 79 Wash. 200, 140 Pac. 324. See the reported case. See also Reynolds v. Starin, 50 App. Div. 535, 64 N. Y. S. 141. Thus the reported case holds that a county owning a dock is bound to exercise reasonable care for the safety of a child awaiting an incoming steamer for the purpose of receiving a newspaper, a public dock being analogous to a public highway. Similarly in Belles v. Tacoma, 79 Wash. 200, 140 Pac. 324, it was held that a municipality owning a dock at which passenger ships land is required to exercise only ordinary care to prevent injuries to persons lawfully there, and where it has no notice of a defect therein, it cannot be held liable for an injury to a person slipping on the floor. The court said: "The appellants argue that the evidence disclosed such a degree of negligence on the part of the respondent as to carry to the jury the question of its liability for the injury suffered by the appellant, and that, in consequence, the trial judge erred in granting a nonsuit. But without following the argument by which the proposition is sought to be maintained, we think it not supported by the record. In its care of the building, the city did not owe to the public that high degree of care imposed upon carriers of passengers. Its duty in this respect was performed if it exercised reasonable and ordinary care and diligence in keeping the building in repair; the same degree of care that is imposed upon a city with reference to its streets and other public places open to the use of the public. Plainly, it would be laying down a harsh rule to say that a city became guilty of negligence whenever it permitted a plank in a board walk, or a slab in a concrete walk, to remain in place whenever its center became worn down a quarter of an inch below the common level. Rules governing the imperative duties of cities with regard to keeping its streets and buildings in repair must be reasonable and practicable rules, else the burden of supporting the government therein will necessitate an abandonment of all government. Again, we think the judgment may rest on another ground. There was no evidence to show notice on the part of the city that the floor was defective, even conceding it so. True, the officers of the city could have discovered, by an examination of the floor, that the particular plank complained of had worn faster than other planks surrounding it, and that its center was, to a certain degree, lower than such surrounding planks. But they were not bound by this to assume that it was in such a defective condition as to be dangerous. The common observations of their every day life would tell them that it was not so; and, more than this, they knew that many persons passed over this particular floor daily with safety. If it had been shown that other persons had slipped thereon so as to lose their balance or fall, and this fact had been brought home to the officers of the city, a different question might have been presented. But the fall of a single person proves nothing. Persons have been known to slip and fall on the best constructed walks. Nor do we think the evidence to the effect that there were nail marks on the board of any moment on the question of the dangerous condition of the defect. They could have been made, and are usually made, by scuffing the heels and can be found on any floor generally used by the public where heel marks show." Likewise in Jeffersonville v. Gray, 165 Ind. 26, 74 N. E. 611, it was held that it is the duty of a municipal corporation to keep its public wharves in repair and that it is liable in damages to a person injured on account of a hole negligently allowed to remain in a wagonway although it is open to ordinary observation. In Harris v. Bremerton, reported in full, post, this volume, at page 160, it was held that in view of the implied invitation to the public to use a municipal wharf, the mere fact that a person has not paid the wharfage does not render him a trespasser to the extent that he thereby loses the right of protection against personal injuries through the failure of the city to exercise ordinary care.

In Reynolds v. Starin, 50 App. Div. 535, 64 N. Y. S. 141, it was held that the docks of the city of New York were subject to the same rule as highways and that a woman injured by the falling of the wall of a freight house could recover from the contractor whose lack of ordinary prudence caused the injury. In Degan v. Dunlap, 15 Phila. (Pa.) 69, 39 Leg. Int. 32, it was held that a wharf erected at the end of a highway is public in its nature so that a vessel has the right to a berth there, and that a stevedore who assists in moving the vessel and is injured by reason of a defect in the wharf is not a trespasser though the vessel has not express permission to dock at the wharf. The court said: "The whole history, therefore, of the construction of wharves, and the common and statute laws which regulate their erection and use, all show clearly that they are not in the ordinary sense to be considered the private property of the person who erects them. A person, therefore, who goes upon them, or who fastens his vessel to them, does not, by so doing, make himself a trespasser."

But as was held in Birch v. New York, 190 N. Y. 397, 83 N. E. 51, 18 L.R.A.(N.S.) 595, *reversing* 121 App. Div. 395, 106 N. Y. S. 104, a municipality which has purchased a pier for the purpose of making a park is

under no duty to repair it and place it in a reasonably safe condition. The court said: "The issue is extremely narrow and not free from doubt, but we are inclined to the view that the court at Trial Term was right and that the judgment upon the nonsuit should be sustained. We think it would be imposing upon municipalities altogether too harsh a rule of liability to hold that private property acquired by them for public purposes must be treated as thrown open to the use of the public from the moment of its acquisition, without regard to the character of the changes or improvements that may be contemplated in fitting it for future public use. This was private property up to the moment that it was acquired by the city. Although it was to be devoted to public use in that it was embraced in the plans for the city park system, the precise character of its improvement and the exact nature and extent of its use do not appear to have been definitely determined at the time of the intestate's death. It is true that eight years had elapsed between the time of its acquisition by the city and the tragic ending of this young man's life, and that during this interval the pier might have been improved or removed. But these are considerations with which we have no concern in a case of this character, unless we are prepared to hold as a matter of law that a municipality which acquires property for public purposes is bound either to improve it at once, or to exercise a degree of care in its maintenance before its improvement, beyond that which is chargeable to a private owner of property similarly situated. It is too plain for discussion that neither individuals nor courts have any right or power to demand or direct how or when public improvements shall be made, except where such right or power are conferred by statute or other legal authority. It seems equally plain to us that there is no valid reason why a municipality should be held to a different rule of liability for its alleged negligence than an individual owner with respect to the care and maintenance of property which, although acquired for a definite public use, has not yet been improved for that purpose and is used, if at all, by mere sufferance. This is not a case where the pier was a part of the highways of the city, or one of its public places. . . . Neither was it a place which the city permitted to be used as a highway for public travel. . . . This was private property, although owned by the city and held for a public purpose, and that private character continued until it was actually devoted to the public use for which it was purchased, unless the city either invited or permitted a use of it that was public in its nature." In Holland v. New York, 16 Daly 124, 9 N. Y. S. 499, *affirmed* 129 N. Y. 674, 30 N. E. 66, it appeared that a gangplank for the egress of passengers from a steamboat to a public dock was not under the control of the municipality owning the dock, and that an open stairway was necessary in the landing of the passengers and its maintenance was not a nuisance. It did not appear that the dock was in need of repair. It was held that the city was not liable for personal injuries received by a woman in falling down the stairway, which was only partially covered by the unguarded gangplank, even though the dock was insufficiently lighted.

A person has the right to assume in the absence of knowledge or notice to the contrary that a wharf continues to be open to the public and in the absence of such knowledge or notice he cannot be regarded as a trespasser in an action to recover for personal injuries resulting from a defect therein. New Orleans, etc. R. Co. v. Hanning, 15 Wall. 649, 21 U. S. (L. ed.) 220; Delaney v. Pennsylvania R. Co. 78 Hun 393, 29 N. Y. S. 226, *affirmed* 144 N. Y. 718, 39 N. E. 857. Thus the right of passage over a public wharf continues until some notice is given that the right has been terminated by the grant of the property to a railroad company and a person continuing to use it cannot be deemed a trespasser. New Orleans, etc. R. Co. v. Hanning, 15 Wall. 649, 21 U. S. (L. ed.) 220, wherein the court said: "It would seem that, prior to the passage of the act authorizing the defendants to occupy and possess the wharf, it had been open to the public, free to the passage of all, at their pleasure to come and go. The judge charged, in substance, that this right of passage to the public continued until some notice should be given to those accustomed to use it that their rights had ended. This principle is one of quite general application. A railroad or steamboat company, by the departure and arrival of their conveyances, give an invitation to all who desire to approach their boats or cars to pass over their wharf or platform. One accustomed so to pass cannot be deemed a trespasser in repeating his act after a new station or landing has been adopted and the cars or boats have ceased to use the old one. To exclude the passer's right so as to make him in fault, and to prevent his recovery for an injury sustained by leaving the place in a bad condition, notice must have been given of its changed character, and that the rights of passers are terminated. This principle is so familiar, and exists in so many forms, that it is unnecessary to elaborate it." Similarly in Delaney v. Pennsylvania R. Co. 78 Hun 393, 29 N. Y. S. 226, *affirmed* 144 N. Y. 718, 39 N. E. 857, it was held that where the piers in a certain locality of a city had been generally used at pleasure as a matter of public right a person had the right to assume in the

absence of notice that a particular wharf continued to be open to the public and if he was drowned by falling through an unguarded and unlighted hole therein his representatives might recover damages for his death. The court said: "The right to the possession of this particular wharf had become vested in the defendant, it is true, by contract entered into between it and the authorities of the city, but of that fact the public naturally could not have had knowledge. There was nothing to indicate to the people going upon it that they had not the same right to use it, and could not use it, with the same impunity as any of the other wharves in that vicinity and along that avenue. That being so, within the principle of the authorities already referred to, it was clearly the duty of the defendant to take some precautions to warn the public against coming upon the property. As the evidence tended to show that the defendant did not take any precautionary steps whatever in that direction the court properly denied the motion for a nonsuit."

III. Persons Liable.

1. Generally.

A wharf owner retaining control over the repair of the wharf is liable for personal injuries sustained by a licensee due to the negligence of the contractor. New Orleans, etc. R. Co. v. Hanning, 15 Wall. 649, 21 U. S. (L. ed.) 220, wherein the court said: "It is insisted that the wharf at the time of the accident was in the possession of Carvin; that the negligence if any, was his, not that of the company; and that the company is not responsible for any negligence by him or those employed by him. . . . The rule extracted from the cases is this: The principal is liable for the acts and negligence of the agent in the course of his employment, although he did not authorize or did not know of the acts complained of. So long as he stands in the relation of principal or master to the wrongdoer, the owner is responsible for his acts. When he ceases to be such and the actor is himself the principal and master, not a servant or agent, he alone is responsible. Difficult questions arise in the application of this rule. Nice shades of distinction exist, and many of the cases are hard to be reconciled. Here the general management and control of the work was reserved to the company. Its extent in many particulars was not prescribed. How and in what manner the wharf was to be built was not pointed out. That, rebuilt, was to be as good as new. The new was to be of the best workmanship. This is quite indefinite and authorizes not only, but requires a great amount of care and direction on the part of the company. The submission of the whole work to the direction of the company's engineer is evidence, although not conclusive, that the company retain the management and control. The reservation of authority is both comprehensive and minute. The company have the general control, and it may prescribe where each pile shall go, where each plank shall be laid, where each stringer shall be put down, where each nail shall be driven. All the details are to be completed under their orders and according to their direction. The contractor undertakes in general terms to do the work well. The company reserve the power not only to direct what shall be done, but how it shall be done. This is an important test of liability."

It has been held that an invitee on a dock had the right to assume, in the absence of explanation, that the whole dock was in the possession and under the control of the person who ostensibly had the license to use it in entirety without a longitudinal division, and that where he was injured by the unsafe condition of the dock, without his contributory negligence, it did not constitute a defense to show that the legal title to the part of the dock where the unsafe condition existed, was in a third person, or that in fact the defendant had no legal right to repair it. Thomas v. Henges, 131 N. Y. 453, 30 N. E. 238, *affirming* 62 Hun 620, 16 N. Y. S. 700. But it has been held that no liability attached to a ship owner for an injury to a person on a wharf by the permission or invitation of the owner arising from the breaking of a defective rope, since a rope is not a dangerous structure; but that had the masts, on account of being insecurely fastened, fallen and injured any one, that would have been a violation of a duty imposed by law on every one to have no dangerous structures on his property which might injure persons coming on the premises by the invitation or permission of the owner. See The Mary Stewart, 10 Fed. 137.

It seems that a person who piles lumber on a wharf under the license of the owner is liable to a teamster engaged in hauling coal for delivery at the wharf for injuries caused by the negligent manner in which the lumber is piled. See Murphy v. Stanley, 136 Mass. 133. Similarly in Dunn v. Ballantyne, 5 App. Div. 483, 38 N. Y. S. 1102, it was held that a man injured by the falling of a pipe, due to the negligent manner in which it was placed on a bulkhead used as a wharf, could recover damages from the master of the workman who unloaded the pipe, even though the pipe had been delivered to the consignee, where the bulkhead was a public place and the plaintiff was there engaged in the inspection of the lighters of an oil company. The court said: "Here the structure, if it may be so called, was put up in a public place, to which

people generally have a right to resort, just as they have the right to use the streets of a city. While it is intended that the bulkhead shall be used for the temporary storage of goods in transit, no one has a right to store them there in such a manner as to endanger the persons of those who rightly resort to the wharf any more than a person who is engaged in the construction of a house in a city has the right to pile bricks or building material upon the sidewalk or in the streets in such a manner as to imperil passers-by. . . . It would seem that under such circumstances the person who erects a dangerous structure in a highway or public place, as well as the person who acquires ownership and subsequently assumes control thereof with knowledge or notice of its true condition, is responsible for injuries which may result from its presence."

Of course a municipality or county operating wharves, docks, or piers is liable in damages for injuries to persons consequent on the failure to exercise due care in their construction and maintenance. Jeffersonville v. Gray, 165 Ind. 26, 74 N. E. 611; Harris v. Bremerton, reported in full, post, this volume, at page 160; Belles v. Tacoma, 79 Wash. 200, 140 Pac. 324. And see the reported case.

2. Liability of Lessor.

The lessor of a wharf, dock, or pier remains liable for the injuries caused by a neglect to repair the premises if he leases them in their defective condition or if binds himself to keep them in repair. Campbell v. Portland Sugar Co. 62 Me. 552, 16 Am. Rep. 503; Albert v. State, 66 Md. 325, 7 Atl. 697, 59 Am. Rep. 159; Joyce v. Martin, 15 R. I. 558, 10 Atl. 620. See also State v. Boyce, 73 Md. 469, 21 Atl. 322; Swords v. Edgar, 44 How. Pr. (N. Y.) 139; Swords v. Edgar, 59 N. Y. 28, 17 Am. Rep. 205, *affirming* 1 Thomp. & C. 23, Addenda; Edwards v. New York, etc. R. Co. 98 N. Y. 245, 50 Am. Rep. 659. Thus in Campbell v. Portland Sugar Co. supra, it was held that the owner of a wharf who had let a part of it through his agents to another was liable for injuries suffered by a person by reason of its defective condition even at a place within the exclusive possession of the lessee, the owner being under contract to keep the premises in repair. The court said: "This is not a question of privity of contract, but of obligation under which the owners of real estate lie to all who are induced by the use which such owners make of their property to enter upon it for the transaction of business. And we fail to find any case where the owner has been exonerated from the consequences of neglect to make and keep the access to a place of business reasonably safe, because the property may be in possession of his tenant. Certainly there can be no ground for claiming such exemption, where, as here, by express stipulation between the lessors and lessees, the former were to make all necessary repairs. To suffer such an exemption, even in the absence of such evidence as this case affords, we think would be contrary to public policy and substantial justice, for it would not unfrequently operate to deprive the injured party of all remedy except against an irresponsible tenant through whom a negligent landlord would reap the profits, without bearing the responsibilities, of his proprietorship. Like all who are engaged in business which involves the personal safety of large numbers, proprietors of wharves should be held to the exercise of the strictest care." Similarly in Albert v. State, 66 Md. 325, 7 Atl. 697, 59 Am. Rep. 159, it was held that the lessor of a wharf was liable in damages for the death of a person suffered by reason of a defective condition existing at the time of the renting, which was known or should have been known by him, the court saying: "That instruction substantially laid down the law to be, and so instructed the jury, that if they found that the defendant was the owner of the wharf, and that he rented it out to a tenant, and that at the time of the renting, the wharf was unsafe, and defendant knew, or by the exercise of reasonable diligence could have known, of its unsafe condition, and that the accident happened in consequence of such condition, the plaintiff was entitled to recover. Of the correctness of the rule so laid down, provided the jury found the facts, we think there can be no reasonable doubt. . . . A wharf, furnishing the only mode of ingress and egress to a summer resort, where crowds were invited to come, if in an unsafe and dangerous condition is certainly a nuisance of the worst character. It will not do for the owner, knowing its condition, or having by the exercise of any reasonable care the means of knowing it, to rent it out and receive rent for it, but escape all liability when the crash comes. He who solicits and invites the public to his resorts, must have them in a reasonably safe condition, and not in a condition to risk the lives and limbs of his visitors." Likewise in Joyce v. Martin, 15 R. I. 558, 10 Atl. 620, it was held that the father of a boy injured by a defect in a wharf at a public pleasure resort had a right of action for the loss of his services against the lessor and the lessee jointly, where the defect existed at the time of the lease, and the lessee subsequently acquired knowledge of it, the boy being there at the invitation of the lessee. So in Cristadore v. Von Behren, 119 La. 1025, 44 So. 852, *disapproving* McConnell v. Lemley, 48 La. Ann. 1433, 20 So. 887, 55 Am. St. Rep. 319, 34 L.R.A. 609, it was held that the owner of a "camp," con-

sisting mainly of a platform and a house built over the waters of a lake and intended to be used as a place of resort and recreation and to be leased to all persons desiring to rent it, was liable to a guest of his lessee for personal injuries occasioned by the collapse of the pier due to the neglect to keep it in repair. The court said: "The reason, then, why Mrs. Cristadoro was rightfully on the wharf is that she was a guest of her mother, Mrs. Schmitt, and that Mrs. Schmitt had secured by contract with Von Behren the right to receive visitors; and the reason why, she being rightfully on the wharf, the owner of the wharf is responsible to her for the injury she suffered, is that "the owner of a building is answerable for the damages occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice in its original construction" (Civ. Code, art. 2322)—this provision of the Code being nothing more than an application of the principle that "every person is responsible for the damage he occasions, not merely by his act, but by his negligence, his imprudence, or his want of skill" (article 2316, Civ. Code). The learned counsel for defendants very properly say that there must be a duty before there can be negligence; but, when they say that Von Behren did not owe Mrs. Cristadoro the duty to see to it that this wharf was maintained in proper condition for its ordinary use, they fail to take the foregoing articles of the Code into consideration. . . . The court seems to have thought that the recourse of the guest was against the lessee; but what if the lessee has not been in fault? Nay, what if, injured by the same accident, he himself has a cause of action? Would the legal situation be that he would have to respond in damages to the guest, and the owner to him? If so, the absurd result would be that he would have to turn over to his guest whatever he might have recovered from the owner. Under the doctrine of this Lemley Case, if, through gross vice of construction or the gross negligence of the owner, one of the so-called "skyscrapers" of this city were to collapse, the heirs of a person who had been visiting one of the tenants at the time of the disaster and had perished therein could have no recourse against the culpable owner, but only, if any at all, against the heirs of the innocent and unfortunate tenant. It may be that, with regard to all those who derive through the lessee the right to be on the leased premises, the lessor may by contract shift from himself to the lessee the duty of seeing to the safety of the building, and may in that way absolve himself from all duty towards the guests of the lessee but so long as he does not do this, but retains to himself the duty of seeing to the safety of the house, he plainly and manifestly owes that duty as much to those who are rightfully in the house as to those who may happen to be passing by it." In Swords v. Edgar, 59 N. Y. 28, 17 Am. Rep. 295, *affirming* 1 Thomp. & C. 23, Addenda, it was held that even though the lessee of a pier is under a covenant to keep it in repair the lessor remains liable for injuries to a person rightfully on the pier caused by the failure to exercise ordinary care to maintain it in a reasonably safe condition. The court said: "The defendants were not in possession of the premises at the time of the accident. It is claimed that thereby the defendants are under no liability to the plaintiff. We have shown that this pier, so far as the intestate was concerned, was in the nature of a public place, whereon he was lawfully engaged. We have shown that it was of such nature that there was as to him a duty resting somewhere, to keep this pier in a reasonably sound and secure condition. Primarily, this duty is upon the occupants of the pier, and, in the absence of any covenant from their lessors to keep the same in repair, that duty, as to all defects arising after their tenancy began, would altogether rest upon them, and there would be no liability upon the lessors. But there may be a state of facts which will cast a liability upon the lessors also. The neglect of this duty, the suffering the pier to fall into such a state of decay, as to become dangerous to those lawfully coming upon it, is the creation of a nuisance. For a private nuisance is any thing unlawfully or tortiously done to the hurt or annoyance of the person, as well as the lands, tenements and hereditaments of another. . . . Where there has been a nuisance of continued existence upon demised premises, the lessor and the lessee may both be liable for damages resulting therefrom. The lessee in the actual occupation of the premises, if he continues the nuisance after notice of its existence and request to abate it, and the lessor, if he at first created it, and then demised the premises with the nuisance upon them, and at the time of the damage resulting therefrom, is receiving a benefit therefrom by way of rent or otherwise. . . . A pier so defective and insecure when it is leased, as that a subsequent injury, received in the proper use of it as if sound, is consequent upon its original condition, is, for the purposes of such an action as this, per se a nuisance. Its effect upon the third parties is not the result of the manner of the use of it by the lessee. There is but one use to be made of it—as a place at which vessels may lay, and put off and take on their cargoes. For that use it is rented; and used therefor, it is the original insecure condition of it

which is the cause of an injury, though it should be, that in the first construction of it, it was well and substantially built; yet the suffering it, by continued use, to become decayed, and the neglecting of needful repairs, is the same as if it was placed, on the day before the lease, in the unsafe condition of it. Moreover, there was testimony tending to show an original faulty mode of construction. When leased in that condition, for a rent reserved to the defendants, they became liable from injuries resulting to an innocent person, unless there be something else in the case which will relieve them. It is urged that, by taking from the lessees a covenant to keep the premises in good order and repair, the defendants have protected themselves from liability to the plaintiff. As to this, it is first to be observed that by giving this covenant, the lessees did not increase nor change their liability to the plaintiff's intestate, nor to that portion of the public which might lawfully use their pier. As tenants and occupants of the pier they were liable, though no covenant had been given. Their relation to strangers is in no wise changed by the existence of the covenant, so that the question is, whether the lessor of premises, demised in a ruinous state, may shield himself from liability to strangers, for damage resulting from their defective condition, by taking to himself a covenant like that here found. It is plain from what we have before said, that there was once a duty upon the defendants, as owners of the pier, to maintain it in a safe condition. They did not do this. They leased it in its unsafe state, and took a rent for the use of it. Thereby they became liable to any one lawfully upon it, who suffered damage in consequence of its state of insecurity. The pier was unsafe on and before the day of the lease. The defendants were certainly, at that time, charged with the duty of putting and keeping it in a safe condition. . . . Can the fact that the granting over, is upon the taking back a covenant to keep in repair, work a discharge of that liability? The person injuriously affected by the ruinous state of the premises demised has no right nor privity in the covenant. He is not given thereby a right of action against the lessee greater nor more sure than he had before. He has the right without the covenant. The covenant is a means by which the lessor may reimburse himself for any damages in which he is cast by reason of his liability. But it is an act and obligation between himself and another, which does not remove nor suspend that liability. It is not so, that a person upon whom there rests a duty to others may, by an agreement solely between himself and a third person, relieve himself from the fulfilment of his duty. Surely an ineffectual attempt to fulfil it would not; as if in this case insufficient repair of the pier had been made by a builder who had contracted with the lessor to do all that was needful to make the pier secure for all comers. A covenant taken from a lessee, to keep in order and repair, is no more effectual than a contract with a builder to the same end. Both may afford an indemnity to the lessor, but neither can shield him from liability."

But if the owner of a wharf does not know, or in the exercise of reasonable diligence could not know, of a defect at the time of leasing it, he will not be held liable in damages for the death of an employee of the lessee occasioned by his fall through a rotten plank. State v. Boyce, 73 Md. 469, 21 Atl. 322. And in Ahern v. Steele, 115 N. Y. 203, 22 N. E. 193, 12 Am. St. Rep. 778, 5 L.R.A. 449, *reversing* 48 Hun 517, 1 N. Y. S. 259, it was held that heirs who became full owners of a pier at the death of their ancestor, subject to a valid outstanding lease which provided that the lessor was not bound to repair but retained the privilege of entry for that purpose, were not responsible for a nuisance created thereon during the existence of the lease and before the title passed to them, they having no notice of the defective condition. The court said: "It is not the general rule that an owner of land is, as such, responsible for any nuisance thereon. It is the occupier, and he alone, to whom such responsibility generally and prima facie attaches. . . . The owner is responsible if he creates a nuisance and maintains it; if he creates a nuisance and then demises the land with the nuisance thereon, although he is out of occupation; if the nuisance was erected on the land by a prior owner, or by a stranger, and he knowingly maintains it; if he has demised premises and covenanted to keep them in repair, and omits to repair, and thus they become a nuisance; if he demises premises to be used as a nuisance, or for a business, or in a way so that they will necessarily become a nuisance. In all such cases I believe there is now no dispute that the owner would be liable. But an owner who has demised premises for a term during which they become ruinous, and thus a nuisance, is not responsible for the nuisance unless he has covenanted to repair. It has even been held in some cases that an owner may demise premises so defective and out of repair as to be a nuisance, and if he binds his tenant to make the repairs he is not responsible for the nuisance during the term. . . . But these cases are not in entire harmony with the decisions in our own state, and probably would not now be generally

received as authority in this country or in England. A grantee or devisee of premises, upon which there is a nuisance at the time the title passes, is not responsible for the nuisance until he has had notice thereof, and in some cases until he has been requested to abate the same. . . . But the position of these defendants is stronger than the one we have just been dealing with. This pier came to them, not only with this nuisance existing thereon, but subject to an outstanding lease for some years which they had no power to terminate. The lessee who occupied and used the pier was under obligation to the public to see that it did not become a nuisance, and it was his duty to respond for any damage sustained by any person from the nuisance. The owners of the reversion had the right, in the absence of notice, to suppose that he would discharge such duty and protect the public, and they were under no obligations to see by watchful vigilance that he performed such duty. And so it has been held in all the analogous cases, that the landlord, in the absence of notice, is liable only in case he demised the premises with the nuisance thereon. . . . Now, within these authorities, what ground is there for imposing liability upon these defendants for this nuisance? They did not create it, and had no connection whatever with those who did create it. They were not bound by the lease to repair the pier. They did not demise the pier with the nuisance thereon, and they had no notice, actual or presumptive, of the existence of the nuisance."

The sublessors of a wharf in surrendering it to the owners of a steamship for their temporary use remain liable for injuries sustained by reason of the negligence of their sublessee in maintaining the wharf. Newall v. Bartlett, 114 N. Y. 399, 21 N. E. 990, *affirming* 1 N. Y. St. Rep. 718. The sublessor of a pier, however, who has paid a judgment secured against him for personal injuries to an invitee on the pier may recover indemnity from the sublessee whose neglect is the cause of the accident and who has possession of the part of the pier where the accident occurs. See Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola, 134 N. Y. 461, 31 N. E. 987, 30 Am. St. Rep. 685.

3. Liability of Lessee.

The lessee in possession of a wharf, dock, or pier is liable in damages to a person who suffers an injury by reason of a neglect to keep the premises in a safe condition. King v. Cooney-Eckstein Co. reported, in full, post, this volume, at page 163; Cooney-Eckstein Co. v. King, 67 So. 918; Gluck v. Ridgewood Ice Co. 56 Hun 642, 9 N. Y. S. 254, *affirmed* 125 N. Y. 728, 26 N. E. 757; Joyce v. Martin, 15 R. I. 558, 10 Atl. 620. See also Buchingham v. Fischer, 70 Ill. 121; DeGruy v. Aiken, 43 La. Ann. 798, 9 So. 747; Campbell v. Portland Sugar Co. 62 Me. 552, 16 Am. Rep. 503; Swords v. Edgar, 59 N. Y. 28, 17 Am. Rep. 295, *affirming* 1 Thomp. & C. 23. Thus in Gluck v. Ridgewood Ice Co. supra, the court said: "It would be, undoubtedly, true, were the pier in question to be considered as the private property of the defendant, no recovery could be had, because the deceased was not upon the pier at the invitation or request of the defendant. But it seems to be reasonably well settled that a public pier in the city of New York is a part and parcel of its public streets, and that the defendant has not the right to the exclusive use thereof, but that the public have also the right to enter upon such pier, in the same manner as they have a right to enter upon and pass over the public streets of the city. A large number of cases has been cited by the counsel for the appellant tending to show that the owner of land owes no duty to a person who comes upon it without his permission, and who is thereby a trespasser. But in the case at bar the deceased was not a trespasser in coming upon this pier, because, as already stated, it is part and parcel of the public street. He was entitled to pass over the same, and to assume that it was in such condition that he could safely do so. If, therefore, this accident happened in the manner in which it was claimed upon the part of the plaintiff, namely, because of a hole existing in this pier which remained there for a long period of time, and which the defendant, the lessee of the pier, had failed to render safe, a recovery could certainly be had." In De Gruy v. Aiken, 43 La. Ann. 798, 9 So. 747, it was said that the lessees of the wharves of a city were liable in damages to a person injured by reason of the failure to repair holes in the flooring, to mend the bulkheads and incline heads immediately after the need of the repairs, no notice to the corporation of patent defects being essential to liability especially where the lessees were under contract to keep the wharf in repair. In Cooney-Eckstein Co. v. King (Fla.) 67 So. 918, it was held that an averment in the declaration that the defendant "had exclusive control and management" of a wharf was sufficient to make it liable for personal injuries occasioned by the defective condition of the wharf.

IV. Contributory Negligence of Person Injured.

Of course the contributory negligence of a person injured on or about a wharf, dock, or pier precludes him from recovering dam-

ages for the injury. Grand Tower Mfg. etc. Co. v. Hawkins, 72 Ill. 386; DeGruy v. Aiken, 43 La. Ann. 798, 9 So. 747; Stewart v. Newport News, etc. R. Co. 86 Va. 988, 11 S. E. 885. See also York v. Canada Atlantic Steamship Co. 22 Can. Sup. Ct. 167; Anderson v. The E. B. Ward, 38 Fed. 44; Plant Inv. Co. v. Cook, 74 Fed. 503, 41 U. S. App. 109, 20 C. C. A. 625; Cooney-Eckstein Co. v. King (Fla.) 67 So. 918; Jeffersonville v. Gray, 165 Ind. 26, 74 N. E. 611; Cristadoro v. Von Behren, 119 La. 1025, 44 So. 852; Campbell v. Portland Sugar Co. 62 Me. 552, 16 Am. Rep. 503; Low v. Grand Trunk R. Co. 72 Me. 313, 39 Am. Rep. 331; Burke v. St. Louis Southwestern R. Co. 120 Mo. App. 683, 97 S. W. 981; Swords v. Edgar, 59 N. Y. 28, 17 Am. Rep. 295, *affirming* 1 Thomp. & C. 23, Addenda; Downes v. Elmira Bridge Co. 179 N. Y. 136, 71 N. E. 743, *affirming* 41 App. Div. 339, 58 N. Y. S. 628; Hart v. Delaware, etc. R. Co. 76 Hun 296, 27 N. Y. S. 767; Harris v. Bremerton, reported in full, post, this volume, at page 160. Thus in Grand Tower Mfg. etc. Co. v. Hawkins, supra, wherein it appeared that the plaintiff used an unusual mode of access to a wharf boat without a light to guide him, it was held that his gross contributory negligence barred him from a recovery, the court saying: "The law, as declared by this court through a long series of decisions, is, that, although the mere fact that the plaintiff was guilty of contributory negligence, will not, of itself, prevent him from recovering for injuries caused by the negligence of others, yet he cannot recover in such case unless his negligence, as compared with the defendant's, was slight, and that of the defendant was gross. There must be fault on the part of the defendant, and no want of ordinary care on the part of the plaintiff, to entitle him to recover. . . . We are unable to conceive upon what principle appellant can be held liable. We are aware of no duty which it owed the public that was not discharged. It was not a common carrier of passengers, or in the exercise of functions from which the law would imply a duty to have a passway open to the public at all hours of day and night across its wharf boat. It received no compensation from passengers for the use of its boat, and, while it was its duty to have the passway safe which it permitted the public to use, the rights of the public were limited to that passway, and its use, when kept open for that purpose. They cannot compel appellant to maintain passways for passengers over and around every part of its wharf boat. Appellee was guilty of a high degree of negligence. A man of ordinary prudence would surely have restrained his anxiety until the steamboat had landed, and would then scarcely have been trying to reach it by an unusual mode of access, without even a light to guide him. We think it clear, from the evidence, that the plaintiff's own reckless imprudence was the efficient cause of his injury, and he alone must therefore bear the consequences." Similarly in DeGruy v. Aiken, 43 La. Ann. 798, 9 So. 747, it was held that it was contributory negligence for a man while waiting at night for the arrival of a steamer on which his daughter was a passenger to leave the wharf proper and to walk down the incline of the apron merely for the sake of the pleasure of standing in the breeze; and that he could not recover for injuries sustained by a fall due to a missing plank. The court said: "The wharf, proper, was safe enough, but it was highly imprudent to leave it and walk on the incline in the nighttime. This incline measures thirty-five feet in width and has a fall of nine feet. It is not a moderate incline. After a rain it is dangerous to walk on it. It had rained on the day of the accident. This apron is built, and has this fall, with unquestioned approval. Granted that there was a missing plank, as alleged, the plaintiff increased the risk of an accident by venturing on it in the nighttime. If in the discharge of a duty, in the performance of any work or service, an accident were to happen, because of a missing plank on this incline, those having it in charge would be exposed to the payment of damages, but the one hazarding himself to gratify a pleasure assumes certain risks; to recover, it must be shown that the defendants were guilty of negligence; that a dangerous open space was left for some time, prior to the accident, without repair." Likewise in Stewart v. Newport News, etc. R. Co. 86 Va. 988, 11 S. E. 885, it was held that an engineer on a boat lying at a pier waiting to be loaded with coal who was familiar with the construction of the premises was guilty of contributory negligence in selecting a dangerous passageway in preference to the way provided. The court said: "That the deceased contributed to his death by his own negligence in this case is clear. (1) He was the chief engineer of a steamship which was constantly taking in coal, and as it was his business and custom to go on these piers to see to the weighing of the necessary coal for the ship, it is not unreasonable to suppose that he knew that these chutes were uncovered, as they were always uncovered, as are all coal piers, as is proved by the evidence in this case. (2.) He has before coaled at this pier, perhaps more than once. His face was familiar to the health officer. He therefore knew that these chutes at this pier were uncovered generally, and always before this.

(3.) He certainly knew that they were uncovered on this pier at this time, because he was distinctly so informed by the health officer. (4.) He was warned to wait for a guide, that his trip would not only be dangerous, but probably useless, unless he waited for the messenger, who would be sent for him to give him notice that his coal was ready, and to perform the very important part of guiding him to the office in safety over these dangerous ways. He chose to disregard this caution, and so neglected wholesome safeguards. (5.) When leaving the office, where he really had none but a pretended mission, he saw safe planked-ways, one on each side of the track, which he declined to use, and walked upon the track, which he knew to be honeycombed with open chutes. (6.) When he reached the chute in question, which was wide open and under the full blaze of an electric light, which plainly showed it to all who chose to look, he neglected to use his eyes, and walked into it, and to his death; when, by the simple precaution of looking where he stepped, he would have been saved from all harm. This negligence on his part was of the grossest character. Why he did not look where he was walking, and where he was looking, will forever be unexplained; but that his own negligence was the proximate cause of the injury which he received, without which, the injury would not have happened to him is clear, and he is not entitled to recover damages from another for an injury caused by himself."

However, a person unlawfully on a pier has the right to assume, as against those bound to maintain the pier in good condition, that it is in a fair and ordinary state of security and strength, and able to sustain all the weights to which such a structure is usually subjected, and before contributory negligence can be imputed to him the contrary must come to his knowledge. Swords v. Edgar, 59 N. Y. 28, 17 Am. Rep. 295, *affirming* 1 Thomp. & C. 23, Addenda. And it is not contributory negligence for the driver of a loaded wagon in the waning twilight to fail to observe a small hole in a place where he has the right to expect secure footing and where, but for the dereliction of the defendants, he would find it. Campbell v. Portland Sugar Co. 62 Me. 552, 16 Am. Rep. 503. It has been held that where the open space between two floats used as a wharf was so apparent at the time that one could readily see it and thus be reminded of the danger, contributory negligence could be imputed to a person familiar with the construction; but that momentary forgetfulness might absolve one from the charge of contributory negligence when the danger was so hidden as not of itself to be a reminder of its existence to one coming within its presence, since mere forgetfulness of hidden danger with which one may be acquainted does not necessarily, as a matter of law, constitute contributory negligence. Harris v. Bremerton, reported in full, post, this volume, at page 160. In Jeffersonville v. Gray, 165 Ind. 26, 74 N. E. 611, wherein it appeared that the defective condition of a wagonway on a wharf was open to ordinary observation but was not in fact seen by the plaintiff who was injured by the overturning of his wagon loaded with hay, it was held that he was not guilty of such contributory negligence as to bar a recovery. The court said: "It is true the answers to the interrogatories show that the jury found that the condition of said wagonway was open to ordinary observation by persons on vehicles passing over the same, and that vehicles could not by the exercise of care be safely hauled over said wagonway, but it was also found that appellee did not see the condition of said wagonway, nor did he see his horse step into the hole in said way, and could not see the same because he was sitting three or four feet back on his load. There are no answers showing that the position occupied by appellee on the load of hay was not a proper one, nor that there was any place on either side of said hole that he could have driven, nor that he was not exercising ordinary care in so driving. The further point is made that appellee could have driven his wagon along said wagonway without going upon the cinder footway, because there was a space of six feet between said cinder footway and the end of said west apron of the ferry dock, and the wheels of appellee's wagon were only five feet apart. Said answers of the jury do not show what the conditions were in the space mentioned, nor that the roadway ran in this space, nor is there anything in said answers to indicate which end of the apron is referred to, nor the direction the measurement refers to, whether up or down the river, nor that appellee could have driven through said space. It is clear, under the rule heretofore stated, that said facts are not in irreconcilable conflict with the general verdict, which found that appellee was not guilty of contributory negligence." And in Low v. Grand Trunk R. Co. 72 Me. 313, 39 Am. Rep. 331, it was held that a customs officer who was on a wharf in search of a smuggler and who was injured by falling into a gangway was not precluded from recovering. For the defendant it was argued that "if the night is light enough to see the gangway, no railing or light is necessary to enable a person to avoid it, and if the night is too dark to allow of its being seen, then a person groping around in the dark and unconsciously walking into it is guilty of such negligence as to preclude him from recovering." The court

said: "The idea seems to be that there is no necessity for any precaution on the part of the wharf owners, because constant vigilance on the part of those who come there when it is light enough to see the danger will enable them to avoid it; and, duty or no duty, they must not come without a light in the nighttime, or they will be set down as wanting in ordinary care, and so forfeit their right to protection or compensation. The argument establishes, if anything, too much. The questions are not of a character to be disposed of by a little neat logic. . . . His duty carried him there in consequence of, and in connection with the business which defendants had established there. The jury probably thought that if he went as a section of a torchlight procession he might as well have stayed at home; that he was not in search of an honest man, and had no need of a lantern; that it would take a cordon of custom house officers, exhibiting themselves with lanterns, numerous enough to surround the vessel constantly from the time she hauled into the wharf till she was unloaded, to prevent the mischief, while prudently conducted observation by one or two watching at the right times and seasons without making their presence known, would answer the same purpose. Seeing that the defendants did owe a duty to the public officer, and seeing too how easily they might, to all appearance, by a little precaution, have prevented his being made a cripple, if the 'practical men' before whom the case was tried made allowances for the liability of the human senses to deception in a dim light, and acquitted him of a want of ordinary care in the premises, we are not satisfied that the conclusion they reached on this question of contributory negligence, is so plainly unjustifiable as to require us to send the case to a new trial."

HARRIS

v.

CITY OF BREMERTON.

Washington Supreme Court—April 12, 1915.

85 Wash. 64; 147 Pac. 638.

Wharves — Personal Injury from Defect — Liability.

In an action for personal injury from falling into the open space between the two floats constituting a public municipal dock, it is held that the city's negligence was for the jury.

[See note at end of this case.]

Same.

Evidence, in an action for falling into opening in municipal dock, held to make the plaintiff's contributory negligence a question for the jury.

[See note at end of this case.]

Contributory Negligence — Forgetfulness of Known Danger.

Momentary forgetfulness of a danger so hidden as not of itself to be a reminder of its existence to one coming within its presence does not, as a matter of law, constitute contributory negligence.

[See Ann. Cas. 1913D 36.]

Wharves — Personal Injury from Defect — Liability.

Where a city maintained a floating public dock for the landing of launches and small water craft by day and night, and extended an implied invitation to the public to use it, plaintiff's failure to pay the required wharfage for landing his launch does not make him a trespasser, so as to affect his right of action against the city for personal injury from alleged negligent maintenance of the dock.

[See note at end of this case.]

Appeal — Record — Necessity of Showing Exceptions.

Where no exception to instructions, given or refused, appears in the statement of facts, they will not be reviewed.

Incorporating Instructions by Reference.

A bill of exceptions referring to purported instructions by number only, where no numbered instructions appeared in the record, did not sufficiently identify the instructions sought to be reviewed.

Trial — Instructions Given in Substance.

There is no error in the refusal of requested instructions, where they are given in substance, and in so far as the facts of the case call for instructions upon the matters therein requested.

Appeal from Superior Court, Kitsap county: FRENCH, Judge.

Action for damages. E. T. Harris, plaintiff, and City of Bremerton, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. AFFIRMED.

Jas. W. Carr for appellant.

Vince H. Faben and *C. D. Sutton* for respondent.

[65] PARKER, J.—The plaintiff, E. T. Harris, commenced this action in the superior court for Kitsap county, seeking recovery of damages which he alleged resulted to him from the negligence of the defendant city in the maintenance of a floating public wharf used for the landing of launches and other small water craft. Trial before the court and a jury resulted in a verdict and judgment against the city, from which it has appealed to this court.

The city maintains a floating wharf for the use of the public at which small water craft land to receive and discharge passengers. The wharf consists of two floats, each being sixteen feet wide and approximately forty feet long. They lie end to end and project from the shore into deep water. They are held in place by piles so as to permit their rising and falling with the tide. Between the two floats there is a space of about eighteen inches. In this space there are two piles, each near the outer edges of the floats. The floats are held in place by these piles and two chains, fastening the floats together near their outer edges just outside the piles. There was at the time here involved an apron about five feet wide covering a portion of this open space between the floats and the piles, so that on each side between the apron and the piles there was an open space of water of about one and one-half by four feet. These spaces were not protected by railing or otherwise. There was an electric light some twenty-five feet distant from the wharf at right angles thereto, opposite this open space and the piles, so situated that it threw the shadow of one of the piles over the open spaces between the floats, rendering them not readily discernible at night to one passing over the wharf. The [66] wharf was evidently contemplated to be used by the public in the night as well as in the day, and the light was evidently for the purpose of lighting this wharf as well as another municipal wharf on and near the edge of which it was placed. The maintenance of the floating wharf in this manner, rendering the open space dangerous at night, is the alleged negligence of the city complained of.

At the time respondent was injured, he was operating a launch for hire, being engaged in ferrying passengers between Port Orchard and Bremerton and other points in that neighborhood. He had landed his launch at the wharf to receive and discharge passengers some five or six times only, the wharf being open to the public only a short time. He had never actually been upon the wharf, though he knew in a general way of the manner of its construction and of the open spaces and apron between the two floats of the wharf. On the night of April 5, 1913, about ten-thirty o'clock, he landed at the wharf with his launch. He stepped from the launch upon the wharf and, evidently with the view of reaching the bow of his launch and tying it to the wharf, walked along the wharf and fell into one of the open spaces between the floats, breaking one of his legs and receiving other severe injuries of which he now complains. He apparently momentarily forgot the open space between the floats, and, it then being in the shadow of the pile, he did not see it and was not reminded of it. There is some evidence tending to show that the city knew of the danger of these open spaces in the shadow of the pile at night, and, also, that it knew of other persons having been injured by falling into them.

Some contention is made that the evidence was not sufficient to support the conclusion that the city was negligent in the maintenance of the wharf with the open space therein. We think this contention cannot be sustained as a matter of law, in view of the hidden danger which existed because of the open spaces, and their not being readily observable at night by reason of the shadow of the pile being thrown upon [67] them, and the fact that people would necessarily have to walk so close to them in passing along the wharf. These facts, we think, made the question of the city's negligence one for the jury to determine. Gregg v. King County, 80 Wash. 196, 141 Pac. 340.

It is also contended that respondent was guilty of contributory negligence, in the light of his knowledge of the manner of the construction of the wharf. We are unable to so decide as a matter of law. If the open space had been so apparent at the time that one could have readily seen it and thus been reminded of the danger, there would possibly be merit to this contention, but momentary forgetfulness may absolve one from the charge of contributory negligence when the danger is so hidden as not of itself to be a reminder of its existence to one coming within its presence. We have repeatedly held that mere forgetfulness of hidden danger with which one may be acquainted does not necessarily, as a matter of law, constitute contributory negligence. Jordan v. Seattle, 26 Wash. 61, 66 Pac. 114; Williams v. Ballard Lumber Co. 41 Wash. 338, 83 Pac. 323; Blankenship v. King County, 68 Wash. 84, 122 Pac. 616, 40 L.R.A.(N.S.) 182.

It is contended that the trial court erred in rulings made upon the pleadings and in excluding evidence which in effect eliminated from the case the question of respondent's being a trespasser upon the wharf at the time he was injured, which question counsel for the city sought to bring into the case with the view of defeating respondent's right of recovery. The fact thus sought to be proven was, in substance, that the city required all persons operating launches or boats for hire to pay wharfage for the privilege of landing at the wharf, and that respondent had failed to make such payment and therefore had no right to land his launch there. The law which regards the maintenance of a wharf for the use of the public as an invitation to all persons to go upon it who may have use for it is stated in 40 Cyc. 917, as follows:

[68] "The keeping of a pier, built into or adjacent to navigable waters for the purpose

of loading and unloading vessels, gives a general license to all persons to go upon and use it in the manner and for the purposes contemplated; and so long as it is kept open, the duty rests upon the occupant or owner of keeping it in a safe condition so that those having a lawful right can go upon it without incurring risk of injury. Consequently if a person, when properly on the wharf, in the exercise of reasonable care and diligence, sustains injury through a defect in the wharf, he is entitled to recover, unless the defect was so hidden and concealed that it could not be discovered by such examination and inspection as the construction, uses, and exposures of the wharf reasonably required. Plaintiff's right of action in such a case arises from the duty which the law imposes on the owner or occupant to keep the wharf safe, so long as he should permit it to be open and used, and not from any contract between them."

In view of the public use to which the wharf was admittedly intended by the city, and the implied invitation to the public to go upon it and use it, we think that the mere fact that the respondent had not paid the wharfage did not render him a trespasser to the extent that thereby he lost such right of protection against personal injuries received through the city's negligence when he was upon the wharf as other members of the public had. It may be that the city could have prevented him from landing his launch at the wharf without first paying the wharfage, but the city did not do so. We think that whatever failure there may have been on the part of the respondent to pay for this privilege, it did not affect his rights sought to be enforced in this action. Petersburg v. Applegarth, 28 Grat. (Va.) 321, 26 Am. Rep. 357; Swords v. Edgar, 59 N. Y. 28, 17 Am. Rep. 295; Lowe v. Salt Lake City, 13 Utah 91, 44 Pac. 1050, 57 Am. St. Rep. 708.

Counsel for the city contends that the trial court erred in giving instructions to the jury. We do not find in the statement of facts any exception to the instructions complained of. Under our decisions in Coffey v. Seattle Electric Co. 59 [69] Wash. 686, 109 Pac. 202, and State v. Peeples, 71 Wash. 451, 129 Pac. 108, this would seem to preclude inquiry upon our part touching such claimed errors, since under those decisions there seems to be no way of proper preservation of such question for our review except by bill of exceptions or statement of facts. We find among the clerk's files certified here a paper purporting to be the city's exceptions to the instructions complained of, and by indorsement of the trial judge thereon these exceptions appear to have been allowed by him before the return of the jury to render their verdict. It could be well argued that this is not a bill of exceptions binding upon the respondent properly preserving these questions for review here, in the light of Rem. & Bal. Code, §§ 389, 391 (P. C. 81, §§ 685, 689), prescribing the notice, time and manner of certifying a bill of exceptions or statement of facts. However this may be, these purported exceptions refer to supposed instructions by number only, and there are no numbered instructions in the record before us given by the court. It seems, therefore, quite clear to us that these claimed errors in the giving of instructions do not refer to instructions sought to be reviewed, with such certainty as to enable us to notice them, aside from the question of the exceptions not being otherwise properly preserved by bill of exceptions or statement of facts in the record. The exceptions do not tell us what instructions were called to the trial court's attention and claimed to be erroneous.

By this same method of identification, appellant's counsel had, in the same paper only, attempted to except to the refusal of the court to give certain instructions requested by him to be given. Of these claimed errors we think it is sufficient to say that we have carefully read all these requested instructions and are clearly of the opinion that they were given in substance in so far as the facts of the case call for instructions upon matters therein requested. In connection with these claimed errors, we also pass the question of the proper preservation of exceptions to the refusal of the court [70] to give these instructions, because of the failure to have such exceptions included in a bill of exceptions or the statement of facts.

Contention is made that the verdict of the jury is excessive to the extent that it evidences prejudice and passion on the part of the jury. We deem it sufficient to say that careful review of the evidence convinces us that the verdict of the jury should not be disturbed upon this ground.

The judgment is affirmed.

Morris, C. J., Holcomb, Mount, and Chadwick, JJ., concur.

NOTE.

It is well settled that a municipality, as is held in the reported case, is liable in damages to a person injured on account of its negligence in the maintenance of a wharf, to the use of which he is entitled by virtue of the implied invitation of the public. For a full treatment of the subject of injuries to persons on or about wharves, docks, or piers, see the note to Gregg v. King County, reported ante, this volume, at page 135.

KING

v.

COONEY-ECKSTEIN COMPANY.

Florida Supreme Court—November 4, 1913.

66 Fla. 246; 63 So. 659.

Wharves — Personal Injury from Defect — Liability of Lessee.

At common law the tenant and occupier of a wharf is bound, as between himself and the public, to keep the premises in such condition that they will be reasonably safe for persons who go lawfully upon the premises, by express or implied invitation; and such tenant or occupier is prima facie liable for damages caused by defects in or dangers on the premises that reasonably could have been avoided by appropriate care taken by the tenant or occupier. This is the law even though the lessor covenanted to keep the premises in repair.

[See note at end of this case.]

Same.

The liability of the lessee in damages for injuries to others caused by unsafe premises is grounded upon his duty in being the occupant to keep the wharf in reasonably safe condition for those who go thereon by express or implied invitation.

[See note at end of this case.]

Same.

The common-law rule of liability of lessees who have control or occupancy of a wharf, for injuries caused by the defective or dangerous condition of the premises where such defective or dangerous condition reasonably should have been known to and remedied by the occupying tenant, is in force in this state.

[See note at end of this case.]

Trial — Direction of Verdict — Insufficiency of Evidence.

A verdict for the defendant should never be directed by the court, unless it is clear that there is no evidence whatever adduced that could in law support a verdict for the plaintiff. If there is evidence tending to prove the issue, and sufficient to show liability, it should be submitted to the jury as a question of fact to be determined by them, and not taken from the jury and passed upon by the court as matter of law.

Damages — Personal Injury — Measure of Damages.

The damages recoverable in actions for personal injuries are for all the legal and natural consequences proximately resulting from the negligence alleged, though the particular form or nature of the results were not contemplated or foreseen.

Negligence — Affirmative Defenses.

Assumption of risk and contributory negligence when available are affirmative defenses.

Error to Circuit Court, Duval county: CALL, Judge.

Action for damages. Ed King, plaintiff, and Cooney-Eckstein Company, defendant. Judgment for defendant. Plaintiff brings error. The facts are stated in the opinion. REVERSED.

Bryan & Carson for plaintiff in error.

John E. & Julian Hartridge for defendant in error.

[248] WHITFELD, J.—In an action to recover compensatory damages for personal injuries alleged to have been caused by the negligence of the defendant corporation, the court directed a verdict for the defendant; and to a judgment rendered on the verdict, the plaintiff took writ of error.

It appears that the defendant was the lessee of a wharf or dock, which the lessor covenanted "to keep in usual repair;" that the lessor reserved "the right to discharge at said dock one or more vessels each year" and also the privilege of "loading or unloading its lighter over said leased premises without charge;" that more than two years after the lease began a decayed plank in the dock gave way under a truck containing lumber, thereby injuring the plaintiff who was carrying the lumber to a ship being loaded at the dock; that the defect in the plank was not patent to casual observation, but could have been seen by a reasonably careful inspection.

It does not appear that any one other than the lessee was in control of or occupied the wharf or dock at the time of the injury, even though the loading of the vessel may not have been under the direction of the defendant lessee. The occupancy and control of the dock and the [249] liabilities incident thereto were apparently that of the lessee in possession under the lease.

For the defendant in error it is contended that the lessor and not the lessee is liable for injuries caused by the defective condition of the wharf or dock. This contention ignores the fact that both the lessor and the lessee may be liable under certain circumstances and that *prima facie* the liability rests primarily upon the one in actual occupancy and control of the premises.

At common law the tenant and occupier of premises is bound, as between himself and the public, to keep the premises in such condition that they will be reasonably safe for persons who go lawfully upon the premises by express or implied invitation; and such tenant or occupier is *prima facie* liable for damages caused by defects in or dangers on the premises that reasonably could have been avoided by appropriate care taken by the tenant or occupier. This is the law even

though the lessor covenanted to keep the premises in repair.

The liability of the lessee is grounded upon his duty in being the occupant to keep the premises in reasonably safe condition for those who go thereon by express or implied invitation. See 1 Thompson on Neg. Sec. 1154 et seq.; Keeler v. Lederer Realty Corp. 26 R. I. 524, 59 Atl. 855; Hussey v. Ryan, 64 Md. 426, 2 Atl. 729, 54 Am. Rep. 772; Abbott v. Jackson, 84 Me. 449, 24 Atl. 900; 24 Cyc. 1125.

The common law rule of liability of lessees who have control or occupancy of premises, for injuries caused by the defective or dangerous condition of the premises where such defective or dangerous condition reasonably should have been known to and remedied by the occupying tenant, is in force in this State.

A verdict for the defendant should never be directed by the court, unless it is clear that there is no evidence whatever [250] adduced that could in law support a verdict for the plaintiff. If there is evidence tending to prove the issue, and sufficient to show liability, it should be submitted to the jury as a question of fact to be determined by them, and not taken from the jury and passed upon by the court as matter of law. Atlantic Coast Line R. Co. v. Pelot, 62 Fla. 121, 56 So. 496; Southern Express Co. v. Williamson, 66 Fla. 286, 63 So. 433, decided this term.

The damages recoverable in actions for personal injuries are for all the legal and natural consequences proximately resulting from the negligence alleged, though the particular form or nature of the results were not contemplated or foreseen. Hussey v. Ryan, 64 Md. 426, 2 Atl. 729, 54 Am. Rep. 772.

Evidence was adduced showing that the defendant was a lessee of the wharf or dock; that the plaintiff was lawfully upon the dock, and apparently without his fault, was injured because of the defective condition of the wharf or dock owing to a decayed plank in the floor thereof over which plaintiff rightly passed with lumber in loading a vessel, when the defendant by ordinary care could have known of and remedied the defect, and there was apparently no reason for the plaintiff to apprehend danger to himself.

The plaintiff did not assume the risks incident to the negligence of the lessee in not having the dock in safe condition, when the danger was not obvious and was unknown to the plaintiff. Assumption of risk and contributory negligence when available are affirmative defenses; and neither appears in the evidence.

The injuries sustained by the plaintiff are apparently a natural and proximate result of the defendant's negligence in not exercising due care to keep the dock in a reasonably safe condition.

A verdict for the plaintiff on the evidence would not [251] have been unlawful; and for the error in directing a verdict for the defendant the judgment is reversed.

Shackleford, C. J., and Taylor, Cockrell and Hocker, JJ., concur.

On Rehearing.

(December 10, 1913.)

Per Curiam.—In a petition for rehearing it is suggested that the defendant corporation leased the dock and placed thereon certain lumber to be transported by ship; that the placing of the lumber on the dock constituted a delivery by the defendant to the ship and defendant did nothing toward the loading of the lumber on the ship, but a contractor was employed by the ship to place the lumber on the ship, and this contractor employed the plaintiff to assist in loading the lumber on the ship, therefore the ship assumed the duty of providing a safe place for its agents or servants to work, and the defendant lessee of the dock is not liable in damages for the injury to the plaintiff caused by a defect in the floor of the dock which might have been seen by a reasonably careful inspection.

The liability of the defendant is based upon the fact that it was the lessee of the dock having the use thereof and did use it in placing the lumber thereon for delivery to the ship, which facts, under the law, imposed upon the lessee a duty to maintain the dock in a reasonably safe condition for those properly thereon, and this liability is not affected by the liability, or non-liability, of the owned of the dock and the ship jointly or severally for any negligence chargeable to them that was a proximate cause of the plaintiff's injury.

A rehearing is denied.

Shackleford, C. J., and Taylor, Cockrell, Hocker and Whitfield, JJ., concur.

NOTE.

The reported case holds that a person who is injured while lawfully on a dock and without his fault may recover from the lessee of the dock the damage he sustains by reason of the negligence of the lessee in not having the premises in a reasonably safe condition. The cases on this question are collated in the note to Gregg v. King County, reported ante, this volume, at page 135.

MILLER

v.

DELAWARE RIVER TRANSPORTATION COMPANY.

New Jersey Court of Errors and Appeals—March 16, 1914.

85 N. J. L. 700; 90 Atl. 288.

Wharves — Personal Injury from Defect — Liability.

In an action for injuries by falling into a hole in the wharf of defendant transportation company, to which plaintiff had gone to receive an expected shipment on defendant's vessel, the evidence is held to sustain a finding that plaintiff was impliedly invited by defendant, on the particular occasion, to go to the river end of the wharf, where he was injured.

Trial — Instruction Given in Substance.

The court is not bound to grant a requested instruction in the very language of the request.

Objection to Refusal of Instruction.

Notwithstanding the new practice act, the appellate court will not review error in refusing requested instructions, unless appellant, at the time of presentation, objected to the refusal to charge each specific request.

Same.

In order to object on appeal to the giving of a requested instruction in language different from the request, an objection should be taken to the request as charged and to the refusal to charge as requested.

Damages — Personal Injury — Loss of Earning Capacity.

One receiving personal injuries because of another's negligence is entitled to damages for any disability he has sustained, including loss of earning capacity.

[See 8 R. C. L. tit. *Damages*, p. 477.]

Same.

Where disability to labor, etc., is clearly proved in a personal injury action, the jury may award a reasonable sum therefor, irrespective of whether the injured person is shown to have any definite income.

Same.

The value of evidence, in a personal injury action, that plaintiff is unable to do as much and as hard work since as before the injury is for the jury, though plaintiff is also shown to have a pulmonary disease.

Appeal from Supreme Court.

Action for damages. Isaac Miller, plaintiff, and Delaware River Transportation Company, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. AFFIRMED.

Grey & Archer for appellant.

Albert S. Woodruff for respondent.

[701] KALISCH, J.—The appellant appeals from a judgment obtained against it by the plaintiff for damages sustained by him as a result of falling into a hole made by the temporary removal of a plank, in the appellant's wharf at Burlington. The plaintiff was a huckster, and on the day he received his injuries was expecting a consignment of fruit shipped on one of the defendant's steamboats from Philadelphia to Burlington. It was in the month of February and the weather was very cold and the plaintiff drove his horse and wagon to the wharf to receive the shipment. The boat was late in arriving. On the land end of the wharf was defendant's freight house with a covered platform adopted for and from which wagons were loaded. The boat did not arrive until eight-thirty that evening. The plaintiff left his horse and wagon at the land end of the wharf and went to the river to see if the boat was about to dock, and if so, to return and back his wagon on to the wharf and close to the boat, to load his wagon, because of the freezing weather and perishable quality of the consignment. He was returning to his wagon when he fell into a hole in the wharf which he claims he did not observe on account of the darkness. The appellant, at the close of the case, asked the court to direct a verdict for the appellant which was denied. It is the refusal of this request which is made a basis of one of the grounds of appeal.

The appellant's argument on this point is that it was not shown that the plaintiff had been legally invited to be in the place where he was at the time of the accident, but, on the contrary, the regular practice was for him to back up his wagon to the covered platform and receive the fruit delivered under the appellant's shed instead of going on the open part of the wharf where he was. But there was testimony on the part of the plaintiff that tended to establish that he had been accustomed for a long period of time both in the day and nighttime, of receiving the shipments made to him on the river end of the wharf directly from the boat, and this was especially so when the boat was late and the weather cold. This testimony was sufficient, if accepted by the jury to have warranted [702] a finding that there was an implied invitation, by the appellant, to the plaintiff to go to the river end of the wharf, at least, on the occasions stated.

But it is argued, by appellant's counsel, even though there was an implied invitation to the plaintiff to go out upon the wharf on foot on this occasion, he had no invitation to pass under a crane, the place where he met

with his injury, for the reason that at the time the plaintiff went thereunder, there was a heavy chain hanging down from the middle beam of the structure which operated as notice to him that the passageway was not to be used.

From the exhibit and uncontroverted proof in the case it appears that the entire wharf was open for foot passengers and vehicles with the exception that near the river end was an open structure consisting of three upright posts standing in direct line at short intervals of each other which served to divide that space for a short distance into two passageways. The upright posts supported the ends of beams extending from the side of the freight house over the abutting drive and passageway, which structure, called a crane, was used to support an endless chain for loading and unloading wagons carrying articles of great weight. The appellant's contention, however, cannot prevail, for the reason that the plaintiff and his witnesses denied that there was any chain hanging there at the time or anything else tending to indicate that the passageway of this part of the wharf was not intended for use. Besides, there was testimony tending to establish that it was the custom of the plaintiff to go where he was, in looking after the fruit consigned to him. The circumstances presented purely a jury question which appears to have been properly submitted to them by the court.

An exception was taken to the refusal of the court to charge the third, fourth and sixth requests, respectively. The third request was as follows: "If you find that the plaintiff was negligent in passing at night under the crane or in not seeing the hole, when he did so pass, he cannot recover." An examination of the judge's charge that he substantially charged the request, though not in the collocation of words of the request, [703] and this he was not bound to do. Consolidated Traction Co. v. Chenowith, 58 N. J. L. 416, 34 Atl. 817, 61 N. J. L. 554, 35 Atl. 1067.

The same answer also applies to the exception to the refusal of the court to charge the fourth request.

Although the appellant argued in the brief a refusal to charge a seventh request, and while the record shows that such a request was made, it does not appear that any objection was made to the refusal of the court to charge it; nor was there any objection made to what the court said on the subject of the request.

The fact that requests to charge were presented to the court, which the court failed or refused to charge, will not make such failure or refusal the basis of an appeal, unless it further appears that the party presenting the requests to charge made, at the time, objection to the failure or refusal of the court to charge each specific request. And where the court charges a request in other terms than those embodied in it, if counsel desire to take advantage of this, an objection should be taken to the request as charged and to the refusal to charge as requested. The new Practice act does not relieve a party from pointing out at the trial to the judge the portions of the charge to which he objects as heretofore, nor from making objection to a refusal to charge a request, if it is intended to make the same the basis of an appeal. The new Practice act has made no change in that regard, only in that bills of exception are no longer necessary.

The remaining question to be considered is the one relating to damages. The court was requested to charge: "There is no proof of loss due to lessening of earning capacity, payment of expenses for medicine or physicians except one dollar. No other damages could be awarded except for pain and suffering." The court charged the jury that the plaintiff was entitled to damages for any disability that he had sustained. This was a correct statement of the legal rule. The appellant's assumption is that New Jersey Express Co. v. Nichols, 33 N. J. L. 434, 97 Am. Dec. 722, holds that unless some proof is made of the plaintiff's income or of his earning capacity, nothing can be awarded on that account. This is a false conception of what was decided by [704] the court. The question there was whether testimony of the plaintiff's average income was admissible as guiding the jury on the question of damages for disability. It was held that such testimony was admissible; but where there is a clear disability the jury may, undoubtedly, award what in their best judgment, as reasonable men, should be awarded, irrespective of whether any definite income is proved or not. The evidence, as is said by Mr. Justice Depue in New Jersey Express Co. v. Nichols, supra (at p. 437), is "to guide them in their exercise of that discretion which to a certain extent is always vested in the jury." There was testimony which tended to show that the plaintiff was unable to do as much and as hard work as he had been able to do before the accident, and though he was afflicted with a pulmonary disease, the value of the evidence was for the jury.

The judgment will be affirmed.

For affirmance—The Chancellor, Chief Justice, Swayze, Parker, Bergen, Minturn, Kalisch, Bogert, Vredenburgh, White, Heppenheimer, JJ.—11.

For reversal—None.

NOTE.

It is held in the reported case that a person going on a wharf to receive a consignment expected to arrive by a steamboat is an invitee to whom is owed the duty of maintaining the premises in a reasonable safe condition. For a full discussion of the liability for injuries to persons on or about wharves, docks, or piers, see the note to Gregg v. King County, reported ante, this volume, at page 135.

TAYLOR

v.

NORTHERN COAL AND DOCK COMPANY.

Wisconsin Supreme Court—May 4, 1915.

161 Wis. 223; 152 N. W. 465.

Wharves — Personal Injury from Negligence — Liability.

Decedent, the employee of a shipbuilding company, engaged in repairing a coal-laden steamer which defendant company is discharging at its dock, who is authorized to be there, and whose presence is known to defendant, which makes no objection, is not a trespasser, but is entitled to the privileges and protection of a licensee.

[See note at end of this case.]

Same.

In such case the defendant company is bound to refrain from acts of affirmative negligence unnecessarily increasing the danger to decedent or rendering the premises more dangerous, at least without notifying him of such increased danger.

[See note at end of this case.]

Same.

Defendant dock company, knowing that the employee of a shipbuilding company, a licensee, was engaged in repair work on the side of the steamer under its discharging rig, and that coal often dropped when the rig was in operation, and which did not notify decedent when the rig was started, is guilty of actionable negligence.

[See note at end of this case.]

Same.

In such action evidence was held to sustain a finding that decedent was not guilty of contributory negligence.

[See note at end of this case.]

Same.

In such action the refusal to submit to the jury the question whether ordinary care or the precaution usually exercised upon the dock, was exercised, and whether decedent knew that the rig had started, and that coal was being hoisted before the hoisting of the particular bucket from which coal fell and killed him is not erroneous, where they do not cover any facts put in issue by the pleadings.

[See note at end of this case.]

Trial — Instructions Given in Substance.

The refusal of requested instructions is not prejudicial error, where the subject thereof is sufficiently covered by the general charge.

Instruction Not Based on Evidence — Action for Personal Injury.

In an action for the death of a licensee engaged in repairing a coal-laden steamer at defendant's discharging dock, killed by coal which dropped from the buckets, an instruction as to decedent's dullness of hearing is properly refused, where it does not appear that it had anything to do with the injury, and where, others present of sound hearing and in a position to hear did not hear defendant's alleged warnings.

Refusal of Instruction Harmless.

In an action for the death of plaintiff's decedent, a licensee, while repairing a coal-laden steamer at defendant's discharging dock, from coal dropping from the discharging buckets, where the questions whether decedent was warned not to be on the dock between the hoisting rig and the boat while the hoisting apparatus was in operation were immaterial, and, if eliminated, would have left findings sufficient to support the verdict, a charge putting the burden of proof upon the defendant on the issues made on such questions is not reversible error.

Same.

In such action an instruction that, if defendant's employees knew, or ought to have known, that decedent was in a place of danger, it was their duty to have given warning, is not prejudicial error.

Appeal from Circuit Court, Douglas county: LUECK, Judge.

Action for death by wrongful act. Margaret Taylor, administratrix, plaintiff, and Northern Coal and Dock Company, defendant. Judgment for plaintiff. Defendant appeals. AFFIRMED.

[224] The appeal is from a judgment entered November 16, 1914, for the sum of $4,510.54 damages and costs in an action brought for the death of one George Taylor.

The complaint contained four causes of action: the first, for injuries to and pain and suffering of deceased caused by the wanton and wilful negligence of the defendant; second, for the death of deceased caused by the wanton and wilful negligence of the defendant; third, for injuries and suffering caused by the negligence of the defendant; and fourth, for death caused by the negligence of the defendant.

The court below held that there was no wanton or wilful negligence shown and submitted the case to the jury on the causes of action for ordinary negligence. The jury returned the following verdict:

"(1) Was George Taylor warned not to be on the dock between the hoisting rigs and the boat? A. No.

"(2) Was said George Taylor sufficiently warned prior to the injury that he was not to work between the hoisting rig and the edge of the dock while the hoisting apparatus was in operation? A. No.

"(3) Did the defendant negligently fail to warn said [225] George Taylor of the starting of said hoisting apparatus after the repairs to the steering line had been completed? A. Yes.

"(4) If you answer the third question 'Yes,' then answer this question: Was such negligence the proximate cause of the injury and death of said George Taylor? A. Yes.

"(5) Did any want of ordinary care on the part of George Taylor contribute proximately to produce his injury? A. No.

"(6) What sum of money will compensate the widow for the pecuniary loss sustained by her in consequence of the death of said George Taylor? A. 4,000.

"(7) What sum of money will make compensation for the damages sustained by George Taylor in his lifetime in consequence of the injury received by him? A. $350."

Judgment was entered in favor of the plaintiff thereon and defendant appealed.

Luse, Powell & Luse and *A. E. Boyesen* for appellant.

Grace, Hudnall & Fridley for respondent.

[227] KERWIN, J.—At the time of the injury complained of the defendant was the owner of a coal dock on the bay in the city of Superior and engaged in unloading coal from boats onto said dock. In carrying on the business boats loaded with coal are tied up at the end of said dock. The floor of the dock is a few feet above the water of the bay. A trestle rests on the dock six or eight feet from the end of the dock and extends above the floor of the dock about sixty feet. There are appliances used for hoisting buckets of coal from boats tied up beside the dock, and a chute or hopper into which is dumped the coal raised from the boats in said buckets. On top of the trestle is a shanty which is occupied by the person who operates the machinery. The buckets in passing from the boat to the chute pass over and sixty or seventy feet above the portion of the floor or dock which is at the bottom of the superstructure and between it and the outer or channel edge of the dock. In the usual operation of unloading coal from the boats onto the dock lumps of coal fall from the buckets onto the dock and near the outer edge of the dock.

On the 4th and 5th of December, 1912, the steamer Charles Hebbard was moored at the edge of the dock of defendant for [228] the purpose of having its cargo of coal unloaded on defendant's dock and the defendant was on said days engaged in unloading the cargo. On and prior to December 5, 1912, one George Taylor was in the employ of the Superior Shipbuilding Company as mechanic and ship carpenter. Said Shipbuilding Company was at said time engaged in repairing boats when moored at the docks. Said Shipbuilding Company received an order to repair the Charles Hebbard, and in pursuance of such order directed Taylor and others of its employees to make the repairs. On the 5th of December, 1912, said Taylor was engaged in making the repairs, when a lump of coal fell from a bucket while being hoisted by defendant and struck him upon the head, from the effects of which he died.

Counsel for defendant insists that the plaintiff failed to make a case and that a verdict should have been directed for defendant on the ground that there was no proof of negligence on the part of defendant and that the evidence showed that the deceased was guilty of contributory negligence.

1. It is contended by counsel for appellant that deceased was a trespasser, or at most a bare licensee to whom the defendant owed no duty of active care. It is clear from the evidence that deceased was not a trespasser. He was lawfully at work repairing the boat at the time of the injury. He was authorized to be there and the defendant knew that he was at work repairing the boat and made no objection, so deceased at the time of injury was entitled, at least, to all the privileges and protection of a licensee. This court has often spoken upon the subject. Davis v. Chicago, etc. R. Co. 58 Wis. 646, 17 N. W. 406, 46 Am. Rep. 667; Dowd v. Chicago, etc. R. Co. 84 Wis. 105, 54 N. W. 24, 36 Am. St. Rep. 917, 20 L.R.A. 527; Hupfer v. National Distilling Co. 114 Wis. 279, 90 N. W. 191; Muench v. Heinemann, 119 Wis. 441, 96 N. W. 800; Rowley v. Chicago, etc. R. Co. 135 Wis. 208, 115 N. W. 865; Hasbrouck v. Armour, 139 Wis. 357, 121 N. W. 157, 23 L.R.A.(N.S.) 876; Brinilson v. Chicago, etc. R. Co. 144 Wis. 614, [229] 129 N. W. 664, 32 L.R.A.(N.S.) 359; Haley v. Swift, 152 Wis. 570, 573, 140 N. W. 292, 293; Lewandowski v. McClintic-Marshall Constr. Co. 155 Wis. 322, 143 N. W. 1063.

The defendant was lawfully engaged in unloading the cargo. The deceased was lawfully on the boat repairing it. Under the decisions of this court the defendant was

bound to refrain from acts of affirmative negligence. It was bound to so act as not to unnecessarily increase the danger to deceased or render the premises more dangerous, at least without notifying deceased of such increased danger. The rule is that one cannot be actively negligent toward a mere licensee. Hupfer v. National Distilling Co. 114 Wis. 279, 90 N. W. 191, at p. 290.

The licensor owes to the licensee the duty to refrain from acts of active negligence rendering the premises dangerous. Brinilson v. Chicago, etc. R. Co. 144 Wis. 614, 129 N. W. 664, 32 L.R.A.(N.S.) 359.

The evidence shows that deceased had repairs to make on both sides of the boat. He had worked some on the port side and had started to do work on the starboard side under the unloading rig while the defendant was making some repairs on the unloading rig, which took over an hour to make, during which time the unloading rig was not running and it was safe for deceased and his crew to do the work. There is credible evidence that the defendant knew that deceased and his crew were at work on the starboard side of the boat and under the unloading rig where the coal dropped when the unloading rig was in operation and that deceased was not notified when the rig was started immediately before the coal fell upon him. The jury found that deceased was not warned and we think the findings are supported by the evidence.

We think the evidence was sufficient to show negligence on the part of defendant. Deceased and his crew were repairing the boat under the hoisting rig while the hoisting crew was repairing the steering line. Deceased was entitled to be [230] warned before the rig was again started, and the jury found upon sufficient evidence that he was not and that such failure to warn was the proximate cause of the injury.

It is further contended that the evidence establishes that deceased was guilty of contributory negligence. The jury acquitted him of contributory negligence, and we think there is ample evidence to support the finding. Had it been established that deceased continued to work at the place where injured after being warned and knew the danger, the situation would be different. There is evidence that only a few buckets had been hoisted after the steering line had been repaired, and that about two buckets a minute were hoisted; that after the steering line had been repaired the rig started, and after three or four buckets had been hoisted the rig was again stopped to allow the "bleeders" to be fixed, and deceased was injured by coal falling from the first bucket that was hoisted after the "bleeders" were fixed and the rig started.

We are convinced that there was no error in refusing to direct a verdict for defendant.

2. Counsel assigns thirty errors. We shall not attempt to discuss them at length. Perhaps they might be disposed of properly by the statement that we find no prejudicial error in the record. Northern Land Co. v. Wisconsin Live Stock Assoc. 160 Wis. 203, 151 N. W. 256.

The first assignment of error is the refusal to direct a verdict, which has been already disposed of.

The second and third assignments are to the effect that the court erred in refusing to submit to the jury whether Anderson [the hoister] exercised ordinary care or the precaution usually exercised upon the dock. There was no error in refusing these requests. They asked for a finding evidentiary and did not cover any fact put in issue by the pleadings, and moreover the matter involved was sufficiently covered by the verdict submitted and the charge.

The fourth assignment of error is the refusal of the court [231] to submit the question whether the deceased, Taylor, knew the rig had started and coal was being hoisted before the hoisting of the particular bucket from which coal fell which caused his injury. There was no error in refusing to submit this question for the reasons stated under the second and third assignments. Steber v. Chicago, etc. R. Co. 139 Wis. 10, 120 N. W. 502; Wawrzyniakowski v. Hoffman, etc. Mfg. Co. 146 Wis. 153, 131 N. W. 429; Anderson v. Sparks, 142 Wis. 398, 125 N. W. 925; Lomoe v. Superior, Water, etc. Co. 147 Wis. 5, 132 N. W. 623; Vogel v. Herzfeld-Phillipson Co. 148 Wis. 573, 134 N. W. 141.

The fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth assignments may be considered together and relate to the refusal of the court to instruct the jury as requested by counsel for defendant. These requests were to the effect (a) that defendant was under no obligation to warn deceased; (b) that deceased was a man of experience and presumed to know the dangers; (c) that defendant was in no way interested in deceased being upon the dock and under no obligation to take active measures for his safety; (d) that deceased was bound to look after his own safety; (e) that there is no evidence that defendant's employees knew deceased's hearing was not acute; (f) that if deceased was hard of hearing it was his duty to govern himself accordingly; (g) that positive testimony is ordinarily entitled to more weight than negative. There was no error in the refusal to give these requests—at least no prejudicial error. So far as the requests touching deceased's familiarity with the business is concerned the matter was sufficiently covered by the charge given. On the requests

as to dullness of hearing it does not appear that dullness of hearing had anything to do with the injury, because others present who were not dull of hearing and who were in position to hear did not hear the alleged warnings. Moreover the question was covered by the charge given. The request under (g) was sufficiently [232] covered by the general charge, which was substantially correct. Van Salvellergh v. Green Bay Traction Co. 132 Wis. 166, 111 N. W. 1120; Coel v. Green Bay Traction Co. 147 Wis. 229, 133 N. W. 23; Brown v. Milwaukee Electric Ry. etc. Co. 148 Wis. 98, 133 N. W. 589; Marinette v. Goodrich Transit Co. 153 Wis. 92, 100, 140 N. W. 1094.

Assignments 12 and 13 refer to instructions of the court which it is claimed put the burden of proof upon the defendant as to questions 1 and 2 of the special verdict. The charge does not specifically put the burden of proof upon the defendant. It does not state upon whom the burden rests, but even if it did there was no reversible error, since questions 1 and 2 might be eliminated from the verdict and the balance of the verdict would support the judgment. In fact it is practically conceded on both sides that questions 1 and 2 are immaterial. They may therefore be regarded as surplusage. Milwaukee Trust Co. v. Milwaukee, 151 Wis. 224, 138 N. W. 707.

Error is assigned because the court instructed the jury in effect that if the employees of the defendant knew deceased was in a place of danger, or ought to have so known, it was their duty to give warning. There was no prejudicial error in this part of the charge. Rowley v. Chicago, etc. R. Co. 135 Wis. 208, 115 N. W. 865; Hogan v. Chicago, etc. R. Co. 59 Wis. 139, 17 N. W. 632.

Other errors assigned we do not regard of sufficient importance to require treatment. We have carefully examined the record and all the errors assigned and are convinced that no prejudicial error was committed.

By the Court.—Judgment is affirmed.

A motion for a rehearing was denied, with $25 costs, on October 5, 1915.

NOTE.

The rule that the owner of premises owes to a licensee the duty to refrain from acts of active negligence rendering the premises dangerous is applied in the reported case to the owner of a coal dock whose breach of duty caused the death of the plaintiff's intestate. The cases on this topic are collected in the note to Gregg v. King County, reported, ante, this volume, at page 135.

HUNT

v.

LEWIS.

Vermont Supreme Court—May 9, 1914.

87 Vt. 528; 90 Atl. 578.

Fraud — Action for Deceit — Procuring Personal Property.

The rules and principles governing actions for deceit in the sale of real or personal property apply to actions for procuring personal services by fraud.

Representations as to Future.

To constitute actionable fraud in the sale of property, the representations must be of existing facts relating to the subject matter of the contract, made by the vendor as inducements, which are false and known by the vendor to be false, or made by him as of his own knowledge without knowledge as to the facts, which are not open to knowledge of or known by the other party, and are relied on by him in making the purchase to his damage; representations as to future facts or promises, or matters of opinion, not constituting actionable fraud.

[See 18 Am. St. Rep. 556.]

Inducing Performance of Personal Services.

A declaration for fraud in procuring the services of an attorney, which alleged in the first count that the defendant represented that he would pay for the services, knowing that he would not have the money with which to pay and intending to deceive the plaintiff, and in the second count that the defendant falsely and maliciously represented that he would and could pay for the services, not knowing that he could or would have the money with which to pay, charges representations or promises as to future and not as to existing facts, and therefore does not state a cause of action.

[See note at end of this case.]

Same.

An amended count in the same declaration, which alleged that defendant had the money with which to pay for the services and he so informed the plaintiff and promised to pay for them, but did not intend to do so, merely alleges a promise, and not a misrepresentation as to an existing fact, and is insufficient.

[See note at end of this case.]

Exceptions from Lamoille County Court: Waterman, Judge.

Action for fraud. B. A. Hunt, plaintiff, and C. S. Lewis, defendant. Judgment for defendant. Plaintiff alleges exceptions. The facts are stated in the opinion. Affirmed.

B. A. Hunt pro se.
M. P. Maurice for defendant.

[529] TAYLOR, J.—This is an action on the case for fraud in procuring the services of the plaintiff, an attorney at law, not intending to pay therefor. The case was heard at the December Term, 1908, of Lamoille County Court on demurrer to the declaration. The demurrer was sustained and the declaration adjudged insufficient to which the plaintiff was allowed an exception. The cause was passed to this Court before trial.

The demurrer is general and no grounds of demurrer were specified in the court below, the case having arisen before the adoption of the rule requiring specification of grounds of demurrer. The bill of exceptions throws no light upon the question and the plaintiff's brief affords very little assistance in understanding his position either here or in the court below. The defendant says that the declaration does not state a cause of action; that neither count contains sufficient allegations of fraud.

The first count alleges in substance that the defendant was in need of counsel for a certain case in which he was interested; that he employed the plaintiff as attorney to attend to the case for him at a certain compensation to be paid in money as soon as the service was performed; that the plaintiff performed the service relying upon the representation of the defendant that he would pay as soon as the service was performed; that the defendant "neglected and refused to pay the plaintiff after he received the said services knowing all the time when he had engaged the plaintiff as aforesaid that he had not the money to pay for said services . . . and intending thereby to deceive and defraud the plaintiff, whereby the plaintiff hath been deceived and damaged as aforesaid." The second count is much the same except that therein the plaintiff alleges that the defendant employed him representing that he would and could pay for the services as soon as they were performed; that the plaintiff relied upon the representations of the defendant "then and there falsely and maliciously made for the purpose of procuring the services of the plaintiff;" that the defendant did not know at the [530] time of said arrangement that he "could and would have the money and pay the plaintiff as aforesaid . . . and he did not have the money and did not pay the plaintiff as aforesaid, whereby the plaintiff hath been defrauded," etc.

In the amended count filed in county court the plaintiff alleges in substance that the defendant was possessed of thirteen dollars and not intending to pay the plaintiff hired him to perform certain services for an agreed compensation; that when the agreement was made defendant informed the plaintiff that he (defendant) had the money to pay him (plaintiff) and that his money was ready for him as soon as the service was performed, the defendant thereby intending to get the service of the plaintiff and avoid paying therefor and defraud the plaintiff thereby; that plaintiff relied upon the information and representations of the defendant so made and performed the service; that the defendant received the benefits of the service and refused to pay therefor, whereby the plaintiff has been defrauded, etc.

The principal point made in the plaintiff's brief is that fraud in procuring the service of a person on credit, like fraud in the purchase of goods, is actionable. The defendant does not controvert this position nor advance the claim that actionable fraud may not enter into a contract for personal service. While our attention has not been called to any such case, we fail to discover any inherent peculiarity in a contract for service on credit that takes it out of the ordinary rules concerning fraudulent representations. The sufficiency of the declaration may therefore be tested by the principles governing actions for deceit in the sale and purchase of real estate or personal property.

To constitute actionable fraud or deceit in the sale of property the representations must be of existing facts relating to the subject matter of the contract and affecting its essence and substance, made by the vendor as inducements to the contract, such representations being false and at the time known by him to be false, or made as of his own knowledge without in fact knowing them to be true, not open to knowledge of or known by the other party and relied upon by him in making the purchase to his damage. Representations of facts that will exist in the future, or promises, or matters of judgment or opinion, though false and intended to deceive, do not afford the basis of actionable fraud. Shanks v. Whitney, 66 Vt. 405, 29 Atl. 367; Corey v. Boynton, 82 Vt. 257, 72 Atl. 987; Belka v. Allen, 82 Vt. [531] 456, 74 Atl. 91; Cabot v. Christie, 42 Vt. 121, 1 Am. Rep. 313.

An actionable misrepresentation must relate to a present or past state of facts. Belka et al. v. Adams, supra. Representations of intention, or promises, having reference merely to the future, constitute no ground of action. An action of deceit does not lie for failure on the part of a promisor to perform a promise made by him to do something in the future, which he does not intend to do and subsequently refuses to do, although the promisee has acted in reliance on such promise to his damage. 1 Jaggard on Torts, 583, 584; Bigelow on Frauds, 11, 12; Robertson v. Parks, 76 Md. 118, 24 Atl. 411; Patterson v. Wright, 64 Wis. 289, 25 N. W. 11;

Dawe v. Morris, 149 Mass. 188, 21 N. E. 313, 4 L.R.A. 158, 14 Am. St. Rep. 404. The distinction between a representation that something exists which does not, and a representation, or more properly a promise, that something shall be done thereafter, is obvious.

Tested by these rules neither count of the declaration is sufficient. Neither count alleges a misrepresentation of an existing fact. The first count merely alleges a promise by the defendant to pay for the services as soon as rendered knowing that he did not have the money with which to pay. While it discloses the defendant's "moral obliquity" and his capacity to disappoint the plaintiff, if he chose to break his promise, it does not charge actionable deceit. Best v. Smith, 54 Vt. 617. The second count differs from the first only in that it alleges in addition that the defendant represented that he would have the money with which to pay for the services as soon as rendered, not knowing at the time that he could and would have it. This was not a false representation of an existing fact but instead a promise coupled with a boast as to his ability to pay in the future. It was a mere matter of opinion and an action of fraud cannot be predicated upon such a representation. Jude v. Woodburn, 27 Vt. 415. The comment in Fisher v. Brown, 1 Tyler (Vt.) 387, 4 Am. Dec. 726, is pertinent: "When a man seeks to obtain credit and boasts his ability to pay, here is a proper occasion for the exercise of discretion and vigilance." Such statements ordinarily could not be classed as false, as they relate to future events, though with some the failure of realization might be so far certain as to make them fraudulent; but in no case would they sustain an action for deceit. Dyer v. Tilton, 23 Vt. 313; Best v. Smith, supra.

[532] The amended count is subject to the same obligations. It differs mainly in that it alleges that the defendant had the money with which to pay and so informed the plaintiff. Here, then, there was no false representation of an existing fact to secure the credit. When shorn of non-essentials it amounts to a charge that the defendant promised to pay for the services not intending to do so, which, as we have already seen, will not support the action. The demurrer was properly sustained.

Affirmed and remanded.

NOTE.

Right of Action for Fraud in Inducing Performance of Personal Services without Intent to Pay Therefore.

There seems to be no decision, other than the reported case, on the right of action for fraud in inducing the performance of personal services without the intention to pay therefor. Closely analogous, however, is another Vermont case, Carrigan v. Hull, 5 Vt. 22, which was an action of assumpsit for work and labor performed by the plaintiff on the defendant's farm. The testimony tended to show that the contract of employment was made with the defendant's son although the defendant was present at the time. It was also shown that the son was a bankrupt and that the defendant knew of this fact; that the plaintiff at the time of the making of the contract had but lately arrived from abroad, was a stranger to the defendant and his son and did not know of the latter's inability to pay the plaintiff's wages. The court in affirming a judgment in favor of the plaintiff said: "The instructions given to the jury in this case, do not treat the case as involving fraud per se; but as a case of evidence, tending to prove facts, from which the jury might infer the further fact of a fraudulent intention in the defendant and his son Sewall, to procure the plaintiff to labor for the defendant, with no prospect of ever getting any pay for his labor. The question now presented, is, whether the testimony, if believed, proved facts, from which this fraud might legally be inferred. It seems, that the plaintiff had but lately arrived at Plattsburgh from Ireland, when this contract was made; and that the said Sewall Hull had then lately come there from Peru, with expectation of being committed to prison for debt. The testimony is, that Sewall was then a bankrupt, and this well known to him and to the defendant.—There is no intimation that the plaintiff knew it. It is said the plaintiff had the means of knowledge. What these means were, or could have been, does not appear.—It is very improbable that the circumstances of Sewall were much known at Plattsburgh at that time. It does not appear, that they were known at all. Hence any inquiry by the plaintiff, in the neighborhood, might have been of no use. It is pretty certain, that the plaintiff would not thus have gone to Danville and performed this labor, if he had not believed, he should receive his pay.—All these considerations presented themselves as fully to the defendant then, as they have since been presented to the court and jury. If the defendant stood by, as was testified, and refused to become holden himself to pay for the plaintiff's labor, and heard Sewall, the bankrupt, make this contract with the plaintiff for his the defendant's benefit, and took the plaintiff home with him and received his labor, the defendant all this time knowing of Sewall's total inability to pay the plaintiff, and yet did not undeceive the plaintiff by informing him of Sewall's bankruptcy, from all this the jury might well infer the fraudulent intent

of Sewall and the defendant to obtain this labor of the plaintiff, and he be left with no prospect of any compensation for it."

The general proposition laid down in the reported case that a mere promise or a representation in good faith as to future conditions does not constitute fraud has been recognized in many cases and is usually said to be subject to an exception in case of a wilfully false statement of an intention. Thus the concealment by a purchaser of the fact of his insolvency is, when coupled with a present intention on his part not to pay, a fraud entitling the seller to rescind. See the note to German Nat. Bank v. Princeton State Bank, 8 Ann. Cas. 502. In like manner, while a statement by a vendor of his intention to make certain improvements on adjacent property is ordinarily deemed to be a mere promise or expression of opinion as to the future, if such a statement is made with a present intention not to carry it into effect, it constitutes a fraud on the vendee. See the note to Roberts v. James, Ann. Cas. 1914B 859.

BUNGER

v.

GRIMM ET AL.

Georgia Supreme Court—September 22, 1914.

142 Ga. 448; 83 S. E. 200.

1. Executors and Administrators — Order to Sell Land — Sufficiency of Description.

An order to sell land, granted to an administrator by the court of ordinary, describing the land as located in a named county and known by a certain name, and as containing a stated number of acres, more or less, and lying alongside a certain river, followed by an additional description giving the calls for three sides of it, is not void for uncertainty. When property has a descriptive name, it may be conveyed by that name; and such description will prevail over one which is intended to be a further description, but which is uncertain and imperfect. Extrinsic evidence is receivable to apply the description to its subject-matter.

2. Evidence — Administrator's Deed — Necessity of Showing Appointment.

An administrator's deed, accompanied by the order of the ordinary granting leave to sell, is admissible as a muniment of title, without the production of the letters of administration.

3. Same.

An administrator's deed without an order of sale, or a sheriff's deed not accompanied by the execution under which the property is sold, is admissible in evidence as color of title.

4. Admissibility of Ancient Map.

An ancient map of the public roads of a county, purporting to have been made by authority, and coming from the proper custody, is competent evidence to show the existence and location of the public roads of the county at the time it was made, and in a contest between coterminous landowners, where a road delineated on the map is claimed to be a boundary, such map is relevant, and is receivable in evidence when, upon inspection by the court, the map appears to be what it purports to be and is shown to have been produced from the proper depository.

[See note at end of this case.]

5. Admissibility of Survey.

An unofficial survey is admissible in evidence when proved to have been correct.

6. Adverse Possession — Instruction Condemned.

The charge of the court in respect to prescriptive title was an inaccurate statement of the law.

7. Boundaries — Establishment by Parol.

A disputed boundary line between coterminous proprietors may be established by oral agreement, if the agreement be accompanied by actual possession to the agreed line, or is otherwise duly executed.

[See Ann. Cas. 1912B 662.]

8. Real Property — Action Held to Involve Title.

Where a plaintiff seeks to enjoin a defendant from trespassing on land, on the ground that he has title to the premises, and the defendant in his answer asserts title to the premises, and both parties offer evidence to substantiate their respective claims, it is error to instruct the jury that their verdict would not determine the title to the premises.

(Syllabus by court.)

Error to Superior Court, Chatham county: CHARLTON, Judge.

Action for injunction. John H. Grimm et al., plaintiffs, and H. H. Bunger, defendant. Judgment for plaintiffs. Defendant brings error. The facts are stated in the opinion. REVERSED.

P. W. Meldrim for plaintiff in error.
R. R. Richards for defendants in error.

[449] EVANS, P. J.—This is an action by John H. Grimm et al. against H. H. Bunger, to enjoin the defendant from knocking down parts of a fence erected by the plaintiffs, and otherwise trespassing upon a triangular piece of land containing between two and three acres, located in Chatham county, adjacent to the bridge which spans the Ogeechee river.

The plaintiffs prevailed, and the court refused the defendant a new trial.

1. The court received in evidence a deed from Brooks, administrator, to the plaintiffs, over the objection that the order from the court of ordinary authorizing the sale was insufficient to identify the premises, as one of the boundaries was omitted, and because the description in the deed did not correspond with the description [450] in the petition. The description of the premises in the order is all "that tract of land lying in the county of Chatham, said State, known as Litchfield, containing one thousand and eighty-four (1084) acres, more or less, lying on the Great Ogeechee River, bounded on the south by the Savannah and Darien Road, east by the Fort Argyle Road, and west by the Great Ogeechee River." When property has a descriptive name, it may be conveyed by that name; and such description will prevail over one which is intended to be a further description, but which is uncertain and imperfect. Martin v. Lloyd, 94 Cal. 195, 29 Pac. 491. Extrinsic evidence is receivable to apply the description to its subject-matter. Hancock v. King, 133 Ga. 734, 66 S. E. 949. If in fact the premises described in the petition are embraced within the premises known as "Litchfield," parol evidence is admissible to establish the same.

2. An administrator's deed, accompanied by the order of the ordinary granting leave to sell, is admissible as a muniment of title, although the letters of administration may not be produced. The granting of the order of sale by the ordinary adjudicated that the applicant was the administrator and authorized to make the sale. Roberts v. Martin, 70 Ga. 196.

3. It has been repeatedly ruled by this court that an administrator's deed without an order of sale, or a sheriff's deed not accompanied by the execution under which the property was sold, though inadmissible as a muniment of title, is admissible in evidence as color of title. Street v. Collier, 118 Ga. 470, 45 S. E. 294; Dodge v. Cowart, 131 Ga. 549, 62 S. E. 987; Burkhalter v. Edwards, 16 Ga. 593 (2), 596, 60 Am. Dec. 744.

4. The court received in evidence a copy of a map purporting to have been made by John McKinnon on September 5, 1816, over the objection that the map did not purport to have been made by the county surveyor, and that a map made by a private person should be proved to be correct before it is admissible as evidence. Counsel for the defendant stated that he did not insist upon the introduction of the original, which was in the custody of the county commissioners. The court allowed the map to be introduced on the ground that it came from the custody of the proper public officials, and purported on its face to be a map of the county roads in 1816. The map had an endorsement thereon that it was made at the request of the commissioners of roads of the county, purporting [451] to have been signed by "John McKinnon, Surv.," and bearing date September 5, 1816. An ancient map of the public roads of a county, purporting to have been made by authority, and coming from the proper custody, is competent evidence to show the existence and location of the public roads of the county at the time it was made; and in a contest between coterminous landowners, where a road delineated on the map is claimed to be a boundary, such map is relevant on the question of boundary. The theory on which such ancient maps are received is that where the matter in controversy is ancient and not susceptible of better evidence, traditionary reputation of matters of public and general interest is competent evidence of the matters to which it relates. 1 Greenleaf, Ev. (16th ed.) 226; Adams v. Stanyan, 24 N. H. 405; Donohue v. Whitney, 133 N. Y. 178, 30 N. E. 848. The original map should be produced and shown to have come from the proper depository; and if upon inspection the court should be of the opinion that it is what it purports to be, the map is receivable in evidence without further extrinsic proof.

The admissibility in evidence of an ancient map of matters of a public and general interest is not to be confounded with a map which a landowner causes to be made of his premises. In Bower v. Cohen, 126 Ga. 35, 40, 54 S. E. 918, it was doubted that the rule admitting a map thirty years old as an ancient document applied to private maps. In Jones v. Huggins, 12 N. C. 223, 17 Am. Dec. 567, Taylor, C. J., gave as a controlling reason for excluding an ancient survey of land made under the owner's direction and for his convenience, when offered in behalf of himself or those claiming under him, that it might benefit men to include in such surveys more land than belonged to them.

5. The defendant offered a certain map of the premises, made by the county surveyor, purporting to be a correct map, showing the boundaries of the land as claimed by the defendant. In connection with this evidence it was offered to prove the correctness of the map by the defendant, who was with the surveyor when the survey was made. In approving this ground of the motion the court certified that the map was excluded from evidence for the reason that "the persons who were present when the work was done were allowed to testify; but the surveyor being accessible, and for a part of the time in the court-room and not called to the stand, the court held that [452] his testimony was necessary to prove the correctness of the map,

and that the adversary had the right of cross-examination. The map offered was a copy by the surveyor, purporting to have been copied from the records of deeds in Book 2 I's, 217." The survey was not offered as one made under the rule of court (Civil Code, 1910, § 6314). The defendant offered to prove the correctness of the survey, by a witness who was present when the lines were run, and who proposed to testify to its correctness. An unofficial survey is admissible in evidence when proved to have been correct by the parties who made it. Maples v. Hoggard, 58 Ga. 315. In principle it would seem to be immaterial whether the witness who proposes to testify to the correctness of the survey be the surveyor, or one who was present at the time the survey was made, if he offers to testify to the correctness of the survey. The defendant offered himself as a witness to prove the correctness of the map. If his testimony went to the fact that the map was correct, it should have been received in evidence, notwithstanding the surveyor may not have been put upon the stand and was an accessible witness.

6. Exception is taken to the following excerpts from the charge: "As already indicated to you in what I have said here, it sometimes happens that people are holding adjoining lands, and the boundaries of each extend beyond the line, and each paper takes in the premises in dispute—what is called in law an interlock; and the question arises in that case, what is the jury to do? If they find the plaintiffs' papers, for instance (whether by deed or prescription or color of title), include this particular land in question here on which they claim a trespass was made, and it is also shown that the boundaries of the land described in the defendant's papers (whether by deed, by prescription, or by color of title) extend over the point where the alleged trespass is said to have been committed, and you are confronted with that situation, then the question arises, how that is to be adjusted? The general rule in regard to that is this: that where the boundaries of each cover the same point, then whatever may be the superior title held by any one of the parties, to that party the decision should go. For instance, if one holds by a regular chain of title back to a grant of the State of Georgia, and the other one holds by color of title, and they clash there, superior title as shown by the evidence would control, that is the deed. If you find that both hold the same character of title, and the length of [453] possession thereunder is the same, and an interlock resulted there from the description in the paper, all I can say to you in that regard is that the law would leave them where they found them. If one color of title was perfected, say thirty years ago, and the other color of title was perfected only ten years ago, then as between those you would adopt the color of title which had been perfected thirty years ago. If they both are of the same date, and running the same time, and the seven years had practically transpired at the same time, and therefore both perfected at the same time, then the law would leave them where they found them." The criticism is, that the court laid down a wrong rule of law; the true rule being that if adjacent owners are in constructive possession of the same land, then no prescription can arise in favor of either, and if two persons claim to be in actual possession of the same land, then he is deemed in possession who has the legal title. Throughout the whole charge, and as apparent from the foregoing excerpts, the court instructed the jury on the theory that title by prescription was based upon possession alone; that adverse possession of land under color of title for seven years was known as color of title. For instance, the court instructed the jury, that there are several ways in which one becomes the owner of land in this State; that one class of title is a series of successive conveyances from the sovereign; another class is that known as prescriptive title, which is "based upon possession, not upon paper title, not upon a deed;" and "the third method of acquiring title is what is known as color of title, and that has in it some of the elements of title by deed and some of the elements of title by prescription." The court was in error as to his classification as to color of title being something apart from prescription. The statute declares that actual adverse possession of lands for twenty years shall give a good title by prescription against every one except the State or persons laboring under disabilities; and adverse possession of lands under written evidence of title for seven years shall give a like title by prescription. Civil Code (1910), §§ 4168, 4169. A prescriptive title, therefore, may be founded either upon twenty years actual adverse possession of land, or upon seven years adverse possession of land under color of title. In the present case neither of the contending parties deraigned a perfect paper title. Both parties offered in evidence certain deeds as color of title, and proved possession of a portion [454] of the land embraced therein. In other words, both plaintiffs and defendant were seeking to assert a constructive possession over the premises in dispute. If one of the parties had acquired prescriptive title by reason of the fact that he was in adverse possession of his land for a period of seven years before his adversary went into possession of the land claimed under his color of title, such party would not lose his prescriptive title which had ripened

before the other's possession began. But if neither was in actual possession of the premises in dispute, and both were in constructive possession thereof, and neither had acquired a prescriptive title before the possession of the other began, no prescription would arise in favor of either. In Harriss v. Howard, 126 Ga. 325, 55 S. E. 59, it was said that "adjacent owners may be in constructive possession of the same land, being included in the boundaries of each tract. In such cases no prescription can arise in favor of either; but the rights of the parties will be determined according to the superiority of the one title or the other aside from such prescription." That is to say, if both of the adjacent landowners were in constructive possession, neither having a prescriptive title against the other, and one of them had a paper title from the sovereign, that title would prevail. We do not understand, however, the rule to be that if neither of the adjacent owners has a complete title, the one whose color of title is the oldest shall be preferred, where the possession of neither has ripened their respective color of title into prescriptive title. We think the charge of the court was inaccurate statement of the law.

7. The court charged: "If you find from the evidence in the case that the prior owners of the land in question, that is to say, plaintiffs' ancestors in title, and defendant's ancestors in title, had agreed on a division or boundary line, then I charge you that that division or boundary line so agreed upon must govern in this case." The excerpt from the charge did not fully state the law respecting the conclusiveness of an agreed line between coterminous owners. A disputed boundary line between coterminous proprietors may be established by oral agreement, if the agreement be accompanied by actual possession to the agreed line, or is otherwise duly executed. Osteen v. Wynn, 131 Ga. 209, 62 S. E. 37, 127 Am. St. Rep. 212.

8. The jury were instructed that the object of the present suit "is to prevent the defendant from doing repeated acts prejudicial [455] to the rights of the plaintiffs, who claim to be owners of the land. The verdict of the jury does not determine title. All they have to find from the proofs is that they believe that ownership in the plaintiffs is established" under the evidence in the case. In their pleadings the plaintiffs asserted their right to an injunction by reason of their ownership of the land upon which the alleged trespasses were committed. Their right to injunction was dependent upon showing title in themselves. Issue was joined by the defendant, and both sides submitted evidence tending to show a prescriptive title to the premises in dispute. In the grant of an interlocutory injunction against a trespasser the plaintiff may not be held to strict proof of title. It is sufficient to sustain an interlocutory injunction against trespassers on land, in the absence of a better outstanding title, for the plaintiff to show a prima facie title. McArthur v. Matthewson, 67 Ga. 134. But on the final hearing, where the plaintiff prays permanent injunction against interfering with his possession, on the ground that he has title to the land, and the defendant also sets up title to the land, the plaintiff is not entitled to injunction unless he shows title in himself.

The motion for new trial contains numerous grounds. Those which we have specifically discussed entered into all the others, and such as are not specifically noted are controlled by the foregoing discussion.

Judgment reversed. All the justices concur.

NOTE.

Admissibility in Evidence of Ancient Map or Survey.

Map:
Official, 176.
Unofficial, 178.
Survey:
Public, 179.
Private, 180.

Map.

Official.

An ancient map, in proper custody, authorized or recognized as an official document, is admissible in evidence to prove the location of a boundary line.

England.—New Romney Corporation v. New Romney Sewer Com'rs [1892] 1 Q. B. 840, 61 L. J. Q. B. 558, 56 J. P. 756. See also Vyner v. Wirrall Rural Council, 73 J. P. 242, 7 L. G. R. 628.

United States.—Burns v. U. S. 160 Fed. 631, 87 C. C. A. 533. See also Morris v. Harmers, 7 Pet. 554, 8 U. S. (L. ed.) 784.

Alabama.—Barker v. Mobile Electric Co. 173 Ala. 28, 55 So. 364.

Connecticut.—Hamilton v. Smith, 74 Conn. 374, 50 Atl. 884. See Stevens v. Smoker, 84 Conn. 569, 80 Atl. 788.

Georgia.—See the reported case.

Louisiana.—Carrollton R. Co. v. Municipality No. 2, 19 La. 62.

Maine.—Goodwin v. Jack, 62 Me. 414.

Massachusetts.—Drury v. Midland R. Co. 127 Mass. 571.

Missouri.—St. Louis Public Schools v. Erskine, 31 Mo. 110.

New Hampshire.—Gibson v. Poor, 21 N. H. 440, 53 Am. Dec. 216; Adams v. Stanyan, 24

N. H. 405; Whitehouse v. Bickford, 29 N. H. 471; Lawrence v. Tennant, 64 N. H. 532, 15 Atl. 543.

New York.—Oxford v. Willoughby, 87 App. Div. 609, 83 N. Y. S. 1118, *affirmed* 181 N. Y. 155, 73 N. E. 677. See also Jackson v. Witter, 2 Johns. 180.

Pennsylvania.—Com. v. Alburger, 1 Whart. 469; Huffman v. McCrea, 56 Pa. St. 95. See also Com. v. Philadelphia, 16 Pa. St. 79; McCausland v. Fleming, 63 Pa. St. 36.

Texas.—Spencer v. Levy (Tex.) 173 S. W. 550.

Wisconsin.—Dickinson v. Smith, 134 Wis. 6, 114 N. W. 133.

Thus in Lawrence v. Tennant, 64 N. H. 532, 15 Atl. 543, the court said: "The party offering the paper must make out a prima facie case for its reception; he must show that the paper is apparently as he contends. If he wholly fail to do this, the court should reject the paper; but if there be a reasonable probability established that the paper is what it purports to be, the question then becomes one for the jury, and the paper ought to go before them with proper instructions. The real question affecting the consideration of such documents with the tribunal before which they are offered is, whether they are genuine, and contain a true statement of what they purport to contain. If found to possess these requisites, there is no reason why they may not be read in evidence. . . . In this case both of these requisites appear. An inspection of the plan leaves no doubt that it is an ancient and much worn document, and, taken in connection with the reported evidence, establishes a reasonable probability that it is what it is marked and purports to be, namely, 'A plot of the town of Epsom, taken on a scale of one hundred rods to an inch, in the year 1800, by D. L. Morril.' The antiquity and genuineness of the plan thus appearing, it was of course admissible if made by public authority; and if not so made, it was none the less admissible, there having been preliminary evidence of its correctness. Other grounds of admissibility need not be considered." So in Spencer v. Levy (Tex.) 173 S. W. 550, the court admitted as evidence a certain map termed the Westcott Map of which it was said that it "had been hanging in the office of the county clerk of Falls county for at least 30 years, during all of which time it has been the custom of citizens of Marlin to buy and sell lots in said Railroad addition as indicated on said map, and it does not appear that any one ever called its correctness in question." The court said: "We do not see how evidence of the correctness of said map could reasonably be made stronger. It purports to have been made in 1871. If the man who made it had testified on the trial hereof that he correctly copied the original map, this would have been only his memory of that event, after the lapse of more than 40 years. That it has stood the test of time as above stated we think is stronger evidence than would have been the memory of the man who made it." Likewise in Whitehouse v. Bickford, 29 N. H. 471, wherein it was held that the genuineness of a plan was sufficiently established to entitle it to be offered in evidence, the court said: "The plan was found in the custody of J. W. Pierce, and that he was at the time the acting clerk of the Masonian Proprietors, having the custody of their records, and that it was delivered by him, at his office in Portsmouth, in this state, as an original plan and as a part of the proprietary records, and the witness of these facts produced the plan in court. It purported, upon its face, to be an ancient plan, bearing date 1781, and purporting to be signed by James Hersey, surveyor. It was accompanied by a certificate attached to the plan signed by Pierce, which also showed that it had been, in point of fact, in his custody, and came from his possession." In Com. v. Alburger, 1 Whart. (Pa.) 469, the court said: "A copy, therefore, of a map of the city remaining in the Surveyor-General's office, as one of the records or papers of that office, received and accredited by the officers as authentic, and proved to be so considered, and to be an ancient paper, of course handed down by the proprietary's officers from early times, relating to its public and official acts, is evidence. . . . The presumption is, that these maps were placed there by the proprietary or his officers, as public documents for the benefit of all concerned in a matter of great public importance. They have been placed where they ought to have been, in the source and depository of all matters relating to the origin of land titles in Pennsylvania, superintended by a public officer of the highest authority, and open to public inspection, where every person might resort for information as to land titles. Even a survey adopted by the land office, though not made by the regular officer, is evidence." And in New Romney Corporation v. New Romney Sewer Com'rs [1892] 61 L. J. Q. B. 558, 1 Q. B. (Eng.) 840, 56 J. P. 756, the court said that a map made under authority of a commission and acquiesced in for a period of sixty years was admissible to show the boundaries of certain marsh lands.

In Finberg v. Gilbert, 104 Tex. 539, 141 S. W. 82, *reversing* 124 S. W. 979, the court said: "It is not doubted that as to ancient maps and plats long and publicly recognized and with reference to which it may be fairly presumed that the parties, as well as the general public had acted, they may be and are admitted as in the nature of a species of

reputation of the location of lots, streets and alleys or even of sections or leagues of land." And in Smucker v. Pennsylvania R. Co. 188 Pa. St. 40, 41 Atl. 457, wherein it was held that a map was not a paper between the parties as to boundary, but a signification by the commonwealth of the quantity taken by boundary, the court said: "The map was over sixty years old; it was found in the files in the proper office at Harrisburg, in a book entitled 'Plan Book No. 23, of Public Works,' in the very custody and place it should have been. We do not think that, to give effect to such a map, thus guarded, as evidence, it was necessary that defendant should go further and show that it was framed and filed at the exact time the state entered upon the land of which the map purports to be the boundary."

Where an ancient official map is no longer in existence, a copy or tracing thereof properly authenticated is admissible in evidence. Barker v. Mobile Electric Co. 173 Ala. 28, 55 So. 364; Hamilton v. Smith, 74 Conn. 374, 50 Atl. 884; Goodwin v. Jack, 62 Me. 414; Dickinson v. Smith, 134 Wis. 6, 114 N. W. 133. See also Gibson v. Poor, 21 N. H. 440, 53 Am. Dec. 216. Thus in Barker v. Mobile Electric Co. supra, the court said: "Official records show that about 1848 one Troost was employed by the city of Mobile to lay out a map of the city. A copy of so much of this map as shows the block containing the property in controversy was introduced in evidence. This map was hearsay, but it was an ancient document and came from a proper custody. It was competent to show boundary lines of private ownership." So in Dickinson v. Smith, 134 Wis. 6, 114 N. W. 133, it was said: "Whether it was filed in the office of the city clerk does not appear, but it does appear that Stephens made such survey and plat and that he set monuments or landmarks, and that copies or prints of such plat made by Stephens were in use, one of them in the office of the register of deeds of Outagamie county, and this copy was offered in evidence. It therefore comes from the custody of the register of deeds, is in common and general use and publicly recognized as a true copy of the John Stephens plat, and the copy itself is apparently of the same age as the original, and is rather a print made by the process of map-making then in vogue than a copy. It was properly received in evidence after proof of the loss of the original." And in Gibson v. Poor, 21 N. H. 440, 53 Am. Dec. 216, by way of dictum the court said: "Even if this ancient plan had not been found, we are not prepared to say, that the copy presented could not have been used. Ancient plans must at some time become worn out by age and use; and the necessity of the case seems to require that their place be supplied by copies. After these copies have been kept among the records, and used by the inhabitants a sufficient number of years to raise the ordinary presumption of genuineness, can they not be used as substitutes for the originals, without resorting to proof of being true transcripts, if the originals cannot be found, or have become defaced and unintelligible by use? If the originals should be lost, there would be no doubt of the competency of the copies as secondary evidence, and the reason would seem to be quite as cogent for the admission of copies after the originals had become defaced by age and use."

In Lawrence v. Tennant, 64 N. H. 532, 15 Atl. 543, the court said: "The party offering the paper must make out a prima facie case for its reception; he must show that the paper is apparently as he contends. If he wholly fail to do this, the court should reject the paper; but if there be a reasonable probability established that the paper is what it purports to be, the question then becomes one for the jury, and the paper ought to go before them with proper instructions." See to the same effect Gibson v. Poor, 21 N. H. 440, 53 Am. Dec. 216; Whitehouse v. Bickford, 29 N. H. 471.

UNOFFICIAL.

An ancient map, made under the direction of a private person, or one for which no official authorization, or recognition appears, is inadmissible in evidence. Pollard v. Scott, Peake N. P. (Eng.) 18; Reg. v. Milton, 1 C. & K. 58, 47 E. C. L. 58 (map made under private act); Hammond v. Bradstreet, 10 Exch. (Eng.) 390, 2 C. L. R. 1195; 23 L. J. Exch. 332, 2 W. R. 625 (maker not deputed to make map); Pipe v. Fulcher, 1 El. & El. 111, 102 E. C. L. 111, 28 L. J. Q. B. 12, 5 Jur. (N. S.) 146, 7 W. R. 19 (not recognized as authority on highways); Earl v. Lewis, 4 Esp. (Eng.) 1; Mercer v. Denne, [1904] 2 Ch. (Eng.) 534; Bower v. Cohen, 126 Ga. 35, 54 S. E. 918; Carter v. Maryland, etc. R. Co. 112 Md. 599, 77 Atl. 301; Washington Female Seminary v. Washington Borough, 18 Pa. Super. Ct. 555 (not made by regular official or filed in proper place). Thus in Pollard v. Scott, supra, the following facts appeared: "A copper-plate map was produced, wherein this close was described as a public road; and the plaintiff offered evidence to prove that it was generally received in the parish as an authentic map. It purported on the face of it to be taken by the direction of the churchwardens of that time." Lord Kenyon refusing to admit it in evidence said: "It would be equally improper to admit it as to admit a plan taken by the Lord of a manor, who might thereby crush and destroy

the estates of his tenants." And in Earl v. Lewis, 4 Esp. (Eng.) 1, the court said: "Among those papers so produced, was one describing the bounds and limits of High Ongar parish. It was in the form of a map, or terrier of the parish; but drawn in an unartificial manner, bearing the appearance of a rough delineation of the limits of the parish, made by the parson, or some person on his account. The metes or bounds were set out with apparently sufficient accuracy; but it was not signed by any person whatever, bearing any public character or office in the parish." So in Mercer v. Denne [1904] 2 Ch. (Eng.) 534, wherein the court held a map to be inadmissible because it was not shown to have been made by any competent person, competent to make it quoad the high-water mark and low-water mark, the court said: "The fact that it comes from the possession of the Admiralty makes no difference; it is not an Admiralty chart nor has it received the sanction of the Admiralty in any way. The Admiralty are in the habit of acquiring, either by purchase or by gift, or, perhaps I might say, by quasi-inheritance, as from the East India Company, numbers of old charts and maps. That does not make them in any way official." Likewise in Bower v. Cohen, 126 Ga. 35, 54 S. E. 918, wherein it appeared that a map was offered in evidence to show a division of land into lots and streets, the court said: "It is contended that as this map appears to be more than thirty years old, and there is nothing suspicious in its appearance, it is prima facie admissible. There was no evidence as to the age of the map, except the date thereon and the evidence of Donalson. Donalson came into possession of the map within much less than thirty years from the date on the map; and the mere date on the map, without evidence as to who placed it there, would not be evidence of its age, even if the rule admitting a map thirty years old applies at all to private maps." And in Carter v. Maryland, etc. R. Co. 112 Md. 599, 77 Atl. 301, the court holding a plat to be inadmissible said: "It certainly has an ancient appearance, but it bears on its face no indication of who made it or whence it came or whether it is an original or a mere copy."

However, in Whitman v. Shaw, 166 Mass. 451, 44 N. E. 333, the court said: "Other plans dated in 1820 and 1823, and signed by Mather Withington, were admitted in evidence, against the tenants' exception. They represented certain lots in the vicinity of the White marsh, and were shown on the plan produced by Mr. Bowditch. They came from the custody of one Crafts, who, in 1853, sold the lots to one Dana. The plan of 1820 showed a lot adjoining the White marsh on the opposite side of the creek. The plan of 1823 showed six lots. These lots were drawn on the same scale, and were identical with the same lots as shown on the Bowditch plan. We are of opinion that these plans were admissible on the preliminary question of the genuineness and accuracy of the Bowditch plan." And in S. C. nom. Schools v. Risely, 10 Wall. 91, 19 U. S. (L. ed.) 850, by way of dictum the court said: "Complaint is also made by the plaintiffs that the court erred in not regarding Chouteau's map as a muniment of title conclusive in their favor; but the court is of the opinion that the view taken of it by the state court is correct, and that it was properly regarded as evidence of title, and not as a muniment of title conclusive in itself, and that as such it was regular to submit it to the jury with the other evidence introduced by the parties."

Survey.

PUBLIC.

An ancient survey made by competent authority, recorded or accepted as a public document, and produced from proper custody, is admissible in evidence to prove the location of a boundary line. Talbot v. Lewis, 6 C. & P. 603, 25 E. C. L. 558; Smith v. Brownlow, L. R. 9 Eq. (Eng.) 241; Burns v. United States, 160 Fed. 631, 87 C. C. A. 533; Burgin v. Simon, 135 La. 213, 65 So. 128; Com. v. Alburger, 1 Whart. (Pa.) 469; McCausland v. Fleming, 63 Pa. St. 36; Mineral R. etc. Co. v. Auten, 188 Pa. St. 568, 41 Atl. 327, 43 W. N. C. 158; Aldrich v. Griffith, 66 Vt. 390, 29 Atl. 376. See also Com. v. Philadelphia, 16 Pa. St. 79. Thus in Talbot v. Lewis, 6 C. & P. 603, 25 E. C. L. 558, wherein it appeared that a great number of Spanish dollars were found in the sands of the seashore, and the plaintiff in order to show his title to the same offered in evidence an ancient survey of the manor, made in 1635, at a court of survey, Parke, B., said: "I think that this document is evidence to show the boundaries of the manor; and I am of opinion that it is evidence for that purpose, as being the opinion of persons whom we must presume to have been cognizant of the facts, it having reference to a subject on which reputation is evidence." And in Smith v. Brownlow, L. R. 9 Eq. (Eng.) 241, it was held that the survey of a manor, while a part of the Duchy of Cornwall, and produced from a proper depository, was admissible as evidence of the boundaries of the manor. To the same effect, see Mineral R. etc. Co. v. Auten, 188 Pa. St. 568, 41 Atl. 327, 43 W. N. C. 158. Likewise in Aldrich v. Griffith, 66 Vt. 390, 29 Atl. 376, wherein it appeared that the location of a town line

was the issue, the court held that a field book with surveys of the town was admissible.

In Evans v. Merthyr Tydfil Urban Dist. Council [1899] 1 Ch. (Eng.) 241, 68 L. J. Ch. 175, 79 L. T. N. S. 578, the court said: "Objection has also been taken to the admission in evidence of the survey made by Mr. Cheese in 1816. Now with reference to that survey, I am of opinion that, having regard to the fact that it was made by Cheese in performance of the duty cast upon him by the statute 34 Geo. 3, c. 75, s. 8, this document was properly admissible. It is a survey of Crown lands on the occasion of a sale of them, and it was made pursuant to the provisions of a public Act of Parliament; it is a public document produced out of the proper custody, and is admissible as such." Likewise in Burchfield v. McCauley, 3 Watts (Pa.) 9, the court held that a draft of a survey made by a deputy surveyor and found among the official papers of the surveyor, after the death of both, was admissible in evidence. See also Lexington v. Hoskins, 96 Miss. 163, 50 So. 561. And in Hart v. Gage, 6 Vt. 170, wherein it appeared that a field book with surveys was offered in evidence to prove acquiescence as to a division of lands, the court said: "A Field Book, accompanied with testimony showing that it had been recognized as such, was pregnant evidence of the two necessary facts, survey in fact, and an acquiescence under it. And these books, and the maps made from them, as they ripen by time, and monuments perish, may, like Doomsday Book, be the best, if not the only evidence of many ancient surveys."

PRIVATE.

An ancient survey which does not appear to have been officially authorized, or which appears to have been made for a private purpose, is inadmissible in evidence. Evans v. Taylor, 7 Ad. & El. 617, 34 E. C. L. 178, 7 L. J. Q. B. 73, 3 N. & P. 174; Daniel v. Wilkin, 7 Exch. (Eng.) 429, 21 L. J. Exch. 236; Jones v. Huggins, 12 N. C. 223, 17 Am. Dec. 567. See also Rogers v. Riddlesburg Coal, etc. Co. 31 Leg. Int. (Pa.) 325 (made by unauthorized surveyor). *Compare* Sweigart v. Richards, 8 Pa. St. 436. Thus in Evans v. Taylor, supra, the court sustained the rejection of a "survey of the manor of Minsterworth, parcel of the possessions of the Duchy of Lancaster, made by a person named 'deputy to Sir J. Poyntz,' surveyor, appointed by Queen Elizabeth, on the finding of certain tenants of the manor at a court of survey." Lord Denman said: "The deputy surveyor of the duchy does not appear to have had any authority to institute the enquiry; and, stripped of this authority, he has not merely no right to make any kind of return, but the presumption that he did make it falls to the ground. The paper may have been written by any clerk idling in the office, from his own imagination, or compiled possibly by some interested person in furtherance of a sinister object of his own. From these considerations, it appears that the document was no evidence for any purpose." And in Daniel v. Wilkin, 7 Exch. (Eng.) 429, 21 L. J. Exch. 236, it was held that an early survey made by direction of a commissioner of the Earl of Leicester was "no more evidence of title than a survey or map of any landed gentleman." The court said: "The ground on which a survey made by officers of the Crown under a commission is received, is, that it is presumed that they acted in accordance with their public duty, and have stated nothing in their inquisition or survey which is contrary to the fact. But no such presumption of truth attaches to a survey belonging to a private individual, although the presentment of a jury might be evidence of reputation." So in Jones v. Huggins, 12 N. C. 223, 17 Am. Dec. 567, the court said: "On the question whether the survey itself be competent evidence for the plaintiff, the court is of opinion that it is inadmissible, as being a private memorial procured to be made by Starkey for his own convenience, and is not evidence for him, or for any one who claims through him. The reason for excluding such evidence is decisive, viz., that it might benefit men to include in such surveys more than belonged to them."

However, in Sweigart v. Richards, 8 Pa. St. 436, the court said: "The title to lands cannot be acquired or established by unofficial diagrams, drafts, or surveys. But such papers may often be extremely useful in fixing and designating doubtful boundaries. It has been an ancient custom of the courts to receive them in evidence for what they are worth, in illustrating a question of boundary."

ARCHER ET AL.

v.

McCLURE ET AL.

North Carolina Supreme Court—May 30, 1914.

166 N. Car. 140; 81 S. E. 1081.

Reformation of Instruments — Proof of Mistake — Parol Evidence.

Parol evidence of mistake in a written contract is admissible for purpose of reformation.

[See 65 Am. St. Rep. 491.]

Reformation of Bond — Changing Name of Obligee.

It being intended that a bond should be to the plaintiffs in an action, with whom a contract therefor was made, and by mutual mistake it being made to one who was their active agent in prosecuting the action, it will be reformed, though the loss has occurred, and the surety's principals have become bankrupt.

[See note at end of this case.]

Sufficiency of Evidence for Jury.

Whether the evidence of mistake, warranting reformation of an instrument, is of the necessary clear, strong, and convincing character is a question for the jury.

[See generally 19 Ann. Cas. 343.]

Appeal from Superior Court, Cherokee county: FERGUSON, Judge.

Action to reform and recover on bond. Robert N. Archer et al., plaintiffs, and George W. McClure et al., defendants. Judgment for plaintiffs. Defendants appeal. AFFIRMED.

[141] This action or proceeding was brought by the plaintiffs to reform and recover upon a bond given by the defendants in an action brought by Robert N. Archer and others against George W. McClure. The original action of Archer and others against McClure was brought for the recovery of a certain tract of land described in the complaint, and a restraining order was issued therein against the said McClure, enjoining him from cutting timber from the lands in dispute, and from removing certain sawed lumber. Thereafter the lumber claimed by McClure was sold by him to the Albert Haas Lumber Company, and in order to remove the lumber the Albert Haas Lumber Company, through one of its members, went to M. E. Cozad, who had represented the plaintiffs, Archer and others, as agent, and told him that they were making arrangements to purchase the lumber from McClure and did not care to trespass on the land, and Cozad told Haas that if he would give a good bond of indemnity against all loss, that they could remove the lumber. The original suit of Archer and others against McClure, as shown by the record, was instituted in the name of Archer and others, as trustees, by M. E. Cozad, agent for the plaintiffs, and Mr. Cozad was the active agent in prosecuting the same, Archer and others, trustees, being nonresidents of the State.

After the purchase of the lumber by the Albert Haas Lumber Company and the conversation with Mr. Cozad, in which he agreed to allow them to give bond and remove it, the Albert [142] Haas Lumber Company undertook to give this bond, and applied to the defendant Fidelity and Deposit Company of Maryland to make it. A copy of the bond and of the power of attorney is set out in the record of the original case of Archer and others against McClure, as appears therefrom. The bond is signed by George W. Mcclure, the Albert Haas Lumber Company, and Fidelity and Deposit Company of Maryland, and its execution authorized by the latter, by the power of attorney atttached, the only difference being that the name of M. E. Cozad, who was acting as agent, was inserted in the bond as obligee, without the names of his princpals. It is this bond that gave rise to the controversy, the name of M. E. Cozad having, as the plaintiffs alleged, been written in the bond by mistake instead of Archer and others, trustees, the real plaintiffs in the action. This mistake was not discovered until some time after a judgment by default was taken against McClure, adjudging that the plaintiffs were the owners of the land in dispute, and ordering an inquiry as to the damages, and at the succeeding term of court an issue of damages was submitted, and were assessed by the jury at $805. Upon the judgment by default and the verdict assessing damages, a judgment was asked by the plaintiffs (M. E. Cozad having come in and made himself a party plaintiff) against the defendants George W. McClure and the Albert Haas Lumber Company and Fidelity and Deposit Company of Maryland, which judgment was resisted by the latter company upon the ground that the bond given by it was to pay all such sums as might be recovered against the said McClure for the removal of the lumber described in the complaint on file in the suit of M. E. Cozad against George W. McClure.

This proceeding was then instituted to correct the bond so as to conform to the alleged original intention and agreement, which was to indemnify the plaintiffs Archer and others from loss on account of removing the lumber.

The power of attorney signed by the defendant which was filed in the original suit of Archer and others against McClure shows that Aaron Haas or Edwin R. Haas was authorized to execute a bond which the Albert Haas Lumber Company was [143] required to file in the Superior Court of Cherokee County, North Carolina, in the case of M. E. Cozad against G. W. McClure, and the bond was accordingly executed by Albert Haas as attorney in fact of the Fidelity and Deposit Company.

The following verdict was returned by the jury:

1. Did the defendants G. W. McClure, Albert Haas Lumber Company, and Fidelity and Deposit Company execute the bond dated 7 June, 1906? Answer: Yes.

2. Was said bond given for the purpose of allowing the removal of the lumber men-

tioned in the complaint in the case of R. N. Archer et al. v. G. W. McClure, and was said bond intended to have been given in that case, and by mutual mistake and the mistake of the draftsman the name of M. E. Cozad inserted instead of R. N. Archer and others? Answer: Yes.

3. Did the Fidelity and Deposit Company of Maryland know when the bond was executed that there was such a suit pending in favor of R. N. Archer, Louis Krohn, W. R. Hopkins, F. W. Bruch, E. I. Leighton, and George Reeves? Answer: Yes.

4. Did the Fidelity and Deposit Company of Maryland authorize any one to execute any bond for or on its behalf in any action in favor of R. N. Archer? Answer: Yes.

5. Have the defendants G. W. McClure and Albert Haas Lumber Company been discharged in bankruptcy? Answer: Yes.

E. B. Norvell for appellants.

J. D. Mallonee and *Zebulon Weaver* for appellees.

WALKER, J. (*after stating the facts*).—The doctrine is elementary that parol evidence is not, in general, admissible between the parties to vary a written instrument, but it is equally well settled that mistake, fraud, surprise, and accident furnish exceptions to the universal principle, and parol evidence, in any case brought within one of the exceptions, admitted to vary the writing so far as to make it accord with the true intention and agreement of the parties. These exceptions rest upon the highest motives of policy and expediency, or otherwise an injured party would generally be without remedy. Equity follows [144] the law, it is true, but sometimes it will intervene and afford relief where the remedy at law is inadequate for the purpose. The doctrine we have stated has often been applied by this and other courts in the correction of written contracts, bonds, deeds, and other instruments, where the mistake was one of fact, mutual and common to all the parties, and the proof clear, strong, and convincing. 2 Pomeroy's Eq. Jur. (1 Ed.) sec. 858; 1 Beach Mod. Eq. Jur. secs. 48 and 51; 1 Story's Eq. Jur. (12 Ed.) sec. 138 and note; Dillard v. Jones, 229 Ill. 119, 11 Ann. Cas. 82, 82 N. E. 206. A mistake exists when a person, under some erroneous conviction of law or fact, does or omits to do some act which but for the erroneous conviction he would not have done or omitted. It may arise either from unconsciousness, ignorance, forgetfulness, imposition, or misplaced confidence. Where the mistake arises from imposition or misplaced confidence, relief may be had on the ground of fraud. Where it arises from unconsciousness, ignorance, or forgetfulness, no element of fraud exists, and redress must be obtained, if obtained at all, on the distinct equitable basis of mistake. Bispham on Equity (6 Ed.) sec. 185.

It is said in 34 Cyc. 908, to be settled by a host of authorities that where because of mistake an instrument does not express the real intention of the parties, equity will correct the mistake, unless the rights of third parties, having prior and better equities, have intervened. This is done, not for the purpose of relieving against a hard or even oppressive bargain or to give either party a better one, but simply to enforce the agreement as it was made and to prevent the injustice which would ensue if this is not done. Nor will chancery make a new contract, under the pretext of correcting a mistake, for where there is no meeting of the minds, there is no case or ground for reformation. Wherever an instrument is drawn with the intention of carrying into execution an agreement previously made, and by mistake of the draftsman or scrivener it fails to do so, the mistake will be corrected, and the original contract enforced according to the real intention of the parties.

[145] We have said the mistake must be mutual, but by this is not meant that both parties must agree at the hearing that the mistake was in fact made, but the evidence of the mutuality must relate to the time of the execution of the instrument and show that the parties then intended to say one thing and by mistake expressed another and different thing. 34 Cyc. 907, to 935.

A court of equity cannot add or substitute other parties for those appearing on the face of a contract, since the effect might be to make a new contract, but the mistaken use of names of parties appearing in the contract may be rectified in order to carry out the real agreement. 34 Cyc. 934, and cases cited; as, for instance, the insertion of a wrong name through a clerical error or a misnomer of the true obligee in a bond. 34 Cyc. 935, and cases in the notes.

Care must be taken to distinguish between the rule at law excluding parol evidence to vary or contradict a written instrument and that in equity, by which it is reformed so as to make it speak the truth. We considered these questions recently in Wilson v. Scarboro, 163 N. C. 380, 79 S. E. 811, and defined the jurisdiction of a court of equity in such matters. There are decided and well considered cases to the effect that a court of equity will thus correct a mistake in the name of a party to the contract where it was erroneously inserted for the name of another, which is our case precisely. In a case of this sort, Chief Justice Parker, in Brown v. Gilman, 13 Mass. 158, said: "Authorities have been read to show that where a contract in writing has been made and signed,

but the name of the party contracted with omitted, it may be supplied by extrinsic proof. Of this we have no doubt, where the name was omitted by mistake *or a wrong name inserted.*" (Italics ours.) And the same was held in Gayle v. Hudson, 10 Ala. 116, where the name of one person was inserted as obligee for that of another, who was the one intended, and it was further said that the equity of reformation could be enforced even against a surety to the bond. The Court concluded as follows: "It is abundantly shown by the citations [146] to the point, and what we have said, that a court of equity is entirely competent to reform the bond so as to make it speak the intention of the parties, upon satisfactory proof being adduced of the mistake."

Without commenting upon them separately, it will be found that the following authorities clearly sustain the right in equity to have this bond corrected so as to insert the name of the intended obligee, some of them being much like our case in their facts, and in them the correction was decreed where the name of the agent had been inadvertently or by mistake inserted for that of his principal: Wait v. Axford, 63 Mich. 227, 29 N. W. 693; Bell v. Tanguy, 46 Ind. 49; Rankin v. Miller, 43 Ia. 11; Lee v. Percival, 85 Ia. 639, 52 N. W. 543; Eustis Mfg. Co. v. Saco Brick Co. 198 Mass. 212, 84 N. E. 449; Denver Brick, etc. Co. v. McAllister, 6 Colo. 261; Scales v. Ashbrook, 1 Metc. (Ky.) 358; Smith v. Watson, 88 Ia. 73, 55 N. W. 68; Smith v. Wainwright, 24 Vt. 97.

The courts are more inclined to exercise this jurisdiction where it will not prejudice the obligor in the bond or the party against whom correction of the instrument is asked. Gayle v. Hudson, supra.

Applying these principles to the facts of this case, we find that there is ample evidence of a mutual mistake. M. E. Cozad was the agent of the plaintiffs, and also had charge of the prosecution of the other action for them. There was but one suit pending in the county relating to the timber, and that was the one in which the bond was given. There was no reason for indemnifying Cozad, as the contract was not with him, but with the plaintiffs, whose timber was about to be removed. According to Mr. Dillard's testimony (and he drew the bond), it was intended to indemnify the plaintiffs in the suit in which G. W. McClure was defendant, and from whom the Albert Haas Lumber Company had bought the lumber, and the plaintiffs in that suit were Robert N. Archer and others. There cannot be the least doubt, upon the evidence, as to the suit referred to in the bond, though the name of the plaintiff therein was mistakenly supposed to be M. E. Cozad. It would not be creditable to the indemnity company should we assume that it was engaging in [147] so important a business transaction as the giving of a bond of indemnity in a suit without knowing what suit it was and where it was pending. And again, it may be said that it is immaterial to defendant who was named as obligee by mistake, as its main and only reliance for reimbursement was upon its coöbligors or the principals in the bond, and in that respect the bond is not changed. The defendant owes the money, and it would not be right if we should permit it to escape upon a mere technicality, or an inadvertence of the draftsman, or mistake of the parties as to the real name of the plaintiff. The law is strongly against any such view. It does not regard the name of persons so much as it does the substance and actual identity of the agreement.

The Court, in Smith v. Wainwright, supra, upon a state of facts not substantially unlike ours, said: "Under these circumstances it seems to us that it would be a virtual fraud upon the obligees to allow Wainwright to escape from the obligation of the bond. Upon this ground alone, if they made proper application to the court of chancery to have the bond reformed in this particular, we entertain no doubt it would be the duty of that court to make such a decree upon the present state of the evidence."

If we could see, as contended by the defendant, that it had made one contract and plaintiffs were attempting to substitute another, we would not hesitate to deny the latter any relief; but in this case, while the contract was nominally with M. E. Cozad, it was really with his principals, the plaintiffs.

There is one case decided by this Court which seems to be directly in point, McIntosh v. North State Fire Ins. Co. 152 N. C. 50, 136 Am. St. Rep. 818, and it was an action upon an insurance policy. The Court there said, by Justice Brown: "In Henkle v. Royal Exch. Assur. Co. 1 Ves. (Eng.) case 156, p. 318, the bill sought to reform a written policy after loss had actually happened, upon the ground that it did not express the intent of the contracting parties. Lord Hardwicke said: 'No doubt but this Court had jurisdiction to relieve in respect of a plain mistake in contracts in writing as well as against frauds in contracts, so that if reduced to writing contrary to the intent of the parties, on proper proof, it would be [148] rectified.' If the plaintiffs can establish by the proper degree of proof that this contract of insurance was made for the benefit of the wife and the two infants, who are the owners of the property, and that by mutual mistake, or the error of the draftsman, A. H. McIntosh was erroneously made the beneficiary therein, instead of the other

plaintiffs, they will have made out a cause of action which will enable them to have a reformation of the written policy."

In Nicholson v. Dover, 145 N. C. 18, 21, 58 S. E. 444, 13 L.R.A.(N.S.) 167, the Court said, citing and quoting from Woodruff v. McGehee, 30 Ga. 158: "Where an agent makes a contract without disclosing the name of his principal, the latter may claim all his rights, with the single limitation that the other party shall not be injured thereby." And the law is the same, as we have seen, where the contract runs in the name of the agent, without his being designated as such, when it was intended to be for the benefit of the principal.

The jury have found, upon sufficient evidence, that the bond was intended by the parties to be given in the Archer suit, and that the authority of Albert Haas, as attorney in fact for the indemnity company, related to that suit and extended to the giving of the particular bond now in question.

There are no grounds, for the reasons stated, for disturbing the verdict. The bankruptcy of McClure and the Haas Lumber Company does not affect plaintiff's right to recover. It was the misfortune of the indemnity company that it occurred, and it is in no way attributable to any fault of the plaintiffs. There was no exception, though, on this ground.

The evidence of the mistake must, of course, be clear, strong, and convincing, because of the force of the presumption in favor of the correctness of the instrument as written; but whether it is of that character is for the jury, and not for the court, to decide. Lehew v. Hewett, 138 N. C. 6, 50 S. E. 459, 130 N. C. 22, 40 S. E. 769; Cuthbertson v. Morgan, 149 N. C. 72, 62 S. E. 744; Avery v. Stewart, 136 N. C. 426, 48 S. E. 775, 68 L.R.A. 776, but if we were at liberty to decide upon it in this case, we would unhesitatingly hold it to be clear and satisfactory [149] that a mutual mistake had been made, and that the name of M. E. Cozad had been erroneously inserted for the names of the plaintiffs.

There was no error in the proceedings below.

No error.

NOTE.

Right to Reform Bond by Changing Name of Obligee.

It is the general rule that a court of equity, in order to carry out the intentions of the parties, has the right to reform a bond by changing the name of the obligee. Gayle v. Hudson, 10 Ala. 116; Bell v. Tanguy, 46 Ind. 49; Smith v. Wainwright, 24 Vt. 97. And see the reported case. See also Hart v. State, 120 Ind. 83, 21 N. E. 654, *rehearing denied* 120 Ind. 87, 24 N. E. 151. *Compare* Craft v. Dickens, 78 Ill. 131. Thus in Bell v. Tanguy, supra, an action on a delivery bond, it appeared that the bond was made payable to the constable who levied the execution instead of to the plaintiffs in the judgment on which the execution issued. It was contended, therefore, that there could be no recovery by the plaintiffs. But the court said: "The condition of the bond shows that the execution levied on the horse was in favor of the plaintiffs. The complaint shows this mistake, and shows that it was so written, being a clerical error by the draftsman, and asks to reform the bond, and that the plaintiffs were the proper and legal payees of the bond. This was allowed and was clearly right." In Gayle v. Hudson, supra, the question was raised whether it was allowable to show by parol evidence a mistake in the name of one of the obligees of a bond. Holding that parol evidence should not have been admitted on the trial for such purpose, Collier, C. J., said that "a court of equity is entirely competent to reform the bond, so as to make it speak the intention of the parties, upon satisfactory proof being adduced of the mistake." So in Smith v. Wainwright, 24 Vt. 97, it appeared that a partnership, consisting of three persons, purchased a certain business from one Wainwright. In order to secure to them his good will, and to prevent his entering into the same business again within a prescribed territory, Wainwright gave a bond to the three partners jointly, without naming them, and their assigns, administrators, etc. It was the intention of all the parties that the bond should inure for the benefit of the business. This was assented to thereafter repeatedly by the obligor after changes had been made in the parties to whom the bond was executed. In an action on the bond, alleging a breach of contract in carrying on a like business within the prohibited limits, the defendants endeavored to escape liability on the ground of the change in interest of those who bought out the business, and to whom the bond was executed. Remanding the case to the court of chancery to be disposed of in conformity to the principles of equity law the court said: "Under these circumstances it seems to us, that it would be a virtual fraud upon the obligees to allow Wainwright to escape from the obligation of the bond. Upon this ground alone, if they made proper application to the court of chancery to have the bond reformed in this particular, we entertain no doubt it would be the duty of that court to make such a decree upon the present state of the evidence."

However, in Craft v. Dickens, 78 Ill. 131, a bill in chancery to reform an attachment bond, it was held that equity would afford no relief. Reviewing the facts briefly the court said: "It appears, . . . that Dickens sued out an attachment, before a justice of the peace, against Craft, claiming twenty dollars, and executed an attachment bond in the cause, payable to 'John B. Craft, executors, administrators or assigns.' . . . The bill charged that the bond was intended to be made payable to John B. Craft, his executors, administrators or assigns." Affirming the decree dismissing the bill, Mr. Chief Justice Scott said that "conceding a mistake did occur in the execution of the bond, it is plain equity will not assume jurisdiction to reform it, for the reason the statute has given courts of law, in which all attachment proceedings are had, ample powers to allow amendments at the trial, and complainant should have made his application to have the bond corrected in the court where he was sued."

MARVEL

v.

JONAH.

New Jersey Court of Errors and Appeals—June 17, 1914.

83 N. J. Eq. 295; 90 Atl. 1004.

Injunction — Grounds — Breach of Contract.

Equity will restrain a breach of an express covenant where injury arising from a breach cannot be adequately compensated.

Covenant against Engaging in Competing Business.

A stipulation, in a firm agreement between plaintiff and defendant for the general practice of medicine at Atlantic City, that defendant will not practice medicine in the city for three years after the termination of the firm, is enforceable in equity at the suit of plaintiff who had built up so large a practice in the city as to be unable to take care of it without assistance, as against the objection that equitable relief will deprive defendant of the privilege of practicing in the only field of his acquaintance; the practice of the firm not being confined to Atlantic City, but embracing adjacent boroughs.

[See note at end of this case.]

Appeal from Court of Chancery.

Action by Philip I. Marvel, plaintiff, against William E. Jonah, defendant. From judgment rendered, plaintiff appeals. The facts are stated in the opinion. REVERSED.

Bourgeois & Coulomb for appellant.

Allen B. Endicott and *Robert H. McCarter* for respondent.

[296] GUMMERE, C. J.—The complainant and defendant are practicing their profession in the city of Atlantic City, together with one Dr. Durand, as partners. The bill filed by the complainant prays an accounting from the defendant, the dissolution of the partnership relationship between them, because of continued violations by the defendant of certain provisions contained in the partnership agreement, and the enforcement against the defendant of a restrictive covenant contained in that agreement, by the terms of which the defendant bound himself, in case the partnership was terminated because of violations of the contract by him, to refrain from practicing his profession in Atlantic City for a period of three years next thereafter. The learned vice-chancellor before whom the case was heard in the court below held that the complainant was entitled to an accounting, and to have the partnership dissolved because of breaches of the partnership agreement by the defendant, but refused to enforce against the latter the restrictive covenant, because he considered that to do so "would be unjust and unnecessarily oppressive." From so much of the decree as refuses an injunction against the defendant restraining [297] him from practicing in Atlantic City during the stipulated period the complainant appeals.

Dr. Marvel began the practice of medicine in Atlantic City about 1884. His practice gradually grew to such an extent that in 1905 it became necessary for him to employ an assistant. Dr. Jonah, who had graduated from a medical college five years before that time, was selected by him for that position. In 1906, Dr. Marvel found it desirable to employ a second assistant, and took in Dr. Durand. In 1908, the complainant and defendant entered into a parol partnership agreement which, in 1910, was superseded by that which is involved in the present controversy. It is apparent from the proofs that the present development and value of the practice of the firm is, in large measure, due to the efforts and reputation of Dr. Marvel; and that his purpose in having the restrictive covenant put in the partnership agreement was to prevent the younger members of the firm, after having been brought into association with his patients, as his representatives, from setting up an independent practice in Atlantic City, and taking with them such patients, or any of them.

The conclusion of the learned vice-chancellor that it would be unjust and unnecessarily oppressive to enforce the restrictive covenant against Dr. Jonah, seems to be

based upon the idea that, although the independent practice of his profession in Atlantic City by Dr. Jonah will result in the loss of patients by Dr. Marvel, yet, even after such loss, the latter's practice will still be so large as to be beyond his ability to cope with it without the assistance of others, and, consequently, that the restraint sought by him against Dr. Jonah would be of little value to him if granted. The premises do not justify such a conclusion. If Dr. Marvel has built up a practice so large that he is unable to take care of it without the aid of qualified assistants, he is entitled to the emoluments thereof, and to be protected against the loss of those emoluments through illegal competition. It will hardly do to say that a man who has built up a business so extensive that he cannot handle it without the aid of a staff of assistants, suffers no loss or injury by its diminution in volume to such an extent that he no longer needs assistance to carry it on, provided that [298] what remains of it is sufficient to fully occupy his own time. Common experience is to the contrary.

But the right of Dr. Marvel to the aid of a court of equity to restrain Dr. Jonah from violating his covenant to refrain from practicing his profession in Atlantic City for three years after the termination of their partnership agreement, does not depend upon the extent of the injury to his business which would result from such violation. It is sufficient that such injury be material. Where there is an express covenant, and an uncontroverted injury arising from the breach of it, equity will grant an injunction to restrain such breach, where the injury arising therefrom cannot be repaired, nor estimated in dollars and cents. The damages arising from the breach of a covenant such as that now under consideration would be continuing, accruing from day to day, and it would be impossible to ascertain the money loss sustained by Dr. Marvel therefrom with anything approaching accuracy. A suit at law, therefore, would afford no adequate remedy; and when this is the case, a court of chancery should enforce the covenant by granting an injunction to prevent the breach of it. Butler v. Burleson, 16 Vt. 176; Timmerman v. Dever, 52 Mich. 34, 17 N. W. 230, 50 Am. Rep. 240; Wilkinson v. Colley, 164 Pa. St. 35, 30 Atl. 286, 26 L.R.A. 114; Gravely v. Barnard, L. R. 18 Eq. (Eng.) 518. In each of the cited cases the complainant, a physician, appealed to a court of equity to restrain a fellow-practitioner from violating a covenant very similar in its legal aspects to that which Dr. Marvel claims the benefit of. In each of them the restraint prayed for was decreed, and this was done without any consideration of the extent of the injury which the plaintiff would suffer from a violation of the covenant.

The conclusion of the learned vice-chancellor that the granting of the restraint asked for by Dr. Marvel would be unjust to the defendant, seems to be based upon the idea that the latter would thereby be deprived of the privilege of pursuing his practice in the only field of his acquaintance. But this idea is not justified by the proofs in the case, for from them it appears that the practice of the firm is not confined solely to the city of Atlantic City, but embraces Ventnor, Margate and Longport, boroughs which are adjacent thereto. But even if the deprivation [299] should be as complete as the learned vice-chancellor seems to think it would, we see no injustice in compelling Dr. Jonah to live up to the covenant solemnly entered into by him, and which was one of the causes inducing Dr. Marvel to admit him into partnership, and to a share in the benefits of the practice which he had built up. The fact that the performance of such a promise involves personal hardship, or pecuniary lose, to the promisor, affords no justification for nonperformance. If the law recognized such an excuse for the breach of a contract of this kind, very few cases would be found in the books where the performance of such negative covenants had been compelled by injunction; for speaking generally it is only where the performance of the covenant is disadvantageous to the covenantor that he refuses to perform it, and renders it necessary for the party for whose benefit it is made to apply to the courts for relief.

The above views lead to a reversal of so much of the present decree as is brought before us by this appeal. The record will be remitted to the court of chancery with a direction that an injunction issue against Dr. Jonah restraining him from the practice of his profession in the city of Atlantic City for a period of three years from and after the making of the decree in that court. The complainant below is entitled to costs.

GARRISON, J. (*dissenting*).—I agree that Dr. Marvel was entitled to the measure of protection stated in the majority opinion, viz., that Dr. Jonah often having been brought into association with Dr. Marvel's patients should not set up an independent practice in Atlantic City and take with him such patients, or any of them. I very fully agree that a covenant to this effect would be one that a court of conscience ought to enforce. The present covenant, however, goes away beyond such protection and penalizes Dr. Jonah by prohibiting him from practicing not only among such patients of Dr. Marvel's but also among the hundreds of

thousands of persons who annually visit Atlantic City without ever having heard of Dr. Marvel.

Such a covenant, while good in law, is, owing to its highly penal character, one to the enforcement of which equity refuses [300] to lend its aid, leaving the parties to the courts of law where the complainant can obtain redress that is exactly proportioned to the injury he has suffered.

This was the view of Vice-Chancellor Leaming, in whose conclusions I concur and vote to affirm the decree advised by him. I am requested by Mr. Justice Bergen and by Judge White to say that they concur in the foregoing views.

For affirmance—Garrison, Bergen, White—3.

For reversal—The Chief-Justice, Parker, Minturn, Kalisch, Bogert, Vredenburgh, Heppenheimer—7.

NOTE.

Injunction as Remedy for Breach of Express Covenant Not to Engage in Same Business as Covenantee.

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Introductory.

The earlier cases discussing the remedy by injunction for a breach of an express covenant not to engage in the same business as the covenantee, are reviewed in the notes to Simms v. Burnette, 15 Ann. Cas. 690, and Philadelphia Ball Club v. Lajoie, 90 Am. St. Rep. 627. This note presents the recent cases on the subject.

For a discussion of the question what constitutes the carrying on of a business within such a covenant, see the note to Hadsley v. Dayer-Smith, Ann. Cas. 1915A 379.

Covenant by Vendor of Business.

RULE STATED.

Where a business, occupation or professional practice is sold, and the seller, as part of the consideration for the purchase, enters into an agreement not to re-engage in the same business, the purchaser may, if the agreement is valid within the rules governing contracts in restraint of trade, enjoin a breach of the agreement.

Arkansas.—Webster v. Williams, 62 Ark. 101, 34 S. W. 537.

Georgia.—Busk v. Wolf, 143 Ga. 18, 84 S. E. 63.

Iowa.—Cole v. Edwards, 93 Ia. 477, 61 N. W. 940.

Kansas.—Mills v. Ressler, 87 Kan. 549, 125 Pac. 58.

Kentucky.—Gutzeit v. Strader, 158 Ky. 131, 164 S. W. 318.

Louisiana.—Moorman v. Parkerson, 127 La. 835, 54 So. 47.

Maine.—Flaherty v. Libby, 108 Me. 377, 81 Atl. 166.

Michigan.—C. H. Barrett Co. v. Ainsworth, 156 Mich. 351, 120 N. W. 797; Buckhout v. Witwer, 157 Mich. 406, 122 N. W. 184, 23 L.R.A.(N.S.) 506.

Minnesota.—Holliston v. Ernston, 124 Minn. 49, 144 N. W. 415.

Missouri.—Gill v. Ferris, 82 Mo. 156; Angelica Jacket Co. v. Angelica, 121 Mo. App. 226, 98 S. W. 805; Wills v. Forester, 140 Mo. App. 321, 124 S. W. 1090; Glover v. Shirley, 169 Mo. App. 637, 155 S. W. 878.

Nebraska.—Downing v. Lewis, 59 Neb. 38, 80 N. W. 261; Hickey v. Brinkley, 88 Neb. 356, 129 N. W. 553.

New Mexico.—Locke v. Murdoch, 151 Pac. 298.

New York.—Holbrook v. Waters, 9 How. Pr. 335.

North Carolina—Faust v. Rohr, 166 N. C. 187, 81 S. E. 1096.

Oklahoma.—Threlkeld v. Steward, 24 Okla. 403, 103 Pac. 630, 138 Am. St. Rep. 888.

Rhode Island.—French v. Parker, 16 R. I. 219, 14 Atl. 870, 27 Am. St. Rep. 733.

Texas.—Wolff v. Hirschfeld, 23 Tex. Civ. App. 670, 57 S. W. 572.

Washington.—Loutzenhiser v. Peck, 154 Pac. 814.

Canada.—Cook v. Shaw, 25 Ont. 124.

Thus, in Flaherty v. Libby, 108 Me. 377, 81 Atl. 166, the court said: "It is customary and oftentimes necessary that a person purchasing the business of another, with the good-will that should follow the transaction, enters into an agreement with the seller whereby the seller is restricted from engaging in a similar business within specified

districts. If these agreements are not made the seller, if he sees fit, can immediately begin business upon his own account, or in the employment of a rival of the purchaser and completely destroy the good-will which he has sold and for which he has received a valuable consideration. . . . It is but just that the parties to an agreement of this kind, entered into for a valuable consideration, should not only live up to the letter of the agreement, but also to its spirit. It is so easy for one indirectly, by word or conduct, to utterly destroy the good-will of a business which he has sold, and which another in good faith has purchased, adequate damages for which, owing to the rules of law governing the assessment of damages, cannot be awarded, that equity carefully scrutinizes the conduct of the seller, and if, directly or indirectly, he so conducts himself that his agreement not to engage in the business is violated, promptly restrains with its writ of injunction further acts that tend to take from the purchaser the rights that he acquired by purchase from the seller."

Application of Rule.

The rule allowing an injunction against the violation of an agreement by the seller of a business not to engage in a similar business has been applied to sales of a great variety of occupations. The nature of the business or professional practice which forms the subject matter of the contract is, it seems, an immaterial consideration to the application of the rule; at least, the courts have drawn no distinctions on this ground. Injunctions have been granted to restrain defendants from re-engaging in the following named trades: business of distributing advertising matter, Johnston v. Blanchard, 16 Cal. App. 321, 116 Pac. 973; bakery business, Buckhout v. Witwer, 157 Mich. 406, 122 N. W. 184, 23 L.R.A.(N.S.) 506 (sale of business by stockholder); bamboo ware and fancy furniture business, Cook v. Shaw, 25 Ont. 124; barber business, Hampton v. Caldwell, 95 Ark. 387, 129 S. W. 816; Faust v. Rohr, 166 N. C. 187, 81 S. E. 1096 (sale by retiring partner to copartner); bus and baggage transfer business, Holliston v. Ernston, 124 Minn. 49, 144 N. W. 415; butcher business, Nelson v. Brassington, 64 Wash. 180, 116 Pac. 629; Loutzenhiser v. Peck (Wash.) 154 Pac. 841; clothing and tailoring business, Busk v. Wolf, 143 Ga. 18, 84 S. E. 63; manufacture of white porcelain door knobs, Artistic Porcelain Co. v. Boch, 76 N. J. Eq. 533, 74 Atl. 680; drug business, Noble v. Saffold, 181 Ala. 636, 62 So. 515; Kradwell v. Thiesen, 131 Wis. 97, 111 N. W. 233; drug business and practice of medicine, Threlkeld v. Steward, 24 Okla. 403, 103 Pac. 630, 138 Am. St. Rep. 888; retail furniture business, Weickgenant v. Eccles, 173 Mich. 695, 140 N. W. 513; grain business, C. H. Barrett Co. v. Ainsworth, 156 Mich. 351, 120 N. W. 797; grocery business, F. T. Gunther Grocery Co. v. Koll, 153 Ky. 446, 155 S. W. 1145; hardware business, Gill v. Ferris, 82 Mo. 156; insurance business, Bloom v. Home Ins. Agency, 91 Ark. 367, 121 S. W. 293; Moorman v. Parkerson, 127 La. 835, 54 So. 47; manufacture of jackets, Angelica Jacket Co. v. Angelica, 121 Mo. App. 226, 98 S. W. 805; laundry business, Downing v. Lewis, 59 Neb. 38, 80 N. W. 261; manufacture and sale of laundry trays, Washington Charcrete Co. v. Campbell, 72 Wash. 566, Ann. Cas. 1914D 630, 131 Pac. 208; liquor business, Gutzeit v. Strader, 158 Ky. 131, 164 S. W. 318; livery business, Smith v. Webb, 176 Ala. 596, 58 So. 913, 40 L.R.A.(N.S.) 1191; Breeding v. Tandy, 148 Ky. 345, 146 S. W. 742; King v. Fountain, 126 N. C. 196, 35 S. E. 427; Kennedy v. Winfre (Tex.) 163 S. W. 1018; livery and undertaking business, Linneman v. Allison, 142 Ky. 309, 134 S. W. 134; lumber business, Wills v. Forester, 140 Mo. App. 321, 124 S. W. 1090; Thomas v. Cavin, 15 N M. 660, 110 Pac. 841; general mercantile business, Wooten v. Harris, 153 N. C. 43, 68 S. E. 898 (sale by retiring partner to copartner); newspaper business, McAuliffe v. Vaughan, 135 Ga. 852, Ann. Cas. 1912A 290, 70 S. E. 322, 33 L.R.A.(N.S.) 255; paint and glass business, Barrows v. McMurtry Mfg. Co. 54 Colo. 432, 131 Pac. 430; produce business, Bullock v. Johnson, 110 Ga. 486, 35 S. E. 703; Counts v. Medley, 163 Mo. App. 546, 146 S. W. 465; trucking business, Flaherty v. Libby, 108 Me. 377, 81 Atl. 166.

Injunctions have been granted to restrain breaches of agreements by medical practitioners in a number of instances. Webster v. Williams, 62 Ark. 101, 34 S. W. 537; Cole v. Edwards, 93 Ia. 477, 61 N. W. 940; Mills v. Ressler, 87 Kan. 549, 125 Pac. 58; Glover v. Shirley, 169 Mo. App. 637, 155 S. W. 878; Holbrook v. Waters, 9 How. Pr. (N. Y.) 335; Threlkeld v. Steward, 24 Okla. 403, 103 Pac. 630, 138 Am. St. Rep. 888; Wolff v. Hirschfeld, 23 Tex. Civ. App. 670, 57 S. W. 572; French v. Parker, 16 R. I. 219, 14 Atl. 870, 27 Am. St. Rep. 733. And in one recent case, the breach of a covenant by a dentist has been restrained. Locke v. Murdoch, 151 Pac. 298.

Where the vendor of a business, after covenanting not to engage in the same business, enters into the service of a competitor, it has been held that an injunction will lie restraining him from so doing. Smith v. Webb, 176 Ala. 596, 58 So. 913, 40 L.R.A.(N.S.) 1191; Jefferson v. Markert, 112 Ga. 498, 37 S. E. 758; Wilson v. Delaney, 137 Ia. 636, 113 N. W. 842; Pohlman v. Dawson, 63 Kan.

471, 65 Pac. 689, 88 Am. St. Rep. 249, 54 L.R.A. 913; Emery v. Bradley, 88 Me. 357, 34 Atl. 167; Thompson v. Andrus, 73 Mich. 551, 41 N. W. 683; Ammon v. Keill, 95 Neb. 695, 146 N. W. 1009, 52 L.R.A.(N.S.) 503; Finger v. Hahn, 42 N. J. Eq. 606, 8 Atl. 654; Ewing v. Johnson, 34 How. Pr. (N. Y.) 202; Siegel v. Marcus, 18 N. D. 214, 119 N. W. 358, 20 L.R.A.(N.S.) 769; Peterson v. Schmidt, 7 Ohio Cir. Dec. 202; Nelson v. Brassington, 64 Wash. 180; Ann. Cas. 1913A 289, 116 Pac. 629; Jones v. Heavens, 4 Ch. D. (Eng.) 636. See in this connection the note to Hadsley v. Dayer-Smith, Ann. Cas. 1915A 379.

Covenant in Partnership Agreement.

Likewise, a covenant in a partnership agreement, that on the retirement of any partner he shall not engage in the same business, may be enforced by injunction. Hadsley v. Dayer-Smith, 83 L. J. Ch. 770, Ann. Cas. 1915A 379, 111 L. T. N. S. 479, 58 Sol. J. 554, 30 Times L. Rep. 524 [1914] A. C. (Eng.) 979; Rakestraw v. Lanier, 104 Ga. 188, 30 S. E. 735, 69 Am. St. Rep. 154; Glover v. Shirley, 169 Mo. App. 637, 155 S. W. 878. And see the reported case.

Covenant by Employee.

GOVERNING PRINCIPLES.

Ordinarily, the negative covenant in a contract whereby an employee agrees to render services to an employer for a specified period, and not to engage in the same business during such period, does not entitle the complainant to injunctive relief, unless he can show that the employee has some peculiar qualifications. Burney v. Ryle, 91 Ga. 701, 17 S. E. 986; Hammond v. Georgian Co. 133 Ga. 1, 65 S. E. 124; Paxson v. Butterick Pub. Co. 136 Ga. 774, 71 S. E.. 1105; Rosenstein v. Zentz, 118 Md. 564, 85 Atl. 675, 4 L.R.A.(N.S.) 63; Taylor Iron, etc. Co. v. Nichols, 70 N. J. Eq. 541, 61 Atl. 946; Strobridge Lithographing Co. v. Crane, 58 Hun 611 mem. 12 N. Y. S. 898; W. J. Johnston Co. v. Hunt, 66 Hun 504, 21 N. Y. S. 314, *affirmed* 142 N. Y. 621, 37 N. E. 564; Universal Talking-Mach. Co. v. English, 34 Misc. 342, 69 N. Y. S. 813; Kessler v. Chappelle, 73 App. Div. 447, 77 N. Y. S. 285; Magid v. Tannenbaum, 164 App. Div. 142, 149 N. Y. S. 445; Columbia College of Music, etc. v. Tunberg, 64 Wash. 19, 116 Pac. 280; Chain Belt Co. v. Von Spreckelsen, 117 Wis. 106, 94 N. W. 78. And see Sternberg v. O'Brien, 48 N. J. Eq. 370, 22 Atl. 348.

For a discussion of the right to injunctive relief in the case of the breach of a contract by a ball-player or theatrical performer, see the note to Rothenberg v. Packard, Ann. Cas. 1914B 1. As to the validity of a contract by a servant not to engage in a business similar to that of his master after the termination of the employment, see the note to Turner v. Abbott, 8 Ann. Cas. 150.

RULE STATED.

Where a contract of employment contains a valid covenant by the employee that after the termination of the employment he will not engage in the same business as that of the employer, the latter is entitled to an injunction to restrain a breach of the covenant. Caribonum Co. v. LeCouch, 109 L. T. N. S. 587, *affirming* 109 L. T. N. S. 385; Kelly v. McLaughlin, 21 Manitoba 789, 19 West. L. Rep. 633, 1 West. W. Rep. 309; Skeans v. Hampton, 31 Ont. L. Rep. 424, 6 Ont. W. N. 463, 25 Ont. W. Rep. 865, 5 Ont. W. N. 919; Parkers Dye Works v. Smith, 32 Ont. L. Rep. 169, 7 Ont. W. N. 207, 20 Dominion L. Rep. 500; Freudenthal v. Espey, 45 Colo. 488, 102 Pac. 280, 26 L.R.A.(N.S.) 961; Owl Laundry Co. v. Banks, 83 N. J. Eq. 230, 89 Atl. 1055; Witkop, etc. Co. v. Boyce, 64 Misc. 374, 118 N. Y. S. 461, 61 Misc. 126, 112 N. Y. S. 874, *affirmed* 131 App. Div. 922, 115 N. Y. S. 1150; McCall Co. v. Wright, 198 N. Y. 143, 91 N. E. 516, 31 L.R.A.(N.S.) 249; Philadelphia Towel Supply, etc Co. v. Weinstein, 57 Pa. Super. Ct. 290; Columbia College of Music, etc. v. Tunberg, 64 Wash. 19, 116 Pac. 280; Eureka Laundry Co. v. Long, 146 Wis. 205, 131 N. W. 412, 35 L.R.A.(N.S.) 119. But see Star Co. v. Press Pub. Co. 162 App. Div. 486, 147 N. Y. S. 579.

APPLICATION OF RULE.

The rule that an employee will be restrained from breaking an agreement not to engage in the same business after leaving the service of the employer, has been applied in recent cases to the following named employments; driver of laundry wagon, Eureka Laundry Co. v. Long, 146 Wis. 205, 131 N. W. 412, 35 L.R.A.(N.S.) 119; driver for laundry company, who had been furnished with list of names and addresses of company's patrons, Philadelphia Towel Supply, etc. Co. v. Weinstein, 57 Pa. Super. Ct. 290; manager for dealers in automobiles, Kelly v. McLaughlin, 21 Manitoba 789, 19 West. L. Rep. 633, 1 West. W. Rep. 309; manager of dye works, Parkers Dye Works v. Smith, 32 Ont. L. Rep. 169, 7 Ont. W. N. 207, 20 Dominion L. Rep. 500; manager for manufacture of typewriter ribbons and carbon paper, Caribonum Co. v. LeCouch, 109 L. T. N. S. 587, *affirming* 109 L. T. N. S. 385; managerial position in publishing business, McCall Co. v. Wright, 198 N. Y. 143, 91 N. E. 516, 31 L.R.A.(N.S.) 249; music teacher, Columbia College of Music, etc. v. Tunberg,

64 Wash. 19, 116 Pac. 280; salesman, canvasser and collector for grocery concern, Witkop, etc. Co. v. Boyce, 64 Misc. 374, 118 N. Y. S. 461, 61 Misc. 126, 112 N. Y. S. 874, *affirmed* 131 App. Div. 922, 115 N. Y. S. 1150; traveling salesman selling teas and coffees, Skeans v. Hampton, 31 Ont. L. Rep. 424, 6 Ont. W. N. 463, 25 Ont. W. Rep. 865, 5 Ont. W. N. 919; solicitor for laundry, Owl Laundry Co. v. Banks, 83 N. J. Eq. 230, 89 Atl. 1055.

Where it appeared that the defendant sold his shares in a livery company, with a contract in writing that he would never again engage in the livery business within the corporate limits of the town, and became an employee of the company, but later took service in the same town with an opposition livery stable, it was held that an injunction would issue restraining him from so doing. Anders v. Gardner, 151 N. C. 604, 66 S. E. 665. And see Holtman v. Knowles, 141 Ga. 613, 81 S. E. 852.

Similarly, an assistant of a medical practitioner will be enjoined from violating a covenant not to practice after leaving his employer. Freudenthal v. Espey, 45 Colo. 488, 202 Pac. 280, 26 L.R.A.(N.S.) 961; Palmer v. Mallet, 36 Ch. D. (Eng.) 411, 57 L. J. Ch. 226, 58 L. T. N. S. 64, 36 W. R. 460; Fox v. Seard, 33 Beav. 327, 55 Eng. Rep. (reprint) 394. Likewise, a covenant by a solicitor's assistant not to practice after leaving him, has been enforced. Edmundson v. Render [1905] 2 Ch. 320 [1905] W. N. 121. And in Robertson v. Willmott [1909] W. N. 155, an architect's assistant was enjoined from violating such a restrictive agreement.

Considerations Governing Granting of Injunction in Particular Case.

Injury to Plaintiff.

In Columbia College of Music, etc. v. Tunberg, 64 Wash. 19, 116 Pac. 280, the court said: "The motion for nonsuit, . . . was based upon the ground that it had not been shown that any pupils had left the appellant's school on account of respondent's leaving its employ. We grant that the record fails to disclose this fact. But it does disclose an ill-will, as well as an endeavor to influence the minds of certain of the pupils against appellant and its officers. And respondent should not be allowed to claim that immunity which equity gives to those who walk within its precepts, because his effort and his influence failed of results. His continued effort may succeed. To prevent wrong is the peculiar province of equity. His conduct has been such, and promises to be of such character, that damages may result. If so, they would be irreparable, in the sense that they could be estimated only by conjecture and not by any accurate standard."

Laches.

In Fries v. Parr, 139 N. Y. S. 220, holding that an action for an injunction was barred by laches, the court said: "It further appears from the evidence that the defendants not only started the business complained of, but continued it for two years before the plaintiff complained of their acts or took legal proceedings to enjoin them, and that during the two years the plaintiff was fully advised of what the defendants were doing and entered no protest against it. In the meantime the defendants have built up for themselves quite a successful and profitable business. We think the plaintiff has slept on his rights, if he had any, and that he was called on to act promptly, and could not delay proceedings without being charged with the consequences of his laches."

But where an action for an injunction was not commenced until more than ten months after the alleged breach of the contract, the court said: "The trial court entertained jurisdiction of the cause knowing that appellee had waited more than ten months before attempting to protect his rights, and we are not prepared to say that such time, under the circumstances of this case, constituted laches on the part of appellee sufficient to deprive him of resort to a court of equity." Locke v. Murdoch (N. M.) 151 Pac. 298.

Remedy at Law.

In Holliston v. Ernston, 124 Minn. 49, 144 N. W. 415, the court said, quoting Andrews v. Kingsbury, 212 Ill. 97, 72 N. E. 11: "The general rule that a writ of injunction should only issue where there is an unquestionable right and where irreparable injury will be suffered, and there is no adequate remedy at law either on account of the insolvency of the defendant or for some other cause, is not applicable to this case. Courts of equity will, and frequently do, interpose by injunction, thereby indirectly enforcing the performance of negative covenants by prohibiting their breach; and where there is an express negative covenant, courts of equity will entertain bills for injunctions to prevent their violation, even though the same will occasion no substantial injury or though the remedy be adequate at law." And in Artistic Porcelain Co. v. Boch, 76 N. J. Eq. 533, 74 Atl. 680, the court said: "The innumerable instances in which a violation of a contract of the kind under consideration has been enjoined are rested upon the ground that from the nature of such cases just and adequate damages cannot be estimated for a breach of the contract,

and that injunctive relief avoids a multiplicity of actions."

STIPULATION FOR LIQUIDATED DAMAGES.

The fact that the contract stipulates for a fixed sum to be paid to the covenantee in case of a breach thereof, does not oust the jurisdiction of a court of equity. Wills v. Forester, 140 Mo. App. 321, 124 S. W. 1090. And see Buckhout v. Witwer, 157 Mich. 406, 122 N. W. 184, 23 L.R.A.(N.S.) 506. In Magid v. Tannenbaum, 164 App. Div. 142, 149 N. Y. S. 445, the court said: "This case is further differentiated from those in which an injunction has been granted, because if there was a valid contract not to enter a similar employment for a year after his employment with the plaintiffs ceased, the contract itself provided for liquidated damages in case of such breach, and so the plaintiffs would have an adequate remedy at law. In our opinion the record fails to disclose proper and sufficient grounds to warrant the issue of the injunction pendente lite."

And the fact that a bond is given by the covenantor does not vary the rule. Hickey v. Brinkley, 88 Neb. 356, 129 S. W. 553; Fox v. Scard, 33 Beav. 327, 55 Eng. Rep. (reprint) 394; Palmer v. Mallet, 36 Ch. D. (Eng.) 411, 57 L. J. Ch. 226, 58 L. T. N. S. 64, 36 W. R. 460.

ANDERSON

v.

GREAT NORTHERN RAILWAY COMPANY.

Idaho Supreme Court—January 19, 1914.

25 Idaho 433; 138 Pac. 127.

Liens — Logger's Lien — Persons Entitled.

Section 5125 of the Revised Codes, which provides that "every person performing labor upon, or who shall assist in obtaining or securing, sawlogs, spars, piles, cordwood, or other timber, or in obtaining or securing the same," is sufficiently broad and comprehensive to confer a lien upon laborers who work in the employ of a contractor in moving a large quantity of railroad ties a distance of a couple hundred feet from the place where they were piled upon the railroad company's right of way and loading them upon cars for transportation.

[See note at end of this case.]

Same.

The statute (Rev. Codes, § 5125), confers the same lien in favor of every person "performing labor upon" sawlogs, etc., as it confers on every person who assists in "obtaining or securing" such material.

[See note at end of this case.]

Same.

A statute (Rev. Codes, § 5125) which confers a lien in favor of laborers who perform work upon or aid in obtaining or securing "sawlogs, spars, piles, cordwood, or other timber," is sufficiently broad and comprehensive to confer a lien in favor of persons who work upon or assist in obtaining or securing railroad ties, and the words "other timber" are sufficiently comprehensive to include ties.

[See note at end of this case.]

Removal of Property Subject to Lien — Validity of Statute.

Section 5140 of the Revised Codes, which provides for the recovery of damages from any one who eloigns certain property on which a lien exists for labor performed, is constitutional and valid.

Statutes — Title — Effect of Subsequent Codification.

Where a section of a legislative act has been incorporated in the Revised Codes and adopted as a part of the complete statutes of the state, the court will not inquire into or consider the sufficiency of the original title of the act in which such section was originally adopted by the legislature. In such case, it is too late to raise the sufficiency of the title to the original act, which was adopted prior to the date of its incorporation and adoption in the Revised Codes of the state.

Liens — Removal of Property Subject to Lien — Statute.

The purpose and intent of section 5140 of the Revised Codes is to render every person who injures, destroys, or removes any of the property therein described on which a lien exists liable for the amount of the claim held against the property, or, if the property be of less value than the lien claimed, then it allows the claimant the damages which he has sustained by reason of the removal or destruction of the particular property.

Logger's Lien — Persons Furnishing Supplies — Validity of Statute.

Chapter 226, Sess. Laws 1911, giving a lien on logs in favor of a person furnishing supplies, groceries or feed to a contractor or board to an employee is invalid, void, and inoperative, for the reason that it does not provide for any notice to the owner of the property on which the lien is to attach, and affords him no means or method of protecting himself against such claim, and does not provide a method of procedure for taking his property for such claim by "due process of law," and does not give such property owner the "equal protection of the law."

Due Process of Law — What Constitutes.

No process is "due process" which does not give notice, either actual or constructive, and

no taking of property for debt is lawful unless the debt has been created with the knowledge and consent of the debtor.

[See 6 R. C. L. tit. *Constitutional Law*, p. 433.]

Appeal from District Court, Bonner county: FLYNN, Judge.

Action by A. J. Anderson, plaintiff, against Great Northern Railway Company, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. REVERSED.

G. H. Martin for appellant.

C. S. Albert, H. H. Taylor and *Thos. Balmer* for respondent.

C. L. Heitman, amicus curiae.

[440] AILSHIE, C. J.—The appellant commenced this suit on six alleged causes of action which had been assigned to him, and on a seventh in his own favor. A demurrer was sustained to each cause of action and judgment of dismissal was entered, and this appeal was thereupon prosecuted.

One Lee Decker was employed by respondent to take 13,655 railroad ties from where they were stacked on respondent's right of way and remove them a few hundred feet and load them on to respondent's cars. In doing the work involved in this contract, Decker employed six men and secured groceries and supplies from appellant for the use of himself and men while doing this work. Decker appears to have failed to pay his men. The men thereupon and within the statutory time filed liens under the provisions of sec. 5125 of the Revised Codes. Respondent contends, and the trial court agreed with it, that this statute does not contemplate or provide a lien of the kind here sought to be enforced.

Section 5125 provides as follows: "Every person performing labor upon, or who shall assist in obtaining or securing, saw-logs, spars, piles, cordwood, or other timber, has a lien upon the same for the work or labor done upon, or in obtaining or securing the same, whether such work or labor was done at the instance of the owner of the same or his agent. The cook shall be regarded as a person who assists in obtaining or securing the timber herein mentioned."

It must be remembered that this statute is written in the disjunctive and that the lien contemplated is given to "every person performing labor upon . . . saw-logs, spars, piles, cordwood, or other timber" as well as to "every person . . . [441] who shall assist in obtaining or securing" any of the property mentioned. In other words, the same lien is given to one for *"performing work upon"* any of the property enumerated as is given to one who *"assists in obtaining or securing"* any such property. This court adopted this same course of reasoning in construing sec. 5110, Rev. Codes, in Hill v. Twin Falls Salmon River Land, etc. Co. 22 Idaho 274, 125 Pac. 204. This work was undoubtedly done *upon* these ties in removing and loading them; it was work done about, concerning, in respect to, or with reference to these ties. There is little room for doubt but that railroad ties are timber and fall within the enumeration of "other timber" as used in sec. 5125, supra. As authority in point and supporting this view, see Forsberg v. Lundgren, 64 Wash. 427, 117 Pac. 244.

We think the word "timber" as here used refers to any kind of timber as it may be taken from the forest, whether in a prepared state for the use to which it is to be applied or in the natural and unfinished condition. For example, cordwood is enumerated preceding the use of the words "or other timber," and yet cordwood is not a manufactured article. On the other hand, "spars and piles" are enumerated and signify specially prepared pieces of timber for definite purposes. It would be extremely technical and strict to construe the statute as not giving a lien for work upon or in securing ties.

In this case it is alleged that after the ties were loaded on the cars the railroad company elogined them and scattered them along its right of way in the states of Washington, Idaho and Montana and rendered it impossible for the claimants to identify them or foreclose their lien thereon, and appellants seek personal judgments against the company for damages under the provisions of sec. 5140, Rev. Codes. That section provides as follows:

"Any person who shall injure, impair, or destroy, or who shall render difficult, uncertain or impossible of identification, any saw-logs, spars, piles, cordwood, or other timber, upon which there is a lien as herein provided, without the express consent of the person entitled to such lien, shall be liable to the lienholder for the damages to the amount secured by his [442] lien, which may be recovered by civil action against such person."

It will be observed that the foregoing section 5140 applies to any person who shall injure, impair or destroy or shall render uncertain, difficult, or impossible of identification any of the property on which a lien exists under sec. 5125. The objection that sec. 5140 of the Rev. Codes, as originally enacted and found in the 1899 Sess. Laws, p. 188, is unconstitutional and in violation of sec. 16, art. 3 of the state constitution, is without merit, for the reason that this section was subsequently incorporated in the Revised Codes and was adopted as a part of the entire body of the revised statutes and as a part of the complete code of laws of the state. It is now too late to raise the suffi-

ciency of the title to a statute originally adopted prior to the date of the adoption of the Revised Codes, where such statute has been incorporated in the general code of laws. (36 Cyc. 1068; Central of Georgia R. Co. v. State, 104 Ga. 831, 31 S. E. 531, 42 L.R.A. 518; Kennedy v. Meara, 127 Ga. 68, 56 S. E. 243, 9 Ann. Cas. 396; Christopher v. Mungen, 61 Fla. 513, 55 So. 273.)

Lastly, it is argued that sec. 5140 of the Rev. Codes is unconstitutional and void, for the reason that it is violative of sec. 1 of the fourteenth amendment to the federal constitution, and of sec. 13, art. 1, of the state constitution in that it deprives respondent of its property without due process of law and denies to it the equal protection of the laws. We do not think this objection is well founded. In the first place, under this statute, there is no liability against one who injures, destroys or removes such property, unless there is an existing lien thereon. The statute creates the lien. It specifies the kind of a contract and transaction and the conditions under which a laborer will be entitled to a lien. Whenever, therefore, the owner or purchaser of or contractor for property falling within the purview of this statute employs a laborer or enters into a contract which comes within the terms of the statute, the law at once becomes operative and gives to the party rendering the services or performing the labor a lien. This lien exists by operation of law for the period of [443] sixty days. At the expiration of that time, the lien lapses and ceases to exist, unless in the meanwhile the claimant has complied with the provisions of the statute requiring the filing of a written notice of his lien claim, setting forth the facts required to be shown by the statute. If the lien claimant complies with this statute, the lien continues in force from the time of its inception, namely, when he commenced work until the claim is paid or the lien is foreclosed. Under this statute, it is not a question of the lien arising at the time the notice of lien is filed with the proper county official and of the lien relating back to the time the work commenced. There is no such thing under this statute as a lien relating back. The lien arises with the commencement of work and is created by statute, and its continuance beyond sixty days is conditional upon the claimant doing the thing required by the statute.

Now, as for the contention that the statute is void because of being arbitrary, we fail to see wherein this contention contains any merit. The court will first determine whether the claimant was entitled to a lien, and after that fact has been determined, the damages sustained by the lien claimant by reason of eloignment of the property must be determined and assessed in the same way that damages would be determined and assessed in any other case. The fact that this statute may impose an extra burden and hardship upon the owner of the property in that it requires him to ascertain whether any liens exist against the property before removing it, is not a sufficient ground for holding the statute unconstitutional and void. That might be a good argument to present to the lawmaking body, and it might furnish a reason or justification for the legislature making some exceptions in the law, but they have not done so and the court would not be justified in doing so. It is certainly within the power of a railroad company, a lumber company, or of an individual to ascertain whether laboring men have been paid before settling with the contractor, and if they fail to do so, they must assume the consequent burdens and obligations which arise under the statute. The law, therefore, undertakes to render a person [444] who injuries, destroys, impairs or removes the property on which such lien exists liable for the amount of the claim held against the property, or, if the property be of less value than the lien claim, then it allows the claimant the damages which he has sustained by reason of the removal or destruction of the particular property. There is nothing unusual or oppressive about such a statute. The statute might make such a person guilty of a crime, as it does in case of removal of personal property covered by a chattel mortgage. Under the statute, no penalty attaches to the person doing the thing, unless he first violates the statute which prohibits him injuring, impairing, destroying, or removing any such property. If he does this thing, then he is subject to the penalty which may be recovered in a civil action against such person.

The argument advanced that a railroad company would be liable for receiving and shipping ties or other timber product until it can first determine and ascertain whether there are any liens on the property, is unsound. The statute has no application to any such transaction; a common carrier receiving and transporting freight in due course of business would not be liable for impairing, destroying or rendering uncertain or impossible of identification any property on which there is a lien. It does not seem possible that the *mere constructive* notice which the statute imparts would extend beyond the party first removing or disturbing the property. In other words, the liability is not one that would attach to every subsequent purchaser, bailee or carrier of the property.

This brings us to a consideration of the seventh cause of action which involves the validity and constitutionality of chap. 226 of the 1911 Session Laws (1911 Sess. Laws, p. 727). It is argued by counsel that section 1

of this act violates sec. 1, art. 14, of the federal constitution and sec. 13 of art. 1 of the state constitution. Sec. 1 of chap. 226 of the 1911 Session Laws provides as follows:

"Every person, firm, company or corporation selling or furnishing supplies, groceries, feed or other necessaries to any contractor, boarding-house keeper or other person, firm or corporation to be used upon and while such contractor, boarding-house [445] keeper or other person, firm or corporation, or the employer of such contractor, boarding-house keeper or other person, firm or corporation is engaged in obtaining, securing, cutting or manufacturing saw-logs, spars, piles, cord-wood, ties or lumber, has a lien upon the same for the value of the supplies, groceries, feed or other necessaries so furnished."

Section 2 provides for filing a notice of lien, and the remaining sections provide the procedure to be followed, while section 9, being the last section of the act, provides that, "Any person who shall injure, impair or destroy, or who shall render difficult, uncertain or impossible of identification, any saw-logs, spars, piles, cord-wood, ties or lumber upon which there is a lien, as herein provided, without the written consent of the person entitled to such lien, shall be liable to the lien-holder for the damages of the amount secured by his lien, together with treble damages which may be recovered by civil action against such person."

We have examined this statute with unusual care and have considered the authorities cited, both in support of and opposition thereto, and over and above all this have considered what must be the practical workings and effect of this statute. We are not going to review authorities here but shall rather briefly state some of the reasons which have led us to reach the conclusion hereafter to be stated.

Lien laws rest on two cardinal principles: First, that the owner of the property on which the lien is claimed has received some benefit or advantage by reason of the service rendered or material or supplies furnished; and, second, that the owner has contracted with someone, who thereby becomes his agent, to render such service or furnish such material or supplies. The statute under consideration, as may be seen from an examination of section 1, above quoted, runs counter to both these principles of lien laws. It attempts to create a lien irrespective of contract and without regard to any benefit either direct or remote which the owner of the property may have received from the supplies furnished. It furnishes the owner of the property no notice and affords him no method of protecting himself against any such claim, and [446] charges him with a claim which may equal or exceed the value of the property although he has paid the contract price to the men who actually did the labor. In these respects, it undoubtedly has the effect of taking property without due process of law. When the owner of property makes a contract to have work done on such property, he presumably contracts to pay the full value of such work, and he certainly cannot forsee what groceries, feed and supplies the contractor or laboring men may purchase or need in course of the performance of such work. Men must eat and teams must be fed whether they be working or not, and to charge a property owner or one having building done or material furnished with all the "supplies, groceries, feed or other necessaries" which the contractor or any of his men may purchase and use during the performance of such work without giving or serving any notice thereof on the person to be charged would certainly be taking the property of one man and giving it to another without "due process of law" and without affording the party "the equal protection of the law." No process is "due process" which does not give notice, either actual or constructive, and no "taking of property" for debt is lawful unless the debt has been created with the knowledge and consent of the debtor. This knowledge and consent may be constructive so far as it is necessary to create a charge against property, but the statute which furnishes the constructive notice must provide process by which the claims may be measured and established so the property owner may have a ready and certain method of knowing or ascertaining his liability. No such method is furnished by the statute under discussion. There is no means afforded for the property owner to learn who has furnished groceries, supplies or necessaries to the contractor or men until after his liability has attached for laborers and materialmen's liens if he has not in the meanwhile paid them in full. If this statute should be upheld in its present condition, its enforcement would subject the owner of the property on which the lien is claimed to double and possibly treble liability for the work performed or materials furnished.

[447] We conclude that chapter 226 of the 1911 Session Laws is invalid and void, for the reasons above set forth. The following authorities are in point upon the legal principles here involved and hold to the effect above suggested: Davidson v. New Orleans, 96 U. S. 97, 24 U. S. (L. ed.) 616; Rogers-Ruger Co. v. Murray, 115 Wis. 267, 95 Am. St. Rep. 901, 91 N. W. 657, 59 L.R.A. 737; Perrault v. Shaw, 69 N. H. 180, 76 Am. St. Rep. 160, 38 Atl. 724; Meyer v. Berlandi, 39 Minn. 438, 12 Am. St. Rep. 663, 40 N. W. 513, 1 L.R.A. 777; Chicago, etc. R. Co. v. Chicago, 166 U. S. 226, 17 S. Ct. 581, 41 U. S. (L. ed.) 979; Spry Lumber Co. v. Sault Sav. Bank Loan, etc. Co. 77 Mich. 199, 18

Am. St. Rep. 396, 43 N. W. 778, 6 L.R.A. 204; Bielenberg v. Montana Union R. Co. 8 Mont. 271, 20 Pac. 314, 2 L.R.A. 813; Catril v. Union Pac. R. Co. 2 Idaho 576, 21 Pac. 416.

The judgment in this case will be reversed as to the first six causes of action prosecuted under section 5125, Rev. Codes, and this case is remanded, with direction to the trial court to overrule the demurrer thereto, and the judgment is affirmed as to the seventh cause of action prosecuted under chap. 226 of the 1911 Sess. Laws. Appellant will be awarded six-sevenths of the taxable costs of this appeal.

SULLIVAN, J. (*concurring in part and dissenting in part*).—I concur in the conclusion reached by Chief Justice Ailshie to the effect that sec. 1 of chap. 226 of the Session Laws of 1911, p. 727, is unconstitutional and void, in that it undertakes to deprive one of property without due process of law; and I dissent to that part of Chief Justice Ailshie's opinion wherein he holds that the plaintiff and his assignors have a valid lien upon said ties for loading them on the cars after they had been manufactured and delivered to the railroad company upon their right of way. All of the work performed upon said ties was done and the ties delivered as a finished timber product, to the respondent. Sec. 5125 provides that "every person performing labor upon, or who shall assist in obtaining or securing, saw-logs, spars, piles, cordwood, or other timber, has a lien upon the same for the work or labor done upon, or in obtaining or securing the same." The legislature [448] in enacting that section did not have in view, and did not intend to provide for, a lien upon the timber products there referred to, for work and labor upon them after they had been delivered to the owner as finished products.

In this case, all of the work required to complete the ties had been done and the ties delivered to and placed upon the right of way of the defendant. The respondent and his assignors were employed by a person who had a contract with the railroad company to place said ties upon the cars for distribution along the company's railway lines. They began their work about November 13, 1912, and completed it about December 10, 1912. Thereafter, on January 14, 1913, thirty-five days after they had completed loading the ties, and after the railroad company had moved said ties out of the state, they filed their liens. The railroad company had transported said ties out of the state before the lien was filed, and innocently so, and as I view it, it would be an outrage upon justice to permit the plaintiff to penalize the defendant in three times the value of the wages sought to be recovered, under the facts of this case. It is a monstrous proposition to me to hold that one who loads on the cars certain timber that has been manufactured and delivered to the railroad company for transportation can compel the railroad company to hold the material for thirty-five or sixty days in order to permit him to file a lien.

The clear intent of the legislature in enacting said section 5125 was to give a lien for labor performed in the woods and logging camps, upon timber products before they were delivered as completed products to the owner.

After those ties had been delivered to the company, there was no other labor required to obtain or secure them. The respondent had already "obtained and secured" them. The labor for which appellant claims a lien here was performed subsequently to the time the ties were obtained and secured by the respondent and his assignors merely took the ties and placed them on the cars for shipment after they had been "obtained and secured" and delivered into the possession of respondent and piled on its right of way by [449] other parties. Those ties were in the possession of the respondent and were completed timber products before the appellant performed any labor in connection with them.

If the legislature had desired to give a lien to those who performed labor in loading ties upon the cars, they might have done so; but as I view it, they have not attempted to do that. They were simply attempting to give a lien for the work done in procuring the finished timber products mentioned in said section and delivering them to the owner.

In states having statutes similar to ours, such statutes are regarded as timber lien statutes enacted for the purpose of protecting laborers who produce the finished product, such as cordwood, saw-logs, ties, etc.,—those who work in the woods and those who deliver such products, after they are finished, to the owner. (See Jones on Liens, secs. 702–730.) This intent is clearly shown by the phraseology of the statute providing a lien for all those who shall "perform labor upon," etc., enumerating only the raw products of the woods and the products that are produced in the woods, such as "spars, piles, cordwood or other timber products." The last part of said section, to wit, "the cook shall be regarded as a person who assists in obtaining or securing the timber herein mentioned," clearly shows that said statute was intended only to secure those who worked in the woods or in hauling such products to the place where they were to be delivered to the owner.

Under the construction of the provisions of said statute by the majority, railroad construction men who lay these ties in the roadbed and the cooks who prepare their food assist in "obtaining or securing" them. Un-

less the cooks and tie-layers, and even those who furnished supplies to the railroad construction camps in which these men were working, were paid immediately and simultaneously with the laying of each tie, where the ties were secured from different places and laid indiscriminately, they would be entitled under the construction of the statute to an action for damages against the railway company for commingling the ties and impairing their liens. The legislature could not have intended to thus [450] cripple business operations, without requiring each person to notify the company as soon as the work was done that he had not been paid for his labor.

Certainly none of the labor performed by the appellant and his assignors was performed upon said ties, according to the allegations of the complaint, before they were completed ties and delivered to the possession of the respondent, and the respondent in no manner assisted in "obtaining or securing" said ties, within the meaning of those words as used in said statute. It is true the appellant alleges in third paragraph of his complaint that he "performed labor upon and assisted in obtaining and securing said railroad ties," while the other allegations of the complaint clearly show that that statement is false and that they did nothing toward "obtaining and securing" said ties.

All over the timber country in the north men have contracts for placing logs, cordwood and lumber upon cars for the purpose of shipping them to different points in the state or out of the state, and the legislature never intended to give a lien, by the provisions of the laborer's lien law, to persons who place such finished timber products upon the cars for shipment after they have been delivered to the owner. Is it possible or probable that it was intended to give a lien to persons who are employed to load lumber upon a car for shipment out of the state; that such persons have sixty days in which to file a lien, when it is well known by those who load the lumber that it is to be shipped immediately to other parts of the state or out of the state? And if the owner ships the lumber, that he is penalized in three times the value of the labor? The legislature never intended said lien law should be applied so as to cripple business, as will be done by the construction placed upon the statute by the majority of the court. The action of the trial court in sustaining the demurrer in this case ought to be affirmed.

STEWART, J. (*dissenting*).—I dissent from the majority of the court in their two opinions upon the question that sec. 1, chap. 226 of the 1911 Sess. Laws (p. 727) violates sec. 1, [451] art. 14 of the federal constitution and sec. 13 of art. 1 of the state constitution.

Section 1 provides: "Every person, firm, company or corporation selling or furnishing supplies, groceries, feed or other necessaries to any contractor, boarding-house keeper or other person, firm or corporation to be used upon and while such contractor, boarding-house keeper or other person, firm or corporation, or the employer of such contractor, boarding-house keeper or other person, firm or corporation is engaged in obtaining, securing, cutting or manufacturing saw-logs, spars, piles, cordwood, ties or lumber, has a lien upon the same for the value of the supplies, groceries, feed or other necessaries so furnished."

In this case one Decker was employed by respondent to take railroad ties from where they were stacked on respondent's right of way and remove them a few hundred feet and load them on to respondent's cars. In doing the work involved in the contract, Decker employed men and secured groceries and supplies from appellant for the use of himself and men while doing the work He failed to pay the men, and the men, within the statutory time, filed liens under the provisions of sec. 5125, Rev. Codes. Respondent contends, and the trial court agreed with him, that this statute does not contemplate or provide for a lien of the kind here sought to be enforced.

In connection with this section it is clear that chap. 226 of the Sess. Laws of 1911 has no repealing clause and is not an amendment of sec. 5125. It will be observed by comparing these two sections that sec. 1 of chap. 226 does not contain "every person performing labor upon," which is incorporated in sec. 5125, but does provide "every person, firm, company or corporation selling or furnishing supplies, groceries, feed or other necessaries to any contractor, boarding-house keeper or other person, firm or corporation to be used upon and while such contractor, boarding-house keeper or other person, firm or corporation . . . is engaged in obtaining"; then follows the rest of the quotation above given from sec. 1.

[452] It will thus be seen that sec. 1 contains a provision, "Every person, firm, company or corporation selling or furnishing supplies, groceries, feed or other necessaries, to any contractor, boarding-house keeper or other person, firm or corporation to be used upon and while such contractor, boarding-house keeper or other person, firm or corporation . . . is engaged in obtaining," and that chap. 226, 1911 Session Laws, does not repeal sec. 5125, Rev. Codes, specifically or by implication, and is not repugnant to such section.

The two legislative acts are not repugnant to or in conflict with each other, but the one last passed is the latest expression of the legislature upon the creation of a lien for selling or furnishing supplies, groceries, feed

or other necessaries to any contractor, boarding-house keeper or other person or corporation to be used upon and while such contractor, boarding-house keeper or other person, firm or corporation *is engaged in obtaining*, etc. So these two acts are the same in effect, except the provisions in sec. 1 of chap. 226 as to furnishing merchandise such as groceries, feed and other necessaries to be used while the contractor is engaged in obtaining, etc. This is not found in sec. 5125. That section provides for a lien for the work and labor upon or in obtaining or securing sawlogs, etc. If both acts by any reasonable construction can be construed together, both should be sustained. (36 Cyc. pp. 1073–1079.)

This same author announces what we think is the true rule on p. 1077: "When two statutes cover, in whole or in part, the same subject matter, and are not absolutely irreconcilable, no purpose of repealing being clearly shown, the court, if possible, will give effect to both. Where, however, a later act covers the whole subject of earlier acts and embraces new provisions, and plainly shows that it was intended, not only as a substitute for the earlier acts, but to cover the whole subject then considered by the legislature, and to prescribe the only rules in respect thereto, it operates as a repeal of former statutes relating to such subject matter, even if the former acts are not in all respects repugnant to the new act. But in order to effect such repeal by implication, it must appear [453] that the subsequent statute covered the whole subject matter of the former one, and was intended as a substitute for it. If the later statute does not cover the entire field of the first and fails to embrace within its terms a material portion of the first, it will not repeal so much of the first as is not included within its scope, but the two will be construed together, so far as the first still stands."

This rule is also followed by this court in the case of People v. Lytle, 1 Idaho 143.

This subject is annotated by the author in the quotations given from Cyc., and most of the courts in the different states of the Union have followed the rule quoted above, and we believe that such rule should be adhered to by this court. It has been approved by this court.

In the case of Phillips v. Salmon River Min. etc. Co. 9 Idaho 149, 72 Pac. 886, this court, in construing a laborer's lien as it existed at that time, announced the rule that "the provisions of our lien laws must be liberally construed with a view to effect their objects and promote justice," and we think the general rule above stated is the correct rule and should be applied in the construction of a statute of the character involved in this case

In the case of Empire Copper Co. v. Henderson, 15 Idaho 635, 99 Pac. 127, this court held that in construing an act of the legislature the court should ascertain and give effect to the legislative intent where that can be ascertained; but where the language of an enactment is clear and specific as to the subjects upon which a lien is provided for, then the court cannot assume that the legislature included subjects not mentioned in the language of the act, but must accept the act as formulated and adopted by the legislature. (See Holmberg v. Jones, 7 Idaho 752, 65 Pac. 563; 36 Cyc. 1107; Idaho Mut. Co-operative Ins. Co. v. Myer, 10 Idaho 294, 77 Pac. 628.)

In the case of Mara v. Branch (Tex.) 135 S. W. 661, the court of appeals of Texas, in dealing with merchandise, defines the same as follows: "'Merchandise' is a term of very extended meaning, and usually conveys the idea of personalty [454] used by merchants in the course of trade. It may as a fact include *every article of traffic*."

In the case of Ensign v. Coffelt, 102 Ark. 568, 145 S. W. 231, the supreme court of Arkansas, in construing a statute which makes void notes given in ordinary form for the price of patented machines, etc., holds that it shall not extend to merchants and dealers who sell patented things in the usual course of business; the words "merchant" and "dealer" meaning persons engaged in the business of buying and selling merchandise or other personal property in the usual course of trade.

Sutherland on Statutory Construction, vol. 2, sec. 363, lays down the rule of law as follows:

"The intent is the vital part, the essence of the law, and the primary rule of construction is to ascertain and give effect to that intent. The intention of the legislature in enacting a law is the law itself, and must be enforced when ascertained, although it may not be consistent with the strict letter of the statute. . . . Intent is the spirit which gives life to legislative enactments. In construing statutes, the proper course is to start out and follow the true intent of the legislature and to adopt that sense which harmonizes best with the context and promotes in the fullest manner the apparent policy and objects of the legislature."

The rule is generally recognized by the authorities to be that where a statute enumerates the things upon which it is to operate, it is to be construed as excluding from its effect all those not expressly mentioned; *expressio unius exclusio alterius*. (Perkins v. Thornburgh, 10 Cal. 189; Smith v. Randall, 6 Cal. 47, 65 Am. Dec. 475.)

In the case of In re Hull, 18 Idaho 475, 110 Pac. 256, 30 L.R.A. (N.S.) 465, this court held and stated on p. 279: "We enter upon the consideration of this statute fully con-

scious of the duty which rests on the court to ascertain what the law is on the subject, and to declare it as we find it rather than as we think it ought to have been. We have no right to add to or take from the law."

[455] The court cannot speculate upon the intent of the legislature, but must accept the interpretation of the act as it appears therein. This rule is discussed and determined in the case of Empire Copper Co. v. Henderson, 15 Idaho 635, 99 Pac. 127; Holmberg v. Jones, 7 Idaho 752, 65 Pac. 563.

The language used in chap. 226, Session Laws 1911, sec. 1, when read as an entirety, is clear and would seem to furnish its own interpretation, in designating the property upon which liens may be filed by certain persons, firms and corporations for supplies, groceries, feed or other necessaries sold or furnished to any contractor, boarding-house keeper or other person, firm or corporation *to be used upon and while* such contractor, boarding-house keeper or other person, firm or corporation, or the employer of such contractor, boarding-house keeper or other person, firm or corporation is engaged in *obtaining, securing, cutting or manufacturing* saw logs, spars, piles, cordwood, ties or lumber.

If the language used in chap. 226, 1911 Sess. Laws, sec. 1, is unconstitutional, then it results in discrimination against the merchant and salesman or the producer of feed and sustenance who is engaged in selling or furnishing supplies, groceries, feed or other necessaries to any contractor, boarding-house keeper, or other person or corporation, to be used upon and while such contractor, boarding-house keeper or other person, firm or corporation is engaged in obtaining, etc., as without the furnishing of such supplies to the men who are doing the labor in obtaining, securing, cutting or manufacturing saw-logs, spars, piles, cordwood, ties or lumber by such merchants or salesmen, such employees so engaged would be deprived of the necessaries of life and would be unable to live without such supplies, and the man who provided them, under the provisions of the statute in question, is justified in claiming a lien, and the statute should not be held void.

I therefore hold that chap. 226, 1911 Sess. Laws, is not in violation of the constitution. Neither is the act beyond the power vested in the legislature in enacting laws providing for mechanics' liens either for laborers engaged in obtaining, securing and cutting or manufacturing saw logs, spars, piles, [456] cordwood, ties or lumber, or for every person, firm, corporation, or company *selling or furnishing supplies, groceries, feed or other necessaries to any contractor, boarding-house keeper or other person, firm or corporation, or the employer of such contractor, boarding-house keeper or other persons, firm or corporation engaged in obtaining, securing, cutting or manufacturing saw-logs, spars, piles, cordwood, ties or lumber.*

My conclusion in this case is that chap. 226 is not unconstitutional, and should be sustained by this court, and that a judgment should be entered in this case accordingly.

NOTE.

By Whom and for What Labor or Services Logger's Lien May Be Claimed.

I. Manual Labor:
1. In General, 198.
2. Employee of Contractor, 202.
II. Services of Contractor, 202.
III. Services of Team, 208.
IV. Miscellaneous, 204.

I. Manual Labor.

1. In General.

The statutes which give a lien to those who work on timber or logs differ materially in wording, but in all cases the object of the acts is to protect the wages of the men who actually do the manual labor and to accomplish this object the courts have construed such statutes liberally. As was said in Breault v. Archambault, 64 Minn. 420, 67 N. W. 348, 58 Am. St. Rep. 545: "That the statute in question was enacted to correct an abuse and to remedy an evil which had grown to enormous proportions is a matter of common history. Many owners of pine land habitually entered into logging contracts with reckless and irrepressible parties, the purpose and inevitable result being that the men who did the work were unable to collect their wages. The statute was passed to protect these men and the interests of labor, and a sound public policy require that it be liberally construed; that a construction be placed upon it which will protect all who, in furtherance of the common object, go into the logging camp, and there engage in the business of converting trees into logs and timber, in hauling the same to the banks of the streams, and there driving or rafting the product of their labor to market.

It has been held under a statute providing that "every person performing labor upon, or who shall assist in obtaining or securing sawlogs . . . has a lien upon the same for the work and labor done" etc., that a person who does the work of blasting rocks along a river to make a passage for logs thereon, which blasting is part of a general logging enterprise, is entitled to a lien. Duggan v. Washougal Land, etc. Co. 10 Wash. 84, 38 Pac. 856. And where the work

done consists in construing a road which is necessary for the taking of logs from one place to another in a logging camp, the person doing that work may claim a lien therefor. Proulx v. Statson, etc. Mill Co. 6 Wash. 478, 33 Pac. 1067. But no lien will be given to those who do the work of opening up a public road leading to a logging camp laid out by county commissioners over which no logs are to be hauled but which is to be used only for hauling supplies to the camp. Duggan v. Washougal Land, etc. Co. 10 Wash. 84, 38 Pac. 856. In Grand Rapids Chair Co. v. Runnels, 77 Mich. 104, 43 N. W. 1006, an affidavit in an action brought under a lien law which gave a lien to laborers for 'cutting, skidding, falling, hauling, scaling, banking, driving, running, rafting, or booming any logs" etc., alleged that the labor was performed in "cutting, skidding, hauling, chopping, sawing, swamping, loading, and falling." It was held that the services mentioned were within the meaning of the statute since "chopping" was included in "cutting," and "loading" was a necessary part of the "hauling," and "swamping" belonged to "skidding" as it consisted in the cutting out of the brush and removal of the rubbish in the way of getting the logs to the skidway.

It has been held that a scaler has a lien on logs for his service in scaling them. Meands v. Park, 95 Me. 527, 50 Atl. 706; Kline v. Comstock, 67 Wis. 473, 30 N. W. 920. See also Kennedy v. South Shore Lumber Co. 102 Wis. 284. And under a statute providing that "whoever labors at cutting, hauling, rafting or driving logs or lumber has a lien thereon for his personal services," it has been held that one who cuts, peels, and piles lumber is entitled to a lien. Bondur v. Le Bourne, 79 Me. 21, 7 Atl. 814. So a person who belonged to a gang of loggers and who spent his last day in getting together the tools which had been used in the enterprise has been held to be entitled to a lien for his services. Milton v. Underwood Lumber Co. 79 Wis. 646, 48 N. W. 857.

But under a statute giving a lien to "whoever labors at cutting, hauling, rafting or driving logs or lumber," it has been held that one who "sticks" lumber, that is, places thin strips of wood between layers of boards or lumber to secure a proper circulation of air through the pile, is not entitled to a lien. Hutchins v. Blaisdell, 106 Me. 92, 75 Atl. 291, wherein the court said: "Does the statute give a lien for sticking lumber? We think not. The evidence is barren of any explanation of the term but it is familiar knowledge that it is the process of placing thin strips of wood between layers of boards or timber in order to secure a proper circulation of air and the consequent seasoning of the lumber without warping or decay. It is not a necessary incident of hauling, but a distinct and independent branch of work that requires experience and skill in order to accomplish the best results. The work must be carefully done and requires time, for lumber improperly stuck may be greatly damaged. One crew may be and often is hired to haul and another to stick. A man may be competent to do the one but incompetent to do the other. A contract to haul would include loading and unloading but would not be construed to include sticking, because not all lumber is required to be stuck, and a contract to haul and stick would not be fulfilled by simply hauling and unloading in piles. The legislature might well have provided a lien for such work but it has not yet done so, and the court cannot create it."

Where a person occupies the position of foreman or superintendent of an entire logging operation and had charge of the men engaged in cutting and hauling the logs, but performs no manual labor on the logs, he does not "labor" within the meaning of a statute which provided that "whoever labors at cutting . . . logs or lumber . . . has a lien" etc. Meands v. Park, 95 Me. 527, 50 Atl. 706.

Under a statute declaring that "every person doing the work of cutting and sawing logs into lumber, getting out wood pulp, . . . shall have a lien upon the . . . lumber for the amount of wages," it has been held that one who does work directly for the betterment of the property, such as cutting, hauling and rafting logs is entitled to a lien thereon. Thomas v. Merrill, 169 N. C. 623, 86 S. E. 593.

A logger who is detained by his employer and is ready to do service for him, but whose services are not actually needed, is entitled to compensation for the time thus spent and has a lien on masts cut and hauled by a crew of which he is a member, under a statute which gives to log laborers a lien for personal services. McCrillis v. Wilson, 34 Me. 286, 56 Am. Rep. 655.

Under a statute declaring that "any person who shall do or perform any labor or services in cutting . . . sawing . . . into lumber . . . any logs" shall have a lien, it has been held that work done in repairing the machinery of a sawmill is of such a nature as to give a right to a lien. Engi v. Hardell, 123 Wis. 407, 100 N. W. 1046.

Where a statute provides that "every person performing labor upon, or who shall assist in obtaining or securing saw logs, spars, piles, cordwood, shingle bolts, or timber, . . . shall have a lien upon the same for work or labor done upon, or in

obtaining or securing . . . the particular saw logs, spars, cordwood, shingle bolts, or other timber in said claim of him described" etc., laborers who cut and manufacture railroad ties in the woods are entitled to a lien. Forsberg v. Lundgren, 64 Wash. 427, 117 Pac. 244 (*superseding* Ryan v. Guilfoil, 13 Wash. 373, 43 Pac. 351).

A statute which provides that "every person performing labor upon or who shall assist in obtaining or securing saw logs, spars, piles, cord wood, shingle bolts, or other timber, and the owner or owners of any tugboat or towboat which shall tow or assist in towing, . . . and the owner . . . of any logging or other railroad over which saw logs . . . or other timber . . . shall be transported and delivered, shall have a lien upon the same" etc. has been held to apply to the labor of one who hauls timber products after they have been cut, and who does not use in doing the work a "tug boat," "towboat" "logging or other railroad." O'Brien v. Perfection Pile Preserving Co. 49 Wash. 395, 95 Pac. 489.

Under a statute which gives to laborers who perform work and labor a lien on the production of their labor, laborers who cut timber into logs and haul and place them on a mill skidway are entitled to a lien on the lumber made from the logs as their labor is part of the work necessary to change the timber into lumber. Klondike Lumber Co. v. Williams, 71 Ark. 334, 75 S. W. 854.

Under a statute which gives a lien to "every person doing the work of cutting or sawing logs into lumber" etc. it has been held that the following persons are entitled to a lien: a mill hand piling lumber; a mill hand inspecting lumber; and all others engaged in handling lumber at a sawmill, including the sawyer, the lumber stacker, the mill foreman, the slabman, the saw filer, the engineer for the mill engine, the fireman at the mill boiler, the lumber handler, the edgerman, the jacker and piler. Hogsed v. Gloucester Lumber Co. (N. C.) 87 S. E. 337, wherein it was also held that those who were engaged on a train hauling logs in a timber plant, such as the engineer thereon, the dogger on carriage, the fireman, conductor, and brakeman on the train, the night watchman, and all connected with the repairs of the machinery, or the running of the log train, or the bringing in of the logs to the mill, did not come within the words of the act and were not entitled to a lien.

It has been held that a person was not entitled to a lien on lumber manufactured at a sawmill where it appeared that he superintended the building of an addition to the mill and the installation of the machinery, and that later when the mill started operating he oversaw the keeping of the mill and machinery in repair when breakages occurred, unless he could separate the work done while the mill was in operation from that performed previous thereto. Glover v. Hynes Lumber Co. 94 Wis. 457, 69 N. W. 62.

And it has been held that where a statute gives a lien to those who furnish timber or other supplies to a sawmill a person who cuts and hauls logs, which he does not own, to a mill, is not entitled to a lien for his services. Kendall v. Davis, 52 Ga. 9. Balkcom v. Empire Lumber Co. 91 Ga. 651, 17 S. E. 1020, 44 Am. St. Rep. 58; Trapp v. Walters, 6 Ga. App. 480, 65 S. E. 306.

Under a statute which provides, in effect, that every person performing labor on, or who shall in any manner assist, in the manufacture of lumber shall have a lien on the lumber while it remains at the yard where it is manufactured, it has been held that where work is performed in, around and about a sawmill, and in some manner connected with and incidental to the converting of timber into lumber, those who do the work may claim a lien for their services. Alderson v. Lee, 52 Ore. 92, 96 Pac. 234.

Under a statute which declares "that any person or persons who perform any labor or services in manufacturing lumber or shingles, . . . shall have a lien thereon" and that "the word 'person' or 'persons' shall be interpreted to include cooks, blacksmiths, artisans, and all others usually employed in performing such labor and services," it has been held that one who furnishes shingle bands to bind manufactured shingles has a lien on the shingles for his services. Bass v. Williams, 73 Mich. 208, 41 N. W. 229.

Where a statute provides that "any person or persons who perform any labor or services in manufacturing lumber or shingles in or about any lumber or shingle mill, or in cutting, skidding, falling, hauling, scaling, banking, driving, running, rafting, or booming any logs, timber, cedar posts, telegraph poles, railroad ties, bark, shingle bolts, stave bolts, staves, cordwood, pulp wood, hop poles, hoop poles, veneering wood or any other forest products in this state, shall have a lien thereon for the amount due for such labor or services" etc., it has been held that no lien is given to a person who hauls the product into which logs and timber are manufactured from a mill yard to a railroad. Villenuve v. Sines, 92 Mich. 556, 52 N. W. 1007. And under a statute of similar import the same rule was laid down in the case of McGeorge v. Stanton-De Long Lumber Co. 131 Wis. 7,110 N. W. 788. See also Mitchell v. Page, 107 Me. 388, 78 Atl. 570. *Compare* the reported case. In McGeorge v. Stanton-De Long Lumber Co.

supra, the court said: "The language of the statute provides for a lien upon lumber 'material' for the labor of producing the same from saw logs. Otherwise no lien is given thereon. The complete process of manufacturing logs into lumber ordinarily includes the work of placing the lumber in the sawmill yard in piles but not that of transporting the same from the yard to market. Such process is ended at the point in the mill yard from which it is designed that the lumber shall be taken to enter into consumption."

It has been held that a blacksmith who works in a logging camp is entitled to a lien for his services equally with the lumbermen. Breault v. Archambault, 64 Minn. 420, 67 N. W. 348, 58 Am. St. Rep. 545, wherein the court said: "It is evident that a cook or a blacksmith is as essential to a logging crew as is the man who swings an ax or drives a team, and it is also evident that both perform manual labor. If the ax man or the teamster was compelled to leave his work, and spend two hours of each day in preparing his own food, or in shoeing his horses, or repairing his sled or tools, would it be suggested that his time while so engaged should be deducted from his day's work, and a lien allowed for the balance only? We believe that no one would think of asserting such a proposition. And, if this be so, why should a person who renders these services, but performs no other, be declared outside of the statute, and thus deprived of a lien? The camp cook and the blacksmith are part of the crew whose business it is to cut and bank logs. They do not personally and directly engage in the work of cutting the logs or in handling them, but it is absolutely necessary that the men personally and directly engaged be furnished with food, that the animals be shod, that the sleds be kept repaired, and the tools be sharpened and kept in order." In Glazener v. Gloucester, Lumber Co. 167 N. C. 676, 83 S. E. 696, however, it was held that a blacksmith employed at a lumber plant whose duties were to make repairs from time to time on the cars which were used to haul out logs from the woods, and to make necessary repairs, in the way of blacksmithing, on the sawmill machinery, was not entitled to a lien under a statute which gave a lien to every person who did the work of cutting or sawing logs into lumber.

It has been held that one who worked for a railroad company, building and helping in repairing its railway, which was constructed to transport the timber felled in its territory, and which was moved, as the timber disappeared, from place to place, had no lien for his services on logs which were carried on the railroad. Carpenter v. McCord Lumber Co. 107 Wis. 611, 83 N. W. 764. Nor is one who does repair work on a railroad track and bridge over which a logging train is run entitled to a lien on the lumber which is cut at a sawmill from the logs brought in by such train, under a statute which gives a lien to all those who do the work of "cutting or sawing logs into lumber." Glazener v. Gloucester Lumber Co. 167 N. C. 676, 83 S. E. 696.

One who does work consisting in driving piles and building docks and tramways for permanent use in connection with a sawmill, which structures are necessary to the business of the mill, has no claim to a lien on the product of the mill for such services, under a statute which provides that "any person who shall do or perform any labor or services in cutting, felling, hauling, running," etc., "or manufacturing into lumber, any logs," etc., shall have a lien on such logs and lumber. Kendall v. Hynes Lumber Co. 96 Wis. 659, 71 N. W. 1039. And it has been held that a person who furnishes a cable and boom chains for logging operations, and also does work shoeing horses which are used in such operations has no lienable claim on the logs for his services. Braeger v. Bolster, 60 Wash. 579, 111 Pac. 797.

Where a statute gives a right to boom companies duly incorporated to take possession of logs which come down a stream and requires that the logs then taken possession of shall be inspected and scaled under the supervision of a state surveyor it has been held that he may by statute be given a lien on the logs of private persons for performing such services. Lindsay, etc. Co. v. Mullen, 176 U. S. 126, 20 S. Ct. 325, 44 U. S. (L. ed.) 400.

A New York statute, entitled "Artisans' Lien on Personal Property," provides that "a person who makes, alters, repairs, or in any way enhances the value of an article of personal property, at the request or with the consent of the owner, has a lien on such article, while lawfully in possession thereof, for his reasonable charges for the work done and material furnished, and may retain possession thereof until such charges are paid." Under that statute it has been held that one who cuts, skids and draws logs has no lien thereon for his services, as the acts refer only to skilled labor as distinguished from common labor, and for the further reason that the law applies to personal property only and not to trees, the cutting of which does not constitute a making, altering, or repairing of an article of personal property. O'Clair v. Hale, 25 Misc. 31, 54 N. Y. S. 386 (*affirmed* in O'Clair v. Hale, 35 App. Div. 77, 54 N. Y. S. 388, on the ground that the lienor had not proved such possession as would entitle him to a lien under the

statute). To the same effect see Brackett v. Pierson, 114 App. Div. 281, 99 N. Y. S. 770.

2. Employee of Contractor.

In a few cases, some of which are of no present authority because of statutory amendments (see statements after cases set out infra) it has been held that a person who performs labor on logs is not entitled to a lien thereon for his services where he is in the employ of a person who is doing the work under a contract with the owner of the logs. Thus it has been held that laborers employed by one who has a contract with the owner of logs to "drive" them down a stream have no right to a lien on the logs by virtue of a statute which provides "that laborers and contractors, contracting and engaging to cut, raft or sell logs or timber of any kind, or to perform any labor in connection with the sale and delivery of any such logs or timber, shall have a first lien on such logs or timber." etc. Wright v. Terry, 23 Fla. 160, 2 So. 6. To the same effect see Landry v. Blanchard, 16 La. Ann. 173. And where a statute gives a lien to "any person who labors at cutting, hauling . . . logs or lumber . . . for his personal services" etc., a laborer who works on logs for a contractor and who has no agreement direct with the owner of the logs has no lien thereon for his services. Jacobs v. Knapp, 50 N. H. 71. (But see N. H. Public Statutes, 1901 p. 452, sec. 13.) So where a statute creates a lien in favor of "every person performing labor upon, or who shall assist in obtaining or securing saw logs, piling, railroad ties, . . . whether such work or labor was done at the instance of the owner of the same or his agent," one who is employed to do work of the kind mentioned in the act by a person who stands in the relation of a contractor to the owner of the logs is not entitled to a lien. Lane v. Lane Potter Lumber Co. 40 Mont. 541, 107 Pac. 898. (But see Mont. Laws 1909, p. 66.)

On the other hand, it has been held, in a number of cases, under statutes variously worded, that a log laborer is entitled to a lien for his services even though the services are furnished through a contractor. Klondike Lumber Co. v. Williams, 71 Ark. 334, 75 S. W. 854; Allen v. Roper, 75 Ark. 104, 86 S. W. 836; Sattes, etc. Lumber Co. v. Hales, 11 Ga. App. 569, 75 S. E. 898; Doe v. Monson, 33 Me. 430; Reilly v. Stephenson, 62 Mich. 509, 29 N. W. 99; King v. Kelly, 25 Minn. 522; Munger v. Lenroot, 32 Wis. 541. See also Kendall v. Davis, 52 Ga. 9; Trapp v. Watters, 6 Ga. App. 480, 65 S. E. 306. In Munger v. Lenroot, supra, the court said: "The statute is founded upon the equitable principle that the laborer who, by his services, has imparted additional value to property of this kind, shall have a lien upon it for his reasonable charges. His right to the lien does not depend upon the fact that he was employed by the general owner of the property to perform labor upon it; but he has a lien when hired by a contractor. So far as the general owner is concerned, if he does not himself employ the laborer, the proceeding is strictly *in rem*. Where the laborer is employed by one not the general owner, as in the case before us, the proceeding has a double aspect, to enforce the personal liability of the debtor as well as to enforce a lien given by the statute. This law requires that the person or corporation liable for the payment of the debt shall be the defendant in the action; but I think the legislature did not intend to restrict the lien to the case where the general owner hired the laborer and was himself personally liable for the services. If this were the intention of the statute then it is very apparent that many cases would arise where the laborer would have no lien, because not employed by the general owner, but by a contractor. I have no doubt, therefore, that the legislature intended by the first section to give the lien absolutely to the laborer, regardless of the question whether he had rendered the services under a contract with the general owner or not."

II. Services of Contractor.

There is some authority to the effect that a person who takes a contract to do logging work but who does no physical work himself is entitled to a lien for his services. Thus it has been held that an independent contractor is entitled to a lien even though the actual work is done by laborers whom he hires, under a statute which provides that "any person or persons who performs any labor or services . . . shall have a lien" etc. Shaw v. Bradley, 59 Mich. 199, 26 N. W. 331; Phillips v. Freyer, 80 Mich. 254, 45 N. W. 81, *overruling* Kieldsen v. Wilson, 77 Mich. 45, 43 N. W. 1054; Carver v. Bagley, 79 Mich. 114, 81 N. W. 757. In Shaw v. Bradley, supra, the court said: "It is first claimed that an independent contractor is not entitled to a lien, under the provisions of this act, under any circumstances. But what is meant by an 'independent contractor?' As applied to the facts as disclosed by this record, I suppose it must refer to a party who enters into a contract with the owner of the property to drive and deliver the logs, cedar posts and telegraph poles for an agreed compensation. Such a contractor, in my opinion, is within the very terms of the law giving a lien to any person who may perform any labor or services in bank-

ing, driving, or running any logs, timber, cedar posts, or telegraph poles in the state, for the amount due for such labor or services. There must be a contract, express or implied, to support a lien; and it never arises, unless by express provision of the statute, where no contract relations exist. The language of the statute, 'that any person or persons that perform any labor or services in cutting,' etc., under the common application of the maxim, 'qui per alium facit, per seipsum facere videtur,' is legally applicable to the general contractor having servants or sub-laborers under him."

And under a statute which provides that "all persons hauling stocks, logs, or lumber with teams for another person shall have a lien against the personalty so hauled by them, to the extent of the amount of the indebtedness if by contract, and to the extent of the value of the services so rendered if the price to be paid for the same is not agreed upon," it has been held that a person who hauls logs for another, using laborers to do the actual physical work, is entitled to a lien. Bruton v. Beasley, 135 Ga. 412, 69 S. E. 561.

However, in other cases, it has been held that one who takes a contract to do logging works and who does no physical work himself is not entitled to a lien on the logs or lumber for the value of the services he renders. Klondike Lumber Co. v. Williams, 71 Ark. 334, 75 S. W. 854; Campbell v. Sterling Mfg. Co. 11 Wash. 204, 39 Pac. 451; Dallaire v. Gauthier, 24 Quebec Super. Ct. 495. *Compare* Desantels v. McClellan, 30 West L. Rep. 485, 7 West W. Rep. 1221. The fact that a contractor does some physical work himself on the logs and lumber does not give him a lien under a statute which provides that "whoever labors at cutting, hauling, . . . logs or lumber . . . has a lien" etc. Littlefield v. Morrill, 97 Me. 505, 54 Atl. 1109, 94 Am. St. Rep. 513. So the same effect under a statute of similar impart see Baxter v. Kennedy, 35 N. Bruns. 179. In Littlefred v. Morrill, supra, the court said: "It is true, these plaintiffs performed some physical labor and also used their own teams to some extent on these logs and lumber, but they did so under the direction of an employer and for mere wages. They had not merely hired out their personal labor. They had taken a contract to cut and haul all the logs on the tract, and were independent in their method of doing it, and were carrying out their contract largely through the labor of others employed by them. They were contractors engaged in a business enterprise from which they expected profits which might be more or less according to circumstances. They were not mere laborers working for fixed wages the rate of which would not be varied by circumstances. When they labored themselves it was not for wages, but to increase profits by saving wages."

Under a statute providing that "whenever . . . any laborer . . . may labor or perform any services in any . . . mill . . . by virtue of any contract or agreement . . . the . . . employees shall have a first lien upon all products, machinery . . . or things of whatsoever character that may be created in whole or in part by the labor of such person," etc., it has been held that where a contract was made to haul logs at a stipulated price per thousand feet and the work was done with teams and personal labor, the contractor was not entitled to a lien for his services as the statute did not give a lien for the services of the teams and the evidence did not show what the value of his personal services were. Sparks v. Crescent Lumber Co. 40 Tex. Civ. App. 222, 89 S. W. 423; Jackson v. Downs (Tex.) 149 S. W. 286.

III. Services of Team.

Under a statute which provides that "whoever performs manual labor or other personal service for hire, in or in aid of the cutting, hauling, banking, driving, rafting, towing, cribbing or booming, any logs . . . shall have a lien thereon for the price or value of such labor or service" it has been held that one who lets teams for logging services to a person for an agreed price per month and who does no labor himself on the logs has no lienable rights thereon. McKinnon v. Red River Lumber Co. 119 Minn. 479, 138 N. W. 781, 42 L.R.A.(N.S.) 872; Kenny v. Duluth Log Co. 128 Minn. 5, 150 N. W. 216. To the same effect under similar statutes, see Richardson v. Hoxie, 90 Me. 227, 38 Atl. 142; McMullin v. McMullin, 92 Me. 336, 42 Atl. 500, 69 Am. St. Rep. 510; Mabie v. Sines, 92 Mich. 545, 52 N. W. 1007; Lohman v. Peterson, 87 Wis. 227, 58 N. W. 407; Edwards v. H. B. Waite Lumber Co. 108 Wis. 164, 84 N. W. 150, 81 Am. St. Rep. 884; Rheaume v. Batiscan River Lumber Co. 23 Quebec Super. Ct. 166; Muller v. Shibley, 13 British Columbia 343; Hunt v. Panhandle Lumber Co. 66 Wash. 645, 120 Pac. 538.

By virtue of a statute which provides that "any person who may do or perform any manual labor in cutting, banking, driving," etc., "any logs or timber in this state, shall have a lien thereon . . . for the amount due for such services," it has been held that a person who furnishes teams to work in a logging operation and who also does work himself, is entitled to a lien for the value of the services rendered by the teams. Martin v. Wakefield, 42 Minn. 176, 43 N. W. 966, 6 L.R.A. 302 To the same effect see

Klondike Lumber Co. v. Williams, 71 Ark. 334, 75 S. W. 854. And the right to claim a lien is conferred on one who is only a bailee of the team at the time he hires out its services. Kelley v. Kelley, 77 Me. 135.

Under the Minnesota statute it has been held that even though a person who furnishes teams for logging work does no work himself, he is entitled to a lien if he furnishes his own teamsters with his teams. Breault v. Archambault, 64 Minn. 420, 67 N. W. 348, 58 Am. St. Rep. 545. To the same effect under a statute of similar import see Hogan v. Cushing, 49 Wis. 169, 5 N. W. 490. In Breault v. Archambault, supra, the court said: "As before stated, the plaintiff in the Lane case furnished, at the request of the contractors, two teams, and two teamsters to care for and drive the teams, at a gross price per month for each team and teamster. If plaintiff had driven these teams, the case would be covered by that of Martin v. Wakefield, supra, in which it was held that, when a man and team were employed at a gross price for both, his lien on the logs extended to the use of the team. But the difference is that plaintiff Lane performed no manual labor personally, all being done by the hired teamsters. But we cannot assent to defendants' contention that there is a marked distinction between the cases. Plaintiff was acting through her servants, and the terms of the statute, under the application of the maxim, 'he who acts through another acts himself,' are logically applicable to one who provides teams with which to haul logs, and men to drive the teams, as did the plaintiff Mrs. Lane."

The case of Hale v. Brown, 59 N. H. 551, 47 Am. Rep. 224, which took a contrary view was decided under a statute which had been amended and the court intimated that its decision would have been otherwise if the amended statute had been in effect at the time the claim in suit arose. And two early Maine decisions which also took a contrary view have been made nugatory by a later statute. See McCrillis v. Wilson, 34 Me. 286, 56 Am. Dec. 655; Coburn v. Kerswell, 35 Me. 126.

IV. Miscellaneous.

It has been held that a cook and his assistant who prepare the food for the workmen at a logging camp are entitled to a lien for their wages. Breault v. Archambault, 64 Minn. 420, 67 N. W. 348, 58 Am. St. Rep. 545; Young v. French, 35 Wis. 111; Winslow v. Urquhart, 39 Wis. 260. But the lien is given only to one who cooks the food for the loggers where the provisions are furnished by the employer and so cannot be claimed by one who makes a contract with a company engaged in logging operations to furnish board for the workmen at a stated price per boarder. Akers v. Lord, 67 Wash. 179, 121 Pac. 51; Bradford v. Underwood Lumber Co. 80 Wis. 50, 48 N. W. 1105. See also Polan v. Cain, 59 Wash. 259, 109 Pac. 1009. In Akers v. Lord, supra, the court said: "The statute provides: 'The cook in a logging camp shall be regarded as a person who assists in obtaining or securing the timber herein mentioned.' The only item recognized by this statute is one for labor performed and services rendered. The cook, to the extent that he renders service as a cook, is entitled to a lien; but when he steps outside of his cook-house and ceased to labor for wages, and becomes a boarding-housekeeper, furnishing all the material and supplies, he is no longer within the purview of the statute, any more than any other laborer who furnishes necessary chains, ropes, tackle, or rigging for use in the logging operation, can claim a lien for the cost of such material. The statute limits the lien to labor performed and service rendered, and eliminates supplies and materials furnished, however necessary they may have been to the work engaged in."

It has been held, however, that one who boarded workmen engaged in getting out railroad ties, at a hotel some miles from the place where they were working, was entitled to a lien under an early statute (since nullified) which gave a lien to those who furnished supplies to logging camps. Kellock v. Parcher, 52 Wis. 393, 9 N. W. 67.

Under a statute providing that "whoever labors at cutting, hauling, rafting or driving logs or lumber, or at cooking for persons engaged in such labor, . . . has a lien on the logs and lumber for the amount due for his personal services" and that "such liens . . . may be enforced by attachment" it has been held that a wife who brings an action for wages against her husband for her services as cook for him and others engaged in logging operation has no enforceable contract on account of her coverture and therefore no enforceable lien on the logs. Mott v. Mott, 107 Me. 481, 78 Atl. 900.

It has been held that a company authorized under its charter to improve a river for the purpose of facilitating the running of logs, lumber, timber, etc., and after spending at least five thousand dollars for the purpose, to collect tolls at a fixed rate on all logs lumber, etc., floated down the river, for which and "for any other services" the company is to have a lien, has a lien on logs for the services of the company's foreman and men who assist another logger in getting his logs into a general drive as they pass down a river. Yellow River Imp. Co. v. Arnold, 46 Wis. 214, 49 N. W. 971.

Where an amendment to a general statute makes provision for the preventing of jams or obstructions above booms whenever navigation may be affected, and the general statute empowers "any person, company, or corporation" to perform the service which an owner of logs has neglected and which has resulted in a jam of logs, it has been held that a boom company has a lienable claim on logs for services rendered in preventing a jam of the logs above the booms as well as at the head or alongside of the booms. Hall v. Tittabawassee Boom Co. 51 Mich. 377, 16 N. W. 770.

BIRD

v.

STATE.

Georgia Supreme Court—October 14, 1914.

142 Ga. 596; 83 S. E. 238.

Grand Jury — Power to Reassemble after Discharge.

Where a grand jury had been properly drawn, summoned, and impaneled to serve during a term of court continuing two weeks, and, having completed their work at or near the end of the first week, were discharged by the court for the term, and on the day following their discharge a homicide was committed in the county in which the court was being held, and the court by appropriate written order directed the sheriff and regular bailiffs sworn at the term of the court then being held to resummon the same grand jury to reconvene during the second week of the court, for the purpose of investigating the case of the person charged with the murder of the person killed, and also to take into consideration any other matter that might legally come before the grand jury during the term, such reconvoking of the grand jury was legal, and an indictment properly found by them against such person was also legal.

The order of the court reconvening the grand jury, after they had been discharged, had the effect of abrogating the former order of discharge.

[See note at end of this case.]

Continuance — Denial Held Proper.

Under the facts of this case, there was no abuse of discretion in overruling the motion for a continuance.

Jury — Qualification of Jury — Loan to Assist Prosecution.

One who loans money to another for the purpose of paying counsel to assist the solicitor general in the prosecution of a case of the state against one charged with murder is not disqualified to serve as a juror on the trial of such a case, where it does not appear that the juror has any interest in the prosecution or is otherwise disqualified.

Instructions — Requests Covered by General Charge.

The requests to charge the jury were substantially covered by the general charge of the court, and it was not error to decline them.

Homicide — Instructions — Offenses to Be Submitted.

Under the evidence in this case, voluntary and involuntary manslaughter were not involved, and the court did not err in failing to charge the jury the law applicable thereto.

Trial — Misconduct of Counsel — Necessity of Objection.

Where complaint is made that the solicitor general, during the trial of the case, indulged in improper remarks to the jury, but no objection was made thereto at the time, and no ruling was invoked, this will not require a new trial. Herndon v. State, 111 Ga. 178 (3) 181 (36 S. E. 634).

[Ann. Cas. 1916A 551.]

Verdict Sustained.

The remaining assignments of error are without substantial merit. The verdict is supported by the evidence.

(Syllabus by court.)

Error to Superior Court, Jasper county: PARK, Judge.

Criminal action. Will Bird convicted of murder and brings error. The facts are stated in the opinion. AFFIRMED.

A. Y. Clement, B. F. Leverette and *H. T. Pope* for plaintiff in error.

Warren Grice and *Joseph E. Pottle* for defendant in error.

[597] HILL, J.—Will Bird was indicted for the offense of murder, and the jury returned a verdict against him, without recommendation. A motion for a new trial was overruled, and he excepted.

1. Upon being arraigned in the court below the defendant filed his plea in statement to the indictment, alleging that because of the facts therein averred the indictment was illegal and void and wanting in the essential features of a legal indictment, by reason of the following: The February term, 1914, of Jasper superior court convened on the third Monday in February, 1914, being the 16th day of the month, and the grand jury regularly selected, chosen, and sworn for that term completed their work and return their presentments and recommendations into court, and were discharged for the term on Friday, February 20, 1914. On Saturday night, February 21, the homicide for which the defendant was indicted was [598] committed. The superior court of Jasper county may hold for

two weeks, under the law. It being in session the second week, the presiding judge, on Wednesday, February 25, recalled the 21 members of the grand jury which had been discharged on Friday of the previous week, for the purpose of considering the return of an indictment against the defendant. It was alleged, that the grand jurors who returned the indictment were not legally drawn, summoned, or impaneled to investigate the case, but the presiding judge instructed the sheriff of Jasper county to summon the grand jurors who had been discharged for the term on Friday of the previous week to appear at court on Wednesday, February 25, for the purpose of taking action on the homicide which occurred since their discharge; that the jurors thus notified by telephone or verbal message assembled on the 25th, during the second week of court, and, without being sworn or taking the oath required to be administered to grand jurors, proceeded to return the indictment against defendant; that after the grand jury had been discharged it ceased to exist as the grand jury for the February term, 1914, of Jasper superior court, and the jurors had no legal right or power to return as indictment after their discharge; that section 866 of the Penal Code contemplates and requires that where the superior court is held for a longer term than one week, as in the case of Jasper superior court, the presiding judge shall draw separate panels of grand jurors for each week, if the public interest, in his opinion, requires a grand jury's services for more than one week, which requirement was not observed in the instant case; that a compliance with the requirements prescribed by law as to the selection, summoning, and swearing of grand jurors before they enter upon their service as such jurors is essential to constitute a legal grand jury, otherwise they are not legally qualified to act; and that the mere fact that the 21 men who returned the indictment had been grand jurors for the February term of court until they were discharged for the term did not ipso facto qualify them to act in the present case without being again selected, summoned, and sworn, for that their functions and qualifications as grand jurors for the February term, 1914, of Jasper superior court expired and ceased instantly upon their discharge for the term. An oral demurrer to this plea was sustained, and the defendant excepted. The order of the court (which by consent was considered a part of the plea) directed the sheriff and regular bailiffs [599] sworn at the February term of court to resummon the grand jury to reconvene on February 25, 1914, "for the purpose of investigating the case of the State v. Will Bird, charged with the offense of murder. . . . And also to take into consideration any other matter that may legally come before during the present term of the court."

The exact question here raised seems never to have been decided by this court. But in several outside jurisdictions we find decisions directly in point. In State v. Reid, 20 Ia. 413 (7), it was held that "The district court has power to recall a grand jury to pass upon offenses committed after their discharge and before the adjournment of the term." See also the body of the opinion on pages 422–423, where the statement of the case by Wright, J., shows it to be very similar to the instant one as to the discharge of the grand jury and the reconvening of it. In Wilson v. State, 32 Tex. 112, a grand jury, after serving about two weeks, was discharge by order of the court. At a subsequent day of the same court the same persons who composed the grand jury were reassembled in court; and the court by order set aside its former order discharging the grand jury, and directed them to proceed to the discharge of their duties as originally charged. The indictment in this case was for murder committed at a time between the discharge of the grand jury and its reorganization, and was found by the grand jury after being so reorganized. It was held "that there was no error in the proceedings, and the indictment was found by a lawful grand jury." See, to the same effect, Newman v. State, 43 Tex. 525; Long v. State, 46 Ind. 582. In Green v. State, 60 Fla. 22, 53 So. 610, it was held that "A grand jury that has been discharged or dismissed may be recalled and reassembled during the same term of the court, and indictments then properly returned by them are valid; and it is not necessary in such a case for the judge to make a formal order vacating his order discharging such grand jury, since the order recalling them is tantamount to a vacation of the order discharging them." See also Cannon v. State, 62 Fla. 20 57 So. 240; 17 Am. & Eng. Enc. of Law (2d ed.) 1298; 20 Cyc. 1324.

We think the court did not err in sustaining the demurrer to the plea in abatement. This ruling is based on the inherent power of the court to hold the organization of the court intact until the end of the term. Where the grand jury is properly drawn, summoned, [600] and impaneled for the term, the court may require them to serve for the term. And if they are discharged before the end of the term, the court may by appropriate order, as was done in this case, reconvoke them to appear and serve until the end of the term, or for any specified period within that term, and such order will be considered as a vacation of the discharge of the jury. No allegation is made that the jurors resummoned were not the same as those who had been previously drawn, summoned and impaneled, or that

they were for any reason otherwise disqualified from serving a grand jurors.

2. Headnotes 2 to 7, inclusive, require no elaboration. The assignments of error not specially dealt with are without substantial merit. The verdict is supported by the evidence.

Judgment affirmed. All the Justices concur.

NOTE.

Power of Court to Reassemble Discharged Grand Jury.

The purpose of this note is to consider the recent cases passing on the power of a court to reassemble a discharged grand jury. The earlier cases are reviewed in the notes to Haynes v. State, 17 Ann. Cas. 653, and Com. v. Green, 12 Am. St. Rep. 894, 904.

The recent cases are unanimous in holding that a court has power to reassemble a discharged grand jury at any time during the term. Green v. State, 60 Fla. 22, 53 So. 610, 615; People v. McCauley, 256 Ill. 504, 100 N. E. 182; Hayes v. State, 93 Miss. 670, 17 Ann. Cas. 653, 47 So. 522. See also Blakely's Petition, 22 Pa. Dist. 221. And see the reported case. In Cannon v. State, 62 Fla. 20, 57 So. 240, the court said: "In the case of Green v. State, 60 Fla. 22, 53 So. 610, we have held that a grand jury that has been discharged or dismissed may be recalled and reassembled during the term of the court, and that indictments then properly returned by them are valid." In State v. Heft, 148 Ia. 617, 127 N. W. 830, it was held that the court has power not only to reassemble a discharged grand jury but to reassemble the whole panel and select a new jury. The court said: "The court had equal power for proper reasons to recall the entire panel and to order a redrawing of a grand jury therefrom. This was so held in State v. Hughes, 58 Ia. 165; State v. Disbrow, 130 Ia. 19. Somewhat analogous also is State v. Hart, 67 Ia. 142. The general reasons underlying these cases are that the trial court has full power to discharge the grand jury for the term. It may also during the term set aside such order and recall the same grand jury. It has like power to let the order of discharge stand and to recall the grand jury panel and to select a new grand jury therefrom." In People v. McCauley, 256 Ill. 504, 100 N. E. 182, it was held that a grand jury when reassembled could consider any matter presented to it.

But in Braxley v. State, 143 Ga. 658, 85 S. E. 888, it was held that a grand jury once discharged cannot be reassembled after the expiration of the term of the court. It was said: "On the doctrine of Bird v. State, supra, the Court of Appeals recognizes that if the court had not finally adjourned for the term the grand jury could be reconvoked, but asks the question on the basis that the court had adjourned for the term. . . . There is no express provision of law authorizing a judge of the superior court out of term time to call together persons who were grand jurors at a former term, so as to act as grand juries, except at a special term. Civil Code, sec. 4876."

In U. S. v. Philadelphia, etc. R. Co. 227 Fed. 206, it was held that a grand jury which has been relieved from service provisionally can be recalled to duty during the same term of the court. The court said: "Upon the challenge to the array, Judge Dickenson held that he had not discharged the grand jury, so as to terminate its existence as a grand jury, and refused to sustain the challenge to the array, and, having them then in court before him, held that no other mandate was required to bring them into court. This was in effect an order at that time that they be recalled forthwith and proceed with their sessions."

And in Leech v. State, 63 Tex. Crim. 339, 139 S. W. 1147, wherein it appeared that a grand jury adjourned for one week with permission of the court, it was held that the court had power to reassemble the members thereof on the very day of the adjournment, the court saying: "Article 411, Code Criminal Procedure, provides: 'When a grand jury has been discharged by the court for the term, it may be reassembled by the court at any time during the term, and in case of a failure of one or more of the members to reassemble, the court may complete the panel by impaneling other qualified persons in their stead, in accordance with the rules prescribed in this chapter for completing the grand jury in the first instance.' . . . It is our opinion that the grand jury, which did indict appellant, was the legally constituted grand jury of the District Court of El Paso County, at the time of the indictment; that the court and judge thereof had the power and authority to reassemble or reconvene the grand jury at the time it did."

MALIN ET AL.

v.

LAMOURE COUNTY.

North Dakota Supreme Court—February 16, 1914.

27 N. Dak. 140; 145 N. W. 582.

Taxes — Probate or Administration Fee — Validity.

Chapter 119 of the Laws of 1909, which is entitled "An act to amend section 2589 of

the Revised Codes of 1905, relating to the fees of county court," and which provides for an initial fee of $5 and an additional charge of $5 for each and every $1,000, or fraction thereof, in excess of the first $1,000 on the value of the estates, to be paid by the petitioner for letters testamentary, of administration, or of guardianship, is unconstitutional, in so far as the additional charge or fee of $5 for each and every $1,000, or fraction thereof, in excess of the first $1,000 is concerned, and violates section 11, art. 1, of the Constitution of North Dakota, which provides that "all laws of a general nature shall have a uniform operation" section 22, art. 1, which provides that "all courts shall be open, and every man for any injury done to him in his lands, goods, person, or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay," section 61, art. 2, which provides that "no bill shall embrace more than one subject, which shall be expressed in its title," etc., section 175, art. 11, which provides that "no tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied," and section 176, art. 11, which provides that "laws shall be passed taxing by uniform rule all property according to its true money value in money." The same is true of section 2589, Rev. Codes 1905, being chapter 87 of the Laws of 1905, and of chapter 127 of the Laws of 1913, and in so far as the fee or charge of $5 for each and every $1,000, or fraction thereof, in excess of the first $1,000 is concerned. Chapter 66 of the Laws of 1903 and section 2071 of the Revised Codes of 1899, being chapter 50 of the Laws of 1890, however, are invalid even as to the initial fee of $5, as such is not imposed upon all estates equally, but according to the value thereof. They are necessarily equally invalid as to the added fee of $5 for every $1,000 additional value.

[See note at end of this case.]

Same.

The fees or charges provided for in chapter 119 of the Laws of 1909 are not inheritance taxes or analogous thereto. An inheritance tax is a tax or charge upon the privilege of succeeding to or inheriting property, and is paid out of that which is inherited, while the charges in question are levied, not only upon the estate as a whole, whether solvent or insolvent, but upon the estates of wards and incompetents.

[See note at end of this case.]

Same.

Such charges cannot be regarded as mere court costs, as they are in no way proportionate to or based upon the work performed or the services rendered.

[See note at end of this case.]

Same.

They are taxes upon the property rather than taxes upon or charges for a privilege. As such they are invalid, as they are not levied according to the true value of such property, or to the uniform rule which is adopted in regard to similar property.

[See note at end of this case.]

Same.

Section 22, art. 1, of the Constitution of North Dakota, which provides that "all courts shall be open, and any man for any injury done him in his lands, goods, or reputation shall have remedy by due process of law, and right and justice administered without sale, denial, or delay," is aimed, not merely against bribery and the direct selling of justice by magistrates and officials, but against the imposition of unreasonable restraints upon and charges for the use of the courts.

[See note at end of this case.]

Recovery Back of Invalid Tax — Payment under Protest.

Such charges, having in the case at bar been demanded of the plaintiff by an officer acting under color of law, and for public services which the plaintiff was entitled to have performed, and having been paid under written protest and under circumstances where injury to the estate and to third parties would have resulted from a refusal to pay such fees and a resort to legal remedies to compel the performance of the official duties, were paid under compulsion and duress, and can be recovered from the county upon a proper showing being made.

[See Ann. Cas. 1915A 495.]

Statutes — Partial Invalidity.

Where a part of a statute is unconstitutional, that fact does not require the courts to declare the remainder void also, unless all the provisions are connected in subject matter depending upon each other, operating together for the same purpose, or otherwise so connected together in meaning that it cannot be presumed the legislature would have passed the one without the other.

Taxes — Administration Fees — Validity.

A requirement for reasonable court fees will be sustained, and is not unconstitutional as being a denial or sale of justice, provided that the fee is reasonable, is uniform in its application, and has some reasonable connection with the services rendered. The portions of the statute before considered, therefore, which provide for an initial fee of $5, and for the expenditures for publishing and sending out notices, are valid, and are sustained.

[See note at end of this case.]

(Syllabus by court.)

Appeal from District Court, LaMoure county: COFFEY, Judge.

Action to recover money paid as statutory probate fees. A. B. Malin et al., administrators, etc., plaintiffs, County of LaMoure, defendant, and State Tax Commission intervener. Judgment for plaintiffs. Defendant appeals. AFFIRMED.

[142] The plaintiffs herein as administrators of the estate of Gottlieb J. Dobler, deceased, paid under protest to the county treasurer of LaMoure county the statutory probate fees, amounting in the case to $335, and prescribed by § 2589, Rev. Codes 1905, as amended by chapter 119 of the Laws of 1909, and thereafter brought this action in the district court of LaMoure county to recover the sum so paid, alleging in their complaint that the act under which the same was paid was unconstitutional. A demurrer was interposed to the complaint and overruled. From the order overruling this demurrer this appeal is taken.

[143] Chapter 119 of the Laws of 1909 reads as follows: "An Act to Amend § 2589 of the Revised Codes of 1905, Relating to the Fees of County Court. Be it enacted by the legislative assembly of the state of North Dakota: § 1. Amendment Section 2589 of the Revised Codes of 1905 of the state of North Dakota is hereby amended to read as follows: § 2589. County to be Reimbursed. How. For the purpose of reimbursing the county for the salaries provided in the foregoing sections to be paid the judges of county courts, each petitioner for letters testamentary, or administration or guardianship, before filing the same in the county court, shall pay or cause to be paid into the county treasury, for the use and benefit of the county in whose county court proceedings are to be instituted to settle the estate of a deceased person or for the appointment of a guardian, the sum of five dollars, and when the value of said estate has been ascertained by the court, through the inventory and appraisement or upon hearing of same, as legally required, within thirty days after the issuance of letters testamentary, administration or guardianship, the judge of said court shall require an additional fee to be paid from said estate into said county treasury, of five dollars for each and every one thousand dollars or fraction thereof, in excess of the first one thousand dollars of value therein found, as shown by said inventory and appraisement, and in all cases in addition thereto, all sums necessarily expended in publishing or serving notices required by law. In all civil and criminal actions the same fees and costs shall be paid as in like actions in the district court, the same to be paid to the clerk of the county court, a record to be kept thereof, and the same turned over by him to the county treasurer."

Chapter 66 of the Laws of 1903 (§ 2589 of the Revised Codes of 1905), which chapter 119 of the Laws of 1909 amends, is as follows: "An Act to Amend § 2071 of the Revised Codes of 1899, Relating to Reimbursing Counties for Salaries Paid to Judges of County Courts. Be it enacted by the legislative assembly of the state of North Dakota: § 1 Amendment, Section 2071 of the Revised Codes of 1899, relating to reimbursing counties for salaries paid to judges of county courts, is hereby amended so as to read as follows: § 2071. County to be Reimbursed. How. For the purpose of reimbursing the county for the salaries provided in the foregoing sections to be paid to the judges of [144] the county courts, each petitioner for letters testamentary, of administration or guardianship, before filing the same in the county court, shall pay or cause to be paid into the county treasury, for the use and benefit of the county in whose county court proceedings are to be instituted to settle the estate of any deceased person, or for the appointment of a guardian, a sum of money according to the value of the estate of such deceased person, or of such ward, as appears from the sworn statement in the petition of such applicant: Five dollars when the value of the estate does not exceed one thousand dollars; five dollars additional for each and every thousand dollars additional value thereto; and in all cases in addition thereto, all sums necessarily expended in publishing or serving notices required by law. In all civil and criminal actions the same fees and costs shall be paid as in like actions in the district court, the same to be paid to the judge of the county court, a record to be kept thereof and the same turned over by him to the county treasurer."

Section 2071 of the Revised Codes of 1899, which is amended by chapter 66 of the Laws of 1903, is but a restatement of § 4 of chapter 50 of the Laws of 1890, which section is as follows: "Section 4. How County Treasurer to be Reimbursed. For the purpose of reimbursing the county treasurer for the salaries provided in the foregoing sections to be paid to the judges of the county courts, each petition for letters testamentary, administration or of guardianship, before filing the same in the county court, shall pay or cause to be paid into the county treasury, for the use and benefit of the county in whose county court proceedings are to be instituted to settle the estate of any deceased person or for the appointment of a guardian, the following sums, according to the value of the estate of such deceased person or [for the value of the estate of such deceased person or] of such ward, as appears by the sworn statement in the petition of such applicant, that is to say: Five (5) dollars when the value of such estate does not exceed the sum of five hundred (500) dollars; ten (10) dollars when the value of such estate does not exceed the sum of $1,500; fifteen (15) dollars when the value of such estate does not exceed $2,500; twenty (20) dollars when the value of such estate does not exceed $5,000, but does exceed

$2,500; twenty-five (25) dollars when the value of such estate exceeds the sum of $5,000, and shall not exceed $10,000; thirty (30) dollars when such [145] estate exceeds the sum of $10,000, but not $15,000; forty (40) dollars when the value of such estate shall exceed the sum of $15,000, but not of $20,000; fifty (50) dollars when the value of such estate exceeds the sum of $20,000, but not of $25,000; and seventy-five (75) dollars in all cases where the value of such estate shall exceed the sum of $25,000, and in all cases in addition, all sums necessarily expended in publishing or serving notices required by law. And in the adjudication of all civil and criminal actions the same fees and costs shall be paid as in like actions and matters in the district court, the same to be paid to the judge of the county court, a record [to] be kept of, and by him turned over to the county treasurer."

This act contained other provisions, and its title was: "An Act to Fix the Compensation of the Judges of the County Courts and Provide a Fund to Reimburse the County for the Same." Section 4 of chapter 50 of the Laws of 1890 copied *verbatim* into the Revised Codes of 1895, being § 2071 thereof. The same being true of chapter 50 of the Laws of 1890, with the exception that § 2 is amended as to the amount of salary of the clerk and § 3 as to the determination of the population upon which the salaries are based.

The petition placed the right to recover upon the proposition that the statute in question violated the following provisions of the Constitution of North Dakota:

(1) Section 11, article 1, "All laws of a general nature shall have a uniform operation."

(2) Section 22, article 1, "All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay."

(3) Section 61, article 2, "No bill shall embrace more than one subject, which shall be expressed in its title, but a bill which violates this provision shall be invalidated thereby only as to so much thereof as shall not be so expressed."

(4) Section 175, article 11, "No tax shall be levied except in pursuance of law, and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied."

(5) Section 176, article 11, "Laws shall be passed, taxing by uniform rule all property according to its true value in money," etc.

Walter H. Murfin for appellant.
Davis & Warren for respondent.

L. E. Birdzell and *Geo. E. Wallace* as *amici curiæ*.

[149] BRUCE, J. (*after stating the facts*). —The statute under consideration was adopted from Minnesota in 1890. Prior to its adoption by us, however, and in April 1889, it was declared invalid by the Minnesota courts. . . . If the rule were followed that a statute is presumed to have been adopted with the construction placed upon it by the state of its origin, the statute would have been stillborn in North Dakota. We are perfectly satisfied, however, that the North Dakota legislature had no knowledge of the Minnesota case. Since the decision of the Minnesota case, similar if not identical statutes, and under similar if not identical constitutional provisions, have been passed upon and declared invalid by the supreme courts of California, Washington, Minnesota, Illinois, Wisconsin and Missouri. See Fatjo v. Pfister, 117 Cal. 83, 48 Pac. 1012; State v. Case, 39 Wash. 177, 1 L.R.A.(N.S.) 152, 109 Am. St. Rep. 874, 81 Pac. 554; State v. Brophy, 38 Wis. 413; State v. Mann, 76 Wis. 469, 45 N. W. 526, 46 N. W. 51; Cook County v. Fairbank, 222 Ill. 578, 78 N. E. 895; Mearkle v. Hennepin County, 44 Minn. 546, 47 N. W. 165; State v. Switzler, 143 Mo. 287, 40 L.R.A. 280, 65 Am. St. Rep. 653, 45 S. W. 245. See also 37 Cyc. 713, and cases cited. In fact, we have yet to find a single instance in which a similar statute has been upheld, either in the adjudicated cases or the *dicta* of the text writers.

The conclusion of these authorities, indeed, is that the charges, being [150] arbitrary, and not in any manner proportionate to the work done, are taxes, and not fees. As taxes they are held to be taxes upon property, rather than taxes upon a privilege, and therefore void because not imposed by uniform rule according to the true value in money.

If the charges could be looked upon in the nature of inheritance taxes, they could perhaps be sustained, but they are not inheritance taxes, as an inheritance tax is a tax upon the privilege of succeeding to or inheriting property, and is paid not out of the estate as a whole, but out of that part of it which is inherited. This is not the case with the present charge. It is an ad valorem charge levied upon the estate, whether solvent or insolvent and is imposed not merely upon the estates of decedents, but upon the estates of minors and incompetents under guardianship. It is either, indeed, a tax upon property, or, if a tax or charge upon a privilege, a tax or charge upon the privilege of administering an estate or of enjoying the protection of the courts as a ward. "But the sums required by this act to be paid into the county treasury," says the supreme court of Minnesota in State

v. Gorman, 40 Minn. 232, 2 L.R.A. 701, 41 N. W. 948, "must be regarded as taxes, in the ordinary sense of that word, and as it is used in the Constitution. They are not in any proper sense fees or costs assessed impartially, or with regard to the expense occasioned or services performed. The amounts are regulated wholly, but arbitrarily, with regard to the value of the estate. They have no proximate relation to the amount of the compensation to be paid to the probate judge, nor to the other expenses of the court, nor to the nature or extent of the services which may become necessary in the proceedings. There is no necessary, natural, or even probable correspondence between the sums to be paid (widely different in amounts with respect to estates of different values) and the nature of the proceedings, or the character or extent of the services, which may be required in the probate court. It cannot be assumed, upon any ground of probability, that these proceedings or services will be different or greater in the case of an estate of the value of more than $500,000 than in one of the value of from $35,000 to $50,000,—yet in the former case $5,000 must be paid, in the latter $100. . . . The purpose for which such payments are required is strictly public in its nature, being directly . . . and indirectly for the support of a court established by the Constitution, with exclusive [151] original jurisdiction in certain matters of great and general public concern. Nor is it practically optional with executors or administrators, or those interested in the settlement of the estates of deceased persons, as to whether they will pay these exactions or not. If the law is valid, payment is practically necessary in the great majority of cases; and the mode adopted by the statute of securing payment by making that a condition precedent to the exercise of the functions of the probate court is as really compulsory, and perhaps as effectual in general, as the means generally employed to enforce the payment of taxes." Again, in Fatjo v. Pfister, 117 Cal. 83, 48 Pac. 1012, we find the following: "It is perfectly plain that the legislature has attempted by that portion of § 1, above quoted, to levy a property tax upon all estates of decedents, infants, and incompetents. The ad valorem charge for filing the inventory is in no sense a fee, or compensation for the services of the officer, which are the same as respects this matter, in every estate, large or small. To call it a fee is a transparent evasion. And it is not merely an inheritance tax, or at all analogous to an inheritance tax, as counsel would contend; for, in the first place, it applies not only to the estates of decedents, but also to the estates of minors and incompetents under guardianship; and, as to the estates of decedents, it applies not to the distributable residue after payment of debts and expenses of administration, but to the whole body of the estate, and would be collectable, if the law were valid, from an insolvent estate, as well as from one of equal appraised value and with no liabilities. As an attempt to levy a property tax, the act is in this particular invalid for several reasons; 1. It violates § 1 of article 13 of the Constitution, in imposing an extraordinary tax upon the property to which it applies, in addition to the equal and uniform tax to which alone all property in the state is liable. 2. The subject of the act is not expressed in its title, and is in no wise germane thereto—a violation of § 24 of article 4 of the Constitution, which requires that every act shall embrace but one subject, which subject shall be expressed in its title."

We realize fully that reasonable court charges have generally been sustained by the authorities. We also realize that the creditor had little protection under the ancient law, and that it was only after many centuries that he could seek reimbursement from the estate of the deceased. See Pulliam v. Pulliam, 10 Fed. 53; Brown's Bl. Com. pp. [152] 393, 394. We also realize that the property of the ward had originally but little protection. See Woerner, Am. Law of Guardianship, p. 3; 2 Bl. Com. 77. We realize therefore, that both wards and creditors have privileges which formerly they did not enjoy; that is to say, the privilege of the use of the machinery of the county and probate courts for the protection of their property and property rights. We realize that the clause of the Magna Charta to the effect: "*Nulli vendimus, nulli negabimus aut differimus justitiam vel rectum,*" and which we have paraphrased in our Constitution, § 22, article 1, into: "All courts shall be open, and any man for any injury done him in his lands, goods, person, or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay," has generally been construed not to prohibit the imposition of reasonable court costs, and was aimed rather against the selling of justice by magistrates themselves,—that is to say, bribery,—than the imposition of reasonable fees. See Northern Counties Invest Trust v. Sears, 30 Ore. 388, 35 L.R.A. 192, 41 Pac. 931; Harrison v. Willis, 7 Heisk. (Tenn.) 46, 19 Am. Rep. 604; Townsend v. Townsend. Peck (Tenn.) 15, 14 Am. Dec. 722. We are quite satisfied, however, that prior to the adoption of the North Dakota Constitution the meaning had extended its original boundary, and that the provisions which are to be found in the Constitutions of all of the states were aimed not merely against the selling of justice by the magistrates, but by the state itself; in other words, that a free and reason-

able access to the courts and to the privileges accorded by the courts, and without unreasonable charges, was intended to be guaranteed to everyone.

In answer, also, to the contention that the right of the creditor to participate in the estate by means of the machinery of the county court is a privilege which he did not originally enjoy, we may say that the right to redress in a very large number of cases may be equally considered so. Until the invention, indeed, of the writ of trespass upon the case in England, there were a very large number of wrongs for which no redress could be had in the courts. Such a fact, however, would, we believe, hardly justify a imposition of extra court costs or fees in such cases.

The petitioner, we believe, is, under any and all of the authorities, entitled to recover his money in the case at bar; that is to say, the amount paid in excess of the initial fee of $5 and the amount expended [153] in publishing or serving notices. The fees in excess of these amounts, and which from the complaint we gather are all that are claimed in the action, were demanded of the plaintiff by an officer acting under color of law, and for public services which the plaintiff was entitled to have performed. The complaint discloses that they were paid under written protest, and under circumstances and at a state of the proceedings when a refusal to pay them and a resort to compel the performance of the duties by legal proceedings and without such payment, would have involved a delay which would have been injurious both to the estate and the third parties. Under such a condition of affairs, the payment was involuntary, and not voluntary. Mearkle v. Hennepin County, 44 Minn. 546, 47 N. W. 165; State v. Nelson, 41 Minn. 25, 4 L.R.A. 300, 42 N. W. 548; Cook County v. Fairbank, 222 Ill. 578, 78 N. E. 895; Chicago v. Northwestern Mut. L. Ins. Co. 218 Ill. 40, 1 L.R.A.(N.S.) 770, 75 N. E. 803; Trover v. San Francisco, 152 Cal. 479, 15 L.R.A.(N.S.) 183, 92 Pac. 1025; Fatjo v. Pfister, 117 Cal. 83, 48 Pac. 1012; State v. Case, 39 Wash. 177, 1 L.R.A.(N.S.) 152, 109 Am. St. Rep. 874, 81 Pac. 554; State v. Mann, 76 Wis. 469, 45 N. W. 526, 46 N. W. 51; State v. Brophy, 38 Wis. 413; State v. Switzler, 143 Mo. 287, 40 L.R.A. 280, 65 Am. St. Rep. 653, 45 S. W. 245; Lewis v. San Francisco, 2 Cal. App. 113, 82 Pac. 1106; Mobile, etc. R. Co. v. Steiner, 61 Ala. 559; St. Anthony, etc. Elevator Co. v. Bottineau County, 9 N. D. 346, 50 L.R.A. 262, 83 N. W. 212.

The judgment of the District Court is affirmed.

SUPPLEMENTAL OPINION.

BRUCE, J.—The opinion which is filed in this case is a substituted opinion, the one first filed having been corrected so as to make it clear that only the fees and charges of $5 for each $1,000 or fraction thereof in excess of the first $1,000 come within the constitutional inhibitions, and are held to be illegally required. We have made this correction as the result of an intervening petition for rehearing which was filed by the tax commission as *amicus curiæ*. All that we strike out of the statute, in short, are the following words: "And when the [154] value of said estate has been ascertained by the court, through the inventory and appraisement or upon hearing of same, as legally required, within thirty days after the issuance of letters testamentary, of administration or guardianship, the judge of said court shall require an additional fee to be paid from said estate into said county treasury, of $5 for each and every one thousand dollars or fraction thereof [in excess of the first one thousand dollars] of value therein found, as shown by said inventory and appraisement." [Rev. Codes 1905, § 2589.] We find no fault with the remainder of the statute. We are quite satisfied, from the authorities and from an examination of the act, that the case is one in which the doctrine of "partial invalidity" may be applied, and that the clauses which are herein held invalid are not so essentially and inseparably connected in substance with the remainder of the act as to require a rejection of the whole statute. The rule is well established that where a part of a statute is unconstitutional, that fact does not authorize the courts to declare the remainder void also, unless all the provisions are connected in subject-matter depending upon each other, operating together for the same purpose, or otherwise so connected in meaning that it cannot be presumed that the legislature would have passed the one without the other. See Cooley, Const. Lim. 7th ed. 246; Hirschfeld v. McCullagh, 64 Ore. 502, 127 Pac. 541, 130 Pac. 1131.

We are satisfied that the initial fee of $5, as well as the expenditures for publishing and sending out notices, can be sustained as reasonable court charges, being levied uniformly upon all estates. The right to require reasonable court fees, indeed, has been so generally conceded, that a discussion of the proposition hardly seems to be necessary. The imposition of such fees is not a denial or sale of justice, provided that they are uniform, are reasonable, and have a reasonable relation to the services rendered. See Perce v. Hallett, 13 R. I. 364; Merrill v. Bowler, 20 R. I. 226, 38 Atl. 114; Northern Counties Invest. Trust v. Sears, 30 Ore. 388, 35 L.R.A. 192, 41 Pac. 931; State v. Judges of First Judicial Dist. 21 Ohio St. 11; Lee County v. Abrahams, 34 Ark. 166; State v. Fogus, 19 Nev. 247, 9 Pac. 123; Comstock Mill, etc. Co. v. Allen, 21 Nev. 325, 31 Pac. 434; Baldwin v. Goldfrank, 88 Tex. 249, 31 S. W. 1064, *affirming*

9 Tex. Civ. App. 269, 26 S. W. 155; State v. Lancaster [155] County, 4 Neb. 537, 19 Am. Rep. 641; State v. Ream, 16 Neb. 681, 21 N. W. 398; Beebe v. Wells, 37 Kan. 472, 15 Pac. 565; State v. Frazier, 36 Ore. 178, 59 Pac. 5.

The same is true of § 2589, Rev. Codes 1905, being chapter 87 of the Laws of 1905, and of chapter 127 of the Laws of 1913, and in so far as the fee or charge of $5 for each and every $1,000 or fraction thereof in excess of the first thousand dollars is concerned. Chapter 66 of the Laws of 1903, and § 2071 of the Rev. Codes of 1899, being chapter 50 of the Laws of 1890, however, are invalid even as to the initial fee of $5, as such is not imposed upon all estates equally, but according to the value thereof. They are necessarily equally invalid as to the added fee of $5 for every $1,000 additional value. These acts are not strictly before us, but we mention the same in order that no confusion of administration may arise from this opinion.

NOTE.

Validity of Statute Fixing Probate or Administration Fees.

A statute imposing a probate or administration fee reasonably designed to compensate for the services of the court officers therein is valid. State v. Gorman, 40 Minn. 232, 41 N. W. 948, 2 L.R.A. 701; Hauser v. Miller, 37 Mont. 22, 94 Pac. 197; Northern Counties Invest. Trust v. Sears, 30 Ore. 388, 41 Pac. 931, 35 L.R.A. 188. And see the reported case. See also State v. Frazier, 36 Ore. 178, 59 Pac. 5; In re Taxes, etc. 19 Pa. Dist. 882. "The legislature has the power to require reasonable fees to be paid by the citizen for special services rendered to him from time to time by the public officers, according to a fixed schedule, such fees being intended to make up the compensation of the officers." Hawser v. Miller, 37 Mont. 22, 94 Pac. 197.

A statute imposing a probate or administration fee the amount of which is not dependent on the value of the services rendered by court officers in the proceeding, but which is dependent on the value of the estate to be administered is invalid as a tax on property which does not conform to the constitutional requirements of equality and uniformity. Fatjo v. Pfister, 117 Cal. 83, 48 Pac. 1012; Cook County v. Fairbank, 222 Ill. 578, 78 N. E. 895; State v. Gorman, 40 Minn. 232, 41 N. W. 948, 2 L.R.A. 701; Hauser v. Miller, 37 Mont. 22, 94 Pac. 197; State v. Case, 39 Wash. 177, 81 Pac. 554, 109 Am. St. Rep. 874, 1 L.R.A.(N.S.) 152; State v. Mann, 76 Wis. 469, 45 N. W. 526, 46 N. W. 51. And see the reported case. See also Mearkle v. Hennepin County, 44 Minn. 546, 47 N. W. 165. In State v. Case, supra, the court, in holding that such a statute could not be sustained on the ground that the charges which it imposed were fees for services rendered, said: "Appellant further argues, that the . . . charge in question here may be regarded not as a tax upon property, but as a fee for services rendered; and that the legislature has the right to fix the amount of such fee. It is true the statute calls the charge a 'fee,' but if it is apparent upon the face of the statute that the charge is in fact not based upon actual and necessary services rendered or to be rendered, but is based entirely upon a property valuation, thereby partaking of the nature of a tax, it would seem to be wholly immaterial by what name the statute may designate it. The statute in terms shows that the charge is based upon the value of the estate, and shall we conclude that the legislature intended to say, in effect, that the amount of actual and required services varies according to the value of the estate only? If the legislature intended to so declare, it cannot be said that the declaration is supported by experience. Can the legislature arbitrarily say that greater service is required in the settlement of an estate valued at one thousand dollars than one valued at $999.99? We think not, and yet such is the exact effect of this statute, if it shall be held that these charges are fees for services only." In Hauser v. Miller, supra, the statute under consideration provided for the payment of a fee at the time of the filing of a petition for letters testamentary or of administration, and on the return of the inventory if the estate was appraised above a named sum another fee was required to be paid, the amount of the fee depending on the appraised value of the estate. It was contended that the effect of the statute was to impose a tax for revenue purposes and hence that it was repugnant to a constitutional provision prohibiting the legislature from levying taxes in any county, city, town or municipal corporation for county, town or municipal purposes, and to another provision declaring that taxes should be uniform and levied for public purposes only. The court in upholding these contentions said: "The impositions complained of cannot be deemed fees paid to the clerk for special services, because they do not go to him. . . . Nor can they be said to be designed to provide a fund to be devoted specially to the payment of his salary. The statute does not so declare. From any point of view, they can only be regarded as a means resorted to by the legislature to provide revenue for the respective counties. They are professedly imposed for the benefit of the counties. They are clearly a tax upon the

property of certain classes of individuals. The amounts are regulated wholly and arbitrarily with regard to the appraised value of the estates of decedents, of minors and incompetents. The burdens fall not upon the residue of the estates of decedents to be distributed after debts and expenses are paid, but upon the whole of such estates, and at arbitrary and unequal rates. An estate of the value of three thousand dollars is required to pay five dollars, whereas all estates of a greater value, up to one hundred thousand dollars, are taxed at a greater and increasing rate. After that value is reached, the rate is the same, without reference to value. There is also a manifest inequality in the rates fixed for estates falling in the different classes; for an estate slightly in excess of the value of ten thousand dollars bears the same burden as one of twenty thousand dollars in value. . . . It is thus entirely clear that the act, levying a tax as it does upon the property of the people in the different counties for the benefit of the counties and at grossly unequal rates, as applied to estates of different values, is open to both the objections urged against it, and is void."

It has been held that a statute imposing a charge on the granting of letters testamentary, administration, guardianship or conservatorship, the amount of the charge depending on the valuation of the estate, cannot be sustained on the ground that it imposes a succession tax. Fatjo v. Pfister, 117 Cal. 83, 48 Pac. 1012; Cook County v. Fairbank, 222 Ill. 578, 78 N. E. 895. In the case last cited it was said: "Nor can the charge or burden imposed be sustained upon the ground that it amounts to no more than an inheritance or succession tax. The contention that it does amount to such tax is fully met by the fact that the statute in express terms applies not only to the estates of deceased persons, but also to the estates of infants, idiots, insane persons, lunatics, distracted persons, drunkards and spendthrifts. The tax here imposed is levied upon the body of the entire estate, if it exceeds two thousand dollars in value, whether the estate is solvent or insolvent, while an inheritance or succession tax is imposed, not as a tax upon the estate, but upon the right of succession."

In State v. Gorman, 40 Minn. 232, 41 N. W. 948, 2 L.R.A. 701, it was held that a statute providing that no proceedings subsequent to the return of the inventory should be had in the probate court for the settlement of an estate until the payment has been made of charges the amount of which varied according to the appraised value of the estate, violated a constitutional provision guarantying free justice. The court said: "Suitors in this (probate) court of exclusive jurisdiction should not be required to pay, as a condition to their suits being entertained, a tax measured by the value of their property, and without regard to the nature or extent of the judicial proceedings which may be invoked or become necessary. That would be contrary to that clause of the constitution which guaranties justice 'freely and without purchase, completely and without denial.'"

In State v. Mann, 76 Wis. 469, 45 N. W. 526, 46 N. W. 51, it appeared that a statute applying to the administration of estates in any county having a population of more than 150,000 required administrators to "pay to the county treasurer of such county, for the use thereof, a sum equal to one half of one per cent. on five hundred thousand dollars of the appraised value of such estate, and one tenth of one per cent. of such value on the balance of said estate." It was held that the charge imposed by the act was a tax which could not be upheld under a constitutional provision that "the legislature shall impose a tax on all civil suits . . . which shall constitute a fund to be applied toward the payment of the salary of judges."

MARCONI WIRELESS TELEGRAPH COMPANY

v.

COMMONWEALTH.

And Eight Other Cases.

Massachusetts Supreme Judicial Court—October 8, 1914.

218 Mass. 558; 106 N. E. 310.

Foreign Corporations — Excise Tax — Validity.

The Foreign Corporation Tax Law (St. 1909, c. 490, pt. 3) § 56 et seq., is valid, it imposing an excise or license, and not a tax upon the property of foreign corporations.

Taxes — Estoppel of Taxpayer to Question.

As St. 1903, c. 437, §§ 60, 73, 74, deny a corporation, which fails to file seasonably with the secretary of the commonwealth the certificate of its condition as a foreign corporation, the right to maintain actions in the local courts and impose severe penalties, the act of foreign corporations which maintained places of business within the state, in filing such certificate and appointing the commissioner of corporations their agent for the service of process in accordance with section

58, does not estop them from denying that they are liable to the excise tax imposed by Foreign Corporation Tax Law (St. 1909, c. 490, pt. 3), particularly as section 70 of that statute, which provides the exclusive remedy for recovering such taxes when improperly paid, does not require any preliminary protest or statement of objection before filing the petition.

[See note at end of this case.]

Statutes — Re-enactment — Adoption of Prior Construction.

Where, although St. 1903, c. 437, imposing taxes on foreign corporations, was construed to be inapplicable to foreign corporations whose places of business within the state were maintained solely for use in interstate commerce, the legislature re-enacted it as St. 1909, c. 490, pt. 3, without substantial change, they must be held to have adopted the prior construction.

Interstate Commerce — What Constitutes.

Commerce within the federal Constitution is commercial intercourse between nations and the states, and includes not only navigation and transportation, but the purchase, sale, and exchange of commodities, and hence the Foreign Corporation Tax Law of 1909 (St. 1909, c. 490, pt. 3), imposing an excise upon foreign corporations, does not apply to those engaged in foreign commerce, although it be a commercial business.

Power of State to Tax.

Where a foreign corporation which does an interstate commerce business within the state also does a domestic business, the state may levy an excise tax upon it.

[See Ann. Cas. 1913C 812.]

Same.

Where a foreign corporation does both an intrastate and interstate business, an excise levied by the state upon its intrastate business is not invalid because the profit on the intrastate business alone is not sufficient to meet it.

What Constitutes Commerce — Correspondence School.

The sending of means of education by correspondence through the mails is commerce.

[See 18 Ann. Cas. 1109.]

Corporation Engaged Wholly in Interstate Commerce — License Tax.

A foreign wireless company which maintained within the state stations at which messages to and from ships on the high seas and foreign countries were received and transmitted, but which did not transmit any local messages, is engaged wholly in interstate commerce, and is not subject to the excise tax imposed by Foreign Corporation Tax Law of 1909 (St. 1909, c. 490, pt. 3).

[See Ann. Cas. 1914A 987; Id. 1913C 812.]

Same.

A foreign corporation which maintained a Boston office under a manager who had charge of the business in that vicinity, and under whom were a salesman and a stenographer, is not, where all orders had to be approved by the New York office, and no customers came to the Boston office, payments and shipments being made from outside the state, engaged in local business so as to be subject to Foreign Corporation Tax Law of 1909 (St. 1909, c. 490, pt. 3).

Same.

Where a Connecticut corporation maintained a Boston office, the sale and delivery of goods to citizens of Connecticut through the local office is not interstate commerce for that reason.

Same.

Where a Connecticut corporation maintained a Boston sales office where samples were kept and salesmen for the New England district had their headquarters, it is not wholly engaged in interstate commerce, it appearing that customers visited its local office, and hence is subject to Foreign Corporation Tax Law of 1909 (St. 1909, c. 490, pt. 3).

Same.

Where a foreign corporation maintained a local sales office where orders for the sale of machines were received subject to approval by the home office, but repair parts for the machines were kept at the local office and a large business in repairs was done, the corporation is not engaged wholly in interstate commerce, and is subject to the excise tax imposed by Foreign Corporation Tax Law of 1909 (St. 1909, c. 490, pt. 3).

Same.

A foreign corporation engaged in the automobile business, which maintained a local sales office where orders for machines were taken, the machines being sent as ordered, but not kept distinct for each customer, and where a large repair and used car business was carried on, is not engaged wholly in interstate commerce, and is subject to Foreign Corporation Tax Law of 1909 (St. 1909, c. 490, pt. 3).

Same.

A foreign flour manufacturing corporation, which maintained a local office from whence salesmen were sent through the country to secure retail orders for flour, which were delivered to the wholesale patrons of the company, is not wholly engaged in interstate commerce, particularly where a small stock was kept on hand for local sales, and is subject to Foreign Corporation Tax Law of 1909 (St. 1909, c. 490, pt. 3).

Same.

A foreign holding company whose articles of association named Boston as its business office without the state of its domicil, and which maintained a Boston office, where dividends from the stock it held for the benefit of its shareholders were received and were paid, is not engaged wholly in interstate commerce, and is subject to the Foreign Corporation Tax Law of 1909 (St. 1909, c. 490, pt. 3), particularly where its officers were citizens of the state of Massachusetts, and all of its records and accounts were kept in that state.

Same.

A foreign mining company whose property was located in another state, but which was authorized to maintain a Boston office, at which its directors' meetings were held, its policies shaped, and selling orders given, is not engaged in interstate commerce, although it had a general manager in charge of its mining business in the foreign state, and hence it is subject to the excise prescribed by Foreign Corporation Tax Law of 1909 (St. 1909, c. 490, pt. 3).

Foreign Corporations — Excise Tax — Validity.

Where a foreign corporation engaged in the automobile business purchased real estate and erected a substantial building for the carrying on of its repair trade, and trade in used cars, as well as a selling agency, Foreign Corporation Tax Law of 1909 (St. 1909, c. 490, pt 3), which greatly increased the license taxes upon foreign corporations, does not deprive such corporation of equal protection of the laws; it not appearing that its real property was exclusively adapted to use for automobile business, that it was necessary for it to have purchased such property to carry on its business, or that the property could not be sold for a reasonable price.

Report from Supreme Judicial Court, Suffolk county.

Nine separate petitions to recover excise taxes paid. Marconi Wireless Telegraph Company of America, Pocahontas Fuel Company, Cheney Brothers Company, Lanston Monotype Machine Company, Locomobile Company of America, Northwestern Consolidated Milling Company, Copper Range Company, White Company, and Champion Copper Company, petitioners respectively, and Commonwealth, defendant in each action. Cases reported. The facts are stated in the opinion. All actions except by two petitioners first named, DISMISSED.

Chas. A. Snow and *Wm. P. Evarts* for petitioners.

Thos. J. Boynton and *Roger Sherman Hoar* for defendant.

[561] RUGG, C. J.—These are petitions brought by corporations organized under the laws of other States to recover excise taxes paid by each for the privilege of transacting business within the Commonwealth.

1. The foreign corporation tax law, St. 1909, c. 490, Part III, §§ 56, et seq., has been upheld as a constitutional exercise of the power of the State after extended argument and thorough deliberation. Atty.-Gen. v. Electric Storage Battery Co. 188 Mass. 239, 3 Ann. Cas. 631, 74 N. E. 467; Baltic Min. Co. v. Com. 207 Mass. 381, 93 N. E. 831; Keystone Watch Case Co. v. Com. 212 Mass. 50, 98 N. E. 1063; S. S. White Dental Mfg. Co. v. Com. 212 Mass. 35, Ann. Cas. 1913C 805, 98 N. E. 1056. On writ of error the judgments in the last two cases were affirmed in 231 U. S. 68, 34 S. Ct. 15, 58 U. S. (L. ed.) 127. The only question to be determined in the cases at bar is whether under the principles already established the several plaintiffs were subject to the excise laid upon each. The tax sought to be recovered is strictly an excise tax and in no sense a property tax. It is a license fee exacted from foreign corporations for the privilege of doing in this State business other than interstate commerce. So far as any of the plaintiffs' requests for rulings seek for a re-examination or reversal of the principles established in these decisions, they rightly were denied.

2. The Commonwealth urges that each of the plaintiffs is [562] estopped now from denying that it is within the scope and purview of this law. The ground for this contention is that each seasonably, voluntarily and without protest filed with the secretary of the Commonwealth the certificate of its condition as a foreign corporation required by § 54, and likewise appointed the commissioner of corporations its agent for the service of process in accordance with St. 1903, c. 437, § 58, and hence has acknowledged itself to be subject to the law. The principle invoked is that, where one of his own volition asks for a privilege or license, he cannot be heard to say afterward that his payment of the fee exacted was illegal and on that account seek to recover it. It relies upon Cook v. Boston, 9 Allen (Mass.) 393, 394, Emery v. Lowell, 127 Mass. 138, 141 and like cases, and especially upon Ficklen v. Shelby County Taxing Dist. 145 U. S. 1, 24, 12 S. Ct. 810, 36 U. S. (L. ed.) 601. But all these were cases where a fee was exacted in advance for a license issued for the transaction of a particular branch of business. In the Ficklen case the precise point decided was that a resident commisison broker, who, after paying the required fee, had taken out a general license to do all kinds of commission brokerage for both foreign and domestic correspondents for 1887 and also had given a bond to pay in addition a percentage on all sales during that year, could not resort to the courts to compel the issuance to him of a license for the ensuing year by municipal authorities who refused because he had not complied with the bond of the earlier year on the ground that as the event had proved business had been done only for non-resident principals. The cases at bar in this respect come within the principle applied to a somewhat similar state of facts in Atchison, etc. R. Co. v. O'Connor, 223 U. S. 280, A. C. 1913C 1050, 32 S. Ct. 216, 56 U. S. (L. ed.) 436, where it was held that a foreign corporation paying an excise tax was not acting volun-

tarily in a legal sense but was under implied duress when it was put to a serious disadvantage against the sovereignty by reason of liability to heavy penalties if in the end its contention for exemption should not be sustained. Severe penalties are provided by § 73 for each day's delay in filing returns, and by § 74 the business of the corporation may be enjoined, while by St. 1903, c. 437, § 60, the delinquent corporation is denied the privilege of maintaining actions in our courts. Somewhat summary remedies are given in the event of a failure to pay the tax. See St. 1909, c. 490, Part III, §§ 58, 62, 69. [563] The provision of § 70 under which these petitions are brought is that relief may be had by any corporation within six months after paying the tax, which shall be the exclusive remedy. It does not require any preliminary protest or statement of objection before filing the petition. From all these considerations the conclusion follows that the several petitioners are not prevented from maintaining these petitions because they complied with the requirements of the law as its scope was contended to be by the officers of the Commonwealth, in order to avoid the consequences of being mistaken in their own interpretation of it. The provisions of St. 1903, c. 437, §§ 58, 60, may apply in whole or in part to corporations engaged exclusively in interstate commerce. International Harvester Co. v. Kentucky, 234 U. S. 579, 34 S. Ct. 944, 58 U. S. (L. ed.) 1479. But that question is not now before us and does not affect the point here decided.

3. It was said in the course of the opinion in Atty.-Gen. v. Electric Storage Battery Co. 188 Mass. 239, at pages 240, 241, 3 Ann. Cas. 631, 74 N. E. 467, "If the statute before us applied to the maintenance of a place of business solely for the purpose of engaging in interstate commerce it would be unconstitutional. . . . We are of opinion that the Legislature cannot have intended to include in this statute corporations whose usual place of business is established and maintained solely for use in interstate commerce." After that decision St. 1909, c. 490 was enacted without material change in this respect, from which the inference flows that the Legislature was content with the law as interpreted by that decision. In Baltic Min. Co. v. Com. 207 Mass. 381, 93 N. E. 831, at page 390 it was said, referring to the case last cited, "In our former adjudication upon it [the statute now under consideration] we expressed the opinion that it was inapplicable to cases where a foreign corporation had its place of business here only for use in interstate commerce. It is not to be inferred that the Legislature intended the statute to go beyond the constitutional authority of the Commonwealth." What was said in these two decisions was adverted to and apparently adopted in part as the basis of decision in Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 34 S. Ct. 15, 58 U. S. (L. ed.) 127, where it was stated at page 84, "and the statute, it is held, does not apply to corporations which have places of business for the transaction solely of interstate commerce." See also [564] S. S. White Dental Mfg. Co. v. Commonwealth, 212 Mass. 35, at page 46, Ann. Cas. 1913C 805, 98 N. E. 1056.

The contention of the Commonwealth that these sentences were not intended to apply to and do not apply to corporations doing a commercial or trading business, but only to transportation corporations, cannot be supported. The decisions in which they occur did not relate to transportation corporations but to purely business corporations. The statements cannot be treated as *dicta*, for they are used as essential links in a chain of reasoning by this court upholding the constitutionality of the statute. We regard ourselves as bound by them in interpreting and applying this statute.

The Attorney General has argued in substance that the maintenance of a local office solely for a purpose connected with interstate commerce is such a doing business within the State as subjects a corporation to the license fee required by this statute. Reliance in this regard is placed especially upon the words in Pembina Consol. Silver Min. etc. Co. v. Pennsylvania, 125 U. S. 181, 8 S. Ct. 737, 31 U. S. (L. ed.) 650, at page 184, to the effect that the State has a right to exact a license fee of a foreign corporation for maintaining "an office in the Commonwealth for the use of its officers, stockholders, agents, or employees." But as was explained in McCall v. California, 136 U. S. 104, 10 S. Ct. 881, 34 U. S. (L. ed.) 392, at page 112, that decision was not intended to impinge upon the equally well settled principle that "the only limitation upon this power of the State to exclude a foreign corporation from doing business within its limits, or hiring offices for that purpose, or to exact conditions for allowing the corporation to do business or hire offices there, arises where the corporation is in the employ of the federal government, or when its business is strictly commerce, interstate or foreign. The control of such commerce, being in the federal government, is not to be restricted by State authority." Expressions to be found in Horn Silver Min. Co. v. New York, 143 U. S. 305, 317, 12 S. Ct. 403, 36 U. S. (L. ed.) 164; Wolff Dryer Co. v. Bigler, 192 Pa. St. 466, 43 Atl. 1092; Davis, etc. Bldg. etc. Co. v. Dix, 64 Fed. 406, 413 and Atty.-Gen. v. Bay State Min. Co. 99 Mass. 148, 153, 96 Am. Dec. 717, relied on by the Attorney General, must be regarded as subject to this limitation. In principle that

question is concluded by Norfolk etc. R. Co. v. Pennsylvania, 136 U. S. 114, 10 S. Ct. 958, 34 U. S. (L. ed.) 394 and McCall v. California, 136 U. S. [565] 104, 10 S. Ct. 881, 34 U. S. (L. ed.) 392, when read in the light of the numerous definitions (presently to be examined) of commerce between the States given by that court. Such a place of business in common with all others, whether of citizens or aliens, perhaps might be required to pay a license fee, but that question is not presented. The conclusion is that the maintenance by a foreign corporation of a local office solely for use in interstate commerce does not render it liable to the excise tax of the statute under consideration.

4. What constitutes "commerce . . . among the several States" within the meaning of those words in the Federal Constitution has been defined by the Supreme Court of the United States. Said Chief Justice Marshall in Gibbons v. Ogden, 9 Wheat. 1, 189, 190, 6 U. S. (L. ed.) 23. "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches." In Mobile County v. Kimball, 102 U. S. 691, 26 U. S. (L. ed.) 238, at page 702 occurs this definition: "Commerce with foreign countries and among the States, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities." In Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 203, 5 S. Ct. 826, 29 U. S. (L. ed.) 158, it was said, "Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions." In Robbins v. Shelby County Taxing Dist. 120 U. S. 489, 7 S. Ct. 592, 30 U. S. (L. ed.) 694, at page 497, it was said that "the negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce." Kidd v. Pearson, 128 U. S. 1, 20, 9 S. Ct. 6, 32 U. S. (L. ed.) 346; Lottery Case, 188 U. S. 321, 352, 353, 23 S. Ct. 321, 47 U. S. (L. ed.) 492; Swift v. U. S. 196 U. S. 375, 25 S. Ct. 276, 49 U. S. (L. ed.) 518; Diamond Match Co. v. Ontonagon, 188 U. S. 82, 23 S. Ct. 266, 47 U. S. (L. ed.) 394. It is apparent from this review of decisions that the interstate commerce regulation which is under the exclusive control [566] of Congress and which cannot be affected by any discriminatory State law, includes not merely transportation but the other inherently necessary incidents of purchase and sale of goods. Nor is it of decisive consequence in this connection where the contract is made or where the title passes. As was said in Dozier v. Alabama, 218 U. S. 124, at page 128, 30 S. Ct. 649, 54 U. S. (L. ed.) 965, 28 L.R.A. (N.S.) 264, "But as was hinted in Rearick v. Pennsylvania, 203 U. S. 507, 512, 27 S. Ct. 159, 51 U. S. (L. ed.) 295, what is commerce among the States is a question depending upon broader considerations than the existence of a technically binding contract, or the time and place where the title passed." Caldwell v. North Carolina, 187 U. S. 622, 23 S. Ct. 229, 47 U. S. (L. ed.) 336; Savage v. Jones, 225 U. S. 501, 520, 32 S. Ct. 715, 56 U. S. (L. ed.) 1182; Crenshaw v. Arkansas, 227 U. S. 389, 33 S. Ct. 294, 57 U. S. (L. ed.) 565; Rogers v. Arkansas, 227 U. S. 401, 33 S. Ct. 298, 57 U. S. (L. ed.) 569; Stewart v. Michigan, 232 U. S. 665, 34 S. Ct. 476, 58 U. S. (L. ed.) 786.

5. The petitioners have emphasized somewhat in argument the phrase in 231 U. S., at page 86, to the effect "that local and domestic business, for the privilege of doing which the State has imposed a tax, is real and substantial," and have sought to infer therefrom that a new limitation has been imposed upon the power of the States. This conclusion does not follow. The sentence probably was intended only as a reference to a fact which existed in the cases then before the court, although not one decisive in any respect as to the conclusion reached. But given its full force, it is nothing more than a statement that a shadow cannot be made the basis of an excise tax. But when the local and domestic business exists, then an excise may be levied. There is nothing to indicate that a comparison between the total business of the company and its local business was intended. Such a basis has never before been intimated. It is directly contrary to Ficklen v. Shelby County Taxing Dist. 145 U. S. 1, 12 S. Ct. 810, 36 U. S. (L. ed.) 601. See also Flint v. Stone Tracy Co. 220 U. S. 107, Ann. Cas. 1912B 1312, 31 S. Ct. 343, 55 U. S. (L. ed.) 389. If such a prineiple exists in reference to any facts, it has no relation to any of the cases at bar. The test is whether the foreign corporation transacts domestic business substantial in its essence and not by comparison, and reasonably susceptible of separation from its interstate commerce. If it does, the State can fix its own terms so far as license fee is concerned.

6. The ratio of profits on the domestic business to the license tax is an immaterial circumstance. If the license fee imposed is general in its operation and is in other respects invulnerable, the mere fact, that some foreign corporation may not be able to make [567] profits enough to meet it, does not render the law unconstitutional as to that corporation. The opportunity to do business subject to the protection of our laws and with all the advantages which arise from our markets and our financial and other resources, is the thing which is made the subject of the excise. U. S. v. Singer, 15 Wall. 111, 21 U. S. (L. ed.) 49; Flint v. Stone Tracy Co. 220 U. S. 107, 166, 167, Ann. Cas. 1912B 1312, 31 S. Ct. 343, 55 U. S. (L. ed.) 389.

Both upon this point and the one last discussed the petitioners rely on the statement in U. S. Express Co. v. Minnesota, 223 U. S. 335, 348, 32 S. Ct. 211, 56 U. S. (L. ed.) 459, to the effect that if the amount of the tax is "unduly great, having reference to the real value" of the property engaged in the business, and on that in Western Union Tel. Co. v. Kansas, 216 U. S. 1, 42, 30 S. Ct. 190, 54 U. S. (L. ed.) 355, referring to a tax "not all disproportioned to such local business." See S. S. White Dental Mfg. Co. v. Com. 212 Mass. 35, 44, Ann. Cas. 1913C 805, 98 N. E. 1056. These tests well may be used as aids in determining whether the general scheme of an excise statute is an honest attempt to raise legitimate revenue, or whether it is "a mere device to reach and burden the interstate commerce of the company." But when the general scheme of the statute has been upheld as not out of harmony with the Federal Constitution, then it cannot be stricken down because in a particular instance the excise may seem large. New York v. Roberts, 171 U. S. 658, 661, 663, 19 S. Ct. 58, 43 U. S. (L. ed.) 323; Pullman Co. v. Kansas, 216 U. S. 56, 66, 67, 30 S. Ct. 232, 54 U. S. (L. ed.) 378; Ohio Tax Cases, 232 U. S. 576, 592, 34 S. Ct. 372, 58 U. S. (L. ed.) 738.

It remains to consider the several cases at bar in the light of these governing principles.

7. The Marconi Wireless Telegraph Company of America is organized under the laws of New Jersey. It maintains in Massachusetts near the ocean three wireless stations, each consisting chiefly of a high pole having at the top a wire or wires with bare ends, from which are sent through and taken from the air currents of electricity, whereby messages are transmitted and received. Connected with this apparatus are rooms similar to ordinary telegraph stations, for use of the wireless telegraph operators. At each station it transmits and receives wireless messages for hire to and from ships on the high seas and foreign countries. It neither transmits nor receives any messages whatever over land or in or through this Commonwealth. It has no property in the Commonwealth, except that above described. [568] It is plain that this petitioner is engaged exclusively in foreign commerce. Transmission of intelligence by means of the electric telegraph has been held to be commerce. Pensacola Tel. Co. v. Western Union Tel. Co. 96 U. S. 1, 24 U. S. (L. ed.) 708; Western Union Tel. Co. v. Texas, 105 U. S. 460, 26 U. S. (L. ed.) 1067; Leloup v. Mobile, 127 U. S. 640, 645, 8 S. Ct. 1380, 32 U. S. (L. ed.) 311; Western Union Tel. Co. v. Kansas, 216 U. S. 1, 30 S. Ct. 190, 54 U. S. (L. ed.) 355. The sending of the means of education by correspondence through the mails also is commerce. International Text-Book Co. v. Pigg, 217 U. S. 91, 18 Ann. Cas. 1103, 3 S. Ct. 481, 54 U. S. (L. ed.) 678, 27 L.R.A.(N.S.) 493. The same principle governs the transmission of ideas, thought and news by the recently discovered instrumentality which has harnessed in its service "the sightless couriers of the air" to perform between its stations without visible highway the functions previously executed by electricty only when confined to wire as a conducting medium. This petitioner transacts no business of a domestic or local nature, except such as is inseparable from and necessarily incidental to its foreign commerce. Hence it is not within the purview of the statute.

8. The Pocahontas Fuel Company is established under the laws of West Virginia. Its business is the buying and selling of coal and coke. At its office in Boston is a manager who has charge of New England business and who is paid by check from New York, a salesman and a stenographer. Records of sales are kept at the Boston office and an average deposit of $1,000 is kept in a local bank for the expenses of this office. Correspondence and telephoning respecting sales is done from this office. Customers do not come to the office, but are called upon by the salesman, who sends all orders to New York, where they must be accepted and approved before the sale takes place. Goods are shipped to customers f. o. b. Norfolk, Virginia. The local office, in making contracts for delivery in Massachusetts, arranges charter parties for boats in the customer's name. All payments by customers are made by remittances by check to New York. This company has none of its goods or property in the Commonwealth, except office furniture, and there is no treasurer here. The description of business done at the Boston office, as shown by the agreed facts, is somewhat meagre, but it does not appear to include anything more than interstate commerce. No stock of goods is kept here. There is no local shop or store as a general resort for customers and the conduct of the essential

details of [569] trade. It does not manufacture nor mine but buys its stock from other companies and, although not distinctly stated, it may be inferred that such purchases do not occur in Massachusetts. Its business, so far as this Commonwealth is concerned, consists of selling by contracts made in New York coal bought in other States to customers in the New England States and arranging for its transportation to them over the high seas or by rail from Virginia, solely through the medium of a manager and a salesman who travel to see prospective purchasers or communicate with them by telephone or letter from its Boston office. That which this company does in Massachusetts seems to be rationally connected with interstate commerce. The sole business which this company appears to carry on is "commerce . . . among the several States" as that phrase has been defined in judgments by which we are bound. The keeping of an office and a local bank account and the employment of a stenographer are incidental instrumentalities reasonably necessary to the conduct of this interstate commerce, and hence inseparable from it. This is not a case where the corporation by the form of its contracts or the details adopted for the doing of its business has attempted to convert into a form resembling interstate commerce that which in its intrinsic substance is local business subject to State control. Hence, Browning v. Waycross, 233 U. S. 16, 34 S. Ct. 578, 58 U. S. (L. ed.) 828, where that thing was essayed, is not in point. This case seems to be covered in principle by McCall v. California, 136 U. S. 104, 10 S. Ct. 881, 34 U. S. (L. ed.) 392; Norfolk, etc. R. Co. v. Pennsylvania, 136 U. S. 114, 10 S. Ct. 958, 34 U. S. (L. ed.) 394; Crenshaw v. Arkansas, 227 U. S. 389, 33 S. Ct. 294, 57 U. S. (L. ed.) 565; Rogers v. Arkansas, 227 U. S. 401, 33 S. Ct. 298, 57 U. S. (L. ed.) 569; Stewart v. Michigan, 232 U. S. 665, 34 S. Ct. 476, 58 U. S. (L. ed.) 786; Singer Sewing Mach. Co. v. Brickell, 233 U. S. 304, 34 S. Ct. 493, 58 U. S. (L. ed.) 974. It follows that it is entitled to prevail in this proceeding.

9. The Cheney Brothers Company is organized under the laws of Connecticut for the manufacture of silk and other fabrics and for the purpose of trade. It maintains in Boston an office and salesroom with one office salesman and four other salesmen who travel through New England. No bookkeeper is employed, no books are kept except copies and records of orders, and no collections are made. The only deposit of funds is for the expenses of the office, amounting usually to about $250, which is sent from the treasury in New York. The salaries of salesmen and rent of [570] office are paid directly from the Connecticut office. A stock of samples is kept, but no other goods. The salesmen take orders, which are subject to approval by the home office in Connecticut, and the goods are shipped directly from Connecticut to the customer. The contract of sale is completed in Connecticut, where the title passes. This description of the place maintained by the corporation in Boston, and the character of business transacted there shows something outside interstate commerce. A fixed abode has been established, which is used as the headquarters for its New England business. It is almost a necessary inference from the maintenance of an "office and salesroom" with one permanent salesman, that customers resort thither in considerable numbers for the purpose of examining samples and placing orders. It reasonably may be assumed that here also are fixed all the terms of a very substantial number of sales, and that the only thing required to complete the transaction is the bald approval by the company at its home office. It is not only a permanent home for the corporation for the carrying on of its New England sales business, but it has many of the characteristics of a local salesroom. The stock of samples kept on hand is large enough apparently to require the constant attendance of one salesman. It was said by Mr. Chief Justice Waite in Robbins v. Shelby County Taxing Dist. 120 U. S. 489, at page 500, 7 S. Ct. 592, 30 U. S. (L. ed.) 489, "I cannot believe that if Robbins had opened an office for his business within the Taxing District, at which he kept and exhibited his samples, it would be held that he would not be liable to the tax, and this whether he stayed there all the time or came only at intervals." These words were used in a dissenting opinion. But they embody a thought by way of hypothesis which evidently was regarded as too plain to be challenged.

Five salesmen are attached to these Massachusetts headquarters; one stationed there permanently; while four others also travel throughout New England. New England is a perfectly well understood geographical term which includes Connecticut, the domiciliary State of the corporation. Since the agreed facts show that the travelling salesmen attached to the Boston office "cover" Connecticut as well as the other New England States, it follows that this local domicil is used in part at least for the transaction of business between the Cheney [571] Brothers Company, domiciled in Connecticut, and other residents of Connecticut. Apparently the orders from residents of Connecticut are registered, copied and forwarded to the Connecticut office of the corporation through the Boston office. Such orders may be taken by the travelling salesmen from purchasers in Connecticut or at the salesroom directly from Connecticut customers who go there in person. Plainly,

the sale and delivery of goods by a Connecticut corporation to a citizen of Connecticut does not become interstate commerce merely because the order may have been transmitted through a sales agency of the corporation located in Massachusetts. This especially is true where the sale is consummated in Connecticut by acceptance of the order and the passing of the title in Connecticut, as is said in the agreed facts to be the course of business. Lehigh Valley R. Co. v. Pennsylvania, 145 U. S. 192, 12 S. Ct. 806, 36 U. S. (L. ed.) 672; United States Express Co. v. Minnesota, 223 U. S. 335, 341, 32 S. Ct. 211, 56 U. S. (L. ed.) 459. That there is nothing inconsistent with this conclusion in Hanley v. Kansas City Southern R. Co. 187 U. S. 617, 23 S. Ct. 214, 47 U. S. (L. ed.) 333, is established by Ewing v. Leavenworth, 226 U. S. 464, 33 S. Ct. 157, 57 U. S. (L. ed.) 303.

Some of these circumstances singly are enough to show that the place maintained by Cheney Brothers Company in Boston was not used exclusively for interstate commerce. Combined together, they lead to the conclusion that it is not entitled to prevail in this proceeding. The recognition of the existence of the corporation in Massachusetts to the extent here shown, by permitting it to maintain an office for the general use of its employees, agents and customers and the storage and display of samples of its products, "was a matter dependent on the will of the State," who could affix to the favorable exercise of its volition the conditions set forth in the corporation excise tax law. Pembina Consol. Silver Min. etc. Co. v. Pennsylvania, 125 U. S. 181, 186, 8 S. Ct. 737, 31 U. S. (L. ed.) 650; New York v. Roberts, 171 U. S. 658, 19 S. Ct. 58, 43 U. S. (L. ed.) 323; Raymann Brewing Co. v. Brister, 179 U. S. 445, 21 S. Ct. 201, 45 U. S. (L. ed.) 269; Horn Silver Min. Co. v. New York, 143 U. S. 305, 12 S. Ct. 403, 36 U. S. (L. ed.) 164; Atty.-Gen. v. Bay State Min. Co. 99 Mass. 148, 96 Am. Dec. 717. The record reveals nothing to bring this corporation within any of the exceptions to this general rule discussed in McCall v. California, 136 U. S. 104, 10 S. Ct. 881, 34 U. S. (L. ed.) 392; Norfolk, etc. R. Co. v. Pennsylvania, 136 U. S. 114, 10 S. Ct. 958, 34 U. S. (L. ed.) 394, and kindred cases.

10. The Lanston Monotype Machine Company, organized under the laws of Virginia, manufacturers machinery at its factory in [572] Philadelphia, Pennsylvania. It maintains an office in Boston, where there are a manager and office manager and four inspectors, all of whom act as salesmen. The machines are all sold on orders subject to cancellation within seven days sent to the home office in Philadelphia and accepted there before becoming operative, and thence the machines are shipped directly to the purchasers with a bill of lading delivered by the local bank to the purchaser when he makes his initial payment. Stock to replace and to repair broken parts of the machines is kept constantly on hand at the Boston office and is replenished weekly from Philadelphia. From this stock in Boston parts are supplied by direct sale for about half the repairs made on the company's machines in New England, amounting to about $12,000 per year. The keeping and sale of this stock in Boston is an inducement to the trade to buy these machines. The petitioner's competitors keep no such stock of parts. These facts show the transaction of a very considerable local or intrastate business as distinguished from its interstate commerce. While there may be economies of management or advertising advantages arising from it in conjunction with the interstate business of the company, there is no necessary or inherent connection between the two. Because the interstate commerce may not be profitable except in connection with local business does not so interlock the two that they are inseparable. The protection afforded by the Federal Constitution to interstate commerce against State excise taxation does not go to the extent of permitting one engaged in interstate commerce to compete in local business free from liability to an excise to the State merely for the sake of greater profit, or even of making the difference between profit and loss in the business as a whole. Plainly this local business of replacing broken parts is conducted in a manner wholly distinct from the interstate business. The distinction is not whether a profit is made by the conjoining and a loss suffered by separating the intrastate and the interstate commerce, but whether the nature of the business is such that the company is free to renounce the domestic business if it chooses and still conduct its interstate commerce. That which was said in Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 34 S. Ct. 15, 58 U. S. (L. ed.) 127, at page 86 is aptly expressive of the situation disclosed on this petition, namely, "It is apparent" that the corporation "is carrying on a purely [573] local and domestic business quite separate from its interstate transactions. That local and domestic business, for the privilege of doing which the State has imposed a tax, is real and substantial and not so connected with interstate commerce as to render a tax upon it a burden upon the interstate business." This case also is governed by Atty.-Gen. v. Electric Storage Battery Co. 188 Mass. 239, 3 Ann. Cas. 631, 74 N. E. 467, where the facts were nearly identical. It there was said by Knowlton, C. J., at page 241, "While the statute is inapplicable to any business or place which belongs entirely to interstate commerce, it is applica-

ble to the defendant, a corporation engaged in interstate commerce, which has, at the same time, a place of business for other purposes. The principle has been recognized repeatedly by the Supreme Court of the United States in similar cases. Osborne v. Florida, 164 U. S. 650, 17 S. Ct. 214, 41 U. S. (L. ed.) 586; Pullman Co. v. Adams, 189 U. S. 420, 23 S. Ct. 494, 47 U. S. (L. ed.) 877." Singer Sewing Mach. Co. v. Brickell, 233 U. S. 304, 34 S. Ct. 493, 58 U. S. (L. ed.) 974.

11. The Locomobile Company of America, a West Virginia corporation, is authorized to manufacture, buy, sell and deal in automobiles and to carry on general business. Its factory is in Bridgeport, Connecticut, where its business is the manufacture and sale of automobiles. In Boston it occupies an office, salesroom and repair shop for the purpose of repairing cars of its own make and second hand cars taken in exchange for its own make. It occupies a large building and employs thirty persons, ten of whom are in the sales and office department and twenty in the repair department. Its method of conducting its sales of new cars is for orders to be taken by its Boston agent and transmitted to Bridgeport, whence cars are shipped to the Boston agent, who makes deliveries in accordance with orders. It does not appear, moreover, that separation of an automobile for a particular purchaser is made until the car reaches Boston, although no shipments of cars are made into Massachusetts "except cars used in fulfilment of orders . . . previously given and approved." In two thirds of the sales of new cars the purchaser pays the entire price in cash on or before the delivery of the car, while in the remaining third "the company accepts, as a part of the consideration, a car of whatever make, previously used by the purchaser." The company maintains at its place of business in Boston a used-car department, where it sells cars of its own and other makes [574] taken as part consideration in the sale of new cars. A stock of such cars is constantly kept for sale. The business of the used-car department for the year during which the excise in question was levied amounted to $41,000 out of a total business of $246,000 done by the company in Boston during the same period. The petitioner also keeps in its Boston repair shop a stock of repair parts used in repairing its own make of cars whether sold in Boston or elsewhere. The repair stock kept on hand amounts to $6,000 and the repairs made annually to $7,500. Testimony was offered to the effect that this was the usual course of business of all automobile companies and that an abandonment of either the used-car business or the repair business would impair the sales of new cars. This narration of facts makes it plain that this petitioner is carrying on a very considerable local and domestic business quite separate and distinct from its interstate business. The petitioner contends that this domestic business is inseparable from its interstate commerce and hence that it is beyond the control of the statute. It was said in Pennsylvania R. Co. v. Knight, 192 U. S. 21, at 28, 24 S. Ct. 202, 48 U. S. (L. ed.) 325, that "many things have more or less close relation to interstate commerce, which are not properly to be regarded as a part of it." The repair part of this company's business comes within the facts before the court in Atty.-Gen. v. Electric Storage Battery Co. 188 Mass. 239, 3 Ann. Cas. 631, 74 N. E. 467, and is concluded by that decision. Moreover, the sale of second hand automobiles is a business by itself. In effect the taking of a second hand machine as part payment for an new one is an investment of part of the proceeds of the sale of the new car. The keeping of these cars in stock and making sales from them is a domestic business and is not interstate commerce nor inseparably connected with it. There is ground for the argument that the transactions as to the new automobiles being shipped to its agent in Boston and separated and delivered to the several purchasers there and paid for there do not constitute interstate commerce, but sales from a local stock replenished by shipments. Apparently there is or may be no apportionment of any particular automobile until it is made by the agent in Boston, for the other may not identify a specific machine. See Caldwell v. North Carolina, 187 U. S. 622, 23 S. Ct. 229, 47 U. S. (L. ed.) 336. But it is not necessary to discuss nor decide this point for the other branches of this company's business which have [575] been described are domestic and separate from this if it be assumed to be interstate. This case comes plainly within the principles established in S. S. White Dental Mfg. Co. v. Com. 212 Mass. 35, Ann. Cas. 1913C 805, 98 N. E. 1056, 231 U. S. 68, 34 S. Ct. 15, 58 U. S. (L. ed.) 127.

12. The Northwestern Consolidated Milling Company is a corporation organized under the laws of Minnesota. It is authorized by its charter among other things to manufacture and sell flour. Its mills are located in Minnesota. It maintains a Boston office which has charge of the business of the company in New England and a part of New York. Sixteen travelling salesmen are connected with the office, seven of whom are devoted to the Massachusetts trade. These salesmen take orders for flour and other grain products from retailers. These orders are turned over to the nearest wholesale dealer, and the petitioner has nothing further to do with them. The situation is that the salesmen in the employ of the manufacturer are soliciting business for the wholesaler by whom they

are not employed. The wholesaler fills from his stock the orders given by the retailer through these salesmen and the retailer pays him. These transactions are wholly between the domestic wholesaler and the domestic retailer. The wholesalers buy their stock from the petitioner by order to the Boston office. Such orders are sent to the petitioner in Buffalo or Minneapolis, and the goods are shipped to the wholesaler. In no case is there any approval of orders by the home office. One half of the sales from the Boston office are for delivery in Massachusetts. The petitioner keeps on hand in Boston a small stock from which it makes sales for delivery in Massachusetts. The major part of the petitioner's business in Massachusetts is furnishing salesmen to act as agents for the domestic wholesalers in soliciting orders from domestic retailers. This is in substance the business of providing agents for the wholesalers. The business done by the wholesaler and the retailer is a domestic business. The business of the petitioner is chiefly in aid of this domestic business, and partakes in no respect of interstate commerce. The motive which influences the petitioner in undertaking this business is inconsequential in determining whether it constitutes interstate commerce. The fact that a natural result may be to increase the sales of the petitioner to the wholesalers is an immaterial circumstance. It is too remote [576] from the actual business of the petitioner's salesmen to make that interstate commerce. Its sales of goods directly from local stock is also domestic, and not interstate in character. There is strong ground for the argument that this company also might be subject to the excise, because the orders from wholesalers are received and accepted, and the transaction in substance consummated at the Boston office. But is is not necessary to pass upon this point, because the manifestly domestic business of the petitioner of very considerable proportions renders it subject to the excise tax.

In none of the cases considered under paragraphs 9 to 12 both inclusive of this opinion is the intrastate business more intimately connected with interstate commerce than in Allen v. Pullman's Palace Car Co. 191 U. S. 171, 24 S. Ct. 39, 48 U. S. (L. ed.) 134; Pullman Co. v. Adams, 189 U. S. 420, 23 S. Ct. 494, 48 U. S. (L. ed.) 134; Osborne v. Florida, 164 U. S. 650, 17 S. Ct. 214, 41 U. S. (L. ed.) 585; Pennsylvania R. Co. v. Knight, 192 U. S. 21, 24 S. Ct. 202, 48 U. S. (L. ed.) 325; Browning v. Waycross, 233 U. S. 16, 34 S. Ct. 578, 58 U. S. (L. ed.) 828, in each of which it was held that the two were separable for purposes of a State excise on the domestic business.

13. The Copper Range Company is organized under the laws of Michigan. Its articles of association state that "the place where the business office of this corporation is located, without the limits of the State of Michigan, is Boston, Massachusetts." This petitioner is a "holding company" whose chief asset is stock in a foreign copper mining corporation, and it also holds the stock and bonds of a Michigan railroad and certain mineral lands. It transacts no commerce either here or elsewhere. Its activities in Massachusetts consisted in receiving monthly dividends from its stock in foreign corporations and depositing them in Boston banks, and the payment of these receipts, less officers' salaries and expenses, to its stockholders by way of dividends. Substantially its entire capital stock is owned by the Copper Range Consolidated Company, whose treasurer is also the treasurer of the petitioner. Its directors' meetings are held three or four times a year in Boston, and its annual stockholders' meeting is also held there. It declares and pays dividends several times annually. The president and treasurer are residents of Massachusetts, and it keeps its corporate records and financial books of account here. It does not appear expressly, but it fairly is inferable from the fact that its treasurer's office is here and its [577] accounts are kept here, that its assets also are kept here. The only question involved in this case is whether the petitioner is doing business in this Commonwealth. Apparently the main business of the corporation is conducted in Massachusetts. A holding company commonly has no business except the holding of its directors' and stockholders' meetings, the receipt of dividends and other income, the payment of its salaries and clerical and office expenses and the distribution of its profits among its stockholders. All of these functions are transacted in Massachusetts. It is significant of the view which the petitioner's incorporators had of its relation to Boston that they stated in their articles of association that its business office outside of Michigan was at Boston. It hardly could be contended that this was not a business corporation. It belongs to no other class of corporations known to the law. The performance of these functions in this Commonwealth constituted a doing of business within the Commonwealth. McCoach v. Minehill, etc. Haven R. Co. 228 U. S. 295, 33 S. Ct. 419, 57 U. S. (L. ed.) 842, manifestly is distinguishable. The place where these activities are carried on property may be termed a usual place of business. Although the legal domicil of the petitioner is in Michigan, its substantial home appears to be in this State, where its essential corporate faculties are exercised. The exaction of a license fee for the transaction of these corporate functions is within the power of the State. Pullman Co. v. Adams, 189 U. S.

420, 422, 23 S. Ct. 494, 47 U. S. (L. ed.) 877; Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 34 S. Ct. 15, 58 U. S. (L. ed.) 127.

14. The Champion Copper Company is organized under the laws of Michigan, to mine, smelt and refine copper and other minerals, and to sell the same. Its articles of association state that the "place where the business office of this corporation is located, without the limits of the State of Michigan, is Boston, Massachusetts." It owns a copper mine in Michigan, where its copper is mined. Its product is sold exclusively through a selling agent in New York which represents the petitioner only with respect to making the contracts of sale and the collections from purchasers and remitting the proceeds to the treasurer of the petitioner. Deliveries under contracts of sale are exclusively under the direction of the petitioner's treasurer. The petitioner maintains its treasurer's office in Boston for the purpose of general [578] direction of the deliveries of copper in accordance with contracts made by its sales agent, and for the purpose of informing its sales agent as to amounts of copper to be sold and the prices, and for the necessary bookkeeping in connection with sales and deliveries, and for the deposit of funds received from all sources in Boston and other banks, the payment of its office expenses and salaries of its officers, and the distribution of dividends among its stockholders. The president and treasurer have their offices in Boston, and five of its seven directors reside in Massachusetts, where also directors' meetings are held during the year. At such meetings reports are submitted and dividends declared and votes passed authorizing the execution of deeds, conveying rights of way and other easements in land in Michigan. The company's mine in Michigan is by vote of its board of directors under the exclusive management of a general manager resident in Michigan. But the general management and control of all the business and property of the petitioner is vested in its directors. This summary of the transactions of the petitioner in Boston shows that it is transacting business there which is not interstate commerce. The articles of association manifest a purpose to maintain a business office in Boston. The functions performed by the president, treasurer and directors are such as commonly are essential to the operation of a business corporation. A considerable portion of the business transacted in Boston relates to matters quite unrelated to interstate commerce. It may be an interesting question whether a foreign corporation can select any place attractive from financial, economic, or other reasons, and establish there the management of all its interstate commerce, and seek immunity from any license for this privilege under the commerce clause of the Federal Constitution, when there is no direct connection between such place and its interstate commerce. We do not understand that McCall v. California, 136 U. S. 104, 10 S. Ct 881, 34 U. S. (L. ed.) 392 and Norfolk, etc. R. Co. v. Pennsylvania, 136 U. S. 114, 10 S. Ct. 958, 34 U. S. (L. ed.) 394, go to this extent. But it is not necessary to discuss this question nor to determine whether the exercise by the treasurer over the sales agent and the other instrumentalities of sale constitutes interstate commerce, Baltic Min. Co. v. Com. 207 Mass. 381, 387, 93 N. E. 831; U. S. v. E. C. Knight Co. 156 U. S. 1, 15 S. Ct. 249, 39 U. S. (L. ed.) 325, because apart from these considerations the corporate activities [579] conducted at Boston constitute a doing of business which has no direct relation to commerce. The entire corporate potentiality dwells in the Boston office. Its executive officers are there. The responsibility for its management as a corporation rests upon those whose headquarters are there. Respecting the effects of our excise law upon such a state of facts, the language of Pombina Consol. Silver Min. etc. Co. v. Pennsylvania, 125 U. S. 181, 8 S. Ct. 737, 31 U. S. (L. ed.) 650, at page 184, is apposite: "It only exacts a license tax from the corporation when it has an office in the Commonwealth for the use of its officers, stockholders, agents, or employees. . . . The exaction of a license fee to enable the corporation to have an office for that purpose within the Commonwealth is clearly within the competency of its Legislature." Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 34 S. Ct. 15, 58 U. S. (L. ed.) 127.

15. The White Company is an Ohio corporation, organized to manufacture and sell automobiles. Its manufactory is in Ohio. It admits that it has a real and substantial local and domestic business. Its petition raises no question under the commerce clause of the Federal Constitution, but it avers that it is denied the equal protection of the laws. Such protection is assured to it, by the Constitutions both of this Commonwealth and of the United States. Its contention rests on these facts. After 1903 (when St. 1903, c. 437, § 75, was in force) and before 1909 it acquired land in Boston, and built thereon a seven story building of steel, brick and concrete. It was especially adapted for use as a garage, and gasoline tanks, elevators and a turntable were installed, the total investment approximating $175,000. Adjoining property was acquired and remodelled and adapted for an automobile service station. This latter estate has not been occupied for several years, nor leased or sold, although it has been for lease or sale. The license fee exacted by the laws of the Commonwealth from foreign corporations has been made more onerous by the statute of 1909. The petitioner contends that

these facts bring it within the principle established by Southern R. Co. v. Greene, 216 U. S. 400, 17 Ann. Cas. 1247, 30 S. Ct. 287, 54 U. S. (L. ed.) 536.

The real estate acquired by this petitioner is of a kind adapted to a very considerable and increasing business, in which there is general competition. The storage and care of automobiles and the performance of necessary service for their repair, maintenance [580] and operation is a widespread business in which large amounts of capital are invested and considerable numbers of persons are engaged. Such establishments are frequent subjects for lease and sale. There is nothing to indicate or to warrant the inference that the petitioner's investment in real estate is not readily salable at reasonable prices. It is not property of a nature irretrievably devoted to a limited and monopolistic use, and not readily available either for other valuable uses or to other persons ready to devote it to the same uses at prices fairly equivalent, subject to the general vicissitudes of business conditions, to the original investment. The Greene case related to railroad property, which is not susceptible of use for any other purpose without great loss. In that opinion it was said, "It must always be borne in mind that property put into railroad transportation is put there permanently. It cannot be withdrawn at the pleasure of the investors. . . . The railroad must stay, and, as a permanent investment, its value to its owners may not be destroyed." 216 U. S. at page 414, citing Ames v. Union Pac. R. 64 Fed. 165, 177. In S. S. White Dental Mfg. Co. v. Massachusetts, 231 U. S. 68, 34 S. Ct. 15, 58 U. S. (L. ed.) 127, at page 88, it was said respecting a similar contention: "The conditions existing in the Southern Railway Co. v. Greene case are not presented here. . . . We do not find in this situation an acquisition of permanent property, such as was shown in the Greene case." The facts in the case at bar are indistinguishable from those before the court in that case. "Permanent property," as these words were used in the opinion in the White Dental Company case referring to the Greene case, we interpret to mean at least a kind of property, ownership of which is inherently necessary for the establishment of the business, which must abide in the same ownership, and which cannot in the nature of things be sold in the general market so as to yield a fair return for the cost, less its normal depreciation. At all events, the Greene case does not exonerate this petitioner from liability to the excise.

Moreover, there is nothing to indicate that the purchase of real estate and the construction of a building were indispensable features of its initial admission to do business here. It is common knowledge that business like that of the petitioner often is conducted on leased property. There is a wide difference between [581] business of that sort and the operation of a railroad, which imperatively requires a roadbed and track.

The conclusion here reached seems to be supported also by Hammond Packing Co. v. Arkansas, 212 U. S. 322, 15 Ann. Cas. 645, 29 S. Ct. 370, 53 U. S. (L. ed.) 530; Security Mut. L. Ins. Co. v. Prewitt, 202 U. S. 246, 6 Ann. Cas. 317, 26 S. Ct. 619, 50 U. S. (L. ed.) 1013, and Waters-Pierce Oil Co. v. Texas, 177 U. S. 28, 20 S. Ct. 518, 44 U. S. (L. ed.) 657.

What has been said disposes of all the cases. It is not necessary to follow in detail the numerous requests for rulings. So far as they apply to any of the cases, the material principles to which they call attention have been discussed. Let entries be made for judgment in the several cases as follows:

Marconi Wireless Telegraph Company of America *v.* Commonwealth,

Decree for the petitioner with costs.

Pochahontas Fuel Company *v.* Commonwealth,

Decree for the petitioner with costs.

Cheney Brothers Company *v.* Commonwealth, *Petition dismissed with costs.*

Lanston Monotype Machine Company *v.* Commonwealth,

Petition dismissed with costs.

Locomobile Company of America *v.* Commonwealth, *Petition dismissed with costs.*

Northwestern Consolidated Milling Company *v.* Commonwealth,

Petition dismissed with costs.

Copper Range Company *v.* Commonwealth,

Petition dismissed with costs.

Champion Copper Company *v.* Commonwealth, *Petition dismissed with costs.*

White Company *v.* Commonwealth,

Petition dismissed with costs.

NOTE.

Estoppel of Taxpayer to Question Validity of Tax.

The decisions discussing the estoppel of a taxpayer to question the validity of a tax turn, to a great extent, on the facts disclosed in each case. In the reported case, a company which had complied with one section of a law is held not to be estopped from contending that it did not come within the purview of another section of the same law which subjected certain corporations to an excise tax laid on them for the privilege of doing business in the state. There seems to be no other case similar in facts.

It has been held, however, that as the tax of each year is separate and distinct from that of previous years a person who has paid

a certain tax is not estopped to deny the validity of the same tax in some subsequent year. Carpenter v. Central Covington, 119 Ky. 785, 81 S. W. 919, 26 Ky. L. Rep. 430; Matter of Wood, 24 Misc. 561, 54 N. Y. S. 30, *reversed* on other grounds 35 App. Div. 363, 54 N. Y. S. 978, reversal *affirmed* 163 N. Y. 605, 57 N. E. 1128. And where it appears that a person has no taxable property in a municipality he is not estopped to maintain an action to recover a tax paid under protest to the municipality merely because he failed to appear before a board of review to correct the assessment. Rice v. Muskegon, 150 Mich. 679, 114 N. W. 661. The same is true where the property on which taxes are paid under protest is later found not to be subject to taxation and the taxes therefore void. Woodmere Cemetery Assoc. v. Springwells, 130 Mich. 466, 90 N. W. 277, 9 Detroit Leg. N. 119.

It has been held that a person who in previous years has failed to make true statements to the taxing authorities as to the amount of his taxable property is not estopped by such conduct to maintain an action to recover taxes assessed wrongfully against him during a current year. Douglas County v. Lane, 76 Kan. 12, 90 Pac. 1092.

In Langworthy v. Dubuque, 13 Ia. 86, it appeared that by an amendatory act the limits of a city were increased by about six thousand acres, and the owners of certain lands included in this added area brought suit to restrain the city from collecting taxes which had been levied thereon. It was held that they were not estopped from contesting the right of the city to tax their property even though the testimony at the trial tended to show that the complainants had voted at the municipal election, and had paid taxes on the property assessed in prior years (sometimes with a protest) and also had prayed for improvements, some of which were granted.

It has been held, in an action by a collector of taxes of the city of C to recover taxes assessed on the personal property of the defendant's testator, where the defense was nonresidence of the testator, that the defendants were not estopped to deny the residence of the testator in the city of C by reason of the fact that they had given a notice in writing to the assessors of the city, on which the latter in no way relied, that they had paid over the estate of the testator to the trustees appointed under the will and that they had no property whatever in their possession as executors, or because of the further fact that in offering the will of the testator for probate they had, in their petition to the court, described him as R who had dwelt in C and the decree of the probate court based on the petition described him as "late of" the same city. Dallinger v. Richardson, 176 Mass. 77, 57 N. E. 224.

In New York v. Thirty-Fourth St. Crosstown R. Co. 137 App. Div. 644, 122 N. Y. S. 344, it appeared that a street railway company had leased its line to a second company which operated the railway and paid a five per cent. gross tax yearly as required by law. The lessor company never ran any cars over the line after the lease but made reports to a city comptroller which indicated that it was still operating the road. In an action by the city to recover from the lessor company a tax of five per cent. of its gross business it was held that the company was not estopped to deny that it did not operate the road, because the city had not been induced in any way to change its position by reason of the action of the company in continuing to file reports after it had ceased to do any business.

In Leach v. Rolettte County, 29 N. D. 593, 151 N. W. 768, it appeared that taxes had been paid to a county on land by the holder of a tax certificate, and that subsequently a suit by the United States government had resulted in a decree setting aside the taxes on the ground that the land in question belonged to it and not to the county from which the taxpayer had derived his title. In a suit by an assignee of the taxpayer for a refund of the taxes paid by him, under a statute which allowed a recovery in a case where a sale of land was declared void by a judgment of court, it was held that the plaintiff was not estopped to maintain the action because his assignor had not defended the suit by the federal government wherein the taxes were set aside.

Where a person pays taxes on a parcel of land, the description of which has been changed several times by the assessors, he is not estopped to question the validity of a tax on the land when described as lot 10 block 4 assessed in the name of "Nonresident" where it appears that at the time this assessment was laid he had paid taxes on land described as lots 8 and 9 block 4, even though at another subsequent time he had paid a tax on the land described as lots 9 and 10 block 4. Mayot v. Auditor General, 140 Mich. 593, 104 N. W. 19, 12 Detroit Leg. N. 279.

On the other hand it has been held that where a horse belonging to a delinquent taxpayer is seised to pay a tax, and the taxpayer brings an action of replevin to recover the animal, but pays the tax after the commencement of the suit, the doctrine of estoppel applies and he will not be allowed to assert at the trial that the tax is illegal. Bushby v. Noland, 39 Ind. 234.

So where a corporation reported to a state comptroller that its capital stock was $150,-

000, which includes $100,000 preferred stock, and the certificates representing the preferred stock might be considered either as obligations of debt or as contributions of capital to the company, it was held that in a proceeding to determine the liability of the corporation to a franchise tax the company was estopped to assert that the money represented by the preferred certificates did not constitute a part of its capital stock. People v. Miller, 180 N. Y. 16, 72 N. E. 525, *affirming* 94 App. Div. 564, 88 N. Y. S. 197.

In Phillips v. Payne, 92 U. S. 130, 23 U. S. (L. ed.) 649, it appeared that an act of Congress, which was in violation of the Constitution, authorized a plebiscite of the citizens of a certain county on the question as to whether they wished their county to be ceded from the United States to the state of Virginia. They voted in the affirmative and for a period of twenty-five years Virginia's title to and possession of the ceded territory had been undisputed, and she had exercised complete jurisdiction over it. In an action brought by a resident of the ceded area to recover taxes levied on him by the duly elected authorities therein, which he had paid under protest, it was held that he was estopped from raising the question as to the validity of the cession of the county to the state of Virginia as he could not, under the circumstances, vicariously raise a question, or force on the parties to the compact, an issue which neither of them desired to make.

It has been held that where a railroad company had done a telegraph business in connection with its railroad, but had a franchise to operate a railroad only, it would be estopped to deny that it had authority to do a telegraph business, in a suit brought by it to recover taxes paid by the company under a statute which provided that a State Board of Equalization "shall . . . in each year assess at its actual value the franchise and all other property within the state of all . . . telegraph or telephone companies." Minneapolis, etc. R. Co. v. Oppegard, 18 N. D. 1, 118 N. W. 830. To the same effect see Southern R. Co. v. Coulter, 113 Ky. 657, 68 S. W. 873, 24 Ky. L. Rep. 203. In Minneapolis, etc. R. Co. v. Oppegard, supra, the court said: "The plaintiff, having carried on a general telegraph business in connection with its railroad business, cannot be heard to now say it had no franchise or authority to do a telegraph business, for the purpose of defeating a tax levied upon its property that was used independently of any railroad business, and so used for compensation. The actual existence of a franchise from the state becomes immaterial, inasmuch as the plaintiff has actually assumed one. To permit it to defeat a tax now, on the ground that it has no franchise or authority, as a matter of fact, to do a telegraph business, would be permitting it to take advantage of its own wrong. The company will not now be heard to assert the fact that it had no authority to do a telegraph business. The company is estopped from showing such fact by reason of having assumed and asserted that authority. The tax will be upheld, not as levied upon an actual or assumed franchise, but upon the ground that the plaintiff has estopped itself from asserting that it had no franchise."

Where a company is permitted to operate steam cars along certain city thoroughfares and acquiesces in the view that the streets are public by dedication, and asserts no other right to use them than by the permission of the city, the company is estopped, in an action to test the right of the city to assess a tax on this right to use the streets as a special franchise, to claim that the streets are not public. People v. State Board of Tax Com'rs, 160 App. Div. 771, 146 N. Y. S. 112, *affirming* order 79 Misc. 124, 140 N. Y. S. 722.

COMMERCIAL NATIONAL BANK OF COUNCIL BLUFFS ET AL.

v.

BOARD OF SUPERVISORS ET AL.

Iowa Supreme Court—January 22, 1915.

168 Iowa 501; 150 N. W. 704.

Taxes — Refund of Illegal Tax.

Under Code, § 1417, providing that the board of supervisors shall direct the treasurer to refund taxes erroneously paid or illegally exacted, the board must first ascertain whether the taxpayer is entitled to reimbursement, and, having done so, it is the treasurer's duty to repay from the particular funds into which the taxes have gone the amount of the illegal exaction.

Mandamus to Compel Refunding.

Code, § 1417, providing that the board of supervisors shall direct the treasurer to refund taxes erroneously or illegally exacted, is mandatory, and the board of supervisors may in a proper case be required by mandamus to order the treasurer to repay the taxes illegally collected.

Same.

Under Code, § 4341, providing for writ of mandamus to compel an inferior body or tribunal to execute a duty imposed by law, a writ of mandamus is the proper remedy to compel the board of supervisors to perform a duty imposed by law.

Voluntary Payment.

Under Code, § 1417, providing for the return of taxes erroneously or illegally exacted and paid, it is no defense that the taxes were paid voluntarily.

[See 94 Am. St. Rep. 425, 439.]

Payment under Unconstitutional Statute.

Taxes paid under a statute subsequently declared unconstitutional by the federal Supreme Court may be recovered back under Code, § 1417, providing for the return of taxes illegally exacted; for the statute was unconstitutional at the time of enactment, and the fact that it was not immediately declared so does not deprive the taxpayer of the right to reimbursement.

[See generally 6 R. C. L. tit. *Constitutional Law*, p. 117.]

Same.

Moneys collected as taxes under an unconstitutional statute may be recovered back under Code, § 1417, providing for the return of taxes illegally paid or exacted; such moneys being regarded as taxes.

Payment under Mistake of Law.

Under Code, § 1417, requiring the return of taxes illegally or erroneously exacted or paid, taxes paid under a mistake of law may be recovered.

Estoppel of Taxpayer to Recover Back Tax — Listing Property for Taxation.

Where plaintiff, pursuant to an unconstitutional statute, listed and paid taxes upon property which was not subject to taxation, the listing of the property does not estop plaintiff from asserting the illegality of the exaction and recovering the payment.

[See note at end of this case.]

Appeal from District Court, Pottawattamie county: ARTHUR, Judge.

Action for mandamus. Commercial National Bank of Council Bluffs et al., plaintiffs, and Board of Supervisors, et al., defendants. Judgment for plaintiffs. Defendants appeal. The facts are stated in the opinion. AFFIRMED.

Frank J. Capell, D. E. Stuart, George Cosson and *C. A. Robbins* for appellants.

Reed & Robertson for appellees.

[502] LADD, J.—Plaintiff, as its name indicates, is a national banking association and sues for itself and in behalf of its stockholders. The stockholders also are made party plaintiffs. The shares of stock were regularly assessed under Sec. 1322 of the Code in each of four successive years beginning [503] with 1907 and taxes levied thereon and paid by the bank. On January 19, 1911, the statute mentioned was declared invalid for that it was in violation of Sec. 5219 of the revised statutes of the United States prohibiting any discrimination in favor of other moneyed capital in the hands of individual citizens of the state, which comes in competition with the business of national banks. Estherville First Nat. Bank v. Estherville, 150 Ia. 95, 129 N. W. 475. In virtue of this decision, neither the shares nor the capital of national banks were assessable under the laws of this state. On May 9, 1912, and after the taxes had been distributed to the several funds for which collected, the plaintiff bank for itself and stockholders made a written demand upon the board of supervisors to direct the county treasurer to refund the several sums exacted and collected by him as taxes levied as aforesaid on the shares of capital stock; and as such demand was rejected, this suit in mandamus was begun to compel the said board to so direct the treasurer. Plaintiff relies on Sec. 1417 of the Code, providing that "The board of supervisors shall direct the treasurer to refund to the taxpayer any tax or portion thereof found to have been erroneously or illegally exacted or paid with all interest and costs actually paid thereon."

The defendant resisted on several grounds which will appear as we proceed.

I. The manifest design of this statute is that the board of supervisors first ascertain whether the taxpayer is entitled to be reimbursed for taxes illegally or erroneously exacted and if so, that the treasurer be directed to repay the same from the several funds to which these have passed. Such was the interpretation given in Iowa R. Land Co. v. Woodbury Co. 64 Ia. 212, 19 N. W. 915, where recovery against the county was denied, and this decision was followed in Eyerly v. Jasper County, 72 Ia. 149, 33 N. W. 609. It is the duty of the treasurer only to repay from the particular funds into which the taxes have gone and, when necessary, to ascertain by computation the [504] amount to be taken from each. Spencer Dist. Tp. v. Riverton Dist. Tp. 56 Ia. 85, 8 N. W. 784. The result attained is the restoration of the moneys illegally or erroneously paid by the taxpayer, and each fund continues as though these had never been collected. The remedy is perfect.

II. The duty of the board of supervisors is equally explicit. Having ascertained that the taxes have been illegally or erroneously exacted or paid, the statute prescribes precisely what shall be done, i. e., the board shall direct the treasurer to refund them to the taxpayer. Such an order is essential to repayment by the treasurer and to enter it, in a proper case, is the mandatory duty of the board of supervisors. That there is no adequate remedy at law sufficiently appears from the cases cited and as the contention is that the board of supervisors omitted a duty the performance of which the law enjoins, mandamus is the proper remedy. Section

4341, et seq., Code; Eyerly v. Jasper County, supra; See Beecher v. Clay County, 52 Ia. 140, 2 N. W. 1037; The Dubuque, etc. R. Co. v. Webster County, 40 Ia. 16.

III. The taxes were voluntarily paid as contended, but this furnishes no objection to refunding under this statute. Lauman v. Des Moines County, 29 Ia. 310; Richards v. Wapello County, 48 Ia. 507; Isbell v. Crawford County, 40 Ia. 102.

Nor is there anything in the argument that the decision declaring the taxing statute invalid should not operate retroactively. The statute was as vulnerable when enacted as when denounced as void in Estherville First Nat. Bank v. Estherville, supra, and nothing can be found in State v. O'Neil, 147 Ia. 513, Ann. Cas. 1912B 691, 126 N. W. 454, 33 L.R.A.(N.S.) 788, to the contrary. That the statute, though at all times void, had been unassailed up to that time does not render the previous exactions any the less illegal, but may excuse the plaintiff in acquiescing therein.

The suggestion that the moneys paid ought not to be [505] regarded as taxes within the meaning of the statute is without merit. They were levied and collected through the exercise of the taxing power of the state and to be used generally as other taxes. They were paid as such, and to hold that because illegally exacted moneys so paid are not contemplated as "taxes" in the statute quoted would involve a refinement of reasoning not to be indulged in. In referring to taxes as illegally exacted, reference necessarily is had to those which ought not to have been collected. Kehe v. Blackhawk County, 125 Ia. 549, 101 N. W. 281, relied on, contains nothing to the contrary, especially as there was no assessment of property in that case. The point is not well taken.

IV. Counsel argue that inasmuch as the taxes were paid under mistake of law, the suit cannot be maintained. That this is the general rule goes without saying. Ahlers v. Estherville, 130 Ia. 272, 104 N. W. 453. But Sec. 1417 of the Code heretofore quoted expressly declares that if illegally or erroneously exacted or paid, the treasurer shall be directed to refund. Surely if the assessment of the property and levy of taxes thereon was contrary to law, because not authorized by a valid statute, the exaction of the taxes so levied would be illegal, and so regardless of the view thereof entertained by public officers.

In Dubuque, etc. R. Co. v. Webster County, 40 Ia. 16, the taxes sought to be refunded had been properly levied but the plaintiff had paid them under the mistaken belief that it had title to the property taxed when in fact it belonged to another. In denying relief, the court, after saying that recovery might not be had but for Sec. 762 of the Revision, continued: "This section does not contemplate an error of judgment as to the law respecting the title to the land, committed by the taxpayer. It was not intended to protect him against errors or mistakes of law committed by himself but against errors and illegalities committed by the [506] officers of the law to whom is entrusted the duties of assessing, levying and collecting taxes."

In Kehe v. Blackhawk County, 125 Ia. 549, 101 N. W. 281, the amount for which Kehe would have been liable for taxes had he not withheld his property from taxation was settled by him with the tax ferret and paid to the county treasurer without an assessment having been made, and it was held that though the statute of limitations had run against a portion of it and payment might not have been enforced, still as payment was through no fault of the officers, but owing to an error on his part, the statute afforded him no relief. The precise point was decided in Lauman v. Des Moines County, 29 Ia. 310, where the court held that taxes paid on shares of the capital stock of a national bank should be refunded under Sec. 762 of the Revision, in substance like the present statute, a previous decision, Hubbard v. Johnson County, 23 Ia. 130, having declared statutes taxing the same invalid because inconsistent with provisions of the National Banking Act. The mistake of law which will not sustain an order for relief is that of plaintiff alone; the illegality or error which will sustain such relief must be that of the taxing officers; and if what they do appears to be illegal or erroneous, the statute in the plainest terms requires the board of supervisors to refund taxes exacted or paid by reason thereof. The collection or receipt of taxes on property which the law did not subject to taxation was illegal and such as the statute quoted contemplates shall be refunded.

V. Counsel contend that because of having listed the bank stock with and furnishing the assessor the information exacted by Sec. 1322 of the Code without objection, the plaintiff is estopped from asserting the illegality of the taxes subsequently paid. That such is the rule where the owner voluntarily lists taxable property for assessment and taxation appears from Slimmer v. Chickasaw County, 140 Ia. 448, 17 Ann. Cas. 1028, 118 N. W. 779. But such a submission of property not taxable confers no authority on the taxing [507] officers to assess or levy a tax thereon, and being without authority so to do, the taxpayer cannot be estopped by such listing from asserting such want of authority or the illegality of taxes levied and collected thereon. In such a case, the taxing officers cannot be said to have been misled by what the taxpayer may have done, for they are chargeable

with knowledge of the law and must be assumed to have been aware of the invalidity of the taxing statute. As a fact, however, all were laboring under a misapprehension in construing the statute as valid, else the shares of stock would not have been assessed, and this statute affords a remedy to those who aid the assessor and promptly meet the apparent demands of the public by providing for refunding them if afterwards they are found to have been illegal.

We are of opinion that as the property was not taxable the doctrine of estoppel ought not to be applied. The decree has our approval and is

Affirmed.

Deemer, C. J., Gaynor and Salinger, JJ., concur.

NOTE.

Estoppel of Taxpayer Returning Property for Taxation to Dispute Assessment Based on Return.

The cases passing on the question whether a taxpayer who returns property for taxation is estopped to dispute an assessment based on his return, since the decision in Skinner v. Chickasaw County, 17 Ann. Cas. 1028, assert the existence of such an estoppel. See In re Bushnell, 215 Fed. 651, 654; Dull v. Le Fevre, 222 Fed. 471, 474; Millsaps v. Traylor, 128 La. 1068, 55 So. 677. This rule is expressly recognized by the court in the reported case but is regarded as being inapplicable to the case of a complete lack of authority in the taxing officers to declare any assessment. In the case of In re Bushnell, 215 Fed. 651, 654, the rule was tersely stated as follows: "If there is no competent evidence from which it may be found that the assessed valuation was unjust or illegal, a taxpayer is bound and estopped by his own statements, as to the nature, title, and value of his property (Waterbury v. O'Loughlin, 79 Conn. 630, 66 Atl. 173; Union School Dist. of Guilford v. Bishop, 76 Conn. 695, 58 Atl. 13, 66 L.R.A. 989, 37 Cyc. 994, 5 Cyc. 341)." In that case it appeared that certain creditors of a bankrupt disputed the taxes assessed on the bankrupt's property on the ground that they were excessive. The court said: "It was shown that in each of the years mentioned (excepting 1912), the bankrupt returned his assessment lists to the board of assessors, subscribed and sworn to by him in person, as required by the statute laws of Connecticut, and that in all said lists so returned the amounts employed in merchandise and trade were set forth in the same amounts that the trustee now disputes. It was also shown that the original assessment lists, including the personal property of the bankrupt and the items and amounts employed in merchandise and trade, disputed by the trustee, were the same lists subscribed, verified and returned by the bankrupt. . . . If the bankrupt from 1906 to 1911, inclusive, had believed that the assessments were too high, the statute laws of the state afforded him ample remedy for a reduction of those assessments, and neither he nor his trustee can now complain that those assessments were excessive." And in Dull v. LeFevre, 222 Fed. 471, 474, it was said: "And the rule seems to be well established that a taxpayer is bound and estopped by his own statements as to the nature, title, and value of his property made in the list which he returns for taxation, although, of course, he can prejudice no one else by listing property which he does not own, nor can he make such a list a covenant for a title." In that case it appeared that a smelting company in its tax return listed certain improvements such as sawmill smelting plants erected on its lands as personal property. Defendant a purchaser at a tax sale contended that the improvements were real estate and that the assessment of such as personal property was void. But the court said: "These improvements having been fairly and honestly assessed as personal property by direction of the corporation, the assessment and sale must stand."

In French v. New Rochelle, 141 App. Div. 8; 125 N. Y. S. 677, as in the reported case, it was held that a taxpayer was not estopped to assert the invalidity of an assessment which was so improper in manner and form as to be totally invalid. And in Slade v. Butte County, 14 Cal. App. 453, 112 Pac. 485, it was held that a person who listed certain property purchased from the state, but the title to which in fact remained in the United States government, was not estopped to dispute the validity of the tax. The court said: "One question only remains: Is plaintiff estopped from asserting the invalidity of the assessment because he filed with the assessor a verified statement of the property in question for taxation? The answer must be in the negative. The transaction lacks the necessary elements of estoppel. Besides, if the facts bear the semblance of estoppel, they show the state to be the greater offender, for it was through the promise of the state that the land could be acquired under lieu location that plaintiff and his predecessors parted with their money. If anyone was misled it was the plaintiff."

GERMAN EVANGELICAL LUTHERAN SAINT LUCAS CONGREGATION OF BALTIMORE CITY

v.

MAYOR AND CITY COUNCIL OF BALTIMORE ET AL.

Maryland Court of Appeals—March 19, 1914.

123 Md. 142; 90 Atl. 983.

Streets — Vacation — Right of Property Owner to Compensation.

Under Const. art. 3, § 40, forbidding the enactment of any law authorizing private property to be taken for public use without just compensation, Code Pub. Loc. Laws, art. 4, § 6 (Laws 1898, c. 123), authorizing the mayor and city council of Baltimore to provide for laying out, opening, closing, etc., any street in such city, and to ascertain the damages caused thereby to the owner of any ground or improvements for which he ought to be compensated, and section 175 et seq., providing the procedure for opening and closing streets, an owner of property abutting on a street one block of which was closed, but not abutting on the portion of the street so closed, and whose ingress to and egress from its property is not therefore affected, though the direct approach thereto from one direction is cut off, requiring a more circuitous route, is not entitled to damages.

[See note at end of this case.]

Appeal from Baltimore City Court: STUMP, Judge.

Condemnation proceeding. Mayor and City Council of Baltimore et al., plaintiffs, and German Evangelical Lutheran Saint Lucas Congregation of Baltimore City, defendant. From judgment rendered, defendant appeals. The facts are stated in the opinion. AFFIRMED.

Edward L. Ward for appellant.

Joseph S. Goldsmith, Duncan K. Brent, S. S. Field and *Benjamin H. McKindless* for appellees.

[143] BOYD, C. J.—This is an appeal from the Baltimore City Court granting a motion of the appellees to dismiss the appeal of the appellant from the action of the Commissioners for Opening [144] Streets in the City of Baltimore. The Mayor and City Council of Baltimore passed an ordinance, known as No. 387, and approved on the 16th of August, 1909, which provided for the elimination of certain crossings at grade over the tracks of the B. & O. R. R. Co., between Camden and Ostend streets, for the construction and maintenance of bridges and approaches carrying Lee street, Hamburg street, Stockholm street and Cross street over the tracks of said railroad, and, amongst other things, for condemning and closing certain portions of a number of streets named, including Henrietta, between the east side of Eutaw and the west side of Howard street. It was the same ordinance which was before this Court in Walters v. Baltimore, etc. R. Co. 120 Md. 644, 88 Atl. 47, 46 L.R.A.(N.S.) 1128, but a wholly different question is now presented.

The appellant owns a property on the southwest corner of Henrietta and Eutaw streets, which fronts 155 feet on the former and 75 feet on the latter—running from Eutaw street on the east to an alley 20 feet wide on the west. The lot is improved by a church, a school house and a parsonage. The appellant contends that this property will be greatly damaged by the closing of this part of Henrietta street, and it endeavored to have the Commissioners for Opening Streets allow it damages for the injuries thereby sustained. The Commissioners refused to allow any damages and that refusal resulted in the appeal to the Baltimore City Court. Considerable testimony was taken in the lower Court by the appellant, tending to show that its property was materially depreciated in value by the closing of the part of Henrietta street—although it was in direct conflict with that offered by the appellees. The motion to dismiss the appeal, which was granted by the lower Court, was as follows: "The City contends that the appellant has not proved any damage to its property as a consequence of the closing of Henrietta street, between the east side of Eutaw street and the west side of Howard street, of such nature as to entitle it to any award in this case, and therefore prays that the appeal be dismissed."

[145] The appellant's property does not abut on the portion of the street which was closed, but is on another square which is bounded on the north by Henrietta street, on the east by Eutaw street, on the south by Hamburg street and on the west by Warner street, there being also an alley 20 feet wide which runs from Hamburg to Henrietta street at the west side of the appellant's property. The part of Henrietta street which is closed is east of the intersection of Henrietta and Eutaw streets, both of which are 66 feet wide. The ingress to and egress from the property has not been affected, but the direct approach to it from the east by way of Henrietta street is cut off and requires a more circuitous route. There were 10 or 12 tracks of the B. & O. R. R. Co. which crossed Henrietta street at grade, between Eutaw and Howard, before Henrietta street was closed. The access from the north, south and west have not been affected, and there

will be two overhead bridges crossing the railroad tracks within a few squares of the property when the proposed improvement is completed.

When the location of the appellant's property is borne in mind, and it is also remembered that this is a condemnation proceeding into which the appellant has come, there cannot be much difficulty in reaching a correct conclusion under the decisions of this and other Courts. The provisions of section 40 of Article 3 of our Constitution that the General Assembly "shall enact no law authorizing private property to be taken for public use, without just compensation," etc., have been before this Court many times, and although the Constitution does not declare what rights shall be regarded as property, or what shall constitute a "taking" within its meaning, there are decisions which are conclusive of those questions. In the familiar case of O'Brien v. Baltimore Belt R. Co. 74 Md. 363, 22 Atl. 141, 13 L.R.A. 126, Chief Judge Alvey, in delivering the opinion of the Court, said: "In such case as this, therefore, it would seem to be clear, both upon principle and authority, that there is no such taking of private property for public use as is contemplated by the Constitution of the State; and hence there [146] is no ground for any preliminary proceeding by way of condemnation." O'Brien was the owner of a lot of ground and improvements thereon, situate on the east side of Howard street, between Camden and Lee streets, and conducted there a livery stable business. His bill alleged that the railroad company was about to dig up the west half of the bed of Howard street, in front of his property, to a depth of from ten to twenty-four feet, below the then surface of the street; that it was an open cut and, when made, Howard street, between Camden and Lee, would be destroyed as a public highway to the extent of the cut, and devoted to the exclusive use of the railroad company. The plaintiff sought to enjoin the defendant, and the case was before this Court on an appeal from an order refusing to grant the injunction. The Court referred to the unquestioned right and power of the Legislature, through the agency of the municipal government, to change and alter the grades of existing streets, without liability to the abutting owners of property for the mere consequential damages that may be suffered by reason of the changed condition of the streets, but said that that reason, applicable to the change of grade and the improvement of streets for municipal purposes, did not apply in the case of a grant of power to change the grade of and occupy the street with steam railroad tracks, by a railroad company, having no connection with the municipal government. Notwithstanding the fact that that improvement was exclusively by and for the railroad company, the Court announced the conclusion stated above. In considering the question it said: "It is not charged that there will be any invasion of or physical interference with any part of the plaintiff's lot, in the construction of the road. The most that he claims for is that he will be deprived of the full use of the street, as it now exists, and that his property will be depreciated in value, by the construction of the road. This, however, is but an injury, to whatever extent it may be suffered, *of an incidental or consequential nature.* The construction of the railroad being authorized by competent authority, it cannot be treated as a [147] public nuisance, and no right of action can arise against the company before it is known whether, and to what extent damages may be sustained by the construction of the road in the bed of the street."

In the case of Garrett v. Lake Roland El. R. Co. 79 Md. 277, 29 Atl. 830, 24 L.R.A. 396, the same principles were announced by Judge McSherry. Mr. Garrett was the owner of unimproved lots fronting 436 feet on the west side of North street, which was 36 feet wide between the curbs and 60 feet between the building lines. The railroad company erected in front of Mr. Garrett's property a stone abutment, forming an incline plane, to carry on its highest side the iron superstructure for an elevated road, and to serve on its surface as the northern approach to that elevated road. It was 83 feet, 2½ inches in length and 15⅝ feet in width. It started at the street grade and gradually rose to a height of 9 feet—leaving a space between its western face and the curb line contiguous to Mr. Garrett's property of 9 feet, 8½ inches. The erection of that structure was held not to be a taking of private property for public use within the meaning of the Constitution. See also Poole v. Falls Road Electric R. Co. 88 Md. 533, 41 Atl. 1069.

Those cases should be sufficient to dispose of this appeal, unless there be some statute upon which the appellant can rely. In each of them the act complained of was exclusively for the benefit of the railroad company proceeded against, and the municipality had no such interest as it has in the execution of this ordinance. We will not now stop to consider the distinction between this case and those, by reason of the fact that this is a condemnation proceeding by the city, for even if the railroad company was conducting the proceedings, it could not be said that there was a taking of the appellant's property.

Section 6 of Article 4, entitled City of Baltimore, of Code of Public Local Laws (Baltimore City Code, 1906, section 6, subsection 26), gives the Mayor and City Council power "To provide for laying out, opening, extending, widening, straightening or closing

up, in whole or in part, any [148] street, square, lane or alley within the bounds of said city, which in its opinion the public welfare or convenience may require," and then continues: "To provide for ascertaining whether any, and what amount in value, of damage will be caused thereby, and what amount of benefit will thereby accrue to the owner or possessor of any ground or improvements within or adjacent to said city, for which said owner or possessor *ought to be compensated*, or ought to pay a compensation, and to provide for assessing or levying, either generally on the whole assessable property of said city, or specially on the property of persons benefited, the whole or any part of the damages and expenses which it shall ascertain will be incurred in locating, opening, extending, widening, straightening or closing up the whole or any part of any streets," etc. Then section 175 (Baltimore City Charter) provides that whenever the Mayor and City Council shall by ordinance direct the Commissioners for Opening Streets to lay out, open, extend, widen, straighten or close up, in whole or part, any street, etc., the Commissioners "shall ascertain whether any and what amount of value in damages will thereby be caused to the owner of any right or interest in any ground or improvements within or adjacent to the City of Baltimore, for which, taking into consideration all the advantages and disadvantages, such owner *ought to be compensated*."

Section 175 and the succeeding sections provide the procedure by which streets, squares, lanes or alleys can be laid out, opened, etc., and cannot be construed as intended to allow damages which were not previously allowed. The part of section 6 which is quoted above was passed in 1838, Chapter 226, and was codified as section 837 of Article 4 of Code of Public Local Laws of 1860. The same language was continued in section 806 of that Article of Code of 1888. The Mayor and Council of Baltimore had, under the authority so given, passed an ordinance prescribing the manner of proceeding in opening, closing, etc., streets, as early as 1841, [149] (Alexander v. Baltimore, 5 Gill (Md.) 383, 46 Am. Dec. 630), and when the present charter was adopted, the provisions of section 175 were in that ordinance; Baltimore City Code of 1893, Article 48, section 6; but notwithstanding the provisions of section 6 have been in the charter, and those of section 175, in the ordinance passed in pursuance of the charter, for so many years, we have been cited to no case, and are aware of none, which justifies the contention of the appellant that in a condemnation proceeding for opening, closing, etc., streets, damages can be allowed for a property situated as that of the appellant is. On the contrary, the cases of O'Brien v. Baltimore Belt R. Co. Garrett v. Lake Roland El. R. Co., and Poole v. Falls Road Electric R. Co., cited above, were decided while those provisions were in full force, and no reference to them was made. Moreover, by the terms of the statute, the Commissioners are only entitled to allow the damage "for which, taking into consideration all advantages and disadvantages, *such owner ought to be compensated*"—meaning, of course, such as he ought to be compensated for under the established rules of law and practice in such cases.

As illustrating how other Courts have regarded the provisions of statutes in such cases, we will refer to some of their decisions. Smith v. Boston, 7 Cush. (Mass.) 254; Castle v. Berkshire County, 11 Gray (Mass.) 26, and Davis v. Hampshire County, 153 Mass. 218, 26 N. E. 848, 11 L.R.A. 750, were decided when there was a statute in Massachusetts which provided that, "In estimating the damages sustained by any person in his property, by the laying out, altering or discontinuing of any highway, the jury shall take into consideration all the damages done to the complainant, whether by taking his property, or by injuring it in any way," but that language was not deemed sufficient by the Supreme Court of Massachusetts to entitle an owner to compensation for depreciation of his property which did not immediately abut upon the part of the highway which was vacated. In Cram v. Laconia, 71 N. H. 41; 57 L.R.A. 282, and 51 Atl. 635, the statute in force [150] was, "the damages sustained . . . by the discontinuance of a highway . . . may be assessed," etc. The Court said: "Taken literally, this statute is broad enough to allow damages for all injuries, whether special or general. But it has been limited by construction, in accordance with the principle already stated"—which was that only such damages as are not common to the public, but are peculiar and special, and the direct result of the discontinuance may be allowed. In Enders v. Friday, 78 Neb. 510, 15 Ann. Cas. 685, 111 N. W. 140, the statute had this provision: "Provided, that all damages sustained by the citizens of the city or village, or of the owners of the property therein, shall be ascertained in such manner as shall be provided by ordinance;" in East St. Louis v. O'Flynn, 119 Ill. 200, 10 N. E. 395, and 59 Am. Rep. 795, the statute provided: "Where property is damaged by the vacating or closing of any street or alley, the same shall be ascertained and paid as provided by law." These Courts declined to allow damages to those whose property did not abut on the highways closed. In the Illinois case the Court cited Chicago v. Union Bldg. Assoc. 102 Ill. 379, 40 Am. Rep. 598, and Littler v. Lincoln, 106

Ill. 353, in the last of which it was said, "the rights or privileges of other proprietors in the plat, which the statute protects, are necessarily legal rights and privileges, and such parties cannot, therefore, be affected by the closing of streets not adjacent to their property, nor directly affording access thereto, and egress therefrom." In Howell v. Morrisville, 212 Pa. St. 353, 61 Atl. 932, the Court refused to allow damages for vacation of a public road under the Act of 1891 referred to in that case, because it contained no express grant to property owners of the right to damages for vacation, nor any clear implication of an intent to increase the obligations of the cities or enlarge the rights or claims of property holders, and went on to say: "Even if the purpose of the Act were less plain than it is, the Court would not be justified in stretching its terms by a loose construction to cover the exceptional case [151] of vacation of roads. The general rule is founded not only on sound reason, but also on sound policy and justice. While it may be admitted that substantial injury may occasionally result from the vacation of a street, yet it is exceptional, and confined to closely built cities. Even there, if damages are provided for, they should be most carefully hedged about to prevent the inevitable tendency to run off into speculative and shadowy claims that have no real foundation."

The appellant contended that what was said in Baltimore v. Smith, etc. Brick Co. 80 Md. 458, 31 Atl. 423, went far to sustain its position, but it seems to us, that in so far as it is applicable at all it has just the opposite effect. We held in that case that the appeal from the assessment of benefits did not bring up for review the damages allowed, under the statute as it then existed. After showing how the benefits are assessed, and the damages allowed, we said: "In other words, they take such property as is needed for the bed of the street and allow the respective owners compensation for it according to its *then market value;* they then direct that A, B and C, as owners of ground or improvements somewhere in or adjacent to the city, will be *directly* benefited *after the street is opened,* determine how much, and so assess them. If there is a shortage in the benefit column, the account is balanced by the city. It matters not whether A's property thus to be benefited is adjoining to or a part of the property taken for the bed of the street, or whether it is on another square on the street to be opened or in some other locality; if it will be *directly* benefited he is assessed accordingly, and called upon to contribute to the payment for said street to the extent he is so benefited. It seems clear that the two transactions of fixing damages or compensation and of assessing benefits, are separate and distinct." It is implied as clearly as could well be that in allowing damages *it does matter* whether the property to be paid for "is adjoining to or a part of the property taken for the bed of the street, or whether it is on another square on the street to be opened, or in some other locality," [152] while in assessing benefits *it does not matter.* No case can be found in Maryland where damages have been allowed for property *not* "adjoining to or a part of the property taken for the bed of the street." When a part of a property is taken and damages are allowed for injury to the remainder, it is because by taking the part the value of the remainder is lessened, but damages are only allowed even for abutting property, not within the lines of the condemnation, when the owner is deprived of his right of ingress or egress, or there has been something done amounting to a taking of the property, as illustrated by the case of Walters v. Baltimore etc. R. Co. 120 Md. 644, 88 Atl. 47, 46 L.R.A.(N.S.) 1128.

As the decisions are so numerous it will be convenient to refer to the textbooks which are one way, and it can be safely said that except in cases controlled by some special constitutional or statutory provision the decisions are practically unanimous against the appellant's contention. Where the vacation of the street is in front of the plaintiff's property or in the same block, so that his access is cut off entirely, the decisions hold either that it is a taking of the property, or at least that the owner is entitled to damages, and if under those circumstances his access is cut off in one direction, so as to put his property in a *cul de sac,* perhaps most authorities holds that he is entitled to damages. In 1 Lewis on Em. Dom. (3rd Ed.) sec. 203, that author, after having considered the other classes of cases, said: "The case now to be considered is where the vacation is in the next or some remoter block and the plaintiff has left access in both directions to the system of streets. To reach certain points in the direction of the vacation, the plaintiff must make a detour and this fact and the diversion of travel and the loss of a thoroughfare depreciate the value of his property. The decisions are nearly unanimous to the effect that in such case the plaintiff's property is not taken or damaged and that he cannot prevent the closing of the street or recover damages therefor. While this conclusion may be correct so far as the question [153] of a *taking* is concerned, its correctness may be questioned when, by virtue of the Constitution or a statute, compensation is given for property damaged or injured." In 2 Elliott on Roads and Streets (3rd Ed.) sec. 1181, it is said: "Owners of

lands abutting on neighboring streets or upon other parts of the same street, at least when beyond the next cross street, are not, however, entitled to damages notwithstanding the value of their lands may be lessened by its vacation or discontinuance." In 3 McQuillin on Mun. Cor. sec. 1410, the rule is thus stated: "If the street directly in front of one's property is not vacated, but the portion vacated is in another block, so that he may use an intersecting cross street, although perhaps it is not quite so short a way nor as convenient, it is almost universally held that he does not suffer such a special injury as entitles him to damages. And this is so notwithstanding the new route is less convenient or the diversion of travel depreciates the value of his property."

In 27 Am. & Eng. Enc. of Law (2d ed.) 116, it is said: "It is generally held that owners of property not abutting on the street vacated have no such property in the street as entitles them to damages for its vacation were there is still left means of communication with other streets, and whatever detriment or inconvenience they may suffer by the closing of the street they must bear in common with the community at large for the public convenience and welfare." In 37 Cyc. 193, it is said: "On the other hand many cases hold that the vacation of a highway in such a manner as to deprive an abutting owner of access to his property is a 'taking' of property within the Constitutional prohibition, for which compensation must be made. This right to damages does not extend to owners of land not abutting on the highway vacated, and accessible by other ways, unless the statute allowing damages is broad enough to include such persons." The summary of a note to the case of Enders v. Friday, 78 Neb. 510, as reported in 15 Ann. Cas. 685, 111 N. W. 140, is: "As a general rule property owners whose lands do not abut upon the portion of the [154] street vacated, and access to whose property is not cut off, are not entitled to compensation because of such vacation. This is especially true in the absence of a showing, on the part of the non-abutting owner, of a special and direct damage, instead of one merely suffered in common with the general public." In 3 Dillon on Municipal Corporations (5th Ed.) sec. 1160, on page 1842, that author says: "Many decisions declare that, as a general rule only property abutting on the portion of the street closed is specially damaged by the vacation, and that only such abutter can recover damages or compensation for the taking of this property. Hence, if the property of the abutter is *located on another street or on a different part* of the same street, he is not entitled to compensation or damages. In other States this limitation is not observed, and decisions are to be found to the effect that the owner of property which *does not abut* on the part of the street closed is entitled to compensation, provided he is able to prove special and peculiar damage." It will be well in passing to remark that the cases cited in the note in support of the last statement are Chicago v. Baker, 86 Fed. 753, 58 U. S. App. 569, 30 C. C. A. 364; Chicago v. Burcky, 158 Ill. 103, 42 N. E. 178, 49 Am. St. Rep. 142, 29 L.R.A. 568; In re Melon St. 182 Pa. St. 397, 38 Atl. 482, 38 L.R.A. 275, and Highbarger v. Milford, 71 Kan. 331, 80 Pac. 633, but it will be seen by an examination of them that the vacation left the property in a *cul de sac* and in some instances there were special statutes. The case of Henderson v. Lexington, 132 Ky. 390, 111 S. W. 318, 22 L.R.A.(N.S.) 20, cited in that note, is an instructive one, and after discussing various questions in connection with the subject we have been considering, it is said: "Therefore the equitable and practicable rule is to limit the persons entitled to compensation and to be made parties, to the property owners abutting on the street, alley or highway proposed to be closed between the nearest streets intersected by the street, alley, or highway to be closed."

The cases cited by the above authors are very numerous. Whatever apparent conflict there is between them is more apparent than real. There can be no doubt that most of the [155] decisions rendered in cases where the facts are similar to those before us hold that the owner is not entitled to damages. In Davis v. Hampshire County 153 Mass. 218, 26 N. E. 848, 11 L.R.A. 750, the Court said: "Although the doctrine may sometimes be rather harsh in its application to special cases, there are sound reasons on which it rests. The chief of these reasons are, that to hold otherwise would be to encourage many trivial suits, that it would discourage public improvements if a whole neighborhood were allowed to recover damages for such injuries to their estates, and that the loss is of a kind which purchasers of land must be held to have contemplated as liable to occur, and to have made allowance for in the price which they paid," and in Nichols v. Richmond, 162 Mass. 170, 38 N. E. 501, it was said: "The line has to be drawn somewhere, on practical grounds, between those who may and those who may not recover for damages caused by the discontinuance, in whole or in part, of a street or way; and it has been drawn so as to limit the right of recovery to damages which are special and peculiar and different in kind from those suffered by the public at large." The case of Smith v. Boston, 7 Cush. (Mass.) 254, is a leading one, and is relied on, not only in subsequent decisions in Massachusetts, but by many other

Courts. In Cram v. Laconia, supra, the subject is thoroughly discussed and many of the cases considered. The Court after stating the facts in the case of In re Mt. Washington Road Co. 35 N. H. 134, said: "Here, as there, the damage claimed is not for the taking of the plaintiff's land, or any direct invasion of his property, but, as distinctly appears from the case, for loss of business and depreciation of property resulting from a diversion of travel occasioned by a legitimate public improvement." In both cases that Court refused relief. In the last one it said that it was helped to a correct understanding and application of the rule by the cases in that State relating to the set off of benefits where land was taken for highway purposes: that "it has been repeatedly held in this State that benefits from improved [156] facilities of communication, favorable diversion of travel, increased trade and appreciation of property, resulting from the establishment of a new highway, cannot be set off against damages, because they are general and not special benefits." After citing a number of authorities it said: "If favorable diversion of travel and consequent increase of trade and appreciation of property, resulting from the opening of a highway, are *general* benefits, why are not unfavorable diversion of travel, and consequent decrease of trade and depreciation of property, resulting from the discontinuance of a highway, *general* damages?" That question is peculiarly appropriate here because in Friedenwald v. Baltimore, 74 Md. 126, 21 Atl. 555, this Court said: "There can be no doubt about the general proposition that increased facilities for travel enjoyed by the appellant, in common with the community in general, is not a proper element to be considered by the jury in estimating benefits." Although we have not been heretofore called upon to pass the particular question involved in this case, we have in analogous cases announced the rule which is applicable. In Houck v. Wachter, 34 Md. 265, 6 Am. Rep. 332, which was an action to recover damages for the alleged obstruction of a highway, Chief Judge Bartol said: "All the authorities agree that to support the action the damage must be different, not merely in degree, but different in kind from that suffered in common, hence it has been well settled, that though the plaintiff may suffer more inconvenience than others from the obstruction, by reason of his proximity to the highway, that will not entitle him to maintain an action." The fact that that plaintiff "was obliged to proceed to his farm by a very circuitous route" was not sufficient to enable him to recover. In Bembe v. Anne Arundel County, 94 Md. 321, 51 Atl. 179, 57 L.R.A. 279, the *narr.* was sustained only because it distinctly alleged that the highway, with the bridge in question, was the *only* means by which the appellant had access to and egress from his farm, which consequently showed an injury differing in kind from that which other members of the community suffered [157] from the same cause, and the Court, through Chief Judge McSherry, in holding that the demurrer should have been overruled, took occasion to add: "Of course, if the appellant,—the plaintiff below—has any other way or road by which he can get to and from his premises, he cannot maintain this action even though he is put to more inconvenience, or is required to travel a much greater distance in using the other highway." So in Anne Arundel County v. Watts, 112 Md. 353, 76 Atl. 82, the recovery was sustained because it was alleged and proved that the plaintiff was deprived of the use of the *only* public road which passed the points between which the materials he was to use were to be hauled—he being under penalty to do the work within a limited time. Those and similar cases which might be cited were cases in which the defendants were not acting as authorized by the law, as the appellees are, yet the plaintiffs were required to show that the highways were the only ones they could use, in order to establish such special damages as entitled them to recover.

If the appellant's right to recover be on the theory that the closing of this part of Henrietta street has caused it to lose some of its church members, it would be extremely difficult, if not impossible, to fix such damages in dollars and cents by any known rule of law. A church member who would leave his church merely because he had to go a square or two further to get there than he formerly did would not, as a general rule, be a very serious loss to the church, but if any one did absent himself for that reason, how could the financial loss be estimated? Even if it could be proved that he had been paying so much per year, his death, removal or other change might deprive the church of that income at any time. Such loss would be of the most speculative character, and it is not perceived how the loss in membership could in other respects be considered as ground for damages. Moreover, it is an established fact in this case, that there are conditions existing in that part of the city which would necessarily affect this congregation. The uncontradicted evidence is that a considerable [158] part of the territory, on both sides of the railroad, from which this church would naturally have derived a good deal of its membership, is now mainly, and in some squares exclusively, occupied by colored people. It may be that the improvements made under this ordinance, of which this closing of Henrietta street is a part, is to some,

possibly a large extent responsible for the change in the class of residents living there, but surely no one will contend that in assessing damages for closing a block of Henrietta street, all that is done or to be done under this ordinance is to be taken into consideration. We speak of such matters to show how impossible it would be to allow damages to cover such injuries as the appellant claims to have sustained, if we are to be governed by established rules of law and not be led off into what is pure speculation and beyond definite ascertainment. So far as affecting the value of appellant's property is concerned, it may be different in degree, but is not different in kind, from that of the owners of other properties situated in this neighborhood. If the appellant is entitled to damages, every owner on both sides of Henrietta, from Eutaw to Warner street, and from Howard to Sharp, would be, and if they are those on cross streets, or a little further off on Henrietta or some parallel street might claim damages on the same ground. As said by the Supreme Court of Massachusetts, *supra*, the line must be drawn somewhere, and unless there be some very unusual and extraordinarily peculiar conditions, we think that drawn by the great weight of authority, which we have stated above, is the safe and correct one.

In determining how far a dedication of an unimproved street extends, so as to relieve a municipality from paying damages, in a proceeding for opening, etc., such a street, we said in Hawley v. Baltimore, 33 Md. 280: "The doctrine of implied covenants will be held to create a right of way over all the lands of a vendor which may lie, however remote, in the bed of a street. The lands must be contiguous to the lots sold and there must be some point of [159] limitation. The true doctrine is, as we understand it, that the purchaser of a lot calling to bind on a street, not yet opened by the public authorities, is entitled to a right of way over it, if it is of the lands of his vendor, to its full extent and dimensions only until it reaches some other street or public way. To this extent will the vendor be held by the implied covenant of his deed, and no further." The dedication in such cases is held to be co-extensive with the right of way acquired as an easement by the purchaser, and although the owner of the land has laid it out in lots and streets and sells lots calling to bind on such streets, the dedication is limited as stated above, and in Baltimore v. Frick, 82 Md. 85, 33 Atl. 435, it was held that the street which limits the extent of the dedication is the next existing public street, whether the same be actually used as same or not. If, for example, Henrietta street was an unimproved street and it had been dedicated by the owner of the land selling lots to appellant and others, the implied covenant for the right of the appellant to use it would only have extended to Eutaw street. If the city had not accepted the dedication, and no lots had been sold east of Eutaw street, when it proposed to open that part of the street, it would have been compelled to pay for it and could not have been aided by the implied covenant for the benefit of the appellant and other purchasers of lots west of Eutaw street, as that only extended to Eutaw street. The theory of the rule of law is that the vendor only covenanted with the vendee that he could have the use of the street on which his lot fronts, to the next existing public street, because there he would have access to other ways. The law fixed the next cross street as the limit, just as it does in this character of cases, because the line must be drawn somewhere, and that was deemed a reasonable and just place to fix it.

We had intended to refer at some length to the cases cited by the appellant, but this opinion is already too long to admit of that, and we must be content with saying that we have [160] examined them carefully and find that they are for the most part, if not altogether, easily distinguishable from those which sustain the rule we have announced. The case of Howell v. Morrisville, supra, sufficiently explains that of In re Melon Street, supra, to avoid the necessity of further comment, and that of Dantzer v. Indianapolis Union R. Co. 141 Ind. 604, 39 N. E. 223, 50 Am. St. Rep. 343, 34 L.R.A. 769, is much more favorable to the contention of the appellees than it is to that of the appellant. But without mentioning others, an examination of them will show either that damages were allowed under some special statute construed by the Court to include such damages, or that the properties were by the closing left in a *cul de sac* or in some such shape as the Courts held had so affected the access to them as to come within an exception to the general rule.

We do not see the relevancy of the questions in the first and second bills of exception, but whatever the answers might have been they could not have affected our conclusion on the main question. So although it is greatly to be regretted if the property of the appellant has depreciated as indicated by the evidence of the witnesses produced by it—whenever maybe the real cause or causes for the depreciation,—we are convinced that under the overwhelming weight of authority it is not entitled to damages in this case, and the action of the Court in granting the motion to dismiss the appeal taken to the Baltimore City Court must be affirmed.

Order affirmed, the appellant to pay the costs.

NOTE.

Persons Entitled to Compensation for Vacation of Street.

Introductory, 238.
Abutting Owners, 238.
Nonabutting Owners, 239.

Introductory.

It is the purpose of this note to review the recent cases determining the persons entitled to compensation for the vacation of a street. The earlier cases on this subject will be found in the notes to Enders v. Friday, 15 Ann. Cas. 665; Freeman v. Centralia, Ann. Cas. 1913D 786 and Heinrich v. St. Louis, 46 Am. St. Rep. 490.

Abutting Owners.

It is the more general rule that an abutting property owner whose right of ingress and egress is cut off or substantially interfered with by the vacation of a public street or alley, has a right of action for any damage which he may sustain by the vacation. Louden v. Starr (Ia.) 154 N. W. 331; Hubbell v. Des Moines (Ia.) 154 N. W. 337; Jones v. Aurora, 97 Neb. 825, 151 N. W. 958; Galveston Commercial Assoc. v. Ort (Tex.) 165 S. W. 907. In Hubbell v. Des Moines, supra it was said: "The fee of the street is in the city. The peculiar right of the abutting property owners is limited to the use of the street in connection with his property. Of course, he has a common right with the public to the use of the street. As an abutting land owner, he may have a distinct and different right. The plaintiff, as an abutting property owner, has a right to a means of egress and ingress. The street or alley having been established by proper authority, the right, through that instrumentality of ingress and egress, is created. This is a substantial right, and, at certain points abutting his property, of great value; at other points of practically no value. To interfere with the free and convenient use of ingress and egress, to shut off access to his property entirely by the vacation of streets or alleys, would be, in some instances, to destroy the value of the property itself, at least until such time as aerial navigation has been perfected. There is no question, under the rule laid down in this state, and as the law now stands, that the vacation of a public street or alley may be a substantial injury to the owner of abutting property, by the destruction of his right to the larger and fuller enjoyment of his property, resting in the existence of the street or alley. . . . An abutting property owner, whose right of egress and ingress has been substantially interfered with by the vacation of a public street or alley, has the right of action for damages which may result to him personally by such vacation, and it does not matter whether you call it an easement in the street, a vested right to the use of the street, or a claim for damages. This court is committed to the doctrine that he is entitled to recover if the free access to his property, and the improvements thereon, through the street, and by means of the street has been substantially interfered with." In Jones v. Aurora, 97 Neb. 825, 151 N. W. 958, the owner of three adjoining lots brought an action to recover damages occasioned to the property by the vacation of a street. It was contended that no recovery could be had as to two of the lots because they did not actually abut on the vacated street. The court in disposing of this contention said: "In the instant case, the three lots are used as one tract, having common improvements, and, in assessing damages, must be treated as a single piece of property, abutting on the vacated portion of the streets. In closing these streets and placing plaintiff's property at the end of a pocket street, her damage is different from that of the general traveling public, and she suffered damage special and peculiar to this property, and different from that of the general public."

But in Walker v. Des Moines, 161 Ia. 215, 142 N. W. 51, it was held that a property owner is not entitled to compensation for the vacation of a street where the access to his lots has not been interfered with. See also the reported case.

In some jurisdictions the rule obtains that an owner of abutting property cannot recover compensation for the vacation of a street. Harrison Land Co. v. Crucible Steel Co. 82 N. J. Eq. 414, 89 Atl. 41. See also Chenault v. Collins, 155 Ky. 312, 159 S. W. 834. In the case first cited it was said: "So far as the municipality, the town of Harrison, is concerned, the complainant's right to a preliminary injunction depends upon the power of the municipality to vacate a portion of Cumberland street without first making compensation to complainant. The charter (P. L. 1873, p. 265, § 56) authorizes the common council by ordinance to lay out, alter, widen, or straighten, and also to vacate any street then or thereafter laid out, 'and to take and appropriate for such purpose any lands and real estate, upon making compensation to the owner or owners thereof, as is hereinafter mentioned and provided.' The subsequent section of the charter (59), defining the method of ascertaining and making compensation, extends only to the taking and appropriation of lands or real estate for 'opening or altering, widening or straightening streets,' and does not include "vacating.'

Complainant's land is apparently damaged or injuriously affected by the vacation of the street, but its land is neither taken nor appropriated, and therefore does not seem to come within the provision in section 56 for compensation. Unless such provision is expressly directed by statute to be made, streets may under our Constitution be vacated without compensation. . . . In the vacation of streets, lands located on the street vacated are not in fact 'taken and appropriated' by the municipality, which, on the contrary, only releases a public right or easement over the lands, and therefore it may be well claimed that the provisions of section 50 as to the method of compensation and proceedings for 'lands taken' intentionally and properly excluded proceedings for the vacation of streets. And, in my judgment, this omission, construed in connection with section 56 extending the power for compensation only to 'lands taken and appropriated,' excludes complainant's lands from the protection of the provision." And in Chenault v. Collins, 155 Ky. 312, 159 S. W. 834, it was held that "a property owner, in the absence of statutory provision, is not entitled to damages on account of the discontinuance of a county road."

In some jurisdictions it has been provided by statute that landowners shall be entitled to compensation for the injury suffered by the vacation of a road. Highway Com'rs v. Klaus, 186 Ill. App. 431; Olinger v. Watson, 160 App. Div. 96, 145 N. Y. S. 173. In the case last cited it was held that a statute giving damages for the closing of streets did not relate to mere private ways, and that damages could not be recovered for the closing of a street as to which no duty of maintainance had been imposed upon the public. It was also held in that case that as to claims, relating to property included within a block wholly surrounded by new streets, for damage caused by the closing of old streets within the block the damage did not accrue until one of the new streets bounding the block had been actually and physically opened for public use so that unless the assignor of a claimant for damages had title when one of the new streets was actually opened he could not assign a claim for damages.

Nonabutting Owners.

Where the vacation of a street causes special injury to nonabutting property, the owner of the property injured may recover compensation. Hill v. Kimball, 269 Ill. 398, 110 N. E. 18; Hoyt v. Watson, 162 App. Div. 469, 147 N. Y. S. 599, *affirmed* 213 N. Y. 651, 107 N. E. 1079. See also Chambersburg Shoe Mfg. Co. v. Cumberland Valley R. Co. 240 Pa. St. 519, 87 Atl. 968. Galveston Commercial Assoc. v. Ort (Tex.) 165 S. W. 907. "Property may be so specially and peculiarly injured, even though not immediately abutting upon the vacated street or alley, that damages can be recovered from the municipality for such vacation, and the damage to injured property so situated would differ in degree, and not in kind, from the damages incurred by property immediately abutting upon such vacated street or alley." Hill v. Kimball, 269 Ill. 398, 110 N. E. 18. In Hoyt v. Watson, 162 App. Div. 469, 147 N. Y. S. 599, it was said: "It would seem that property situated on a block upon an ancient public street is entitled to have access from each end of that block. As the street has not only been discontinued for a portion of the very block upon which the petitioner's property is located, but has been permanently and physically obstructed by the wall erected a few feet to the north of her property and in said block, I am of the opinion that she has presented a case within the provisions of the Street Closing Act, . . . and that she is entitled to present her claim for damages to commissioners to be appointed, as provided by said act." In that case it appeared that after a street had been closed several feet beyond the property of the petitioner another street was constructed immediately adjacent to the property of the petitioner on property condemned by the city for bridge purposes. It was held that the opening of the new street did not defeat the right of the petitioner to compensation as he did not have an absolute right to the maintenance and continuance of the new street. In Chambersburg Shoe Mfg. Co. v. Cumberland Valley R. Co. 240 Pa. St. 519, 87 Atl. 968, it was said: "The purchasers of lots sold according to a plan showing streets, alleys and courts, acquire a right of property appurtenant to the lots, in the use of the streets, alleys and courts, thus dedicated. Such a right is sometimes called an 'easement of access' which means the right of ingress and egress to and from the premises of the lot owners. It is a property right appurtenant to the land which cannot be impaired or taken away without compensation.

But in Hill v. Kimball, 269 Ill. 398, 110 N. E. 23, it appeared that there was a statutory dedication of all the streets and alleys in a subdivision of the city and it was said that the owners of property in the subdivision could not "recover damages for the vacation of any of the streets or alleys in any part of said Hitch's Fairview subdivision unless as to the vacated alleys in the block in which appellants' property is located."

MAYOR AND ALDERMEN OF CITY OF SAVANNAH

v.

JORDAN.

Georgia Supreme Court—September 19, 1914.

142 Ga. 409; 83 S. E. 109.

Municipal Corporation — Liability for Tort in Cleaning Street.

The duty of keeping the streets of a municipality free from matter which, if allowed to remain, would affect the health of the public is a governmental function, the exercise of which would exempt the municipality from liability to a suit for damages to an employee without fault, who is injured by reason of a defective cart in which he is hauling "the sweepings of the streets" of such municipality, and which has been furnished him for that purpose by the agents of the municipality.

(a) This court will take judicial cognizance that the sweepings of the streets of a municipality contain matter which, if allowed to remain in the streets, will injuriously affect the health of the citizens of such municipality.

(b) And this is so notwithstanding petition describes "the sweepings of the streets" as "dirt and trash."

[See note at end of this case.]

Petition Insufficient.

The petition was subject to general demurrer, and should have been dismissed.

(Syllabus by court.)

Error to Superior Court, Chatham county: CHARLTON, Judge.

Action for damages. T. B. Jordan, plaintiff, and Mayor and Aldermen of City of Savannah, defendant. Judgment for plaintiff. Defendants bring error. REVERSED.

[409] This action was brought against the City of Savannah by T. B. Jordan, who was an employee of the city engaged at the time of the injury in driving a street cart. It was alleged that he was engaged in duties under "the Street and Lane Department of the City," and that at the time of the injury he was "hauling the sweepings of the street." While driving the cart he noticed that the axle was not exactly straight, and not being a mechanic, and knowing nothing about the durability of metals, he called the attention of Mr. Doolan, [410] under whom he was working, to the condition of the axle, who told him to report the matter to the "inspector of carts and mules." The axle was worn, the point where it broke being thinner than the other part, and this made it too weak to stand the weight of the "dirt and trash" in the cart. The inspector who made an examination of the axle pronounced it safe, told the plaintiff to continue using it, and assured him that it would not break. At the point where it broke it was cracked and too weak to stand the weight of the dirt and trash in the cart, which was unknown to the plaintiff, but was known to the defendant, or could and should have been known if proper inspection had been made. On April 10, 1911, plaintiff was driving the cart on Farm Street, which is a rock-paved street; and while on the cart in the discharge of his duties, the axle broke and he was violently thrown to the pavement. This severely injured his elbow and caused a rupture from which hernia resulted, etc. He was entirely free from fault, did not consent or contribute to his injury, and relied upon the assurance of safety given him by "the defendant's mechanic." The axle was not manifestly dangerous. The injury was due directly and proximately to the negligence of the defendant, its servants and employees, in furnishing plaintiff an unsafe appliance with which to work, and in assuring him that the appliance was safe. A general and special demurrer to the petition were overruled, and the defendant excepted.

John Rourke Jr. and *David S. Atkinson* for plaintiff in error.

Twiggs & Gazan for defendant in error.

HILL, J. (*after stating the facts*).—Exception is taken to the overruling of the demurrer to the petition as amended. The amendment sufficiently met the special demurrer. Is the petition as amended sufficient to withstand a general demurrer? This depends on the answer to the question, whether the act of hauling the sweepings from the streets of Savannah by the use of a cart operated under the direction of the department of streets and lanes in that municipality was the exercise of a governmental function, or was the exercise of a ministerial function. It seems to be well settled that where the municipality undertakes to perform for the State duties which the State itself might perform, but which have been delegated to the municipality,—such, for instance, as devolve upon the board of health of a city under its charter, for the protection of life and health and comfort of the community,—and in [411] the exercise of such function under the department a private citizen is injured by the negligence of the servants of the department while engaged in such work, no cause of action arises against such municipality. Love v. Atlanta, 95 Ga. 129, 22 S. E. 29, 51 Am. St. Rep. 64; Cook v. Macon, 54 Ga. 468; Gray v. Griffin, 111 Ga. 361, 368, 36 S. E. 792, 51 L.R.A. 131; Dalton v. Wilson, 118 Ga. 100, 101, 44 S. E. 830, 98 Am. St. Rep.

101; 4 Labatt on Master and Servant (2d ed.) § 1615, p. 4928; 5 Thomp. Neg. § 5789. On the other hand, a municipality is civilly liable for damages arising "for neglect to perform, or for improper or unskillful performance of their duties" (Civil Code (1910) § 897); or for acts which are thus performed in its private character for business purposes, and for its own advantage or profit, although such act may enure to the ultimate benefit of the citizen. 5 Thomp. Neg. § 5789; 4 Labatt, M. & S. (2d ed.) § 1615; Dill. Mun. Corp. (5th ed.) § 1662, p. 2899. See Huey v. Atlanta, 8 Ga. App. 597, 70 S. E. 71; Savannah v. Spears, 66 Ga. 304; Smith v. Atlanta, 75 Ga. 110; Greensboro v. McGibbony, 93 Ga. 672, 20 S. E. 37. There is a diversity of opinion in outside jurisdictions as to the liability of municipalities while engaged in cleaning streets, for torts committed by its officers or agents. In some jurisdictions these duties are held to be governmental in their character, and the right to recover damages for torts thus committed is denied. See 4 Dill. Mun. Corp. 2899, and cases cited. In other jurisdictions municipalities have been held impliedly liable for the negligence of employees engaged in street cleaning. Ibid. Missano v. New York, 160 N. Y. 123, 54 N. E. 744; Quill v. New York, 36 App. Div. 476, 55 N. Y. S. 889; Barney Dumping-Boat Co. v. New York, 40 Fed. 50. A clear distinction between the governmental and ministerial functions of a municipal corporation is drawn in the case of Jones v. Williamsburg, 97 Va. 722, 34 S. E. 883, 47 L.R.A. 294, where Riley, J., says: "A municipal corporation has a dual character, the one public and the other private, and exercises correspondingly twofold functions, the one governmental and legislative, and the other private and ministerial. In its public character, it acts as an agency of the State, to enable it the better to govern that portion of its people residing within the municipality; and to this end there is granted to or imposed upon it, by the charter of its creation, powers and duties to be exercised and performed [412] exclusively for public, governmental purposes. These powers are legislative and discretionary, and the municipality is exempt from liability for an injury resulting from the failure to exercise them, or from their improper or negligent exercise. In its corporate and private character there are granted unto it privileges and powers to be exercised for its private advantage, which are for public purposes in no other sense than that the public derives a common benefit from the proper discharge of the duties imposed or assumed in consideration of the privileges and powers conferred. This latter class of powers and duties are not discretionary, but ministerial and absolute; and, for an injury resulting from negligence in their exercise or performance, the municipality is liable in a civil action for damages, in the same manner as an individual or private corporation. The line of distinction . . . is clearly drawn by the courts and text-writers, and the exemption of the municipality from liability in the one case, and its liability in the other for an injury resulting from negligence, firmly established." Where a municipality is exercising an administrative function at the time an employee is injured, it owes its employee the duty of furnishing a safe place to work; and for a failure to do so, and where by reason of such failure an employee is injured without fault on his part, the corporation would be liable, under the same circumstances that a private individual or corporation would be. 4 Labatt on Master & Servant, § 1615; Condon v. Chicago, 249 Ill. 596, 94 N. E. 976. See Collins v. Greenfield, 172 Mass. 78, 51 N. E. 454; Hourigan v. Norwich, 77 Conn. 358, 59 Atl. 487, 17 Am. Neg. Rep. 445; Bruhnke v. La Crosse, 155 Wis. 485, 144 N. W. 1100, 50 L.R.A.(N.S.) 1148. The authorities undoubtedly make a distinction between cases where injuries are occasioned by the agents of municipalities while engaged in the performance of governmental functions, or in private enterprises. Between the municipality and the public the question of liability depends upon whether at the time of the injury the municipality is engaged in a governmental or ministerial duty. The relation of a municipal corporation to its servants is the same as it is between any other master and servant, provided it is engaged in the performance of ministerial functions.

The question has been settled so far as this State is concerned, and the only difficulty is in applying the rulings made to a particular case. In Love v. Atlanta, supra, it was held that "The duty [413] of keeping the streets clear of putrid and other substances offensive to the sense of smell and which tend to imperil the public health devolves, under the charter of the City of Atlanta, upon the board of health of that city; and the functions of this department of the city government being governmental and not purely administrative in their character, it follows that if, in the exercise of such functions and in the discharge of the duties devolving upon this department thereunder, a private citizen is injured by the negligence of one of its servants in and about such work, no right of action arises against the city." And see, to the same effect, Watson v. Atlanta, 136 Ga. 370, 71 S. E. 664. In the body of the opinion in the Love case Justice Atkinson said: "With respect to matters concerning the public health, however, there is no serious conflict of reason, opinion, or authority upon

the correctness of the proposition that the preservation of the public health in one of the duties that devolves upon the State as a sovereign power. It is such a duty as, upon proper occasion, justifies the exercise of the right of eminent domain and the demolition of structures which endanger or imperil the public health. In the discharge of such duties as pertain to the health department of the State, the State is acting strictly in the discharge of one of the functions of government. If the State delegate to a municipal corporation, either by general law or by particular statute, this power, and impose upon it within its limits the duty of taking such steps and such measures as may be necessary to the preservation of the public health, the municipal corporation likewise, in the discharge of such duty, is in the exercise of a purely governmental function, affecting the welfare not only of the citizens resident within its corporation but of the citizens of the commonwealth generally, all of whom have an interest in the prevention of infectious or contagious diseases at any point within the State, and in the exercise of such powers is entitled to the same immunity against suit as the State itself enjoys. Such a duty would stand upon the same footing as its duty to preserve the public peace, and its liability or non-liability would depend upon the same principle which relieves the city from liability for the misfeasance of a police officer in the discharge of his duty. It will be observed, however, that in order to exempt a city from liability, it is not sufficient to show that the particular work, from the negligent performance of which by the servants of the city a citizen was injured, was being performed under the direction of the health authorities; [414] but it must be shown that the particular work so being done was connected with or had reference to the preservation of the public health." It is a matter of common knowledge that the sweepings of the streets contain matter other than dirt and trash, which is offensive to the sense of smell, and which, if allowed to remain, will tend to affect not only the comfort but the health of the community as well. Even the English sparrows take cognizance of this, and act as scavengers in removing it. And it matters not that the duty of removing this cause of discomfort, inconvenience, and ill health to the community is delegated to the "Streets and Lanes Department" of a city. It is not the character or name of the agent who executes the duty of removing the cause of discomfort and ill health to the public which fixes the character of the duty performed, but it is the act itself which determines whether it be governmental or ministerial. It is immaterial whether the work is done under the supervision of the board of health of a municipality, or by the "Director of Public Works," or under the "Streets and Lanes Department." The duty is the same, and that is to remove from the streets all the sweepings and garbage and whatever would contaminate the atmosphere and breed pestilence and disease; and such a duty is a governmental and not a ministerial function. It is one that the entire public, living within or without the municipality, is concerned in, —the enforcement of laws for the preservation of the comfort and health of the citizen. The allegation that the cart was too weak to stand the weight of "the dirt and trash" in the cart cannot change the character of the contents of the cart. The petition also alleged that the plaintiff was hauling "the sweepings of the street." Counsel for both plaintiff and defendant cite the ordinances of the City of Savannah as throwing light on the question at issue; but the court cannot take judicial cognizance of the existence of the ordinances of a municipality, on demurrer, where such ordinances are not pleaded and set out. What is said in Collins v. Russell, 107 Ga. 423, 432, 33 S. E. 444, as to judicial cognizance of ordinances of the City of Savannah, has no application to a case like the present. But, without reference to the ordinances of the City of Savannah, which we cannot consider under the present record, we hold that the allegation in the plaintiff's petition that the cart contained the sweepings of the streets, which he was hauling at the time of his injury, means that the plaintiff, as an employee [415] of the city, was in the exercise of a governmental function; and this being so, he cannot recover of the municipality. The court erred in overruling the general demurrer to the petition.

Judgment reversed. All the justices concur.

NOTE.

Liability of Municipality for Tort Committed in Cleaning Streets or in Removal of Garbage, Ashes, or Other Refuse.

Majority Rule:
Rule Stated, 242.
Application of Rule, 244.
Minority Rule:
Rule Stated, 245.
Application of Rule, 246.

Majority Rule.

RULE STATED.

A majority of the jurisdictions subscribe to the rule that the cleaning of the streets

and the removal of ashes and garbage is a public duty performed for the protection of the general health of the community, in the discharge of which a municipality exercises a purely governmental function as distinguished from one which is municipal or corporate, and therefore it is not responsible for torts committed in the course of the work. Love v. Atlanta, 95 Ga. 129, 22 S. E. 29, 51 Am. St. Rep. 64; McFadden v. Jewell, 119 Ia. 321, 93 N. W. 302, 97 Am. St. Rep. 321, 60 L.R.A. 401; Kippes v. Louisville, 140 Ky. 423, 131 S. W. 184, 30 L.R.A.(N.S.) 1161; Louisville v. Carter, 142 Ky. 443, 134 S. W. 468, 32 L.R.A.(N.S.) 637; Haley v. Boston, 191 Mass. 291, 77 N. E. 888, 56 L.R.A.(N.S.) 1005; Cassidy v. St. Joseph, 247 Mo. 197, 152 S. W. 306; Connor v. Manchester, 73 N. H. 233, 60 Atl. 436; Condict v. Jersey City, 46 N. J. L. 157; Connelly v. Nashville, 100 Tenn. 262, 46 S. W. 565; Bruhnke v. La Crosse, 155 Wis. 485, 144 N. W. 1100, 50 L.R.A. (N.S.) 1147. And see the reported case. See also Louisville v. Hehemann, 161 Ky. 523, 171 S. W. 165, L.R.A. 1915C 747; Johnson v. Somerville, 195 Mass. 370, 81 N. E. 268, 10 L.R.A.(N.S.) 715; Kuehn v. Milwaukee, 92 Wis. 263, 65 N. W. 1030 (tort by independent contractor). *Compare* Young v. Metropolitan St. R. Co. 126 Mo. App. 1, 103 S. W. 135 (disapproved in Cassidy v. St. Joseph, supra.)

Thus in Love v. Atlanta, 95 Ga. 129, 22 S. E. 29, 51 Am. St. Rep. 64, it appeared that while the plaintiff was passing along the streets of a city, in the exercise of proper care and without fault on his part, an animal attached to one of the garbage carts of the city was negligently permitted to run away, and while so running, collided with the buggy of the plaintiff causing serious injury. It was also alleged that the driver of the cart was a small negro boy, wholly incompetent to the discharge of the duty, and that the mule employed was vicious, dangerous, and liable to run away. It was shown that the mule and cart causing the damage were in use by the city under the direction of the health board of the city, and that the servant of the city charged with driving the cart was then employed in cleaning the streets and removing therefrom such putrid and offensive substances as usually accumulate in the streets of densely populated cities, and which were necessary to be removed because, remaining, they endangered the public health. The court said: "With respect to matters concerning the public health, . . . there is no serious conflict of reason, opinion or authority upon the correctness of the proposition that the preservation of the public health is one of the duties that devolves upon the state as a sovereign power. It is such a duty as, upon proper occasion, justifies the exercise of the right of eminent domain and the demolition of structures which endanger or imperil the public health. In the discharge of such duties as pertain to the health department of the state, the state is acting strictly in the discharge of one of the functions of government. If the state delegate to a municipal corporation, either by general law or by particular statute, this power, and impose upon it within its limits the duty of taking such steps and such measures as may be necessary to the preservation of the public health, the municipal corporation likewise, in the discharge of such duty, is in the exercise of a purely governmental function, affecting the welfare not only of the citizens resident within its corporation but of the citizens of the commonwealth generally, all of whom have an interest in the prevention of infectious or contagious diseases at any point within the state, and in the exercise of such powers is entitled to the same immunity against suit as the state itself enjoys, . . . it can make no difference in principle as to the character of the agents employed in the discharge of this duty with respect to the public health. The principle of nonliability rests upon the broad ground that in the discharge of its purely governmental functions, a corporate body to which has been delegated a portion of the sovereign power, is not liable for torts committed in the discharge of such duties and in the execution of such powers. It can be no more liable because of the failure to select competent drivers of garbage carts than a city could be held liable for failing to elect a wise, conservative and discreet mayor. . . . However incongruous it may appear to be to say that this diminutive darky and this refractory mule were engaged in the performance of some of the functions of government, it is nevertheless true, and illustrates how even the humblest of its citizens, under the operation of its laws, may become in Georgia an important public functionary."

In Louisville v. Hehemann, 161 Ky. 523, 171 S. W. 165, L.R.A. 1915C 747, the court said, obiter: "In the collection and disposition of garbage, undoubtedly the city acts for the public health, and discharges a governmental function. In this regard, it is an agent or arm of the commonwealth, and, for that reason, is absolved from liability for the negligence of its employees."

In Condict v. Jersey City, 46 N. J. L. 157, the court said: "The removal of ashes and garbage placed by the inhabitants in boxes and barrels upon the sidewalks, is part of the duties of this board in their supervision over and care for the cleanliness of the streets. A dumping-ground and horses, carts and drivers, to carry the ashes and garbage to the place of deposit, are necessary to en-

able the board to carry into execution its public duties in this respect; and the board is supplied with horses and carts and authorized to employ drivers at public expense for this purpose. It is the settled law of this state that an action will not lie in behalf of an individual who has sustained a special damage from the neglect of a municipal corporation to perform a public duty, unless the right to sue for such an injury is given by statute. . . . In the execution of the duties of a municipal government the services of inferior officers having only ministerial duties to perform, and of workmen and other employees, are required for the transaction of its business. . . . It has been held that with respect to such officers and employees, the doctrine of respondeat superior does not apply. . . . To maintain in its integrity the doctrine of our courts that a municipal corporation is not amenable to actions for negligence in the performance of public duties, it is necessary to maintain also that persons employed by the corporation in the execution of public duties are mere agencies or instruments by which such duties are performed, and that the doctrine of respondeat superior does not apply to such employments. To impose upon the corporation liability for the negligence of such employees would indirectly fix upon the corporation a liability from which it is by law, on consideration of public policy, exempted."

Application of Rule.

In Kippes v. Louisville, 140 Ky. 423, 131 S. W. 184, 30 L.R.A.(N.S.) 1161, it appeared that the plaintiff was injured by the bursting of a hose in charge of the defendants' employees. The defendant alleged that at the time of the accident complained of the employees of the city, or one of its departments, in charge of the flusher, were engaged in flushing the streets of the city, and that for this service the city did not receive or charge any remuneration or profit, but did the work solely for the promotion of the health, safety and comfort of the inhabitants of the city and the general public; and that in using the flusher it was exercising a governmental function of the city. The plaintiff demurred to the answer and the demurrer was overruled. On appeal the court affirmed the judgment and held that the flushing of the streets of the city was a public duty undertaken by the city in the exercise of its governmental functions.

In Conelly v. Nashville, 100 Tenn. 262, 46 S. W. 565, it appeared that while the plaintiff was sitting in her buggy, which was standing near the sidewalk of one of the streets of a city, a driver of a sprinkling cart, engaged in the services of the city, negligently collided with the wheels of the buggy, so that the animal attached thereto taking fright, overturned the buggy and inflicted the injury complained of. A demurrer to the plaintiff's declaration was sustained and the court said: "An ordinance of the city directing the sprinkling of the streets . . . is one that is sanitary in its character, passed in view of the health and comfort of the general public. While engaged in doing work under such an ordinance, the municipality is discharging a governmental duty, and is not responsible for the carelessness of the agent or agencies so employed."

In Cassidy v. St. Joseph, 247 Mo. 197, 152 S. W. 306, it was held that there could be no recovery against a city for the death of the plaintiff's husband caused by a runaway team used by the city in the cleaning of its streets.

Likewise in Connor v. Manchester, 73 N. H. 233, 60 Atl. 436, the plaintiff offered to prove that the decedent was employed by the street and park commissioners of the city of Manchester, through their superintendent, to drive a horse hitched to a cart used in removing dirt, rubbish, and ashes from the streets of the city and from receptacles placed on or near the streets by abutters; and that while so employed, he was run over and killed by reason of the unsafe character of the horse. The defendants' motion for an order of nonsuit was granted, subject to exception. On appeal the exception was overruled and the order of nonsuit sustained.

In Bruhnke v. La Crosse, 155 Wis. 485, 144 N. W. 1100, 50 L.R.A.(N.S.) 1147, it was held that the defendant city was not liable for an injury to a child caused by the negligence of a driver of a city dump wagon which was being used for street cleaning purposes. The infant who was five years of age had followed the wagon and had come in contact with the chains forming constituent parts of the dumping device just as the driver, without notice or warning, negligently disengaged the dumping device, causing the chains to move and draw the infant into or against the pulleys through which these chains passed, with great force, seriously injuring the infant.

In Louisville v. Carter, 142 Ky. 443, 134 S. W. 468, 32 L.R.A.(N.S.) 637, it appeared that the plaintiff, an eleven-year-old boy, was run over by a wagon belonging to the city of Louisville and severely injured. One of the city's sprinkling carts was being driven through the streets, and another wagon used by the street cleaning department was attached to it. The latter wagon injured the boy. It was conceded that if the injury had been inflicted by the sprinkler while being used for sprinkling the street no recovery could be had. But it was argued that inasmuch as the sprinkler was not being used

for sprinkling purposes, but to haul another wagon, a different rule applied. The court said: "We are unable to draw the distinction which appellee's counsel would make between an injury resulting from the negligent use of the sprinkler while actually sprinkling, and one while the sprinkler was being drawn through the city from one part thereof to another. In the numerous cases that have been decided by this and other courts, holding that a city is not liable for an injury that resulted through the negligence of its employees engaged in the discharge of any of those duties commonly called 'governmental functions,' the opinion in each is rested upon the idea that, as the city is a branch of the state government, an arm of the state, it is against public policy to permit it to be used for the negligence of those of its servants engaged in the discharge of some duty which has for its aim the protection of the lives, health, or property of the citizens."

In McFadden v. Jewell, 119 Ia. 321, 93 N. W. 302, 97 Am. St. Rep. 321, 60 L.R.A. 401, it appeared that an infant was injured by a mowing machine operated by an employee of the defendant who was engaged in cutting down a growth of weeds in one of the alleys of the city. The court said: "Certain it is that in the matter of control over the streets and alleys within the incorporate limits—and, to make the reference direct, in the matter of clearing the alley in question of weeds—the town was in the exercise of police powers possessed by it as an incident to its existence as a municipal corporation. It is well settled that where an act done by an officer or employee of a municipal corporation is essentially in the line of the performance of an official duty, public in character, the municipality cannot be made liable for a tort committed or wrong done by such officer or employee while engaged as such in the performance of the duty in question."

In Johnson v. Somerville, 195 Mass. 370, 81 N. E. 268, 10 L.R.A.(N.S.) 715, it was held that a city was not responsible for the action of its superintendent in dumping ashes on premises adjoining the plaintiff's premises, thereby filling up a natural watercourse, and causing the water to percolate through the soil into a cellar on the land of the plaintiff.

However, in Louisville v. Hans (Ky.) 180 S. W. 65, it appeared that the plaintiff was injured by falling over a garbage can which had been standing on the sidewalk for three days. It was the duty of the street cleaning department to remove all garbage placed in such receptacles on certain days, but an employee of that department had failed to do so. The court said: "In failing to remove this garbage when it should have done so, the city was not exercising any governmental function. It was simply guilty of negligence, as much so as if a man in the employ of the city whose duty it was to remove the garbage had himself put an obstruction on the sidewalk at this place and let it remain there three days. The city is under a duty to exercise ordinary care to keep its streets and sidewalks in reasonably safe condition for public travel, and when it fails to perform this duty by leaving an obstruction in the street or on the sidewalk that it knows, or in the exercise of ordinary care could have known, was present, and some person is injured by reason of the obstruction, the liability of the city grows out of its failure to perform the duty mentioned."

Minority Rule.

Rule Stated.

In some jurisdictions, however, a municipality is held liable for torts committed in cleaning its streets. In those jurisdictions the courts consider the cleaning of streets or the removal of garbage and rubbish to be a corporate function and the fact that its discharge may incidentally benefit the public health is deemed to be of minor importance. Barney Dumping-Boat Co. v. New York, 40 Fed. 50; Denver v. Maurer, 47 Colo. 209, 106 Pac. 875, 135 Am. St. Rep. 210; Flannagan v. Bloomington, 156 Ill. App. 162; Pass Christian v. Fernandez, 100 Miss. 76, 56 So. 329, 39 L.R.A.(N.S.) 649; Missano v. New York, 160 N. Y. 123, 54 N. E. 744, 6 Am. Neg. Rep. 652; Quill v. New York, 36 App. Div. 476, 55 N. Y. S. 889, 5 Am. Reg. Rep. 423, *reversing* 21 Misc. 598, 48 N. Y. S. 141; Silverman v. New York, 114 N. Y. S. 59; Ostrom v. San Antonio, 94 Tex. 523, 62 S. W. 909, *reversing* (Tex.) 60 S. W. 591; San Antonio v. Mackey, 14 Tex. Civ. App. 210, 36 S. W. 760, on rehearing 22 Tex. Civ. App. 145, 54 S. W. 33. See also Denver v. Porter, 126 Fed. 288, 61 C. C. A. 168. *Compare* Davidson v. New York, 24 Misc. 560, 54 N. Y. S. 51 (the decision wherein was based on the holding in 21 Misc. 598, 48 N. Y. S. 141, which holding was later reversed on appeal, see Quill v. New York, supra). Thus in Ostrom v. San Antonio, 94 Tex. 523, 62 S. W. 909, the court said: "In what sense can it be said that the cleaning of the streets of San Antonio was a duty that primarily rested upon the state of Texas? We know of no principle of law upon which such duty can be based, nor any case which has so held, nor any instance in which such power has been exercised by the state for the benefit of the general public, and we must conclude that it does not fall within that class of cases which are specified as being powers to be exercised for the good of the general public imposed upon a municipal corporation for

enforcement within its limits. The law imposed the duty of cleaning the streets upon the city of San Antonio within its own limits primarily and especially for the benefit of its own people. It is strictly a corporate function for the abuse of which by its agents in the course of their regular employment the city must be held liable." Likewise in Pass Christian v. Fernandez, 100 Miss. 76, 56 So. 329, 39 L.R.A.(N.S.) 649, wherein it appeared that a child was injured by the negligence of one of the drivers of the city's garbage carts engaged in hauling dirt and trash, the court said: "The only real defense is that at the time of the injury the cart and driver were engaged in a governmental duty, and on account of this no liability attaches on the part of the city. . . . It may be true, as an abstract proposition of law, that damage occasioned by the city in the exercise of a purely governmental duty does not render the city liable; but it must be a governmental duty, and the idea that a driver of a city cart, engaged in hauling trash and dirt for the city, is engaged in a 'governmental function' in any sense in which the word is used in the law, requires a stretch of the imagination that is beyond our power to make. It is a matter of no little difficulty to define what are and what are not purely governmental duties of a city. To a very large extent these questions can only be settled by the facts of each particular case, so variant are the conditions under which this question arises. The public or governmental duties of a city are those given by the state to the city as a part of the state's sovereignty, to be exercised by the city for the benefit of the whole public, living both in and out of the corporate limits. All else is private or corporate duty, and for any negligence on the part of the agents or employees of the municipality in the discharge of any of the private duties of the city the city is liable for all damages just as an individual would be. The use of the cart in hauling dirt or trash for the city is for no governmental purpose, as connected in any way with the sovereign duty of the state. The state does owe the duty to all its citizens of protecting the person from assault and the property from destruction, and all done by the city in furtherance of this duty of the state is done in a governmental capacity. But the hauling of dirt and trash is for the use and advantage of the city in its corporate capacity, is a corporate duty, and the city is liable for all damage done by any officer or agent so employed."

However, a municipality cannot be held liable for the tort of an independent contractor committed while cleaning the streets. Frank v. Rome, 125 App. Div. 141, 109 N. Y. S. 247. *Compare* Flannagan v. Bloomington, 156 Ill. App. 162.

In *England*, it seems that a municipality is liable for torts committed in the cleaning of its streets although the action must conform in all respects to the general rules of practice or particular statutes governing the same. Thus in Edwards v. St. Mary, Islington, 22 Q. B. D. 338, 58 L. J. Q. B. 165, 60 L. T. N. S. 725, 37 W. R. 347, 53 J. P. 180, it appeared that the plaintiff had been employed by certain contractors to drive a water cart for the sprinkling of the streets of the defendant, a metropolitan vestry. The water cart had been furnished by the vestry and while the plaintiff was engaged in his duties the axle broke, and the plaintiff was thrown from the cart and injured. The question of the defendant's negligence in furnishing the cart was submitted to the jury and a verdict was rendered in favor of the plaintiff. On appeal the judgment was reversed on the ground that proper notice of the action had not been given within the prescribed time.

In *Canada*, it has been held that a municipality was not liable for the negligence of a teamster engaged by the city at so much an hour for the purpose of removing filth and scrapings from the streets. Saunders v. Toronto, 26 Ont. App. 265, *reversing* 29 Ont. 273. The decision was based on the fact that under the terms of his employment the teamster was an independent contractor and the relation of master and servant therefore did not exist.

Application of Rule.

In Denver v. Maurer, 47 Colo. 209, 106 Pac. 875, 135 Am. St. Rep. 210, it appeared that the plaintiff was injured by stumbling over or being struck by a hose stretched across the street by employees of the city in washing out street refuse collected in a storm sewer. Affirming a judgment for the plaintiff the court said: "The authorities agree that two classes of general duties are imposed upon a municipal corporation. One is governmental, and the municipality is not liable for negligence of employees occurring in the performance thereof. The other is private and corporate, and the municipality is liable for negligence of employees occurring in the performance thereof. . . . The authorities are practically agreed in placing certain general duties in the class that is governmental, and among those is the general duty of the preservation of the public health. . . . There is considerable conflict among the authorities when it comes to the application of the general rule to specific cases. In reading the authorities, one is impressed with the fact that often some detail in the performance of one class of general duties, partakes partly or wholly of the nature of another class of general duties. Thus, fre-

quently, details in the performance of the general duty of caring for the streets partake of the nature of duties performed in the preservation of public health. It also appears that a municipality may be immune from negligence occurring in the performance of a detail in one class of duties, while it would be liable for negligence in the performance of a like detail in another class; as, for instance, while it would not be liable for the negligence of its firemen in stretching a hose on a sidewalk while using it to put out a fire, it might be liable for the negligence of employees in stretching a hose on the sidewalk while using it in the care of its streets."

In Quill v. New York, 36 App. Div. 476, 55 N. Y. S. 889, 5 Am. Neg. Rep. 423, *reversing* 21 Misc. 598, 48 N. Y. S. 141, it appeared that the plaintiff was injured while seeking to board a street car, by being struck by an ash and garbage cart belonging to the street cleaning department of the defendant city. The court held the city to be liable for the negligence of its employee and said: "The duty or labor imposed on the city . . . as to the removal of garbage and ashes, seems to us plainly not the governmental function of abating nuisances, but the private duty which would otherwise rest on residents and property owners within the municipality."

In Missano v. New York, 160 N. Y. 123, 54 N. E. 744, 6 Am. Neg. Rep. 652, the defendant city was held to be liable for the death of a child, who was run over and killed by a horse attached to an ash cart of the street cleaning department. The court said: "At the time this alleged cause of action accrued it was the duty of the city of New York to keep its streets in repair and to see that they were thoroughly cleaned and kept clean at all times; also to remove the sweepings, ashes and garbage as often as the public health and use of the streets required it to be done. . . . The fact that the discharge of this duty might incidentally benefit the public health did not make the acts of the commissioner of street cleaning a public function. It is clear upon principle and authority that the city of New York, in the ordinary and usual care of its streets, both as to repairs and cleanliness, is acting in the discharge of a special power granted to it by the legislature, in the exercise of which it is a legal individual, as distinguished from its governmental functions when it acts as a sovereign."

In Silverman v. New York, 114 N. Y. S. 59, it was held that a municipality was liable for the negligence of a driver of a rubbish cart in running over the foot of the plaintiff while he was sitting on a park bench.

In Barney Dumping-Boat Co. v. New York, 40 Fed. 50, the United States circuit court, following the principle laid down by the New York courts, held the defendant city to be liable for damage caused by the negligent operation of a steam tug belonging to the city and used in removing refuse from the streets.

In Ostrom v. San Antonio, 94 Tex. 523, 62 S. W. 909, a city was held to be liable for the acts of cart drivers in the employ of the street cleaning department, in driving over the plaintiff's land.

In Flannagan v. Bloomington, 156 Ill. App. 162, it was held that a municipality was liable for the act of a cartman in its employ, in dumping garbage and refuse on a lot within the city limits to the damage of the plaintiff. The court said: "The determination by the council of the city of Bloomington as to how and in what manner the garbage and refuse matter might be removed from the streets, was for the determination of the city authorities but the selection of the place of the dumping ground and the dumping of the refuse matter in a place where it caused the injury or damage to another was an action for which city became liable and it must exercise its duty of disposing of this garbage and refuse matter in such a manner as not to injure or expose others to danger and a failure to do so renders it liable. The fact that the city provided an ordinance prohibiting the doing of the acts which it is complained of here were done, is no defense where the violation of the ordinance is permitted and committed by the servants and employees of the city; while there may be a penalty imposed upon a person for violation of the ordinance, this does not relieve the city from any liability for its negligence and wrongful acts."

In Stephenville v. Bower, 29 Tex. Civ. App. 384, 68 S. W. 833, it was held that a municipality was liable for the act of a city scavanger in repeatedly depositing refuse on a lot adjoining that of the plaintiffs, instead of on a dumping ground provided by the city beyond its corporate limits, to the damage of the plaintiffs.

In San Antonio v. Mackey, 14 Tex. Civ. App. 210, 36 S. W. 760, on *rehearing* 22 Tex. Civ. App. 145, 54 S. W. 33, the city was held to be liable for the dumping of refuse on the plaintiff's land, although the act may not have amounted to a nuisance.

In Clayman v. New York, 117 App. Div. 565, 102 N. Y. S. 661, it was held that the illegal arrest of a woman at the instigation of a street cleaner for an alleged violation of an ordinance declaring it to be a misdemeanor to sweep rubbish into the streets after certain hours, was the act of the police department and not that of the street cleaner, and that the city therefore was not responsible.

BURSOW

v.

DOERR ET AL.

Nebraska Supreme Court—May 15, 1914.

96 Neb. 219; 147 N. W. 474.

Service of Process — Leaving at Residence.

Service of summons on defendant by leaving a copy "at his usual place of residence," held valid, within the meaning of that term as used in section 69 of the Code, on a record showing that the sheriff went into defendant's yard; that he handed a copy of the summons to defendant's wife, who was at the time not more than 20 feet from the house in which he resided; that he asked her to give the copy to defendant; that she said she would do so; and that she went into the house with it.

Appeal — Review — Verdict on Conflicting Evidence.

A verdict on substantially conflicting proof will not be set aside, where it is supported by sufficient competent evidence.

Damages — Excessiveness — Assault — Malicious Prosecution.

A recovery of $3,090 for assault and battery, and of $1,300 for malicious prosecution, held not excessive.

[See note at end of this case.]

Appeal — Necessity of Bill of Exceptions — Affidavits.

Affidavits purporting to show misconduct of counsel, to be available on appeal, must be included in the bill of exceptions.

(Syllabus by court.)

Appeal from District Court, Saline county; HURD, Judge.

Action for assault and battery and for malicious prosecution. Max Bursow, plaintiff, and Solomon Doerr et al., defendants. Judgment for plaintiff. Defendants appeal. The facts stated in the opinion. AFFIRMED.

James E. Addie and *Brown & Venrick* for appellants.

R. M. Proudfit and *Hastings & Ireland* for appellee.

[220] ROSE, J.—The petition contains two counts, one demanding $5,080 for assault and battery, and the other $2,075 for malicious prosecution. In the answers defendants deny that any unlawful assault was made upon plaintiff, and allege that he shot the wife of defendant Kelly, and that the latter thereupon assaulted plaintiff, but used no more force than was necessary to protect her from further injury and to preserve his own life; that no one assaulted plaintiff but Kelly, who was justified in doing so. The allegation that the prosecution of plaintiff was malicious and without probable cause is denied. The jury rendered a verdict in favor of plaintiff for $3,090 on the first count, and for $1,390 on the second. From a judgment on the verdict defendants appeal.

The jurisdiction of the court is challenged by defendant Doerr on the ground that the sheriff never served a summons upon him by delivering a copy to him personally, "or by leaving one at his usual place of residence," as required by section 69 of the code, containing those words. Doerr's residence was with his wife and children in a house on a farm in Saline county. The sheriff went into their yard and handed a copy of the summons to Doerr's wife, who was at the time not more than 20 feet from the house. He testified that he asked her to give the copy to Doerr; that she said she would do so; and that she went into the house with it. The contention is that the copy was not left "at" his usual place of residence, within the meaning of that word as it appears in the language copied from the statute. It is argued that "at" means "in," as used by the legislature, and that the sheriff was required to leave the copy in some part of the house. In the general use of the word there is a diversity [221] of meaning, owing to the context. Had the lawmakers intended to limit the meaning to "in," they would have used that word. "At," in the language quoted, has a wider signification, referring evidently to a point in space. In this sense, some of the definitions given by the Standard Dictionary are: "In proximity to; in the vicinity or region of; close to; by; near." "At" includes "in," because leaving a copy in the house occupied by Doerr as a residence would comply with the statute, but it is used in a broader sense. For the purpose of imparting notice, leaving a copy by or near the residence, with the wife, who was in the yard, within 20 feet of the house, and who took it into the house, was as effective as leaving it in the house would have been. It not only means "in," but it also means "by" or "near," in a situation like that described. In this view of the statute, the objection to jurisdiction was properly overruled.

On the merits of the case the principal discussion relates to the sufficiency of the evidence to sustain the verdict. Plaintiff was assaulted, seriously injured, prosecuted criminally, and kept in the custody of a constable five days. The examining magistrate found that the prosecution of plaintiff was without probable cause and released him. These facts are not disputed, but evidence that defendants were the aggressors is contradicted. The assault occurred early in the morning, November 21, 1910. Plaintiff had

come from Poland five years earlier, and was deficient in the use of the English language. When assaulted, he was 26 years old and unmarried. He was small of stature, compared with defendants. He had rented 15 or 20 acres of land in Saline county, with an orchard, a pasture, a barn, a corral, and a windmill. There was also on this land a frame house which he occupied as a residence with a family consisting of Adolph Suesz and his wife and children. The house was in an open yard between the orchard and the pasture, with a public road in front. Plaintiff, under a lease, had been farming an unfenced 80-acre tract across the road. Part of it was in corn, which plaintiff had been husking. Adjoining the [222] cornfield, defendant Doerr, a neighboring farmer, had an open field of wheat growing across the road from the house occupied by plaintiff, who, earlier in the season, had farmed the land on which the wheat was growing. Horses owned by plaintiff had been in the wheatfield two or three times, and he had been reminded of the fact. Defendant Kelly had been in the neighborhood four or five days only, and was an employee of Doerr. The material parts of the story told by plaintiff and his witnesses may be summarized as follows: On the morning of the assault plaintiff had hitched a team to a wagon and had driven to his cornfield to husk corn. A mare and two colts had broken away from him at the corral before he left, and had run across the road into Doerr's wheatfield. Plaintiff could not catch them at the time, but, thinking he could do so a little later, went to his cornfield. When there he saw Doerr, his two daughters, Emma and Alma, and Kelly, and the latter's wife. They had three teams and wagons. They drove onto Doerr's wheatfield. The men chased the mare and the colts and tried to drive them off. Plaintiff immediately returned with his team and wagon and left them at the windmill back of his house by the corral. In the meantime Mrs. Kelly and Emma Doerr left their wagons, went to a private lane in plaintiff's yard between the road and the corral, and tried to prevent the mare and the colts from going in, the intention of defendants being to drive the trespassing animals away for the purpose of impounding them. The women were near plaintiff's house. He protested against their driving his stock away from his premises. The men approached hurriedly. Observing that they meant mischief, plaintiff crawled through the fence into his pasture and tried to escape by flight. Doerr followed him, and Kelly attempted to intercept him. He changed his course to avoid Kelly and ran into Doerr, who beat him severely. Kelly came up, knocked him down and pounded him. Plaintiff was helped up by defendants, and went to his house pursuant to their orders. In the meantime the mare and the colts returned to the corral. Defendants started to take them away, and plaintiff protested, [223] complaining bitterly. Again apprehending danger, plaintiff went into his house. Defendants and the women came up. Mrs. Suesz went to the front door, said she was sick, and told the assailants not to come in. They went to the back door, which had been locked, broke it open, and entered. Plaintiff ran up stairs, got a shotgun belonging to Suesz, and threatened to shoot. The stairway door below was opened. To frighten the intruders, plaintiff fired without stopping them, the shot striking the casing near the top of the stairway door. He again threatened to shoot, and pulled the trigger, but the second cartridge did not explode. He was dragged down stairs and beaten into insensibility. Defendants took him to Doerr's in a wagon, and from there to Friend, where they had him arrested. Plaintiff was unable to give an account of his injuries, but it is shown by physicians or by other witnesses that there was a deep wound in one of his legs; that blood ran from his nose, from his mouth, and from one of his ears; that an eye was closed; that a lip was cut; that his head and face were bruised; that his skull was fractured; that his brain was injured; that one side of his body was partially paralyzed, temporarily interfering with his speech and with his sight; that his hearing in one ear was permanently injured, if not destroyed. The interior of the house, after the assault, as described by witnesses, bore marks of violence. This is the substance of the story told by plaintiff and his witnesses.

On the other hand, defendants testified that plaintiff was the aggressor; that he had been warned to keep his horses out of Doerr's wheatfield; that defendants were pursuing the advice of counsel in attempting to impound the trespassing animals; that when plaintiff came back from his cornfield he used profane language and threatened to shoot Kelly's wife and Doerr; that defendants were not in his pasture or house; that he came out of his house and shot Mrs. Kelly; that he aimed at Doerr, the gun failing to go off; that he was assaulted by no one except Kelly, who did not strike him until after he shot Mrs. Kelly.

[224] The jury evidently believed plaintiff's version of the controversy. It is supported by ample evidence. The proofs are conflicting, and the verdict settled the issues of fact. There is no substantial ground for setting aside the verdict on either count as excessive. Plaintiff was permanently injured. While partially paralyzed and at times unconscious, he was in the custody of a constable for five days. He was comparatively a stranger in a

strange land. Suffering and mental anguish were inevitable results of the assault and of the prosecution. No sufficient reason for disturbing the judgment as unsupported by the evidence or as excessive has been suggested or found.

Some complaint is made of rulings in admitting and in rejecting evidence, and in giving and in refusing instructions, but it is clear that in these respects no ruling properly assailed is prejudicially erroneous.

An assignment of error is directed to alleged misconduct of an attorney for plaintiff in treating jurors to cigars. The bill of exceptions contains no evidence of such misconduct, and for that reason the assignment is overruled.

Finding no error in the record, the judgment is

Affirmed.

Letton, Fawcett and Hamer, JJ., not sitting.

NOTE.

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I. Introductory.

It is the purpose of this note to collect those cases which have determined the excessiveness or inadequacy of verdicts in actions for malicious prosecution. The treatment is confined strictly to the actions for malicious prosecution, the cases involving verdicts in actions for the malicious abuse of process being excluded. For the distinction between malicious abuse of process and malicious prosecution, see the note to Malone v. Belcher, Ann. Cas. 1915A 830. Likewise, verdicts in actions for false imprisonment have been excluded, except in instances where an award for false imprisonment is inseparably connected with a verdict for malicious prosecution.

For convenience in reference, the cases have been arranged in an ascending scale according to the amount of the recovery, and where the number of cases renders it appropriate, alphabetically according to the crime that was the subject of the malicious prosecution. In the statement of the facts adjudged to be material by the court in passing on the verdict attacked as excessive or inadequate, the exposition will be found to be complete though condensed and concise in form.

While the infinite variety of the possible combinations of the facts in the adjudged cases makes it improbable that two cases should be identical, the awards in analogous cases are of practical value in the ascertainment of the justice of the verdict in the particular case under consideration, and the courts sometimes avail themselves of the aid of the recoveries in other cases as an elastic standard of comparison. See Billingsley v. Maas, 93 Wis. 176, 67 N. W. 49.

II. Excessiveness of Verdict.

1. Generally.

The ascertainment of the damages in an action for malicious prosecution being largely a matter for the unbiased judgment of the jury, a verdict is not excessive in the legal

sense so as to require that it should be set aside or remitted in part unless it appears it has not been fairly obtained or the damages awarded are so obviously disproportionate to the injury shown to have been sustained as to warrant the belief that the jury must have been influenced by passion, partiality or prejudice, or have been misled by some mistaken view of the merits of the case.

England.—Farmer v. Darling, 4 Burr. 1971; Gilbert v. Burtenshaw, Lofft. 771, 1 Cowp. 230; Hawlett v. Cruchley, 5 Taunt. 277; Leith v. Pope, 2 W. Bl. 1327.

Canada.—Wilson v. Winnipeg, 4 Manitoba 193; Lee v. Taylor, 6 Ont. W. Rep. 332; Abell v. Light, 12 N. Bruns. 240. See also Winfield v. Kean, 1 Ont. 193.

United States.—Clarke v. American Dock, etc. Co. 35 Fed. 478; Black v. Canadian Pac. Ry. 218 Fed. 239.

Alabama.—National Surety Co. v. Mabry, 139 Ala. 217, 35 So. 698; Abingdon Mills v. Grogan, 175 Ala. 247, 57 So. 42.

California.—Weaver v. Page, 6 Cal. 681; Kinsey v. Wallace, 36 Cal. 462; Russell v. Dennison, 50 Cal. 243, *modifying on rehearing* 45 Cal. 338; Phelps v. Cogswell, 70 Cal. 201, 11 Pac. 628; Williams v. Casebeer, 126 Cal. 77, 58 Pac. 380. See also Seabridge v. McAdam, 119 Cal. 460, 51 Pac. 691.

Connecticut.—Gray v. Fanning, 73 Conn. 115, 46 Atl. 831; Seidler v. Burns, reported in full, post, this volume at page 266. See also Ives v. Bartholomew, 9 Conn. 309.

Georgia.—See Olmstead v. Williams, 89 Ga. 144, 15 S. E. 31; McPherson v. Chandler, 137 Ga. 129, 72 S. E. 948.

Illinois.—Walker v. Martin, 43 Ill. 508; Montross v. Bradsby, 68 Ill. 185; Hirsch v. Feeney, 83 Ill. 548; Loewenthal v. Streng, 90 Ill. 74; Mexican Cent. R. Co. v. Gehr, 66 Ill. App. 173; Wheeler, etc. Mfg. Co. v. Barrett, 70 Ill. App. 222, *affirmed* in 172 Ill. 610, 50 N. E. 325; Thomas v. Kerr, 137 Ill. App. 479; Treptow v. Ward, 153 Ill. App. 422. See also Nelson v. Danielson, 82 Ill. 545.

Indiana.—Evansville, etc. R. Co. v. Talbot, 131 Ind. 221, 29 N. E. 1134; Indianapolis Traction, etc. Co. v. Henby, 178 Ind. 239, 97 N. E. 313; Sasse v. Rogers, 40 Ind. App. 197, 81 N. E. 590; Henderson v. McGruder, 94 N. E. 580. See also Sexson v. Hoover, 1 Ind. App. 65, 27 N. E. 105.

Iowa.—Paukett v. Livermore, 5 Ia. 277; Davis v. Seeley, 91 Ia. 583, 60 N. W. 183; Rule v. McGregor, 115 Ia. 323, 88 N. W. 814.

Kansas.—Clark v. Baldwin, 25 Kan. 120; Bell v. Morse, 48 Kan. 601, 29 Pac. 1086; Spencer v. Cramblett, 56 Kan. 794, 44 Pac. 985. See also Malone v. Murphy, 2 Kan. 250; Drumm v. Cessnum, 61 Kan. 467, 59 Pac. 1078.

Kentucky.—Stephens v. Gravit, 136 Ky. 479, 124 S. W. 414; Wright v. Hagerman, 42 S. W. 917, 19 Ky. L. Rep. 1032; Provident Sav. L. Assur. Soc. v. Johnson, 99 S. W. 1159, 30 Ky. L. Rep. 1031.

Louisiana.—Cointement v. Cropper, 41 La. Ann. 303, 6 So. 127.

Michigan.—Peterson v. Toner, 80 Mich. 350, 45 N. W. 346; Davis v. McMillan, 142 Mich. 391, 7 Ann. Cas. 854, 105 N. W. 862, 113 Am. St. Rep. 585, 3 L.R.A.(N.S.) 929, 12 Detroit Leg. N. 771.

Minnesota.—Chapman v. Dodd, 10 Minn. 350; Fiola v. McDonald, 85 Minn. 147, 88 N. W. 431; Shea v. Cloquet Lumber Co. 97 Minn. 41, 105 N. W. 552; Price v. Minn. etc. R. Co. reported in full, post, this volume, at page 267. See also Shea v. Cloquet Lumber Co. 92 Minn. 348, 1 Ann. Cas. 930, 100 N. W. 111.

Missouri.—Carp v. Queens Ins. Co. 203 Mo. 295, 101 S. W. 78; Ruth v. St. Louis Transit Co. 98 Mo. App. 1, 71 S. W. 1055; Farrell v. St. Louis Transit Co. 103 Mo. App. 454, 78 S. W. 312; Callaghan v. Kelso, 170 Mo. App. 338, 156 S. W. 716; Bowers v. Walker, 182 S. W. 116. See also Walser v. Thies, 56 Mo. 89.

Montana.—Martin v. Corscadden, 34 Mont. 308, 86 Pac. 33.

Nebraska.—See the reported case.

New York.—Scott v. Dennett Surpassing Coffee Co. 51 App. Div. 321, 64 N. Y. S. 1016; Rawson v. Leggett, 97 App. Div. 416, 15 N. Y. Ann. Cas. 261, 90 N. Y. S. 5, *reversed* 184 N. Y. 504, 77 N. E. 662; Thorp v. Carvalho, 14 Misc. 554, 36 N. Y. S. 1; Orefice v. Savarese, 61 Misc. 88, 113 N. Y. S. 175; Scholl v. Schnebel, 8 N. Y. S. 855. See also Burt v. Place, 4 Wend. 591; Bumpy v. Betts, 23 Wend. 85; Tooney v. Delaware, etc. R. Co. 4 Misc. 392, 24 N. Y. S. 108.

North Dakota.—Merchant v. Pielke, 10 N. D. 48, 84 N. W. 574.

Pennsylvania.—Coyle v. Snellenburg, 30 Pa. Super. Ct. 246.

South Dakota.—Neys v. Taylor, 12 S. D. 488, 81 N. W. 901.

Tennessee.—Morgan v. Duffy, 94 Tenn. 686, 30 S. W. 735.

Texas.—Gulf, etc. R. Co. v. James, 73 Tex. 12, 10 S. W. 744, 15 Am. St. Rep. 743; Missouri, etc. R. Co. v. Craddock, 174 S. W. 965. See also Beckham v. Collins, 54 Tex. Civ. App. 241, 117 S. W. 431.

Washington.—Charlton v. Markland, 36 Wash. 40, 78 Pac. 132; Finigan v. Sullivan, 65 Wash. 625, 118 Pac. 888.

West Virginia.—See also Vinal v. Core, 18 W. Va. 1.

Wisconsin.—Plath v. Braunsdorff, 40 Wis. 107; Spear v. Hiles, 67 Wis. 350, 30 N. W. 506; Billingsley v. Maas, 93 Wis. 176, 67

N. W. 49. See also Eggett v. Allen, 119 Wis. 625, 96 N. W. 803.

Thus in Black v. Canadian Pac. Ry. 218 Fed. 239, supra, in sustaining a large verdict in an action for malicious prosecution, the court laid down the rule in general terms as follows: "The elements of compensatory damage include, among other things, loss of time, peril to life and liberty, injury to fame, reputation, and health, mental suffering, and decrease in earning capacity. . . . This case belongs to a class where the jury is peculiarly the proper judge of the amount of damages, and, before a verdict may be set aside or remitted in part, the court, under well-known rules, must be satisfied that the result was influenced by passion or prejudice, or that the amount was grossly disproportionate to the wrong inflicted. Neither on the evidence, nor because of the manner and method of the trial, can I say that the verdict was arrived at by other than calm, orderly processes. The extraordinary story of plaintiff turned out to be true, and was told in quiet, dignified fashion, without any attempt on the part of himself or his attorney to be dramatic, as sometimes happens in a courtroom. The jury, if observation of faces and manner counts for anything, was an attentive, sober-minded, and hard-headed set of men." Likewise in Gilbert v. Burtenshaw, 1 Cowp. (Eng.) 230, Lord Mansfield said: "The verdict is taken upon two counts: upon the first, 'for maliciously indicting the plaintiff of perjury;' and upon the second, for calling him 'a perjured rascal, and saying he would prove it.' There was evidence in support of both counts. Therefore, the whole ground of the application rests on the point of excessive damages. I should be sorry to say, that in cases of personal torts, no new trial should ever be granted for damages, which manifestly show the jury to have been actuated by passion, partiality, or prejudice. But it is not to be done without very strong grounds indeed; and such as carry internal evidence of intemperance in the minds of the jury. It is by no means to be done where the court may feel, that if they had been on the jury they would have given less damages, or where they might think the jury themselves would have completely discharged their duty, in giving a less sum. Of all the cases left to a jury, none is more emphatically left to their sound discretion than such a case as this; and unless it appears that the damages are flagrantly outrageous and extravagant, it is difficult for the court to draw the line." So in Kinsey v. Wallace, 36 Cal. 462, in holding the award in an action for the malicious prosecution of a civil suit to be excessive, the court said: "The only remaining point worthy of consideration is, whether or not the damages awarded by the jury are excessive, and appear to have been given under the influence of passion or prejudice. Whilst there was much in the conduct of the defendants, and particularly of the defendant Wallace, as disclosed by the evidence, which was in a high degree reprehensible, and might well have justified the jury in awarding a considerable sum as punitive damages beyond the actual pecuniary loss of the plaintiff, nevertheless, in our opinion, the large sum of seven thousand six hundred dollars, at which the damages were assessed, is out of all just or reasonable proportion to the damages, pecuniary or otherwise, suffered by the plaintiff, or to the offense committed by the defendants. . . . There is no inflexible or definite rule by which courts can be governed in reviewing verdicts in such cases; and each case must, in the nature of things, depend more or less on its own circumstances. But whilst we do not desire to restrict juries within very narrow limits, in assessing damages in this class of cases, the ends of justice demand that we should not allow verdicts to stand which so far exceed all reasonable bounds as to raise a just presumption that they proceeded from passion to prejudice. We think this verdict is of that character, and we deem it to be our duty to reverse the judgment for that reason, unless the plaintiff shall remit the excess." So in Walker v. Martin, 43 Ill. 508, the court said: "That the courts have power to set aside verdicts, for the reason that the damages assessed are excessive, is not, and cannot be, questioned. It has been exercised, without challenge, for more than two hundred years, which we are not at liberty to disregard. Cases are numerous in which this court has exercised this power, always reluctantly, yet, in every case, where it appeared probable, from the amount of damages assessed, that the jury had acted under the influence of prejudice or passion. In such cases, it would be a severe reflection upon the law, and a stigma upon the trial by jury itself, to say that no redress could be afforded—to admit that a jury is 'a chartered libertine,' free to indulge their worst passions, and through their influence, victimize every man who may be so unfortunate as to have a case before it, in which his conduct does not show to the best advantage. A jury has the power, in a proper case, to visit a tortfeasor with heavy damages, but it has no right to crush him. While great latitude must be and is allowed juries in all actions for personal torts, yet, it must be confined within some limits, no less for justice's sake than for the protection of the citizen. In these kinds of torts it is impossible to estimate precisely the measure of damages which would repair the alleged injury. To a

great extent it is a matter of sentiment and feeling, under the guidance of sound judgment, duly weighing all the circumstances of the case. . . . We make no attempt now to find circumstances to mitigate the wrong done by the appellants to appellee, but have taken it in all its magnitude, and admit that appellants did, maliciously, without probable cause, prosecute appellee, on a charge of larceny of coal belonging to appellants; that they did imprison him for some days, and that the accused was discharged from imprisonment, and from the charge by a court of competent authority, and that Walker boasted of what he had done, and declared his ability to pay any damages a jury might find against him, and this in a public tavern, at the time the trial of his case was going on. But there is one fact, which the jury do not seem to have heeded, in estimating the damages—that is, the plaintiff's character. The weight of evidence is, that it was bad, and that should have had much weight with the jury. This action of malicious prosecution, is of kin to the action of slander, and as in that, the damage consists in part in injury to character by a criminal charge, and not wholly in the mere physical injury consequent on the imprisonment on the charge. There is a vast difference between men in society, although theoretically they are all equal. He who has a fair character among his acquaintances and in community generally, is entitled, in an action for defaming it, to greater damages than one suing on a doubtful character; but it must be a very strong case indeed, in which any man, no matter how high may be his social position, no matter how unsullied his character, can be accorded the right to receive for defaming it the enormous sum given in this case. It is a handsome fortune, and places the receiver of it at once on high and independent ground. 'It is a golden shower, and pour'd, not on the head of purity and innocence.' Its parallel cannot be found in such an action in the judicial annals of any country in the civilized world. Though damages in such cases are very much a matter of sentiment and feeling, and no rule can be prescribed by which they shall be measured, still, the judgment of the jury must be exercised in every case, and all the circumstances duly weighed by them. It seems to us, the jury did not give proper weight to the evidence of respectable men, that the plaintiff's character was not good; that he was not an object on which they should lavish so much generosity: that nothing which the appellants did, however maliciously, demanded at the hands of the jury such a vengeful bolt as they hurled at the appellants. The conduct of one of them, while attending the trial of the issue in Will county, though evincing a high degree of malice, though it manifested a reckless disregard of the feelings of appellee, and a spirit of bravado and persecution, not to be tolerated, and most unjustifiable, yet, with all this, the verdict for the wrong is outrageous. No impartial and unprejudiced mind can, for a single moment, indulge the supposition, that appellee was entitled to twenty thousand dollars. . . . What then shall be said of this verdict, dwarfing as it does all previous verdicts ever rendered in a like case? Can we say less, than that it is the result of prejudice and passion, in which the judgment of the jury did not participate? Believing thus, we have no hesitation in setting it aside, and awarding a new trial, on the ground alone that the damages are outrageous."

In the federal courts the correction of an excessive verdict is solely a question for the trial court on a motion for a new trial, the granting or refusing of which will not be reviewed by the appellate court. Black v. Canadian Pac. Ry. 218 Fed. 239.

The primary duty to guard against an excessive verdict devolves on the trial court and great weight is given to its judgment. Williams v. Casebeer, 126 Cal. 77, 58 Pac. 380; National Surety Co. v. Mabry, 139 Ala. 217, 35 So. 698; Abingdon Mills v. Grogan, 175 Ala. 247, 57 So. 42; Gray v. Fanning, 73 Conn. 115, 46 Atl. 831; Mexican Cent. R. Co. v. Gehr, 66 Ill. App. 173; Farrell v. St. Louis Transit Co. 193 Mo. App. 454, 78 S. W. 312; Orefice v. Savarese, 61 Misc. 88, 113 N. Y. S. 175; Morgan v. Duffy, 94 Tenn. 686, 30 S. W. 735. See also Evansille, etc. R. Co. v. Talbot, 131 Ind. 221, 29 N. E. 1134; Sexson v. Hoover, 1 Ind. App. 65, 27 N. E. 105; Price v. Minn. etc. R. Co. reported in full, post, this volume, at page 267; Walser v. Thies, 56 Mo. 89; Eggett v. Allen, 119 Wis. 265, 96 N. W. 803. Thus in Gray v. Fanning, supra, in sustaining the action of the trial court in setting aside a verdict in an action for malicious prosecution, the court stated the rule as follows: "Upon a careful examination of the entire evidence there appears to be nothing that would or should have necessarily led any reasonable jury to give punitive damages in this case; and certainly there is nothing in the record to indicate that the jury in this case included, or intended to include, such damages in their verdict, or to show that they intended to give other than compensatory damages. Regarded as compensatory merely, the damages given in this case are manifestly excessive and unreasonable; and even if the verdict can be regarded as including punitive damages, looking at the entire record, and applying to the questions involved the principles stated in Loomis v. Perkins

[70 Conn. 444] supra, we cannot say that the trial court erred in holding that the damages were so unreasonable and excessive as to justify it in setting aside the verdict. In such a matter a large discretion is of necessity vested in the trial court, and only in cases where that discretion is unreasonably exercised ought the action of the trial court to be set aside. In this case the record does not show that the discretion vested in the trial court has been unreasonably exercised." Likewise in Mexican Cent. R. Co. v. Gehr, 66 Ill. App. 173, in sustaining a verdict in an action for malicious prosecution the court said: "The judge before whom the cause was tried required nothing to be remitted from the verdict as a condition that it should not be set aside altogether, and it would be a mere assumption of superior wisdom in such respect for us to measure out a less sum and say that it is sufficient. We might think that a less judgment would be enough but it would be a guess that we are not called upon to make." In Farrell v. St. Louis Transit Co. 103 Mo. App. 454, 78 S. W. 312, the court said: "The rule of law . . . has been announced with incessant repetition, that the function or duty of granting a new trial rests peculiarly and specially within the sound discretion of the trial court, and unless it is manifest and apparent that its judicial discretion has been abused or that injustice has been done, its ruling in that regard will not be disturbed by an appellate court. . . . Circuit courts are vested not only with the authority, but are charged with the duty, to supervise the verdicts of juries, and to grant new trials, if in their judgment the verdict is improper or not sustained by the evidence. . . . While the case under consideration appears to be distinguished from the above cases by circumstances of weightier aggravation inflicting more serious wrong on the plaintiff, yet we cannot dissent from the opinion of the circuit court that the verdict was excessive, and the circuit court performed its duty in setting it aside."

It has been held, nevertheless, that where the damages awarded are grossly excessive and indicative of passion and prejudice on the part of the jury the proper course of the trial court is not to order a remittitur of more than half of the verdict but to order a new trial. Bell v. Morse, 48 Kan. 601, 29 Pac. 1086, wherein the court said: "The most serious objection to the rulings of the court is the denial of the motion for a new trial. One of the statutory grounds for a new trial is the award of excessive damages, appearing to have been given under the influence of passion and prejudice. The action of the court in finding that the greater part of the award made by the jury was excessive, and requiring the plaintiff below to remit the same, clearly indicates the view of the court. It is evident from this finding and the proceedings in the case that the jury were influenced by passion and prejudice in rendering the verdict which was so grossly excessive, and within the authority of the cases already decided a new trial should have been granted." And in Vinal v. Core, 18 W. Va. 1, it was held that in an action for malicious prosecution, the proper practice for the trial court is to award a new trial when the damages are excessive in the legal sense and not to order a remittitur as a condition of refusing a new trial, but that if the plaintiff consents to the reduction he cannot complain. The court said: "I am therefore of the opinion, that the circuit court in no suit for a malicious prosecution, if it deemed the damages awarded by the jury were so enormous as to furnish evidence of prejudice, partiality, passion or corruption on the part of the jury, should refuse to grant a new trial, if the plaintiff would remit so much of the verdict, as in the opinion of the court exceeded what was just. If the damages assessed by the jury were so enormous as to furnish such evidence of impropriety on the part of the jury, the defendant is entitled to have the verdict set aside and cannot be compelled in lieu of the verdict of a new and fair jury to accept the judgment of the court; and if in our judgment the verdict of the jury was so enormous as under the circumstances of this case to furnish evidence of such impropriety, we would set aside both the judgment and verdict and award a new trial. But a careful examination of the case has led us to the conclusion after giving due weight to the opinion of the circuit judge, that this verdict of the jury in this case is not so enormous, as on the principles we have laid down would have justified the circuit court, or would justify us, in setting aside the verdict, had the circuit court done what it should have done, rendered a judgment for the full amount of the verdict. But this error of the circuit court cannot be complained of by either party in this court."

2. Illustration of Verdicts Attacked as Excessive.

a. *Malicious Prosecution of Civil Action.*

The following verdicts in actions for the malicious prosecution of civil suits have been sustained as not excessive:

$200—Ives v. Bartholomew, 9 Conn. 309 (malicious attachment, defendant knew at commencement of civil suit he had no cause of action, plaintiff's pecuniary loss $70);

$450—Walser v. Thies, 56 Mo. 89 (malicious attachment, business of plaintiff interrupted, lost boarders, credit destroyed, ultimately forced to sell out and quit business, jury awarded $800, trial court ordered remittitur of $350);

$750—Nelson v. Danielson, 82 Ill. 545 (suit in attachment instituted maliciously and without probable cause, levy made wantonly on exempt property even "clothing of half-dressed babe" in spite of remonstrance of mother);

$750—Bump v. Betts, 23 Wend. (N. Y.) 85 (malicious prosecution of attachment on paid judgment, court said damages undoubtedly large);

$825—Burt v. Place, 4 Wend. (N. Y.) 591 (man, sued maliciously and without probable cause, arrested, imprisoned, thereby rendered unable to secure evidence for defense, civil suit went against him but reversed on appeal, court thought damages liberal but not excessive in law);

$15,000—Weaver v. Page, 6 Cal. 681 (drawer of set of bills of exchange in favor of defendants maliciously sued on second of set but first to arrive, protested for nonpayment, at time of suit first of set had been paid, suit accompanied by attachment of property).

The following verdicts in actions for the malicious prosecution of civil suits have been declared excessive:

$100—Farrar v. Brackett, 86 Ga. 463, 12 S. E. 686 (man, maliciously sued in bailtrover, remittitur of $80 ordered);

$1,500—See Tuckett v. Eaton, 6 Ont. 486 (execution on goods after debt to defendant had been paid, plaintiff was at time conducting auction of goods which were about to become unseasonable);

$1,500—Wheeler, etc. Mfg. Co. v. Barrett, 70 Ill. App. 222, *affirming* 172 Ill. 610, 50 N. E. 325 (woman, sued maliciously and without probable cause in replevin, sewing machine valued at $60 taken from her, later suit dismissed, appellate court affirmed action of trial court in ordering remittitur of $1,200);

$3,250—Bosch v. Miller, 136 Mo. App. 482, 118 S. W. 506 (woman, sued maliciously and without probable cause by heir of person who had conveyed real property to her in trust, jury awarded $1,620 actual and $1,630 punitive damages, appellate court on rehearing ordered remittitur of punitive damages);

$6,000—Stalker v. Drake, 91 Kan. 142, 136 Pac. 912. (man employed by number of railway companies in various capacities, as freight brakeman, conductor, switchman, and yardmaster, fell into clutches of loan shark by borrowing $25, wilful and malicious acts of oppression and coercion in litigating groundless and fraudulent claims, wages tied up, positions lost, $5,000 punitive damages not excessive, but actual damages reduced from $1,000 to $448);

$7,200—Jacobs v. Crum, 62 Tex. 401 (attachment sued out maliciously and in law at least without probable cause, jury awarded $3,000 actual and $6,000 exemplary damages, remittitur of $1,800 filed, appellate court said verdict for exemplary damages not supported by evidence and ordered new trial);

$7,600—Kinsey v. Wallace, 36 Cal. 462 (civil suit maliciously instituted and attachment procured by defendant, dismissed on stipulation of attorneys, remittitur of $4,600 ordered).

b. *Malicious Prosecution of Criminal Action.*

(1) Arson or Similar Crime.

The following verdicts in actions for the malicious prosecution of a charge of incendiarism or arson have been sustained as not excessive:

$5,000—Spear v. Hiles, 67 Wis. 350, 30 N. W. 506 (man, charged with others with incendiarism in setting fire to two warehouses belonging to defendant, plaintiff brought before justice, waived examination, committed to jail for lack of bail, detained several weeks, finally procured bail, information filed against him by district attorney, tried, acquitted);

$12,500—See Carp v. Queen Ins. Co. 203 Mo. 295, 101 S. W. 78 (man, charged with arson in setting fire to and burning stock of goods, bonded for appearance at term of court, mistrial as jury disagreed, discharged, court said verdict was large but not excessive, reversed on other grounds).

The following verdict in an action for the malicious prosecution of a charge of burning an unoccupied dwelling house has been declared excessive:

$3,000—Davis v. Seeley, 91 Ia. 583, 60 N. W. 183, 51 Am. St. Rep. 356 (man, of bad moral character, reputation for truth and veracity bad, charged with having burned unoccupied dwelling house, property of defendant, in custody but not incarcerated short time until bailed, discharged at preliminary hearing, admission of evidence of condition of family sustained as bearing on mental anguish, punitive damages recoverable).

(2) Assault.

The following verdicts in actions for the malicious prosecution of a charge of assault have been sustained as not excessive:

$70—Peterson v. Toner, 80 Mich. 350, 45 N. W. 346 (man, arrested for assault after

defendant consulted prosecuting attorney, lay in jail ten days, at trial before jury question of jurisdiction raised and sustained by justice, jury thereupon rendered verdict of not guilty, plaintiff discharged, court said amount was large, but jury did not act entirely without evidence in arriving at result);

$750—Fiola v. McDonald, 85 Minn. 147, 88 N. W. 431 (man, arrested for assault in second degree, complaint dismissed at preliminary hearing upon motion of prosecuting attorney, plaintiff taken from work at railroad station, locked up in county jail for two or three hours, lost position with railway company but subsequently reinstated, put to considerable expense);

$4,000—Clarke v. American Dock, etc. Co. 35 Fed. 478 (respectable woman, wife of ship carpenter and mother of six daughters, some adult and away, some small and at home, arrested at instigation of defendants on false charges of forcible entry into house, assault, and gross breach of peace, taken before police court, committed to jail with disorderly women, in default of bail immediately required under pretence of awaiting trial, and afterwards required to give sureties of peace without trial, for purpose of getting and keeping her away from house until defendants could put out her things and tear down house, actual pecuniary damages small).

The following verdict in an action for the malicious prosecution of a charge of assault has been declared excessive:

$4,000—Phelps v. Cogswell, 70 Cal. 201, 11 Pac. 628 (man, arrested on charge of simple assault, never put in jail or subjected to any real hardship or act of oppression, deposited cash bail, appeared for trial twice and on default of appearance of prosecutor charge dismissed, social and business reputation seemingly uninjured, awarded $7,500, trial court ordered remittitur of $3,500, and appellate court further sum of $3,000).

(3) Breach of Peace.

The following verdicts in actions for the malicious prosecution of a charge of threatened breach of the peace have been sustained as not excessive:

$1,200—Shea v. Cloquet Lumber Co. 97 Minn. 41, 105 N. W. 552 (man, arrested on charge that he had threatened to shoot and kill defendants' employees who had been sent to land, title of which was in dispute, to cut and remove timber, discharged at hearing before municipal court, defendants consulted attorney before institution of proceedings, jury returned verdict for $3,000, trial court ordered remittitur of $1,800).

$4,000—Clarke v. American Dock, etc. Co. 35 Fed. 478 (respectable woman, wife of ship carpenter and mother of six daughters, some adult and away, some small and at home, arrested at instigation of defendants on false charges of forcible entry into house, assault, and gross breach of peace, taken before police court, committed to jail with disorderly women, in default of bail immediately required under pretence of awaiting trial, and afterwards required to give sureties of peace without trial, for purpose of getting and keeping her away from house until defendants could put out her things and tear down house, actual pecuniary damages small).

The following verdicts in actions for the malicious prosecution of a charge of breach of the peace have been declared excessive:

$2,000—Ruth v. St. Louis Transit Co. 98 Mo. App. 1, 71 S. W. 1055 (business man, arrested on charge of disturbing peace by refusing to pay fare on street car except with nickel worn on one side, detained for short while, but not put in jail, discharged by police justice, expended $3.50 for bail bond and $10 for attorney's fee, lost less than one day, no damage to reputation shown, jury awarded $1,000 actual and $1,000 punitive damages, appellate court ordered remittitur of $1,000);

$2,500—Farrell v. St. Louis Transit Co. 103 Mo. App. 454, 78 S. W. 312 (man, peaceable, law-abiding citizen of high character, without cause for suspicion, unjustly denounced and subsequently prosecuted by employees of street railway company on charge of disturbing peace in throwing rock through car window, detention prior to arrest by officer attended by rough, insulting and offensive conduct on their part toward him, wholly unprovoked and in no way palliated, justified or explained by company, bailed after detention at police station for one hour, arraigned, tried, and acquitted in police court, jury awarded $1,500 actual and $1,000 punitive damages, order of new trial by trial court affirmed);

$3,825—Shea v. Cloquet Lumber Co. 92 Minn. 348, 1 Ann. Cas. 930, 100 N. W. 111 (man, arrested on charge that he had threatened to shoot and kill defendants' employees who had been sent to land, title of which was in dispute, to cut and remove timber, discharged at hearing before municipal court, defendants consulted attorney before institution of proceedings, jury returned verdict for $4,000, reduced by trial court to $3,825 on ground of failure of evidence to establish one item, court thought damages excessive but reversed on another ground).

(4) Burglary or Similar Crime.

The following verdicts in actions for the malicious prosecution of a charge of bur-

glary or similar crime have been sustained as not excessive:

$1,000—Neys v. Taylor, 12 S. D. 488, 81 N. W. 901 (married woman, returning to premises right of possession of which her husband claimed, found dwelling locked and two men inside, entry refused, she became ill and begged husband to take her into house where she could lie down as she was not able to go back to town, husband broke window, entered and admitted wife, defendant procured arrest of husband and wife on charge of having wilfully, maliciously, and unlawfully broken into a dwelling house by tearing down and breaking windows of house while occupied by hired man, plaintiff waived examination because too ill to attend, bailed, state's attorney refused to file information);

$1,200—Hirsch v. Feeney, 83 Ill. 548 (man, local householder and resident for seventeen or eighteen years, of good character, employed by wholesale house and trusted with goods and key to their establishment, arrest made without grounds for least suspicion, house searched, after trial court had entered remittitur judgment stood for $1,200);

$14,500—Missouri, etc. R. Co. v. Craddock (Tex.) 174 S. W. 965 (switchman, earning $100 a month, charged with burglary and theft from railroad car, information filed in district court against him and then remanded to justice court, tried on second information in district court and acquitted, shot in foot at time of arrest, expended $250 for attorneys' fees and $100 for doctors' bills).

The following verdict in an action for the malicious prosecution of a charge which the court spoke of as burglary at one point in the opinion has been declared excessive:

$750—See Cartwright v. Elliott, 45 Ill. App. 458 (man, between thirty and forty years of age, local resident for many years, good reputation for honesty, arrested on charge of larceny (or burglary?) of harness of defendant, no actual malice, disclosure to counsel, jury awarded $1,000, trial court ordered remittitur of $250, appellate court remanded for new trial on ground of excessiveness of judgment).

(5) Embezzlement.

The following verdicts in actions for the malicious prosecution of a charge of embezzlement have been sustained as not excessive:

$150—Coyle v. Snellenburg, 30 Pa. Super. Ct. 246 (boy, arrested on charge of embezzlement of $10.20, detained for about two hours, closely interrogated, mother appeared and insisted on his discharge, no hearing before magistrate);

$300—Eggert v. Allen, 119 Wis. 625, 96 N. W. 803 (man, charged with embezzlement and subsequently with obtaining money under false pretenses, difficulties arose out of real estate deal, discharged because evidence insufficient to convict, jury awarded $300 for malicious prosecution on charge of embezzlement and $700 for subsequent prosecution for obtaining money under false pretenses);

$1,500—Rule v. McGregor, 115 Ia. 323, 88 N. W. 814 (man, arrested on charge of embezzlement, while in custody of officer driven around through neighborhood where he was well acquainted during part of afternoon and whole of night, at trial next day dismissed by justice, arrested second time while attending political convention as delegate just as members were about to separate, detained over night, special damages of $100 for attorney's fees and $6 for time lost proved, verdict not excessive as compensatory damages);

$6,500—Evansville, etc. R. Co. v. Talbot, 131 Ind. 221, 29 N. E. 1134 (man, prosecuted on charge of embezzlement, acquitted);

$7,500—National Surety Co. v. Mabry, 139 Ala. 217, 35 So. 698 (plaintiff, at instigation of defendant surety company arrested and indicted for embezzlement of $432.60 by overdraft while acting as agent of packing company, released few hours after arrest on giving bond, attended court for trial two or three times, nol. pros. entered after several continuances, disclosure to counsel by defendant not full and fair);

£2,000—Hewlett v. Cruchley, 5 Taunt. (Eng.) 277 (man, of unimpeached character, clerk for fourteen years to defendant who was deputy prothonotary of marshalsea court, on suspension of defendant from office plaintiff was appointed in his place, plaintiff refused to deliver books or permit inspection showing entry of fees in favor of defendant, latter secretly preferred charges before grand jury which found seven indictments for embezzlement, at trial of first indictment it was announced on behalf of defendant that he was mistaken, acquitted on other six indictments, expended £100 in his defense);

$10,000—Ross v. Innis, 35 Ill. 487, 85 Am. Dec. 373 (young man of good character and uniform integrity, charged with embezzlement of $166, money taken and appropriated as due him from defendant as balance of salary as cashier, disclosure to counsel by defendant not full and fair, heavy damages awarded in two previous trials);

$25,000—Rawson v. Leggett, 97 App. Div. 416, 90 N. Y. S. 5, *reversed* 184 N. Y. 504, 77 N. E. 662 (man, fifty-five years of age, holding honorable position in community, in employ of defendants between twenty and twenty-five years, for several years prior to arrest

at salary of $4,500 a year, charged with embezzlement after confession of alleged coembezzler, matter allowed to drop after six indictments, Appellate Court held award not excessive, Court of Appeals held that as matter of law defendant had probable cause in instituting criminal proceedings).

The following verdict in an action for the malicious prosecution of a charge of embezzlement has been declared excessive:

$3,500—Billingsley v. Maas, 93 Wis. 176, 67 N. W. 49 (cashier and bookkeeper of corporation, arrested on charge of embezzlement of $35, bailed on depositing $40, in custody but not confinement one hour, prosecution dismissed for want of prosecution, compelled to pay $50 to secure discharge, defendants consulted attorney before instituting prosecution, appellate court ordered remittitur of all except sum of $1,000).

(6) False Pretenses.

The following verdicts in actions for the malicious prosecution of a charge of obtaining property under false pretenses have been sustained as not excessive:

$500—Morgan v. Duffy, 94 Tenn. 686, 30 S. W. 735 (man, arrested on charge of having obtained goods under false pretenses, placed in jail about five o'clock one evening, released about ten o'clock next morning, total want of probable cause, prosecution for purpose of forcing payment of debt);

$700—Eggett v. Allen, 119 Wis. 625, 96 N. W. 803 (man, charged with embezzlement and subsequently with obtaining money under false pretenses, difficulties arose out of real estate deal, discharged because evidence insufficient to convict, jury awarded $300 for malicious prosecution on charge of embezzlement and $700 for subsequent prosecution for obtaining money under false pretenses).

The following verdicts in actions for the malicious prosecution of a charge of obtaining property under false pretenses have been declared excessive:

$3,000—Wilson v. Winnipeg, 4 Manitoba 193 (man, charged with conspiracy to obtain money from municipal corporation by false pretenses, informed against by mayor, fees for conducting prosecution paid by city, detained only few hours and in considerate way, no evidence of express malice, very little damage to reputation, court ordered reduction to $500 or new trial);

$4,000—Davis v. McMillan, 142 Mich. 391, 7 Ann. Cas. 854, 105 N. W. 862, 113 Am. St. Rep. 585, 3 L.R.A.(N.S.) 928, 12 Detroit Leg. N. 771 (man, arrested on charge of obtaining property under false pretenses, under claim that he represented to defendant that president of company had authorized plaintiff's brother to take certain tools and stock of company away, thereby obtaining property with intent to cheat and defraud, prosecuting attorney advised discharge on inability to prove that plaintiff's brother had not so told plaintiff, no dispute that property was obtained by this false representation and removed from state, at former trial verdict for $2,800 set aside as excessive and on another ground).

(7) Forgery.

The following verdicts in actions for the malicious prosecution of a charge of forgery or similar crime have been sustained as not excessive:

$500—Thomas v. Kerr, 137 Ill. App. 479 (man, arrested on charge of intent to cheat and defraud by certain false writing and mortgage on property, in custody of officer and in imprisonment several hours, discharged on hearing before justice of peace who issued warrant, disclosure by defendant to counsel consulted not full and fair, actual malice proved);

$1,000—Scholl v. Schnebel, 8 N. Y. S. 855 (man, wheelwright, arrested on charge of forgery of indorsement of defendant's name on note, done by authority of defendant, locked in cell for nearly four hours, bailed, subsequently proceedings dismissed, disclosure to counsel by defendant not full and fair);

$1,000—Thorp v. Carvalho, 14 Misc. 554, 36 N. Y. S. 1 (man, arrested on charge of attempting to get money by forged order, locked up about hour and half).

The following verdict in an action for the malicious prosecution of a charge of forgery has been declared excessive:

$4,500—Wright v. Hagerman, 42 S. W. 917, 19 Ky. L. Rep. 1032 (man, charged with forgery in filling in blank above signature of defendant, arrested and held under bond, grand jury refused to indict, defendant negro ignorant and owning property not exceeding $500 in value, unable to write or read, attorney wrote affidavit for warrant, jury seems to have been prejudiced by evidence not objected to at trial to effect that plaintiff while awaiting action of grand jury was prevented from going to his wife who had been burned by explosion.

(8) Larceny.

The following verdicts in actions for the malicious prosecution of a charge of larceny have been sustained as not excessive:

$100—Clark v. Baldwin, 25 Kan. 120 (man, accused of felony in keeping express package of money after getting it by mistake, disclosure to counsel by defendant as to reputation of plaintiff not full and fair, actual expenses of $20 incurred, confinement

in jail ten days, contraction of severe cold while imprisoned, suffering ill health in consequence, court said if jury had returned much larger verdict it would not be at liberty to interfere);

$400—Haas v. Powers, 130 Wis. 406, 110 N. W. 205 (man, charged with larceny of fence material and with threat to commit larceny, acquitted by jury on first charge and second charge was dismissed on motion of district attorney, prosecution arose out of dispute of right to take wood and stumps from fence in highway, defendant did not make full disclosure to counsel, jury awarded $100 punitive and $400 compensatory damages, appellate court held latter not excessive);

$550—Martin v. Corscadden, 34 Mont. 308, 86 Pac. 33 (man, charged with grand larceny of two hogs, result of disagreement as to effect of contract between parties, not committed to jail or required to give bond, tried and acquitted by justice);

$1,000—Callahan v. Kelso, 170 Mo. App. 338, 156 S. W. 716 (man, arrested for petit larceny of turkeys, acquitted at trial, incurred expense and loss of time in amount of $50, jury awarded $400 as actual and $600 as punitive damages);

$1,000—See Johnson v. Comstock, 14 Hun (N. Y.) 238 (man of family, holding respectable position among neighbors, humiliated by search made under warrant preliminary to charge of larceny, no stolen property found);

$2,000—Williams v. Casebeer, 126 Cal. 77, 58 Pac. 380 (married woman charged with grand larceny in stealing with aid of husband deeds and other property, detained in county jail three days before admission to bail, acquitted two days afterward, actual pecuniary loss alleged to be $87.50, at trial of criminal action defendant concealed fact he had found some of property alleged to have been stolen, consulted police justice, a practitioner of law, before institution of prosecution);

$2,500—See Doane v. Anderson, 60 Hun 586, mem. 15 N. Y. S. 459, 39 N. Y. St. Rep. 913 (woman, charged with theft of diamonds, defendant procured search warrant as preliminary to prosecution for larceny, constable invaded plaintiff's apartments, compelled her to undress before him, and to suffer him to put his fingers through her hair in searching for diamonds, "plaintiff could not have been subjected to coarser indignity if she had been a thieving prostitute." defendant admitted that he could not honestly believe plaintiff stole diamonds);

$4,000—Cartwright v. Elliott, 45 Ill. App. 458 (young man of unquestioned honesty, employed by jeweler as packer, charged with purloining watches merely on ground of their passage through his hands before loss though equally accessible to another employee, suffered great indignity, incarcerated in cell at police station for three days, afterward for several days in county jail, told he was thief, efforts made to compel confession, opportunities for advancement in life jeopardized);

$5,000—See Vinal v. Core, 18 W. Va. 1 (man, charged with larceny of large quantity of oil, arrested and carried before justice, investigation lasted two days, discharged by justice, expended $56 for witnesses' fees, paying fare and hotel bills, attorney's fee $25 and time lost worth $25, prosecution arose out of transactions relating to oil-wells, jury awarded $10,000, remittitur entered for $5,000, court said $10,000 damages awarded not excessive);

$25,000—Black v. Canadian Pac. Ry. 218 Fed. 239 (station agent, earning $90 to $100 a month, while on leave of absence arrested in United States as fugitive from justice on charge of larceny in Canada, extradition proceedings dismissed on condition that he was to go voluntarily and without process as ordinary passenger to the place of trial about 2,400 miles away to go over his accounts, agreement trick to get him across border, in Canada thrust in jail, not permitted to communicate with attorney or American consul, not able to obtain medical service for injured hand, compelled to undergo physical hardship and mental distress, then haled through streets handcuffed, taken in day coach with no sleeping accommodations, both wrists handcuffed and not removed until pain of sore hand was so great that he threatened to appeal to passengers whereupon he was chained to seat day and night, missed many meals, at trial charge dismissed on showing of crown without calling him to stand and on admission of auditor of defendant of mistake, refused return transportation, some evidence that sister offered to deposit amount of alleged defalcation pending re-examination of accounts, person exercising slightest degree of intelligence after examination of books would conclude that mistakes were clerical errors or omissions without intent to do wrong; unable to get work after prosecution, jury charged to award compensatory but not punitive damages as actual malice had not been shown).

The following verdicts in actions for the malicious prosecution of a charge of larceny have been declared excessive:

$750—Cartwright v. Elliott, 45 Ill. App. 458 (man, between thirty and forty years of age, local resident for many years, good reputation for honesty, arrested on charge of larceny (or burglary?) of harness of defendant, no actual malice, disclosure to coun-

sel, jury awarded $1,000, trial court ordered remittitur of $250, appellate court remanded for new trial on ground of excessiveness of judgment);

$1,000—Bell v. Morse, 48 Kan. 601, 29 Pac. 1086 (young man, after leaving employment of defendant on his farm charged with larceny of missing harnesses, defendant on advice of counsel procured search-warrant but property not found, no arrest made, proceedings abandoned, jury awarded $1,000 trial court ordered remittitur of $600, appellate court held new trial should have been granted);

$1,000—Cointement v. Cropper, 41 La. Ann. 303, 6 So. 127 (man, charged with larceny of cow, parties had been on bad terms, arrested, bailed, three days at court place during session of grand jury, bill ignored, appeared that cow had been detained in stable lot of property owned by plaintiff but under management of relative to keep her out of cane field, defendant consulted counsel but full disclosure not made, judgment reduced to $500);

$6,000—Loewenthal v. Streng, 90 Ill. 74 (man, charged with larceny of property taken under claim of ownership, in custody few hours, held for appearance to criminal court, grand jury failed to find true bill, defendant proceeded on advice of counsel, trial court ordered remittitur of $4,000 of $10,000 awarded, appellate court granted new trial);

$20,000—Walker v. Martin, 43 Ill. 508, Walker v. Martin, 52 Ill. 347 (poor man, apparently of bad character, charged with larceny of coal, at preliminary examination ordered to give bail for appearance at next term of court, in default of bail committed to jail remaining nine days until release on habeas corpus, defendant, wealthy man, evinced reckless disregard of feelings of plaintiff at trial of issue in criminal proceedings; on retrial jury awarded $25,000, trial court ordered remittitur of $5,000, appellate court ordered new trial).

(9) Libel.

The following verdict in an action for the malicious prosecution of a charge of criminal libel has been sustained as not excessive:

$1,250—Provident Sav. L. Assur. Soc. v. Johnson, 99 S. W. 1159, 30 Ky. L. Rep. 1031 (man, prosecuted for criminal libel, expenses in criminal prosecution about $700).

(10) Malicious Mischief.

The following verdicts in actions for the malicious prosecution of a charge of malicious mischief have been sustained as not excessive:

$800—Merchant v. Pielke, 10 N. D. 48, 84 N. W. 574 (married woman, charged with malicious mischief, growing out of civil dissension, expended $30.15 in making her defense, acquitted and discharged day after arrest, disclosure to counsel by defendant not full and fair, plaintiff not committed to jail);

$2,000—Price v. Minnesota, etc. R. Co. reported in full, post, this volume, at page 267 (man, arrested again after being bailed on another charge, for malicious mischief, statutory felony for dynamiting pier in river above railroad bridge, complaint dismissed by committing magistrate).

The following verdict in an action for the malicious prosecution of a charge of malicious mischief has been declared excessive:

$800—See Seabridge v. McAdam, 119 Cal. 460, 51 Pac. 691 (man, prosecuted for malicious mischief in breaking gates and for entering tract of enclosed land, acted under claim of subtenancy, acquitted, defendant claimed to have acted under advice of counsel).

(11) Nuisance.

The following verdict in an action of the malicious prosecution of a charge of criminal nuisance has been sustained as not excessive:

£250—Farmer v. Darling, 4 Burr. (Eng.) 1971 (man, prosecuted under two indictments for nuisance, acquitted, expended £140 in defense).

(12) Perjury.

The following verdicts in actions for the malicious prosecution of a charge of perjury have been sustained as not excessive:

$1,000—Montross v. Bradsby, 68 Ill. 185 (man, indicted at instigation of defendant for perjury, nolle prosequi entered at same term);

£400—Gilbert v. Burkenshaw, Lofft, 771, 1 Cowp. 230 (plaintiff maliciously indicted for perjury; after fair trial and acquittal defendant was guilty of repeated defamation of plaintiff);

$3,000—Plath v. Braunsdorff, 40 Wis. 107 (young girl, previously of sound mind, physically strong, healthy, arrested on charge of perjury in giving false testimony in action between her father and defendant's father, brought before justice, duly examined, discharged, alleged false testimony on immaterial point, prosecution greatly injured health, rendered her insane, created predisposition to mental aberration);

$8,000—Gulf, etc. R. Co. v. James, 73 Tex. 12, 10 S. W. 744, 15 Am. St. Rep. 743 (man, charged with perjury in testifying for person injured in wreck in suit against railroad, criminal prosecution instituted with advice

of counsel, court said verdict for $15,000 actual damages would not furnish ground for setting aside as excessive).

The following verdict in an action for the malicious prosecution of a charge of perjury has been declared excessive:

$10,000—Indianapolis Traction, etc. Co. v. Henby, 178 Ind. 239, 97 N. E. 313 (woman arrested on charge of perjury, bailed on giving bond for appearance, acquitted, insane at time of giving false testimony as result of personal injuries sustained in collision on defendant's line, remittitur of $3,000 ordered).

(13) Robbery.

The following verdicts in actions for the malicious prosecution of a charge of robbery have been sustained as not excessive:

$500—Paukett v. Livermore, 5 Ia. 277 (man, charged with robbery, discharged by justice);

$40,000—Mexican Cent. R. Co. v. Gehr, 66 Ill. App. 173 (young man of excellent family and social connections, of high personal character and presumably of fine sensibilities, earning $115 a month and expenses as assistant to paymaster of defendant railroad company, arrested and prosecuted on charge of robbery of $8,000 or $9,000, rigorous and extremely loathsome imprisonment in Mexican prison for about eight weeks, after remaining at police station about twenty-five hours in a room barren of furniture, with brick floor, solid door and no window, health permanently impaired, reinstatement in defendant's service refused, actual pecuniary loss less than $3,000).

(14) Statutory Offense of Enticing Away Laborer.

The following verdict in an action for the malicious prosecution of a charge of committing a statutory offense consisting in enticing away laborers has been sustained as not excessive:

$4,000—Abingdon Mills v. Grogan, 175 Ala. 247, 57 So. 42 (employee of cotton mill, charged with statutory crime of enticing away laborers and of carrying on business of immigration agent without license, waived preliminary examination, grand jury refused to indict on former charge, indicted on latter charge but acquitted, defendant consulted reputable attorney before instituting prosecution, at trial $2,000 of $6,000 award remitted).

(15) Statutory Offense against Railroad.

The following verdicts in actions for the malicious prosecution of a charge of committing a statutory offense against a railroad have been sustained as not excessive:

$200—See Hagerty v. Great Western R. Co. 44 U. C. Q. B. 319 (man, arrested on charge of driving spike between rails of railroad bridge with intention to obstruct traffic, kept nine days in jail, acquitted at trial, court thought verdict moderate in view of nature of evidence leading to criminal prosecution);

$500—Toomey v. Delaware, etc. R. Co. 4 Misc. 392, 24 N. Y. S. 108 (elderly man, arrested with son after dispute on train as to whether tickets offered for passage entitled them to ride, arrested, prosecuted under New Jersey statute providing for fine of five dollars of any person who attempts to travel on railroad without having paid his fare and with intent to avoid payment thereof, discharged by magistrate, son recovered $.06 which recovery General Term sustained as not inadequate in legal sense, verdict in favor of father said to be substantial but not excessive).

(16) Statutory Offense Relating to Timber.

The following verdicts in actions for the malicious prosecution of a charge of committing a statutory offense relating to the cutting of timber or interference with timber booms have been sustained as not excessive:

$600—Charlton v. Markland, 36 Wash. 40, 78 Pac. 132 (old man, charged with having unlawfully cut timber and cordwood from public lands of United States for purpose of selling it, arrested, tried, acquitted, no evidence that United States court commissioner advised prosecution, plaintiff in custody less than hour but accusation of crime and arrest greatly humiliated him, caused much loss of sleep and some grief);

$1,250.—See Price v. Minn. D. & W. R. Co. reported in full, post, this volume at page 267 (man, arrested for a statutory felony, blowing up with dynamite a pocket boom at mouth of river, bound over to grand jury, released on bail, grand jury found no bill, jury awarded $750 as compensatory and $500 as exemplary damages);

$2,097.25—Proctor Coal Co. v. Moses, 40 S. W. 681, 19 Ky. L. Rep. 419 (man, charged with crime of feloniously cutting and removing timber from a certain tract of land, prosecution not only in law and in fact malicious but also cruel and oppressive).

The following verdict in an action for the malicious prosecution of a charge of cutting timber contrary to statute has been declared excessive:

$1,000—Gray v. Fanning, 73 Conn. 115, 46 Atl. 831 (man, charged with violating the statute (§ 1445, Gen. Stat.) making it a criminal offense to cut standing wood and timber on mortgaged premises with intent to defraud the owner of the mortgage and to lessen the value of the premises, not taken

into custody or put under bond, tried and acquitted, total pecuniary loss not exceeding $25).

(17) Statutory Offense Relating to Execution of Written Instrument.

The following verdicts in actions for the malicious prosecution of a charge of committing a statutory offense relating to the execution of a deed or mortgage have been sustained as not excessive:

$2,500—Spencer v. Cramblett, 56 Kan. 794, 44 Pac. 985 (man, arrested on charge that he had given chattel mortgage to bank of which defendant was president on certain personal property which was subject to prior mortgage without referring to it in later instrument, defendant was indebted to bank in considerable sum, mortgage given to secure existing indebtedness, some evidence that bank was fully informed as to existence of prior mortgage before execution of latter, and that criminal prosecution designed to extort payment of indebtedness, prosecution dismissed, $200 for damages to business, $2,300 for reputation, court said damages somewhat liberal but evidence established proper case for exemplary damages);

$5,000—Bowers v. Walker (Mo.) 182 S. W. 116 (practicing lawyer in good standing, incarcerated in jail for half hour, charge of committing statutory felony of fraudulently executing deed of conveyance of lands without mentioning prior deed, dismissed at preliminary hearing).

(18) Stealing or Theft Not Technically Described.

The following verdicts in actions for the malicious prosecution of a charge of theft or stealing not specifically described in the reports in technical terms have been sustained as not excessive:

$450—Orefice v. Savarese, 61 Misc. 88, 113 N. Y. S. 175 (man, twice arrested at instance of defendant on charge of theft of valise containing $800, some evidence of probable cause in instituting prosecution, at trial at General Sessions plaintiff acquitted and discharged);

$500—Stephens v. Gravit, 136 Ky. 479, 124 S. W. 414 (man, charged with horse stealing, defendant claimed vendor's lien on horse, disclosed situation and acted on advice of magistrate);

$500—McIntosh v. Wales, reported in full, post, this volume, at page 273 (married woman, arrested on charge of stealing unbranded calves, deprived of liberty about five hours, taken before magistrate, compelled to give bond for $500, at hearing prosecuting attorney refused to prosecute, charge dismissed, evidence of attorneys' fees amounting to about $250, but petition claimed only $100);

£500—Abell v. Light, 12 N. Bruns. 240 (woman, boarding-house keeper, arrested on charge of unlawfully as bailee detaining and converting property to her own use, property held under claim of lien, right of possession in litigation at time of institution of criminal proceedings, put to large expense and liabilities in defending herself against charge, detained at police office one day, subsequently imprisoned in jail for several hours, bail in large amount required, credit injured, sworn estimate of actual pecuniary loss amount of verdict);

$2,500—Scott v. Dennett Surpassing Coffee Co. 51 App. Div. 321, 64 N. Y. S. 1016 (man, cashier in restaurant, charged with theft of $5.95 on basis of shortage of cash with checks for night, tried and acquitted at Special Sessions, about two weeks intervened between arrest and charge, evidence that during pendency of proceedings agent of defendant acknowledged that "they" had made a little mistake and would withdraw charge if plaintiff would release them);

$3,500—Cuthbert v. Galloway, 35 Fed. 466 (plaintiff, agent for selling photographs for defendant, refused to pay balance to company on ground of infringement of exclusive agency rights in territory, arbitration proceedings broken off by defendant, arrest and commitment on Friday procured on ground that balance received by plaintiff in fiduciary capacity, order vacated on Saturday and released on Monday, ultimate termination in favor of plaintiff, instituted by advice of counsel but complete disclosure not made);

$14 500—Missouri, etc. R. Co. v. Craddock (Tex.) 174 S. W. 965 (switchman, earning $100 a month, charged with burglary and theft from railroad car, information filed in district court against him and then remanded to justice court, tried on second information in district court and acquitted, shot in foot at time of arrest, expended $250 for attorney's fees and $100 for doctors' bills);

£10,000—Leith v. Pope, 2 W. Bl. (Eng.) 1327 (man of family, baronet, officer in army, member of Parliament, charged with horse-stealing, capital offense, house and stables broken open under authority of search warrant, arrested, bailed, defendant admitted on trial of indictment that prosecution was for purpose of getting rid of actions for usury; defendant wealthy).

The following verdicts in actions for the malicious prosecution of a charge of theft or stealing not specifically described in the reports in technical terms have been declared excessive:

$350—Lee v. Taylor, 6 Ont. W. Rep. 332 (man, charged with theft of horse, no warrant issued, two attendances in police court, acquitted, actual outlay and loss of time trifling);

$7,000—Russell v. Dennison, 50 Cal. 243, *modifying on rehearing* 45 Cal. 338 (man, charged with stealing two mules valued at $100 each, placed in jail overnight, then taken in irons to another jail and kept overnight, imprisoned in another jail four days, became quite sick, illness continued for more than a week, requiring services of physician and nurse, at preliminary hearing discharged, remittitur of $3,500 ordered).

(19) Treason.

The following verdict in an action for the malicious prosecution of a charge of treason has been declared excessive:

$9,000—See McConnell v. Hampton, 12 Johns. (N. Y.) 234 (man, "back and forth trader," of liberal education with annual income above $60,000, private citizen, arrested on charge of treason at instance of defendant, man of large fortune who was commander of army of United States at point at which plaintiff came to make some communication relative to enemy, confined about five days, lay on floor of guardhouse, without bed, allowed to procure own provisions, rations of soldier, permitted to speak to others in presence of officer but not to leave guardhouse, defendant declared he should have been justified to have hanged him immediately for giving information to British officers, some personal difference between parties prior to arrest, acquitted at court martial).

(20) Trespass.

The following verdicts in actions for the malicious prosecution of a charge of criminal trespass have been sustained as not excessive:

$250—See Olmstead v. Williams, 89 Ga. 144, 15 S. E. 31 (man, arrested and prosecuted for criminal trespass arising out of dispute of right of possession of real property, acts relied on in justification as shown by evidence did not constitute any violation of penal laws);

$600—Henderson v. McGruder (Ind.) 94 N. E. 580 (man, arrested and prosecuted for violently taking possession of certain real estate, bailed, tried, and convicted by justice of peace on false testimony, on appeal tried and acquitted, not put to any serious inconvenience or expense, court said that measured by standard of compensation judgment seemed large but in that punitive damages were recoverable could not say the amount excessive).

The following verdicts in actions for the malicious prosecution of a charge of criminal trespass have been declared excessive:

$500—Sasse v. Rogers, 40 Ind. App. 197, 81 N. E. 590 (man, arrested for trespass in mowing meadow under claim of license, bailed in sum of $25 for appearance, venue changed, then bailed in sum of $50, prosecuting attorney without any trial dismissed prosecution, discharged four days after arrest, loss of his own services and services of his team $12, attorney's fee $8, nothing claimed for physical or mental pain);

$800—Seabridge v. McAdam, 119 Cal. 460, 51 Pac. 691 (man, prosecuted for malicious mischief in breaking gates and for entering tract of enclosed land, acted under claim of subtenancy, acquitted, defendant claimed to have acted under advice of counsel).

(21) Crime Not Specifically Described.

The following verdicts in actions for the malicious prosecution of a charge of crime not specifically described in the reports have been sustained as not excessive:

$500—Seidler v. Burns, reported in full, post, this volume, at page 266 (man, arrested about five o'clock in afternoon on criminal charge, taken through public streets of city to police station, kept in cell until next morning, case adjourned to next day when he was acquitted, evidence of wantonness and actual malice);

$1,300—See the reported case (man, comparative stranger in community assaulted and then charged with criminal offense, in custody of constable for five days while partially paralyzed and at times unconscious, $3,990 awarded in same action for assault and battery);

$2,000—Finigan v. Sullivan, 65 Wash. 625, 118 Pac. 888 (man, charged with crime, arrested without warrant, incarcerated and kept in jail over night, suffered in body and mind but no injury to reputation shown, paid $200 in defending himself).

III. Inadequacy of Verdict.

1. GENERALLY.

It is a general rule that a verdict in an action for malicious prosecution will ordinarily not be regarded as inadequate in the legal sense, that is, it will not be set aside, merely on the score of the smallness of the damages awarded; subject to the qualification that a verdict will be considered inadequate where the damages are so small as to induce the conviction that the verdict was the result of passion, prejudice, or partiality or that the verdict was the result of mistake or oversight on the part of the jury in failing to take into consideration the proper elements of damage in assessing the amount of the recovery, or that the verdict was the result of the failure of the jury to decide the issues submitted to them, or that the verdict was the result of misapprehension on the part of the jury as to the proof or as to the charge of the court. Paul v. Leyenberger, 17 Ill. App. 167; Gregory v. Chambers, 78 Mo. 294; Waufle v. McLellan,

51 Wis. 484, 8 N. W. 300. See also Linitzky v. Gorman, 146 N. Y. S. 313. Thus in Paul v. Leyenberger, supra, the court said: "The actual damage was shown with such definiteness as to be capable of being classified under a particular head and determined by a legal measure. There was then that element of damage not only involved in the case, but clearly established. But, from the evidence establishing such actual damage and the verdict, it is perfectly obvious that the jury omitted, for what reason we cannot say, to take that element of damage into consideration in making up their verdict. As a matter of principle, important in the due administration of justice, that omission constituted a sufficient ground for granting a new trial, and the court erred in refusing it. . . . The injury to the plaintiff below from the arrest and imprisonment, cannot justly and properly be said to have been trivial. It was serious and substantial. In such case the rule is that the plaintiff is entitled to substantial compensation; and in case of trivial injury, or even without any actual injury, to merely nominal damages. . . . Where a rule of damages can be discovered, the jury are bound to follow it. . . . It is within the province of an appellate court to revise and set aside a verdict for insufficiency, as well as for excessiveness of damages." Similarly in Waufle v. McLellan, 51 Wis. 484, 8 N. W. 300, the rule was stated by the court as follows: "There is no room to attribute the smallness of the verdict to errors of judgment. Neither is it necessary to find that it is a corrupt or even a prejudiced verdict. The probability is, that the jury supposed they had unlimited discretion in the assessment of compensatory as well as punitive damages; and hence, for reasons satisfactory to them, but which do not appear in the record, made the assessment at a nominal sum. The fact remains, however, that the verdict is against the undisputed evidence and the instructions of the court, and is therefore, in that sense, a perverse verdict. If the plaintiff recovers less than fifty dollars, he recovers no more costs than damages; whereas, if he recovers fifty dollars or more, he is entitled to full costs. This is the statutory rule of costs in actions for malicious prosecution. R. S. 771, sec. 2918, subd. 4. Because of this rule, the error of the jury in assessing merely nominal damages, when damages exceeding fifty dollars were pleaded and conclusively proved, was a grievous wrong to the plaintiff. This court would not be disposed to disturb a verdict for unliquidated damages because it is a few dollars less or more than the proof and instructions warrant, especially if the costs were not affected by the error; yet under the special circumstances of this case we think this verdict should not be sustained. The motion for a new trial should have been granted, and we cannot regard the denial of it as a proper exercise of the discretion of the court." Likewise in Linitzky v. Gorman, 146 N. Y. S. 313, the court stated the rule as follows: "This is a motion made by the plaintiff to set aside a verdict rendered by the jury in his favor for the sum of six cents damages. The motion is made by the plaintiff on the ground that the verdict is inadequate and the result of a compromise, that the damages awarded are clearly shown to be entirely too small to compensate him for his injury, and on the further ground that the jury in rendering their verdict wholly disregarded the law of damages as laid down by the court. The action was brought against the defendant to recover damages for malicious prosecution. . . . The damages awarded to the plaintiff are, in the mind of the court, inadequate. The plaintiff, as injured, is entitled to adequate compensation covering all the elements of the particular injury. Such elements of damage include loss of time, peril to life and liberty, injury to fame, reputation, character and health, mental suffering general impairment of social and mercantile standing, actual loss or injury to property, interest, and credit, decrease in earning capacity, and all losses sustained in business. Such damages must be direct, natural, and proximate results of the former suit. . . . The plaintiff was entitled to at least compensatory damages for the suffering and humiliation as aforesaid, but the jury, believing that the plaintiff would be amply compensated by a verdict in his favor, found for him for six cents. The charge lodged against the plaintiff by the complainant was done maliciously and without probable cause. . . . But in the case at bar the defendant knew, or should have known, that the charge of grand larceny pressed against the plaintiff herein before the magistrate, when he had but forty cents in his pocket, which he charged that the plaintiff attempted to steal, was made with the intent to do wrong to the plaintiff. This in itself is sufficient to convince the court that it was maliciously intended and without want of probable cause. Therefore the essential elements in a case for malicious prosecution have been shown by the evidence, and the court would, without hesitancy, set aside the verdict of the jury for a nominal sum found, but unfortunately there is an objection which prevents the court from so doing, and that is that the plaintiff should have asked the court to charge that the uncontroverted evidence was that the damages that the plaintiff had sustained were substantial and not nominal, which the court would have done, and charged the jury that if they believed the facts in the case, and that the charge lodged against

the plaintiff before the magistrate was done maliciously and without want of probable cause, they should have awarded the plaintiff substantial damages. But the plaintiff failing to request the court to charge, therefore the question of damages was left to the jury for their determination; the court is not without power to set aside the verdict or grant a new trial herein on the question of damages as found by the jury. . . . And as the court has said in the Toomey Case, taking an elderly man into custody and marching him through a crowded thoroughfare in charge of an officer, depriving him of his liberty, away from friends and facilities for bail, putting him on trial, causing fear and suspense, are acts sufficient to call for substantial rather than the mere nominal damages sometimes awarded for a mere technical trespass or wrongdoing. For the failure to request the court to charge as above stated, the motion for a new trial must therefore be denied."

In England, however, it was said in two early cases that the courts will never grant a new trial on the ground of the smallness of the damages awarded in an action for malicious prosecution. See Mauricet v. Brecknock, 2 Dougl. 509; Barker v. Dixie, 2 Stra. 1051. On the other hand, it seems that in Canada the appellate court has the power to increase the amount awarded in an action for malicious prosecution when the damages have been assessed without a jury. See Kalmanovitch v. Muller, 1 Dominion L. Rep. 628, 18 La. Rev. de Jur. 159; Montreal v. Hall, 12 Can. Sup. Ct. 74. And in Louisiana the appellate court possesses the power to increase the damages in an action for malicious prosecution when the verdict is inadequate. Deslonde v. O'Hern, 39 La. Ann. 14, 1 So. 286. See also Maille v. Lacassagne, 35 La. Ann. 594. Thus in Deslonde v. O'Hern, supra, which was an action for the damages growing out of the malicious prosecution of a civil suit, the court said: "It seems that the jury in the court below and the judge likewise reached the conclusion we have announced touching the conduct and acts of the defendant and as being of a character to render him liable for damages, but the judge, by his decree, evidently limited the damages to the actual pecuniary loss or expense sustained by the plaintiff from the acts and proceedings complained of. He made no allowance for the trouble, mortification, mental anxiety and distress caused thereby to the plaintiff, which this court in the case of Byrne v. Gardner, 33 La. Ann. 6, held to be actual damages, although of that nature that could not be precisely measured or determined by money or a money value, and that they were of that kind of damage, the estimate of which is left largely to the discretion of the judge or jury, under art. 1934 of the Civil Code. We think the judge erred in thus restricting the liability of the defendant. To a man of average sensibility, under the circumstances attending this case, the expense or pecuniary outlay to which he was subjected by the acts complained of, would doubtless seem of little significance when weighed with the inconvenience, mental suffering and humilation experienced by the plaintiff from the causes stated, aggravated as they must have been, by the serious domestic trouble which, according to the evidence, was weighing upon him at the time. These considerations induce us to grant the prayer for the amendment of the judgment, and to increase the same by the additional sum of $250 to that awarded by said judgment, making the entire amount $350."

2. Malicious Prosecution of Civil Action.

The following verdicts in actions for the malicious prosecution of civil or quasi-civil proceedings have been sustained as not inadequate:

£5—Mauricet v. Brecknock, 2 Dougl. (Eng.) 509 (damages awarded by jury in execution of writ of inquiry after default of defendant for malicious suing out of commission of bankruptcy against plaintiff and maliciously holding to bail for £1020, bill of costs in superseding commission amounted to £30, trial court granted new trial on ground of inadequacy but Lord Mansfield discharged rule);

$3,000—Montreal v. Hall, 12 Sup. Ct. 74 (defendant maliciously and without reasonable or probable cause instituted legal proceeding with view to dismissal of plaintiff from office of commissioner on false charges of corruption, partiality and improper conduct in making award for expropriation of property required for widening street, one judge thought damages should be increased to $10,000).

The following verdict in an action for the malicious prosecution of a civil proceeding has been declared inadequate:

$100—Deslonde v. O'Hern, 39 La. Ann. 14, 1 So. 286 (man, sued maliciously in ejectment, provisional seizure of household goods, in serious domestic trouble at time, had already paid rent far in advance, suffered inconvenience, mental suffering, and humiliation, on appeal award increased to $350).

3. Malicious Prosecution of Criminal Action.

The following verdicts in actions for the malicious prosecution of a criminal charge have been sustained as not inadequate:

$1—Gregory v. Chambers, 78 Mo. 294 (man, arrested on charge of embezzlement of $86.50, confined in jail one day, defendant suggested

points throughout trial of criminal case, some evidence of bad character of plaintiff, some testimony that defendant acted in good faith, on advice of counsel and with probable cause, plaintiff expended $101 for counsel fees);

5s.—Barker v. Dixie, 2 Stra. (Eng.) 1051 (malicious indictment for felony, court said new trial could not be granted on ground of smallness of damages);

$250—See Wood v. Newby, 4 Alberta L. Rep. 333, 21 West L. Rep. 438, 5 Dominion L. Rep. 486 (man, in possession of watch for purposes of repair, while temporarily absent charged by defendant with conversion of watch to his own use, arrested, required to recognize for his appearance at hearing, discharged, no actual damages proved, damages assessed by court);

$450—Maille v. Lacassagne, 35 La. Ann. 594 (attorney, charged with obtaining money under false pretenses, retained by defendant to collect sundry accounts but on disagreement as to compensation did not pay over some money, plaintiff only witness for himself, his outlay as set forth in bill of particulars was $2.60 for newspapers, $9.75 for car fare and extra clerk hire, $1.50 for mail matter and telegram, these items reduced on cross-examination to $.80 for newspapers, $.10 for carfare, $.12 for postage and $.30 for telegram, court considered whole affair puerile, said if it should interfere with verdict at all it should reduce amount but did not disturb it for reason that defendant would probably be taught by it that institution of criminal proceedings is not proper mode of redressing civil injury).

The following verdicts in actions for the malicious prosecution of a criminal charge have been declared inadequate:

$.06—See Lintizky v. Gorman, 146 N. Y. S. 313 (elderly man, had habit of chewing gum, removed wrapper from fresh package and in attempting to drop it behind defendant in subway car latter grabbed hand, accused plaintiff of attempting to pick pocket containing $.30 or $.40, plaintiff arrested on charge of attempted grand larceny; marched through crowded thoroughfare in charge of policeman, questioned as to pedigree, taken to police headquarters in patrol, subjected to Bertillon system and finger prints taken, on examination discharged, court said damages inadequate but did not allow new trial because of failure to request trial court to charge as to damages);

$1—Paul v. Leyenberger, 17 Ill. App. 167 (man, in direct consequence of arrest and imprisonment on false charge sustained actual damages to amount of $35);

$5—Waufle v. McLellan, 51 Wis. 484, 8 N. W. 300 (man, charged with forgery, held to bail after examination before justice, information filed, arraigned, pleaded not guilty, required to recognize for appearance at subsequent term, nolle prosequi entered, expended $50 for services of counsel, $30 to witnesses, and agreed to pay $50 more to witness coming from another state, verdict being for less than $50 did not carry costs);

$76—See Kalmanovitch v. Muller, 1 Dominion L. Rep. 628, 18 La. Rev. de Jur. 159 (facts as set out in 4 Digest Canadian Case law at page 1283, were that plaintiff was awarded $75 for actual expenses and $1 exemplary damages for false arrest and malicious prosecution, appellate court granted additional sum of $50 and costs of review).

SEIDLER

v.

BURNS.

Connecticut Supreme Court of Errors—December 19, 1912.

86 Conn. 249; 85 Atl. 369.

Appeal — Scope of Review — Sufficiency of Evidence.

The trial court should not set aside a verdict as against the evidence where there was some evidence to sustain it, but should not refuse to set it aside where the manifest injustice of the verdict is so plain as to denote mistake, prejudice, corruption, or partiality.

Same.

A verdict on conflicting evidence will not be set aside on appeal.

Malicious Prosecution — Excessiveness of Damages.

Where plaintiff suing for malicious prosecution shows that he was arrested about 5 o'clock in the afternoon and taken through the public streets to the police station, where he was kept in a cell until the next morning, that his case was then adjourned until the following day when he was acquitted, and there is evidence that the acts of defendant were wanton and malicious, a verdict of $500 will not be disturbed as excessive.

[See note at end of this case.]

Elements of Damage Recoverable.

The circumstances of aggravation, bodily pain, mental anguish, and injury to reputation, and expenses of litigation less taxable costs, are proper elements of damages for malicious prosecution.

[See 26 Am. St. Rep. 162.]

Appeal from Superior Court, Hartford county: WILLIAMS, Judge.

Action for malicious prosecution. Michael Seidler, plaintiff, and John J. Burns, defend-

ant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. AFFIRMED.

Joseph L. Barbour for appellant.
A. Storrs Campbell for appellee.

[250] PER CURIAM.—This is an action claiming damages for a criminal prosecution of the plaintiff, alleged to have been instituted by the defendant maliciously and without probable cause. The jury rendered a verdict for the plaintiff to recover $500 damages. The defendant filed a motion to set aside the verdict and for a new trial, upon the ground that the verdict was against the evidence and that the damages were excessive. This motion was denied, and its denial is the only error assigned in the appeal.

A trial court should not set aside a verdict as being against the evidence "where it is apparent that there was some evidence upon which the jury might reasonably reach their conclusion, and should not refuse to set it aside where the manifest injustice of the verdict is so plain and palpable as clearly to denote that some mistake was made by the jury in the application of legal principles, or as to justify the suspicion that they or some of them were influenced by prejudice, corruption or partiality." Steinert v. Whitcomb, 84 Conn. 262, 263, 79 Atl. 675.

The defendant contends that the record contains no evidence of malice upon the part of the defendant, nor that the institution of the criminal prosecution was without probable cause.

It clearly appears from the conceded facts that there was sufficient proof to warrant the jury in finding for the plaintiff upon the question of actual malice, aside from the malice implied from the proof of want of probable cause. Upon the question of probable cause the evidence of the defendant materially conflicted with that of the plaintiff. Apparently the jury did not accept the defendant's explanation, but gave credence to the plaintiff's testimony and that of his witnesses. [251] We cannot say that the jury were not warranted in so reaching such a conclusion.

The damages awarded are not so excessive as to warrant an interference by this court. In cases like the present one, there is no fixed rule of damages as in an action of contract. The object is the remuneration for a personal injury which is not capable of an exact cash valuation.

It appears that Seidler was arrested about five o'clock in the afternoon, taken through the public streets of Hartford to the police station, where he was kept in a cell until the next morning. His case was then adjourned until the following day, when he was acquitted. The circumstances of aggravation, the bodily pain, the mental anguish, and the injury to his reputation, were all elements which the jury might have properly considered in assessing damages. But these were not all. As we have said, there was evidence from which the jury could have consistently reached the conclusion that the acts of the defendant were wanton and malicious. In this class of cases the plaintiff's expenses of litigation in the suit, less his taxable costs, are also a proper element of damages. Hanna v. Sweeney, 78 Conn. 492, 494, 62 Atl. 785, 4 L.R.A.(N.S.) 907; Hassett v. Carroll, 85 Conn. 23, 38, Ann. Cas. 1913A 333, 81 Atl. 1013. Viewed in the light of these suggestions, we are not prepared to say that the damages assessed in the present case are so exorbitant and unreasonable as to warrant the interference of this court in a matter within the province of the jury to determine.

There is no error.

NOTE.

It is held in the reported case that a verdict for five hundred dollars in an action for the malicious prosecution of the plaintiff on a criminal charge is not excessive. The cases on this point are collected in the note to Bursow v. Doerr, reported ante, this volume, at page 248.

PRICE

v.

MINNESOTA, DAKOTA AND WESTERN RAILWAY COMPANY ET AL.

Minnesota Supreme Court—July 2, 1915.

130 Minn. 229; 153 N. W. 532.

Malicious Prosecution — Joinder of Causes of Action.

Two causes of action, each for malicious prosecution, held to arise out of transactions connected with the subject of action, and to each affect all the parties to the action, and therefore to be properly united in one complaint.

Trial — Motion to Dismiss Property Denied.

Certain motions to dismiss, made at the close of plaintiff's case and again at the close of all the testimony, held properly denied.

Malicious Prosecution — Evidence Sufficient.

The determination of the trial court and jury that there was no probable cause is held correct.

Same.

The finding of the jury that there was malice is sustained by the evidence.

Same.

The defense of advice of counsel was properly for the jury to determine, and the evidence sustains the verdict on this issue.

Excessiveness of Damages.

The damages are not excessive within the rule guiding this court in cases of this kind.

[See note at end of this case.]

Trial — Instructions Approved.

There was no prejudicial error in the rulings on evidence, in the charge or in the refusal to give requested instructions.

Appeal — Saving Questions for Review — Misconduct of Counsel.

A claim of misconduct of counsel cannot be urged as ground for reversal, unless it is made a ground of the motion for a new trial in the court below.

[See Ann. Cas. 1916A 551.]

(Syllabus by court.)

Appeal from District Court, Koochiching county: WRIGHT, Judge.

Action for malicious prosecution. James L. Price, plaintiff, and Minnesota, Dakota and Western Railway Company, et al., defendants. Judgment for plaintiff. Certain defendants appeal. The facts are stated in the opinion. AFFIRMED.

Harris Richardson and *Walter Richardson* for appellants.

Arnold & Arnold for respondent.

[231] BUNN, J.—This action was brought to recover damages for malicious prosecution. The original defendants were the appellants here and Minnesota & Ontario Power Co., R. S. McDonald, R. L. Horr, R. J. Young, George S. Langland, John D. McKay and W. H. Forier. Horr and McKay were not served with summons and did not appear. Before the close of the trial the action was dismissed as to all of the defendants except Minnesota, Dakota & Western Railway Co. and International Lumber Company. There was a verdict for $3,250 against these defendants jointly. They appeal to this court from an order denying a new trial, and also from a judgment entered on the verdict.

The principal contentions of defendants on this appeal are these: (1) There was a misjoinder of causes of action; (2) it was error to deny motions to dismiss made by each of the appealing defendants as to each cause of action; (3) there was probable cause; (4) there was no malice; (5) the second of the two prosecutions was begun on advice of counsel. There are also claims of excessive damages, error in the rulings on evidence and in the charge, and a claim of misconduct of counsel. The facts necessary to understand the various questions are somewhat complicated, but we regard the following statement as a sufficient general outline.

The Watrous Island Boom Co., a corporation which appears to have no active agents or employees and the capital stock of which is largely owned by the defendant railway company, owns booms, sorting and hoisting works in the Rainy river, extending from the mouth of the Black river up past the mouth of the Big Fork river. Defendant International Lumber Co. operates the plant of the Watrous Island Co., and manufactures lumber in its mill at International Falls. Defendant railway company operates a line of railroad connecting the plant with the mills of the lumber company; a line [232] runs parallel with the Rainy river on the Minnesota side and crosses the Big Fork river about a mile from its mouth. The lumber company owned a controlling interest in the stock of the railway company. Mr. E W. Backus was the president and general manager of both these corporations, and also of defendant Minnesota & Ontario Power Co., a corporation which operated pulp and paper mills, and which owned a minority of the stock of the lumber company. Defendant R. S. McDonald was a stockholder in both the railway company and lumber company, was a director of the former, and superintendent of the latter. Defendant Horr was a stockholder in both companies, a director in the railway company and secretary of the lumber company. He was a brother-in-law of Mr. Backus.

The Shevlin-Mathieu Lumber Co. and allied "Shevlin concerns" have mills down the river at Spooner and Beaudette. They had great quantities of logs in the Big Fork river which they had been unable to get out for two seasons. In May, 1912, the Watrous Island Co.'s boom was full of logs; logs were held in a pocket just above the mouth of the Big Fork by a boom which sagged one-fourth of the distance across the mouth, and 10 boom sticks of a total length of about 400 feet hung down river from this sag-boom across the mouth of the Big Fork, which was about 600 feet in width at this point. This was quite effective to prevent the passage of logs from the Big Fork into and thence down the Rainy river to the booms and mills of the rival concerns.

On the morning of May 10, 1912, plaintiff and William Bartlett, who were engaged in making a drive of the Big Fork on behalf of the Shevlin interests, blew out with dynamite the pocket boom at the mouth of that river. In the afternoon of that day they were arrested on a "John Doe" warrant issued on the complaint of defendant McDonald. They were taken to International Falls, bound over to the grand jury, and released on bail. The

grand jury afterwards found "no bill." This prosecution constitutes the basis of the first cause of action set out in the complaint.

On May 12, 1912, plaintiff and Bartlett were again arrested, this time on a warrant issued on the complaint of defendant Horr [233] charging them with blowing out, on May 10, one of the piers of the Big Fork river above the railroad bridge. These piers were three or four in number and were set in the river some 500 feet above the bridge. The complaint on this charge was dismissed by the committing magistrate. This prosecution is the basis of the second cause of action.

Defendant Forier was sheriff of Koochiching county, and made the arrest of plaintiff under the McDonald warrant. Defendant Langland was municipal judge of International Falls and as such issued the warrant, and held plaintiff and Bartlett to the grand jury. Defendant McKay was a lawyer employed in the prosecutions, defendant Young, assistant manager of the power company.

The boom of the Watrous Island Co. had been blown out on the ninth at a point just below the mouth of the Big Fork, and logs confined in the boom, some belonging to the defendant lumber company, and some to down-river owners, escaped and went down the river. It does not appear who did this. Employees of the lumber company were engaged in repairing this break. The pocket boom which hung down stream from above the mouth of the Big Fork and extended part way across the mouth of that river was filled with logs, stored there by the lumber company to be later let down into its booms and sorted. Many of the logs in this pocket boom belonged to defendant lumber company, and when plaintiff and Bartlett blew out the pocket boom on the tenth these logs escaped down the river. In the sorting works below defendant lumber company picked out its own logs and all these were hoisted out of the water and taken back up the river either to its mill or the mill of the power company by train. The logs belonging to the Shevlin people and other mill-owners below were sorted out and allowed to go down the river. When logs belonging to defendant escaped down the river, there was apt to be great loss.

It is reasonably clear that conditions at the mouth of the Big Fork constituted an obstruction to the passage of logs from that river into the Rainy, and thence to the down-river mills, whose owners were then making a "clean drive" of the Big Fork. It is clear also that the booms and sorting works of the Watrous Island Co. [234] had not the capacity to hold or handle the logs in the Big Fork. That the situation was serious and likely to bring trouble seems to have been appreciated by McDonald, as there is evidence that on the ninth he begged the superintendent of the Big Fork drive not to blow up the booms, promising to do something to give relief. Instead of removing part of the obstructions McDonald ordered closed up a gap which had been left, went to International Falls and held a consultation with other Backus officers and attorneys. The report of the blowing out of the pocket boom reached McDonald, and he caused a warrant to be issued for the arrest of John Doe and Richard Roe. McDonald, in company with the sheriff, a deputy, Horr, Young and an attorney took a special train for the Watrous Island Co.'s plant at Loman, above the mouth of the Big Fork. There they secured employees of the lumber company, who were appointed deputy sheriffs, and all proceeded by the train back to the bridge across the Big Fork, where they found plaintiff and Bartlett, and arrested them. There is testimony that McDonald directed the sheriff to arrest these men, though he denies this, claiming that he did not know they were the men who had committed the act charged against Doe and Roe. At this time, on the order of McDonald, a boom was stretched across the river above the bridge, and an injunction served on Bartlett restraining him from removing this boom. Plaintiff and Bartlett were then taken to International Falls, held to the grand jury and released on bail.

On Sunday, May 12, while plaintiff and Bartlett were at large on bail, Horr caused the warrant to be issued charging them with having, on the tenth, blown out the pier above the bridge. Another special train carrying the sheriff, or a deputy, Horr, Young and others, proceeded to the bridge, where McDonald and attorneys had come from Loman. Plaintiff and Bartlett were found in their camp there, about to retire for the night. They were arrested, brought to International Falls, and kept in jail until Tuesday morning. There is evidence that Horr gave as a reason for this arrest that the men were out on bail and "he was afraid they might do something."

[235] This is sufficient as a general statement; other evidentiary facts will be referred to as the different questions presented are discussed.

1. The question of misjoinder of causes of action was presented by separate demurrers to the complaint, and the order overruling the demurrers is assigned as error on this appeal. Two causes of action, each for the alleged malicious prosecution of a criminal charge, are attempted to be joined in one action. It is claimed that these two causes of action do not arise out of "the same transaction, or transactions connected with the same subject of action." G. S. 1913, § 7780, subd. 1. It is further contended that each

cause of action does not affect all the parties to the action, as is the requirement of the same statute. As all the defendants other than the appellants here, the railway company and the lumber company, prevailed in the action and are not complaining of the order overruling the demurrers, we will not consider whether the two causes of action affected all the defendants. All that is necessary here is that both causes of action "affected" the two defendants who were found liable by the verdict, and who prosecute this appeal. Two questions arise therefore on this branch of the case: Were the two causes of action included in "the same transaction, or transactions connected with the same subject of action?" Do they affect both of the defendants?

It is probably correct that the two causes of action do not arise out of the same transaction, as they arise out of different prosecutions. There were then two "transactions," the first being the act of defendants in prosecuting plaintiff for blowing out the boom, the second, the act of defendants in prosecuting him for blowing out the pier. We say this without amplication of the subject, and recognizing the various definitions of the word "transaction" as used in this and similar statutes. The difficult question is whether these two transactions were "connected with the same *subject of action*." What was the "subject of action" in the present case? The statute says that two or more consistent causes of action, "whether legal or equitable" may be united in one pleading under the conditions named; in view of the use of the words "whether legal or equitable," we are unable to adopt the suggestion of Mr. Pomeroy [236] (Pomeroy, Code Remedies, § 369) that the clause of the statute as to "transactions connected with the subject of action" probably applies exclusively to equitable suits. It is doubtless true that this clause will find its most frequent application in equitable actions, as pointed out by Mr. Pomeroy and in McArthur v. Moffet, 143 Wis. 564, 128 N. W. 445, 33 L.R.A.(N.S.) 264; and it is also clear that in equitable actions it is generally easier to say what is the "subject of action." We must hold that the clause applies to all actions.

In cases involving specific real or personal property, it is not difficult to determine what the "subject of action" is, as distinguished from the "cause of action." Generally speaking it is the property itself, or rather the property and plaintiff's right or title thereto. McArthur v. Moffet, supra. In tort actions, it is the property or right of plaintiff for the injury for which he seeks redress. While the matter is confusing, we think the "subject of action" in the case at bar may be said to be the right plaintiff possessed to freedom from malicious prosecutions, his right to an unblemished reputation, uninjured feelings and the other rights invaded by such prosecutions. The meaning of this clause has been the subject of a great amount of discussion, and we feel unable to add anything that would be clarifying. In the Wisconsin case referred to the opinion of Chief Justice Winslow is exhaustive. The cases in this state do not decide the precise point here involved, but they are useful. See cases cited in note to the statute, G. S. 1913, § 7780, subd. 1; 2 Dunnell, Minn. Dig. § 7500, and cases cited. In Montgomery v. McEwen, 7 Minn. 351, it was said that the language was intended to allow the plaintiff to litigate everything arising out of the same transaction, or transactions connected with the same subject of action, in one suit. The decisions since have uniformly construed the statute liberally, with the idea of avoiding a multiplicity of suits. We think that the two causes of action in the case, if not a part of the same transaction, arose out of transactions connected with the subject of action, the rights of plaintiff that were invaded by the prosecutions. The authorities support this conclusion. 23 Cyc. 409, et seq., and cases cited.

The statute requires that the two or more causes of action must [237] "affect all parties to the action." It is not, however, necessary that they affect all the parties equally. As said by the present Chief Justice in Venner v. Great Northern R. Co. 117 Minn. 447, 136 N. W. 271: "One general right is demanded and it is not fatal that defendants are in a measure separately or independently involved." In Pleins v. Wachenheimer, 108 Minn. 342, 122 N. W. 166, 133 Am. St. Rep. 451, it was said: "The relief awarded in such cases may affect them differently; but, when all are concerned in some material part of the subject-matter in litigation, they may be joined." We hold that under the allegations of the complaint in the case at bar the two causes of action affect both of the appealing defendants. There was no misjoinder of causes of action and the demurrers were properly overruled.

2. At the close of plaintiff's case and again at the close of all the testimony defendant lumber company moved to dismiss as to the first cause of action and as to the second cause of action, and defendant railway company made like motions. Insofar as the claim of error in the denial of these motions is based upon the general contentions that there was probable cause for instituting the prosecutions, and that there was no malice, these questions will be taken up later. As to the claim that the lumber company was not responsible for the act of McDonald, or the railway company for the act of Horr, we

will simply say that the evidence is ample to show that these men were acting for their respective corporations, within the scope of their duties, and that their acts are the acts of the defendants. It is urged that in any case the railway company was not responsible for the first prosecution, or the lumber company for the second. We do not sustain this view. McDonald was superintendent of the lumber company, and a director in the railway company, while Horr was secretary of the lumber company, a director in the railway company, and a stockholder of both companies. While McDonald signed the complaint in the first case and Horr in the second, they both participated in the arrest of plaintiff under each warrant. The two corporations were controlled by the same people, and their interest in preserving intact the obstructions made by the booms in the Rainy river and the piers in the Big Fork were [238] the same. The two acts of plaintiff and Bartlett were part of the same scheme, done on the same day, and were directed against the interests that, in the opinion of their employers, were obstructing the passage of logs down the Big Fork and Rainy rivers to the mills below. We are unable to say that the lumber company was not instrumental in instituting the prosecution for blowing out the pier above the bridge, or that the railway company had nothing to do with the prosecution for blowing out the booms.

3. This brings us to the merits. The first question here is whether there was probable cause for believing plaintiff guilty of a crime in dynamiting the pocket boom at the mouth of the Rainy river. There is no fair doubt that he and Bartlett actually did the act, but was it a criminal act, or did defendants have probable cause for so believing?

Of course if plaintiff was actually guilty, that is a complete defense to an action for malicious prosecution. This is elementary, as is also the proposition that, even if not guilty, probable cause to believe him guilty is a good defense. The law of probable cause and malice in these cases has been so often stated by this court, and so recently, that it would be useless repetition to again state it. Hanowitz v. Great Northern R. Co. 122 Minn. 241, 142 N. W. 196; Lammers v. Mason, 123 Minn. 204, 143 N. W. 359; Cox v. Lauritsen, 126 Minn. 128, 147 N. W. 1093. In this particular case the inquiry is really as to the guilt or innocence of plaintiff, as, if he committed no crime, there can hardly be a question on the evidence that McDonald and Horr had no reason to believe that he did. They knew the obstructions that existed at the mouth of the Big Fork and above the bridge. McDonald knew well that the Shevlin interests were engaged in a drive of the Big Fork, and that they claimed that the booms and piers in the river obstructed the drive. It is quite clear that he anticipated trouble. We have referred to the testimony that on the day before the boom was blown out McDonald begged the superintendent of the drive not to blow out the boom and promised to do something to give relief. It is also in evidence that the center pier above the bridge had been blown out in a prior year, that its existence in the river had been a bone [239] of contention between the Shevlin and Backus interests, and that Mr. Backus had promised to permit the free passage of logs down the Big Fork, but instead, that the pier had been replaced.

The question therefore on this branch of the case is whether plaintiff violated any criminal statute when he assisted in blowing out the boom or the pier. According to the complaint and warrant upon which plaintiff and Bartlett were arrested for blowing out the boom, the crime charged was that they did "wilfully, wrongfully and maliciously destroy and injure a boom in the Rainy river forming the boundary of said state and the Province of Ontario, which boom was placed there by authority of law, and was then and there the property of the . . . Watrous Island Boom Company . . . contrary to the form of the statute in such case made and provided." In the minutes of the committing magistrate, this is called the crime of "malicious mischief," but we think it is immaterial whether the prosecution was under G. S. 1913, § 8932, making it a felony to "wilfully or maliciously displace, remove, injure or destroy any pier, boom or dam *lawfully erected or maintained* upon, in or across any water within the state or any stream forming a boundary thereof," or whether it was under G. S. 1913, § 5479, which makes it a felony to wilfully and maliciously break or otherwise destroy or injure any boom, *unless such boom materially obstructs the navigation* of any navigable stream. Whether or not the Watrous Island Co. had legal authority to maintain booms and sorting works in the Rainy river, and the record does not show such authority, it seems plain that they had no right to unreasonably obstruct the passage of logs of other owners down the Big Fork river. Page v. Mille Lacs Lumber Co. 53 Minn. 492, 55 N. W. 608, 1119. Defendants were not driving the Big Fork, and there seems no legal warrant or excuse for their interference with the drive of the rival interests. Conceding that the booms and works were rightfully in the Rainy river, through the authority of the Secretary of War, the Department of Public Works of the Dominion of Canada, and the International Joint Commission, facts which do not appear, the necessity for defendant's

purposes of the boom and boom sticks across the mouth of the Big Fork is not apparent, while the hindrance [240] to the free passage of the logs of other owners is clear. If defendants had any right in the river so oppressive to others, and so unusual, it was their duty to show it. Not only did the evidence abundantly justify the jury in finding that the boom destroyed by plaintiff "materially obstructed the navigation of a navigable stream," but it justifies us in saying that defendants had no right to obstruct the stream. It follows that plaintiff did not violate G. S. 1913, § 8932, because the boom he destroyed materially obstructed the navigation of the Big Fork and Rainy rivers, and that he did not violate section 5479, because the boom, being an unauthorized obstruction to navigation, was not lawfully maintained.

This is equally true as to the pier above the bridge. The jury was justified in finding that an obstruction to navigation. Defendants had no right to maintain it there. It follows that plaintiff committed no crime when he and Bartlett removed these obstructions to the drive they were making. As before stated, this is equivalent under the facts here to saying that there was not probable cause for prosecuting them on either charge, as McDonald and Horr knew the facts and must be presumed to have known the law. The trial court left the question of probable cause to the jury, under instructions that were eminently correct and fair. This certainly was not error prejudicial to defendants. Considering the evidence as if heard in this court, we have no hesitation in saying that the determination below was correct.

It can make no difference on this issue that the complaint of McDonald was against John Doe and Richard Roe. The bearing of this fact on the question of malice will be noted later, but it is not important on the question of probable cause when the evidence shows, as we think it does, that McDonald had no probable cause to believe that a crime had been committed by anybody. Boyd v. Mendenhall, 53 Minn. 274, 55 N. W. 45.

The rights to maintain booms and sorting works in Rainy river have been involved in several cases in this court. International Boom Co. v. Rainy Lake River Boom Corp. 97 Minn. 513, 107 N. W. 735, 104 Minn. 152, 116 N. W. 221, 112 Minn. 104, 127 N. W. 382; Namakan Lumber Co. v. Rainy Lake River Boom Corp. 115 [241] Minn. 296, 132 N. W. 259. See also Minnesota Canal, etc. Co. v. Koochiching Co. 97 Minn. 429, 107 N. W. 405, 5 L.R.A.(N.S.) 638, 7 Ann. Cas. 1182; Minnesota Canal, etc. Co. v. Pratt, 101 Minn. 197, 112 N. W. 395, 11 L.R.A.(N.S.) 105; Minnesota Canal, etc. Co. v. Fall Lake Boom Co. 127 Minn. 23, 148 N. W. 561.

4. Whether there was malice in instituting the prosecutions was, we think, a question for the jury. In the first place they were at liberty to find malice from want of probable cause. In addition to this, there is ample evidence to justify a finding that McDonald and Horr were concerned only with maintaining the obstructions in the river, and had no thought of the rights of others. The facts attending the two arrests, the injunctions, the circumstances surrounding the commitment of the prisoners, the second arrest made after plaintiff had been released on bail on a charge known to defendants before, are items bearing on the question of good faith or malice. We have alluded before to the evidence that McDonald directed the sheriff to arrest plaintiff and Bartlett under the John Doe warrant. This is denied, but the jury was justified in believing it. This evidence destroys the force of the claim that McDonald, because he did not know who had committed the act, cannot be charged with malice.

5. The defense of advice of counsel applies only to the second cause of action. We do not notice the claim of plaintiff that the lawyer who gave the advice had not been admitted to practice in this state, further than to say that we assume that this defense may be good when the counsel, as in this case, is an attorney in good standing in another state. But this issue was carefully submitted to the jury and the decision was that this defense had not been made out. The evidence of a full good-faith statement of the facts to the attorney was not conclusive, as it seldom is in these cases. We must hold that it sustains the verdict.

6. We have concluded that the amount of the verdict is not so plainly excessive as to warrant our interference. It is rather difficult for us to see any great actual damages to plaintiff from these prosecutions. But in this kind of an action it is rare that the compensatory damages can be measured with any accuracy. Plaintiff's [242] reputation may have suffered more than we think, and the degradation may have been injurious to his standing in the community and to his feelings. For the first prosecution the jury awarded $750 as compensatory damages, and $500 as exemplary damages. They gave $2,000 on the second cause of action. The rule announced in Chapman v. Dodd, 10 Minn. 350, is the law to-day in these cases: "The jury are the proper judges of the amount of damages to be allowed in actions of this kind, and unless there is something in the case showing that the jury in their determination were influenced by passion, prejudice or some improper motive, the court will not interfere to disturb the verdict." The trial court approved the amount and we decline to interfere.

7. We have examined carefully the alleged errors in the rulings on evidence, in the charge, and in the refusal to give requested instructions. We find nothing to warrant a reversal. The rulings on the admission of evidence were correct, or at least not prejudicial, the charge given clearly and correctly covered the issues in the case, and gave either in the words of the requests or in substance all of the instructions asked by defendants that were good law.

8. The claim of misconduct of counsel was not made in the motion for a new trial, and cannot be urged here. Pink v. Metropolitan Milk Co. 129 Minn. 353, 152 N. W. 725.

The order and judgment appealed from are affirmed.

NOTE.

The reported case holds that a verdict for $3250 in an action for malicious prosecution is not excessive where it appears that there were made against the plaintiff charges of the commission of statutory offenses consisting in the dynamiting of a pocket boom and of a pier. The cases on the subject of what is an excessive or inadequate verdict in an action for malicious prosecution are collated in the note to Bursow v. Doerr, reported ante, this volume, at page 248.

McINTOSH ET AL.

v.

WALES.

Wyoming Supreme Court—June 20, 1913.

21 Wyo. 397; 134 Pac. 274.

Malicious Prosecution — Elements of Tort.

The elements necessary to support an action for malicious prosecution are the institution of proceedings without probable cause, with malice, that they have terminated in plaintiff's favor, and that she suffered damage therefrom.

[See 26 Am. St. Rep. 128.]

Termination of Prosecution — Dismissal.

Where defendants furnished information under oath, on which a justice of the peace issued a warrant charging plaintiff with cattle theft, the fact that the prosecuting attorney thereafter caused the proceedings to be dismissed without submitting any evidence does not render such dismissal any the less a termination of the proceedings in plaintiff's favor.

[See Ann. Cas. 1915D 1164.]

Defenses — Insufficiency of Original Complaint.

Where plaintiff was actually arrested and held under a warrant issued on a sworn complaint, the fact that such complaint did not in fact state a criminal offense is no defense to an action for malicious prosecution.

[See 12 Ann. Cas. 1021.]

Want of Probable Cause — Termination of Original Prosecution as Evidence.

Dismissal of a criminal prosecution against plaintiff at the instance of the prosecuting attorney without submitting any evidence, while admissible to show a termination of the proceedings in plaintiff's favor, is not evidence of malice or want of probable cause.

[See 3 Ann. Cas. 112; 18 Id. 65; 21 Id. 1047.]

Distinction between Malice and Want of Probable Cause.

Probable cause, to justify a criminal prosecution, may exist, though the prosecuting witness acts maliciously, if the charge is true, and, even if not true, if the witness acts honestly and in good faith, basing his charge on facts which he in good faith believes to be true, and which afterward turn out to be false; "probable cause" not depending on the guilt or innocence of accused in fact, but on the honest and reasonable belief of the party commencing the prosecution.

[See generally 21 Ann. Cas. 756.]

Same.

Malice may be inferred from a showing of want of probable cause, but want of probable cause will not be inferred from proof of malice alone.

Proof of Want of Probable Cause Insufficient.

Where, in an action for malicious prosecution, one of defendants was plaintiff's uncle, and had known her in the community from childhood, and there was other proof that plaintiff's reputation for honesty and integrity was good, and she testified that she never had stolen any calves from defendants or either of them, as alleged, the proof is sufficient to raise a prima facie case of want of probable cause.

Evidence of Damages — Injury to Credit.

Where, in an action for malicious prosecution, plaintiff claimed that her credit was injured at a bank by her arrest, such injury can be proved by plaintiff as well as by the bank officials.

Defendant's Wealth.

Where, in an action for malicious prosecution, plaintiff claims that defendant, J., had instituted the prosecution in order that he might get plaintiff and her husband out of the country, and so have freer access to a range for his cattle, and plaintiff prays to recover punitive damages, evidence of J.'s financial condition and the extent of his land holdings, etc., is admissible.

[See Ann. Cas. 1913D 563.]

Recovery of Attorney's Fee.

In a prosecution for malicious prosecution, plaintiff may recover a reasonable attorney's fee for services rendered in procuring her release from the prosecution.

Recovery Not Excessive.

Where plaintiff and her husband were arrested for larceny, and the hearing was held in a country precinct 80 miles from the county seat where plaintiffs' attorneys resided, and without railroad connection, an attorney's fee of $250 will not be held unreasonable, though there is no testimony to show its reasonableness.

[See note at end of this case.]

Punitive Damages.

Where there is evidence of actual malice in an action for malicious prosecution, plaintiff may recover punitive damages.

Appeal — Joint Assignment of Error — Ruling Correct as to One.

Where, in an action against several defendants for malicious prosecution, all of them join in an assignment of error, authorizing an allowance of punitive damages, and it appears that actual malice warranting a recovery of punitive damages have been proved as against one of the defendants, the assignment is unsustainable.

Error to District Court, Fremont county: CARPENTER, Judge.

Action for malicious prosecution. Nancy Wales, plaintiff, and P. J. McIntosh et al., defendants. Judgment for plaintiff. Defendants bring error. The facts are stated in the opinion. AFFIRMED.

M. C. Brown and *Ben Sheldon* for plaintiffs in error.

Stone & Winslow for defendant in error.

[405] SCOTT, C. J.—The defendant in error as plaintiff recovered judgment for the sum of $500 and costs against the plaintiffs in error as defendants in the District Court of Fremont County for an alleged malicious prosecution. A motion to set aside the verdict and for a new trial was filed, which the court overruled and the defendants bring error.

There are two separate counts contained in the petition, but the court withdrew the first and the issue as finally submitted to the jury was upon the second count and the evidence directed thereto. It is alleged in the second count as follows:

"And the said plaintiff, Nancy Wales, further complains of the said named defendants, P. J. McIntosh, Jesse Johnson, and Donald A. Beaton, and each of them, and for her second cause of action alleges and says that on the 30th day of May, A. D. 1910, the said named defendants, and each of them, wrongfully, falsely and maliciously, and without probable cause, before Emil Jamerman, a Justice of the Peace in and for the County of Fremont in the State of Wyoming, charged that this plaintiff did, on the 22nd day of May, A. D. 1910, and during the last five years prior to said date, in Rongis, in the County of Fremont, State of Wyoming, unlawfully, maliciously and feloniously steal unbranded calves from the range adjacent to the ranch of this plaintiff and adjacent to the ranches of John Wales and William Johnson, and thereupon prayed and demanded that this plaintiff be forthwith apprehended on the said charge of the said defendants, and said defendants caused this plaintiff to be wrongfully arrested, detained and deprived of her liberty and be brought before the said magistrate and be arraigned to plead to the said charge on the said 30th day of May, A. D. 1910.

"That this plaintiff was so wrongfully detained, imprisoned and deprived of her liberty for the space of about five hours and was compelled to leave her home and work and be taken under arrest a distance of about eight miles and [406] to be taken before the magistrate in the presence of a large number of the friends and neighbors of this plaintiff and accompanied by the defendants as complainants, and the said defendants there caused and procured the said magistrate to order this plaintiff to give bond and this plaintiff was then and there compelled to give bond in the sum of $500.00 for her further appearance before the said magistrate at a time fixed by him, and in default of said bond that she stand committed to the County Jail in said County of Fremont, that plaintiff was afterwards required without her consent and against her will to be and appear before the said magistrate on the 15th day of June, A. D. 1910, and again on the 25th of June, A. D. 1910, to answer said charge.

"That afterwards, on the 25th day of June, A. D. 1910, the said cause came on for hearing before Emil Jamerman, Justice of the Peace, and John Dillon, County and Prosecuting Attorney for the said County of Fremont, appeared on behalf of the prosecution of said cause, and after inquiry and investigation, said John Dillon as such Prosecuting Attorney failed and refused to prosecute said charge and the said charge against this plaintiff was without the consent of the said named defendants herein dismissed and this plaintiff was acquitted of said charge and then released from custody, and said prosecution is now ended and wholly determined.

"And this plaintiff says that she was not guilty of the charge made by said defendants and was never before charged with being guilty of any crime whatever, and up to that

time had always been esteemed a good and worthy citizen and respected by all her neighbors and acquaintances in the community where she resides, and the plaintiff further says that the charge was made by the defendants against this plaintiff and said arrest and detention of said plaintiff was made and caused without any probable cause to suspect the plaintiff guilty of the charge as made by said defendants, or of stealing any livestock whatever; and the said [407] arrest of plaintiff was malicious and was caused and procured by the said defendants in furtherance of their expressed intention and design to prosecute and litigate this plaintiff and involve this plaintiff in expensive litigation until she would be forced to abandon her residence and home in the community and dispose of her holdings to the said defendants and those interested with them, to the end that the said defendants for their benefit and profit might have the fences removed from around the lands of this plaintiff and of her husband and permit the said defendants easy access to the open territory and stock range upon the mountain and beyond the holdings of this plaintiff and of her said husband.

"That by reason of the wrongful acts of the said defendants this plaintiff has been greatly injured and damaged in her credit, standing and reputation in the community where she resides, and has been brought into public scandal, infamy and disgrace, and has suffered great anxiety, mental anguish, great humiliation, shame and disgrace, and has been obliged to expend the sum of $100.00 in procuring her discharge from said prosecution and imprisonment.

"That the whole of said proceedings by said defendants against this plaintiff were unlawful, wanton and malicious, and have greatly distressed and humiliated plaintiff and injured her in her good name and reputation, and by reason of the premises plaintiff has been damaged in the sum of Ten Thousand Dollars.

"Wherefore, Plaintiff prays judgment against the said named defendants, P. J. McIntosh, Jesse Johnson, and Donald A. Beaton, and each of them, in the sum of Ten Thousand Dollars, and that Plaintiff may have and recover such other further or different relief as may be just and equitable."

The defendants answered jointly, denying generally and specifically each allegation of the petition, alleged that defendants stated the facts to the justice in good faith, for good cause believed to exist as a duty to the public and for [408] no other reason whatsoever, and denied that they brought about her arrest without probable cause. The plaintiff filed her reply putting in issue the new matter alleged in the answer.

It is assigned as error (1) that the court erred in overruling defendant's demurrer to the second cause of action on the ground that it failed to state facts sufficient to constitute a cause of action; (2) that the court erred in refusing plaintiff's motion at the close of the testimony to instruct the jury to find for the defendants; and (3) that the evidence does not support the verdict and that the court erred in not granting the motion for a new trial. The essential elements necessary to be shown by the petition and evidence in an action for malicious prosecution are (1) the institution of the proceedings; (2) without probable cause; (3) with malice; (4) that the proceedings have terminated and in plaintiff's favor; (5) damage to plaintiff. (19 Am. & Eng. Enc. of L. (2d ed.) 653, 13 Enc. Pl. & Pr. 427.) In the case here the evidence tends to support the allegations of the second cause of action contained in the petition and if sufficient to entitle the plaintiff to recover what we have to say on that question would be determinative of the sufficiency of the petition. It is urged that proof to the effect that the information which failed to charge plaintiff with the commission of an offense under the laws of this state and the warrant issued thereon were written and prepared by the justice of the peace, the defendants doing nothing more than signing the information and taking no part in the arrest or any other or further action after signing the information is not sufficient to maintain the action. It is also contended that the dismissal of the criminal proceeding by the justice of the peace at the request of the prosecuting attorney without submitting any evidence was not a termination of that proceeding in plaintiff's favor.

The argument as to the first contention is based upon a false premise. The evidence is undisputed that the defendants applied to the justice, furnished him the information, [409] and subscribed to the complaint as the basis of the prosecution, but that they each made oath to the same. Whatever facts were stated in the information were supported by their oaths, and furthermore the jury had a right to presume that they made oath thereto to secure the issuance of the warrant upon which the plaintiff was arrested. The machinery of the law was intended to be put in motion and to all intents and purposes in so far as these defendants are concerned it was, and if their acts were malicious and without probable cause then they could not escape liability in a civil action for damages on the ground that they took no further part in the prosecution or proceedings after signing the complaint.

It may be conceded, as eminent counsel for the defendants claim, that the complaint or

information filed before the justice of the peace and upon which the warrant issued did not state a criminal offense, and it may further be conceded that the courts are at variance as to whether an action for malicious prosecution upon such a complaint can be maintained. The great weight of authority supports the right and we think the better reasoning sustains that view. In Scattgen v. Holnback, 149 Ill. 646, 36 N. E. 969, it is said: "It is not necessary, in order to sustain an action for malicious prosecution, that the affidavit on which the prosecution was based properly charged the offense." It may be said that that court had reference to a defective description of an offense, but not where there is no offense charged in the criminal complaint. In Bell v. Keepers, 37 Kan. 64, 14 Pac. 542, it was held that "in an action for malicious prosecution it is no defense that the complaint upon which the warrant of arrest was issued did not state a criminal offense." The reasons for so holding were pointedly stated in that case as follows: "A warrant was issued substantially following the complaint, and it is now claimed that this complaint does not state a criminal offense, and for this reason plaintiff insists that no action for malicious prosecution can be maintained for the arrest made thereunder. [410] This is no longer an unsettled question in this state. This court has repeatedly held that it could not protect a complainant after procuring a warrant to issue on his complaint, to say in answer to a charge of malicious prosecution, that the complaint charges no crime. A void process procured through malice, and without probable cause, is even more reprehensible, if possible, than if it charged a criminal offense. The wrong is not in the charge alone, but more in the object and purposes to be gained, and the intention and motive in procuring the complaint and arrest. The contents of the complaint, when maliciously made, without good cause, are of but little consequence and can give no protection."

In Mask v. Rawls, 57 Miss. 270, it is said that "trespass on the case lies for malicious prosecution, although the affidavit which was the commencement of the prosecution fails to charge an offense known to the law." To the same effect is Lueck v. Hisler, 87 Wis. 644, 58 N. W. 1101. In the note to Ross v. Hixon, 46 Kan. 550, 26 Pac. 955, 12 L.R.A. 760, 26 Am. St. Rep. 123, 129, Mr. Freeman says: "It may be that the charge as made does not constitute a public offense, or that for some other reason no conviction can be had under it, or through constituting some offense, it does not justify the proceeding taken or warrant issued by the magistrate, and cannot for that reason result in a conviction. In each of the instances supposed, there cannot, if the law is properly construed and applied, be any conviction, and on that account it has been insisted that there is no prosecution such as will sustain an action, though it is shown to be malicious and without probable cause. As we shall hereafter show, it is necessary, to maintain an action for malicious prosecution, that the defendant was guilty of malice and acted without probable cause in preferring the charge which he made. If both of these elements are shown to have been present, it is not material that the prosecutor, in the complaint which he made, did not state facts sufficient to constitute a crime, or that some irregularity of proceeding [411] after the complaint was preferred made the arrest under it improper and unauthorized. Hence, if the charge as made was false, malicious, and without probable cause, the person prosecuted cannot be deprived of compensation for such injury as may have resulted to him from it, by proving that the affidavit or complaint was defective in not charging a criminal offense or that the proceedings were otherwise irregular."

As already stated there are courts which have held contrary to the views of Mr. Freeman as above expressed, and to those courts from whose opinions the above quotations are taken, but we think the better reasoning is with the courts which hold that the action can be maintained even though the affidavit upon which the warrant was issued failed to charge a criminal offense, provided the other necessary elements are present in order to make out a case. Indeed to hold otherwise, would, we think, be contrary to the policy of the law, for it would deprive the injured party of a remedy for what is usually a great wrong and far-reaching in its effect.

It is urged that the dismissal of the case by the justice of the peace at the request of the County and Prosecuting Attorney without the introduction of any evidence was not such a termination of the criminal proceeding as to enable plaintiff to maintain her action. In Graves v. Scott, 104 Va. 372, 51 S. E. 821, 2 L.R.A.(N.S.) 927, 113 Am. St. Rep. 1043, 7 Ann. Cas. 480, the plaintiff was arrested on a warrant issued upon a criminal complaint charging him with obtaining goods under false pretenses. The complaint was dismissed at the time set for trial because of the failure of the prosecuting witness to be sworn and give evidence, and it was held that this was such a termination of the case as would support an action for malicious prosecution for the reason that the case had been disposed of in such a manner that any further action would have to be based upon a new complaint, or by proceedings *de novo*. The case is an interesting one both upon the law and facts

[412] and also because of the appended note as to when a criminal proceeding is terminated and the right to maintain an action for malicious prosecution accrues. In the case before us the dismissal of the proceedings at the request of the prosecuting attorney put an end to any further proceedings against the plaintiff upon the criminal complaint theretofore filed. Further proceedings upon that record could not be revived and were at an end, though such dismissal would be no bar to a prosecution for the same offense charged in a new and different complaint. That being so we are of the opinion that the better reasoning and great weight of authority sustains the view that the dismissal of the proceedings by the justice was a sufficient termination thereof to enable plaintiff to maintain the action. (19 Am. & Eng. Enc. of L. 681; 26 Cyc. 58.)

It was necessary in order to maintain her action to prove that the defendants acted maliciously and without probable cause. It is urged that proof of the dismissal of the proceeding at the request of the county and prosecuting attorney without submitting any evidence to the justice before whom the proceedings were had was not proof of want of probable cause. As already stated, the evidence of dismissal was admissible as showing a termination of the proceeding, and while theoretically the county and prosecuting attorney was acting officially for all citizens, including the defendants, yet he was not their attorney. He was acting in his official capacity and for the state and not under employment or direction of the defendants. Had they employed a private attorney to draw up the complaint and file it, and such attorney had asked the dismissal, his action would be construed as their act, through their authorized agent, but we are unable to understand how the act of the public prosecutor in procuring the dismissal of the criminal complaint and proceedings which were not instituted by him or upon his advice without having produced any evidence in support of the charge would be evidence against the defendants upon the issue of want of probable cause in commencing [413] the action. It should be remembered that the issue before the justice was not the guilt or innocence of the accused, but whether or not a crime had been committed, and if so, whether there was probable cause to believe that accused committed such crime. Probable cause to justify a criminal prosecution may exist even though the prosecuting witness acts maliciously if the charge be true, and even if the charge be not true, yet if such witness acts honestly and in good faith, basing his charge upon facts which he in good faith believes to be true, but which afterward turns out to be false, he cannot be said to have acted without probable cause. It was said in Philpot v. Lucas, 101 Ia. 478, 70 N. W. 625, that "Probable cause does not depend upon the guilt or innocence of the accused party in fact, but upon the honest and reasonable belief of the party commencing the prosecution." If the rule were otherwise every good citizen would expose himself to an action for malicious prosecution when in performing his duty to the state to assist in the suppression of crime he in good faith subscribed to an affidavit as the basis of a criminal prosecution or proceeding, if such prosecution or proceeding be dismissed without a judicial determination upon a hearing from the evidence upon the question of probable cause. In the case here the proceeding was dismissed by the magistrate, not upon a finding from the evidence upon that question, but upon motion of the prosecuting attorney. The distinction we think is clear between this and like cases and those where the question has been judicially determined by the committing magistrate from evidence before him. He could make no affirmative finding on that question in the absence of any evidence before him. The question is important as bearing on the sufficiency of plaintiff's evidence to make out a *prima facie* case. The burden was upon her to prove that the prosecution was without probable cause, and we are constrained to believe from an examination of the adjudicated cases that upon the facts here a dismissal of a criminal complaint in the absence of a waiver of a hearing before [414] the committing magistrate upon motion of the prosecuting attorney, without any evidence having been submitted to such magistrate, is not a judicial determination by such magistrate of the existence of probable cause, nor evidence thereof in an action for malicious prosecution subsequently instituted and based upon such proceedings. In Davis v. McMillan, 142 Mich. 391, 105 N. W. 862, 3 L.R.A.(N.S.) 928, 113 Am. St. Rep. 585, 7 Ann. Cas. 854, which was an action for malicious prosecution, the court say: "We think it can safely be said that the weight of authority denies the rule that discharge by a magistrate upon the request of the prosecuting attorney is *prima facie* evidence of want of probable cause." The holding of the court in that case and as stated therein accords with the great weight of authority. Such a dismissal can not be said to be predicated upon the sufficiency or insufficiency of the evidence, but upon the expressed desire of the state speaking through its prosecutor to abandon the case without introducing evidence and invoking a finding thereon.

The finding of the jury, the verdict being general, was a finding upon all the issues in favor of the plaintiff. It is contended that the verdict, unless the dismissal upon re-

quest of the State be deemed competent, finds no support in the evidence that the prosecution was commenced without probable cause. In this connection it may be said to be the established rule that malice may be inferred from a showing of want of probable cause, but that want of probable cause will not be inferred from proof of malice alone. (19 Cyc. 680.) Both elements are necessary to be shown to warrant a recovery in this kind of an action, although malice may be inferred from a showing of want of probable cause. As to what evidence is admissible as showing want of probable cause, it is said in 19 Cyc. at page 698: "It has been held that the plaintiff is entitled to introduce proof of his general good character or reputation on the question of want of probable cause for the prosecution, or the defendant's [415] belief in his guilt, and this as a part of the plaintiff's affirmative case and not merely in rebuttal of an attack upon his character by evidence on the part of the defense. But of course it should be shown in addition that the defendant had knowledge of the plaintiff's good reputation." In the case here the plaintiff testified that she never stole any calves from defendants, or either of them, off the range, or from any other place, and was permitted to and did introduce as a part of her affirmative case proof of her general good character or reputation for honesty and integrity upon the question of want probable cause for the prosecution. A number of witnesses who had known her for many years in the vicinity in which she lived testified that her general reputation in that respect was good. The defendant Johnson was her uncle, and he had known her in that community from childhood, she being the daughter of his deceased brother. Such acquaintance, and for the length of time shown, we think raises a presumption of his knowledge of her reputation. (Woodworth v. Mills, 61 Wis. 44, 20 N. W. 728, 50 Am. Rep. 135.) In Olson v. Tvete, 46 Minn. 225, 48 N. Y. 914, it appeared in evidence that a search warrant was issued and served at the instigation of the defendant, the premises searched and the property alleged to have been stolen and there concealed was not found and the officer who served the warrant so returned and it was further in evidence that the plaintiff had long borne a good reputation for honesty and integrity. At the close of a plaintiff's case the court dismissed the action and upon appeal the judgment was reversed. The court say: "We think the proof made a *prima facie* case of want of probable cause, from which malice might be inferred, and that it was error to take the case from the jury. It is true that the burden of proof was upon the plaintiff to show that the proceeding was instituted without probable cause and with malice. But in such a case it must often be that the only proof possible from the plaintiff is of a negative character, and in reference to matters peculiarly within the knowledge of the defendant; [416] and hence less satisfactory and convincing proof is required of the plaintiff to shift the burden on the defendant than would otherwise be necessary. The proof of a thorough search, and the official return to the warrant that the property was not found in the plaintiff's possession, was *prima facie* proof that the property was not there, and that the plaintiff was not guilty of concealing stolen goods, or of larceny. Proof of the plaintiff's good reputation for many years in the community went to show an improbability that the plaintiff would be guilty of the conduct implied in this charge, and of this the defendant may be presumed to have been aware. (McIntire v. Levering, 148 Mass. 546, 20 N. E. 191, 2 L.R.A. 517, 12 Am. St. Rep. 594; Israel v. Brooks, 23 Ill. 575; Blizzard v. Hayes, 46 Ind. 166, 15 Am. Rep. 291; Woodworth v. Mills, 61 Wis. 44, 20 N. W. 728, 50 Am. Rep. 135.) Such proof having been made, it was fairly incumbent on the defendant to show affirmatively, as he could easily do, the facts, if any existed, justifying a belief on his part in the truth of the allegations upon which the search-warrant was procured."

This decision is one of the many cited in Cyc. supporting the text above quoted, and while it is the general rule as therein stated, that one may not introduce evidence as to his general reputation for honesty and integrity before his character has been assailed in that respect, yet the courts generally have made an exception in this class of cases, as the burden is upon the plaintiff to negative the existence of probable cause, or to show want of good faith on the part of the defendant in the prosecution of the criminal charge. Such a rule is founded injustice and gives the defendant no shelter from his wrongful act, purposely and maliciously accomplished. The defendant is then given the fullest opportunity to show affirmatively in his defense that he acted in good faith or upon probable cause. The defendants in order to show that they acted upon probable cause is instigating the criminal proceeding, introduced evidence of different witnesses tending to show that plaintiff's reputation [417] for honesty and integrity was bad, and also evidence of different circumstances of which defendants had information prior to the prosecution. It may be conceded that such information standing alone, if honestly believed, would be sufficient to raise in the mind of a reasonably prudent man a well-grounded suspicion that plaintiff had at various times prior to the prosecution been steal-

ing unbranded calves of these defendants and others from the range, and have constituted probable cause for the prosecution. The evidence upon the latter questions was denied by the plaintiff in her testimony. There was, therefore, a direct conflict in the evidence as to the existence or non-existence of the facts relied upon to constitute probable cause and this question was properly one for the jury. We are of the opinion that the second cause of action as pleaded stated facts sufficient to constitute a cause of action in favor of the plaintiff and against these defendants, and that there was sufficient evidence to make out a *prima facie* case to go to the jury at the close of the testimony, and that the verdict is supported by the evidence.

The plaintiff testified that one of the effects of her being publicly arrested and taken before the justice of the peace was that it injured her credit at the First National Bank of Rawlins. The following inquiry was then made, viz.: "Just tell the jury the facts as to how it was hurt, and what the transaction was." The question was objected to as follows: "We object to this; the best testimony as to whether credit was refused would be that the bank itself." The court overruled the objection and such ruling is here assigned as error. It will be observed that the objection goes to the manner of proof and not to the competency of the evidence. If competent at all, and it was not objected to on that ground, the fact could be proved by her as well as by the bank officials, for it would be a fact within her knowledge. We express no opinion as to whether this evidence was competent for that question was not presented to nor ruled upon by the trial court in the first instance and consequently can not be raised for the first time in this court.

[418] Plaintiff testified as to the land holdings and stock business of Jesse Johnson, one of the defendants. Afterwards the defendants made and the court overruled the following motion, viz.: "I move the court to withdraw from the jury all statements made by this witness as to the business of Jesse Johnson, the amount of land he holds, and any business matters that have been stated by the witness, on the ground that it does not tend to prove any issue in the case; is not relevant to any issue in the case; that the value of a man's property or the extent of his holdings is not a fact to be considered in sustaining the petition in the case. I make the motion at this time because it is sometimes held that we waive our right if we proceed with the cross-examination before making the motion." The action of the court in overruling this motion is here assigned as error. We do not think the motion was by its terms directed to anything other than evidence given by her with reference to the business and land holdings of defendant Jesse Johnson. The relative situation of his land and that occupied by plaintiff was illustrative and bore on the question of motive and interest to defendant Jesse Johnson to get her and her husband out of the country as alleged in the petition, so that he could have freer access to the range for his cattle; and further, as hereinafter stated, as punitive damages upon the facts shown were recoverable, evidence of defendant Johnson's financial condition was admissible. (19 Cyc. 700.)

Plaintiff was further permitted to testify over objection that she and her husband paid an attorney's fee to Stone & Winslow for attending the justice court in their behalf on June 25, 1910. While the ruling was not assigned as error the sufficiency of such evidence to warrant a recovery of attorney's fee may be considered under the general assignment (1) that there was error in the assessment of the amount of recovery, the same being too large. The right to recover a reasonable attorney's fee in a case of this kind is well established. Evidence that such a fee amounting to $250 had been paid by herself and her husband was proper [419] to go to the jury as an item of expense if reasonable in amount, and it appearing that the hearing was held in a country precinct a distance of eighty miles from the county seat where her attorneys resided, without railroad connection, we think it may be assumed that the amount was reasonable although its reasonableness was not shown by testimony. (Waufle v. McLellan, 51 Wis. 484, 8 N. W. 300.) There was evidence of actual malice on the part of the defendant Johnson which would warrant the recovery of punitive damages as against him (Cosgriff v. Miller, 10 Wyo. 190, 68 Pac. 206, 98 Am. St. Rep. 997), and joint error being here assigned if the judgment be good as to him it is good as to all the defendants, and upon the record, the other defendants having joined with him in the assignments of error, they are not in a position to complain. (North Platte Milling, etc. Co. v. Price, 4 Wyo. 293, 306, 33 Pac. 664; Hogan v. Peterson, 8 Wyo. 549–564, 59 Pac. 162; Greenawalt v. Natrona Imp. Co. 16 Wyo. 226, 92 Pac. 1008; Shedd Ditch Co. v. Peterson, 18 Wyo. 402, 108 Pac. 72.) The verdict was for $500, which we think reasonable upon the issues being found in favor of the plaintiff. There is no claim in her evidence that she paid or obligated herself to pay all of the attorney's fee. Her evidence was that "we" (meaning herself and her husband) "paid $250 to Stone & Winslow for their services." The jury had a right to award her a reasonable attorney's fee necessarily incurred or paid for her defense in the

prosecution, whether paid by herself (19 Am. & Eng. Enc. of L. 703) or some one else for her (Krug v. Ward, 77 Ill. 603) and upon the record the verdict being general we cannot say in making up their verdict what amount the jury allowed her for attorney's fee. The amount of expenditure alleged in the petition to procure her discharge from the criminal prosecution was $100, but the jury may have allowed her less than that amount for attorney's fee and the balance of the verdict be for other items of expenditure and damage, which were alleged and in proof and also exemplary damages.

[420] Errors are assigned as to the admission and exclusion of evidence over defendant's objection. We deem it unnecessary to discuss these questions in detail, as they are not so discussed in plaintiff in error's brief, nor are their prejudicial character, if any, pointed out in their brief. The attention of the court is called to these alleged errors in a general way, casting upon this court the burden of searching the record to ascertain if error was committed, a burden which rests in the first instance with the plaintiffs in error. We have, however, examined the record and discover no prejudicial error as to the rulings of the court in that respect.

Errors are assigned to the court's refusal to give certain instructions requested by defendants and to the giving of certain instructions over their objections. We have examined these questions and find that the refusal to give the instructions requested and the giving of the instructions objected to are complained of because contrary to the contention of defendants that there was a failure in proof to sustain the action. As we have already held that the proof was sufficient to make out a *prima facie* case sufficient to go to the jury we deem it unnecessary to discuss these questions further than to say that, in our opinion, the instructions fairly presented the law of the case to the jury. The judgment will be affirmed.

Affirmed.

Potter, J., and Beard, J., concur.

NOTE.

Where there is evidence of actual malice in charging a woman with stealing cattle, five hundred dollars is not, the reported case holds, an excessive verdict in an action for the malicious prosecution. For a discussion of what is an excessive or inadequate verdict in an action for malicious prosecution, see the note to Bursow v. Doerr, reported ante, this volume, at page 248.

CUTSINGER

v.

CITY OF ATLANTA ET AL.

Georgia Supreme Court—October 3, 1914.

142 Ga. 555; 83 S. E. 263.

1. Licenses — Occupations Subject to — Hotel or Lodging House.

The business of keeping a hotel, lodging house, or rooming house is one so far affecting the public health, morals, or welfare that it is competent for the legislature, in the exercise of the police power, to authorize municipal authorities to require persons conducting such a business to obtain a license.

[See note at end of this case.]

2. Same.

The conferring by the legislature, in general terms, of the power to grant or refuse licenses of the character mentioned in the preceding headnote, in the discretion of the municipal council, without prescribing the bounds of such discretion, will not ipso facto render the grant of power void, as being an effort to confer arbitrary power, but will be treated as authorizing the municipal authorities to exercise a reasonable discretion in the grant or refusal of such licenses.

[See note at end of this case.]

3. Same.

After the thirteenth section of the act approved August 19, 1912 (Acts 1912, pp. 562, 573), had provided that the keepers of hotels, lodging houses, and rooming houses in Atlanta should apply to the mayor and general council for a license, which might be granted or refused in the discretion of that body, if by the further provision that "their action in the premises shall be final" it was intended to confer arbitrary power upon the mayor and general council, by declaring that even for an arbitrary or capricious use of such power there could be no resort to the courts for relief, it would be violative of the fourteenth amendment to the Constitution of the United States, and also of the clause of the state constitution which declares that no person shall be deprived of life, liberty, or property except by due process of law. If it be construed to mean that the municipal officers can use a reasonable administrative discretion in regard to the granting or refusing of the licenses mentioned (which are licenses under the police power), and that their action shall be final in the sense that no appeal lies to any other body or court for the purpose of reviewing their action, the provision will not be violative of the clauses of the state and federal constitutions mentioned.

Applying the rule that where an act of the legislature is susceptible of two constructions, under one of which it would be unconstitutional and under the other constitutional the latter is to be preferred, the construction last hypothetically stated in the

preceding headnote will be placed upon the clause of the act under consideration.

[See note at end of this case.]

4. Injunctions — Against Criminal Prosecution.

While as a general rule a court of equity (or one exercising equitable jurisdiction) will not enjoin a proceeding before a recorder of a city, instituted for the purpose of punishing the violation of a penal ordinance, yet in certain cases a court having equitable jurisdiction may intervene to protect property or property rights from irreparable damage by wrongful conduct of municipal officers, although repeated prosecutions in the recorder's court, or threats thereof, may be used as a means of consummating the wrong.

[See 10 Ann. Cas. 760; 19 Ann. Cas. 459; 35 Am. St. Rep. 677.]

5. Petition Held Sufficient.

The allegations of the petition in this case were sufficient to withstand a general demurrer, which admits the facts alleged; and it was error to sustain the demurrer and dismiss the petition.

(Syllabus by court.)

Error to Superior Court, Fulton county: PENDLETON, Judge.

Action for injunction. Helen Cutsinger, plaintiff, and City of Atlanta et al., defendants. Judgment for defendants. Plaintiff brings error. REVERSED.

[556] Helen Cutsinger, who alleged that she was a citizen of the United States, and of Fulton County, Georgia, filed her petition against the City of Atlanta, the chief of police of that city, the recorder, the mayor, aldermen, and members of council, alleging in substance as follows: On and prior to October 7, 1912, the City of Atlanta [557] had permitted a rooming house or lodging house to be conducted at number 115½ Decatur street. Being physically unable, at that time, to conduct it herself, she employed one Harding to conduct it for her. On the date mentioned Harding applied for and obtained a license to operate the business and conduct it for the plaintiff until she was able to take charge of it for herself. Early in January, 1913, having resumed the conduct of her own business, the plaintiff applied to the city clerk for a license, tendering him $6.25, the amount due for one quarter, in accordance with the tax ordinance of the city. The clerk declined to receive the tender or issue the license, stating that she would be compelled to file a written application therefor. While not conceding the right of the mayor and general council to pass upon such applications as to a business of this character, which was a useful and lawful business, or to deny her a license, yet, in order to be in harmony with the defendants if possible, she filed an application for a license to operate a lodging house for men only at the place named. Pending this application she was advised by the chief of police, through her counsel, that "no case would be made against her" for conducting the business until after the application had been passed on, and then only if it should be refused. She accordingly proceeded with the conduct of her business until a few days before the filing of the petition, when she was notified by a police officer, who stated that he was acting under the direction of the chief of police, that her application had been refused and she would be compelled to close, and would not be allowed longer to operate her lodging house, that if she attempted to do so she would be charged with the commission of a violation of the municipal ordinance of the city against doing business without a license, that her employees would be arrested, and that she would be carried before the recorder and tried and punished by fine or imprisonment, and that other cases would be instituted against her from day to day until she closed her lodging house. During all the time in which she has been engaged in the business she has been conducting an orderly place, catering to white male trade only, and strictly complying with the laws of the State and the ordinances of the city, and seeking to earn an honest living by the proper pursuit of a legitimate line of business. She has been persecuted, harassed, humiliated, and damaged by the chief of police by continually "flooding" her place of business with police officers and plain-clothes [558] detectives, without any search-warrant or other legal authority. By reason of these continued raids the business and patronage of her lodging house has been considerably and materially diminished, and her revenue has been much reduced. She caters to a class of "country white male trade," and the poorer classes of white men, many of whom pay only twenty-five cents for a bed or cot. Such men are easily intimidated and alarmed at police raids and illegal searches, and they either leave or do not return to her place of business; and she is also humiliated, disgraced, and mortified by such continued illegal and unwarranted action on the part of the police officers under the direction of the chief. She has had as many as ten policemen in her house at one time. A squad of "plain-clothes men" will suddenly enter her house; the officer in command will take charge of the front door, the only place of exit, and will send his force from room to room searching the house. These police squads have taken possession of her lodging-house register and have gone from room to room and asked the occupant of each bed or room his name, waking them if necessary, and seeing if they

were in the proper room, and if their names corresponded to the names on the register. To the best of her knowledge and belief, at none of these times has there been any warrant of any kind or character for such action. She has protested against these raids, but has been advised that she had better submit without comment and allow such persecution, as it would be necessary for her to have the permission of the chief of police in order to procure her license, and that he would oppose her obtaining the license if she did not submit. She filed her application for the license on January 3, 1913, but the council did not refuse it until March 6 following. During that period her place of business has been under constant police surveillance and subject to frequent raids, and at no time has there been a single complaint of any violation of any City, State, or Federal law by her or any occupant or patron of her lodging house. Although she has conducted her business at the place mentioned for months, and in absolute compliance with the law and all police regulations, and has submitted to the police raids mentioned, nevertheless she is advised by a representative of the chief of police that she must close her place of business and yield her right to make an honest living, "unless she meekly submits to the will of the chief of police, J. L. Beavers, who, petitioner believes, [559] is responsible for the denial of her application for license by the mayor and general council of the City of Atlanta." Her lodging house is located near to the police headquarters and within two blocks of the call-office of the police department. On March 23, 1913, the chief of police went in person to her place of business, took charge of her register, instructed an officer who accompanied him to take the names of men who had registered therein, ordered her to allow no one else to register, and to close up her house, and served her with a copy of charges to appear at the recorder's court for violating the rooming-house ordinance. A case was docketed against her, which is now pending. "Your petitioner is advised and believes that said chief Beavers, although he knew that he had used every endeavor possible to find your petitioner violating some law or ordinance, and had failed, yet wrote the police committee of the general council," to whom this application was referred, and recommended to them that the application of petitioner be denied." The action of the chief of police in making this case and in threatening to make other cases from day to day is based upon an amendment to the charter of the City of Atlanta, enacted by the legislature in 1912 (Acts 1912, p. 573, sec. 13), which reads as follows: "That the Mayor and General Council be and they are hereby authorized to regulate hotels, lodging houses, dance halls, rooming houses, and similar places, and they are further authorized and empowered, by ordinance, to require all person or persons owning or operating such hotels, houses, or halls to apply for a license for the operation of same, and such license may be granted or refused in the discretion of the Mayor and General Council, and their action in the premises shall be final. For a violation of such ordinance or the operation without a license granted, as herein provided, any person or persons adjudged guilty thereof in the Recorder's Court shall be subject to a sentence to pay a fine of not exceeding five hundred dollars, or to work on the public works of the city for not exceeding thirty days, either or both in the discretion of the recorder." Under this the mayor and general council adopted an ordinance the first section of which reads as follows: "Be it ordained by the Mayor and General Council, that any person, firm, or corporation desiring to open or operate a hotel, lodging house, dance hall, rooming house, or similar place shall, before opening or operating such house or place, file a petition for a license, addressed to the Mayor and General Council. If said license is granted, then the City Clerk is authorized [560] to issue and receipt for a business license for such house; but if such license is refused, then such business license shall not be issued, and it shall be unlawful for any person, firm, or corporation to operate such house or place." The second section imposed a penalty upon "any person, firm, or corporation owning or operating any hotel, lodging house, dance hall, rooming house, or similar place, without being granted a license therefor by action of the mayor and general council." Under this ordinance the defendants are now seeking to close her house, stop her business, and involve her in a multiplicity of criminal prosecutions. The application which she filed was referred to a subcommittee of the general council, known as the police committee, though without notice to her. She is advised and believes that the chief of police, "by private official letter" to the chairman of the police committee, without notice to her, undertook to prejudice the chairman and other members of the police committee, and through their report the mayor and general council, against granting the application of the plaintiff, and, to the best of her knowledge and belief, undertook privately in personal conversation to influence the members of the police committee to make an adverse report upon her application, without giving her the privilege of knowing the reasons assigned for such action on the part of the committee, or an opportunity to be heard upon them and to reply thereto. At one time her counsel happened to be present at a meeting of the committee and spoke to them

in relation to her application, but she is not advised as to whether the committee had passed adversely upon it at that time or not. At that particular meeting the chief of police was present, but offered no public objection to the application, and no notice was given or opportunity for her or her counsel to answer any objection at that meeting. The entry upon the application shows an adverse report by the committee, dated January 20, but it was not passed upon by the council until March 6. She is advised and believes "that said police committee met in secret session about half an hour before the meeting of the general council, and, upon the information, not under oath, of the said chief Beavers, adversed or passed unfavorably upon the petition or application." The action of the general council followed the recommendation of the police committee, without any investigation on the part of the general council; and under the ordinances of the city she would not have been permitted to be present and to have discussed the merits of [561] her application, and the only method of reaching the city government was through its police committee. She is a woman of mature years, now past middle life. On account of her great weight (two hundred and eighty-six pounds), and on account of her having undergone several surgical operations, she is unable to do manual labor or remain long standing upon her feet. She is familiar with the lodging-house business, and it is practically the only business with which she is familiar and which she is physically able to carry on. She has built up a sufficient business to support herself reasonably, and the name and good will of her business at the location mentioned is an intangible but valuable asset. There can be no reason for any denial of a license to operate a lodging house at this location. The place is located on the second floor of a building, with a stairway entrance to the street, and affects and injures no one; but the location is one where a hotel or lodging house of a cheap character is needed to accommodate a class of poor laboring men working in that locality, and men from the country who have come to town for the sale of their goods and the purchase of merchandise. The business was in operation at the time of the passage of the ordinance above mentioned, and the plaintiff had made large investments in furniture, in papering and painting of walls and woodwork, in carpeting of floors, halls, and steps, and in the installation of gas and electric fixtures and equipment. Practically all of this expenditure will be lost if she is compelled to cease doing business, as well as the name and good will of her business. "Petitioner is advised and believes, that, owing to the antagonistic attitude of the chief of police toward her, she will not be allowed by the mayor and general council of the City of Atlanta to have any license to operate a lodging house at any other point available to her in the City of Atlanta, and that her rights and her experience in the lodging-house business are forever lost to her, as far as being able to use the same in the City of Atlanta." The patronage of a lodging house is affected by so many considerations that it is impossible to estimate the damages which would result from a destruction of the business. To press the proceeding in the recorder's court would expose her to humiliation, embarrassment, expense, and possibly to temporary confinement, should it become necessary for her to have the action of the recorder reviewed by certiorari; and this might continue for months before the case could be heard. The [562] plaintiff, having no real estate, and not being allowed to continue her business, could in all probability procure no bondsman, but would be compelled to languish in jail, and in the meantime her property, her business, would be destroyed; and even though she should ultimately win, the victory would be an empty one, and she would be discharged from jail without a vestige of property left. The multiplicity of the threatened quasi criminal cases would bankrupt her in the payment of counsel fees and other expenses. "Such action amounts to nothing more or less than absolute confiscation of the property of petitioner and her utter ruin financially and in a general business in the said City of Atlanta." She will therefore be irreparably damaged, and have no legal remedy or redress. "Your petitioner shows that said criminal prosecutions now threatened to be continued are obviously nothing but a circuitous method of depriving petitioner of her property and property rights in said business, and are nothing more than an attempt by the municipal authorities of the city of Atlanta, under the pretense of seeking the good of the portion of society entrusted to their supervision, are in fact attacking the vested rights, property rights, of your petitioner." The threatened repeated prosecutions, under color of municipal ordinances, if not prevented, will practically destroy her vested property rights; "and said criminal prosecutions are a wresting of the criminal side of the law from its legitimate purpose, in matters to which they do not properly apply, and are used merely as a cloak to hide the effort to prevent petitioner from engaging in her useful and lawful occupation." The act of the legislature above quoted is unconstitutional as being in violation of the fourteenth amendment of the constitution of the United States (Civil Code (1910) § 6700), in that it attempts to vest in the mayor and general council the arbi-

trary right to abridge the privilege of the plaintiff to do business, and thus denies to her due process of law and the equal protection of the laws. The ordinance is unconstitutional for the same reason; as is also the action of the mayor and council. The act of the legislature and the ordinance based upon it are also in conflict with the provision of the State constitution which declares that "Protection to person and property is the paramount duty of government, and shall be impartial and complete" (Civil Code (1910) § 6358). They also violate the provision of the State constitution that "no person shall be deprived [563] of life, liberty, or property, except by due process of law" (Civil Code (1910) § 6359). The act of the legislature and the ordinance are unreasonable, and seek to invest the mayor and general council with arbitrary power, with no rule or regulation to guide it, or to prescribe terms for its exercise, or put any limitation upon it, and without prescribing any terms or conditions upon which a permit or license can be obtained, or allowing any appeal from the decision of the general council, or prescribing any rules of procedure. Even if discretion is lodged in the municipal authorities, it has not been fairly administered, but has been arbitrarily and grossly abused, amounting to a discrimination against her and an oppression of her as a citizen, and it is being capriciously exercised in an arbitrary manner. In fact the abuse of discretion amounts to a failure to exercise municipal discretion, and to an arbitrary undertaking to exercise unlimited power, without recognition of the rights of the plaintiff, and without giving to her an opportunity to be heard in her own behalf. She is willing to submit to any reasonable regulations that do not amount to a prohibition or a confiscation of her property and civil rights, and she offers to submit to any reasonable rule and regulations the court may impose. She prays that an injunction be granted to prevent the defendants from interfering with the operation of her business, or proceeding with quasi criminal prosecutions against her.

The defendants demurred to the petition, on the grounds that no cause of action was set out; that it undertook to enjoin a criminal prosecution by equitable procedure; that it appeared that the city was authorized to grant or reject the application for license and that it had rejected the same, and no injunction should be granted against the further prosecution of the plaintiff; and that no grounds of equitable interference are set out. The demurrer was sustained, and the plaintiff excepted.

William M. Smith for plaintiff in error.

James L. Mayson and *William D. Ellis Jr.*, for defendants in error.

LUMPKIN, J. (*after stating the facts.*)—1. The police power to grant licenses by which one person can conduct a certain business and another cannot, or by which a business may be conducted at a certain place and not at another, necessarily involves some discrimination for the public welfare. Such licenses have been broadly grouped into four classes: (1) [564] Where promiscuous or indiscriminate freedom to act will disturb public order or interfere with the common use of public places. A type of this class is in regard to permitting the use of the public streets for parades or processions, which may impede public traffic or cause serious collisions if all be allowed the privilege; or the granting of permission to a street railway to lay its tracks in a street, which does not require the same permission to be granted to all other similar companies to the exclusion or injury of the general public. (2) Where an occupation is offensive to comfort or endangers public safety, it may be so restricted as to locality or the manner in which it shall be conducted as not to cause injury. Chemical factories and slaughter-houses furnish examples of this class. (3) In some occupations the lack of personal qualifications or competence causes the danger to the public, and requires to be guarded against. Doctors, dentists, and plumbers are illustrations of this class. (4) Some occupations are held to be such as to involve danger to the public peace, order, or morality, and therefore to be proper subjects for regulation or licensing so as to prevent injury to the public. This is sometimes done by regulating the manner in which the business shall be conducted, and sometimes by means of a license law, so as to see that the business does not fall into the hands of persons of such evil character or reputation as might cause harm to the public. Pawnbrokers and junkdealers illustrate this class, where the grant of a license to a lawbreaker or thief might open the door to making the place one for the reception of stolen goods. In the first two classes the basis of distinction is objective, that is, based on the nature or character of the business; in the last two they two relate rather to the person. Freund on Police Power, § 639. This classification, and these illustrations, not declared to be exhaustive, refer to the police power generally, and not particularly to that granted to towns or cities.

In the growth of municipalities, where the population becomes dense, and new relations and new dangers arise, for the common welfare and protection more extensive power to cope with the new situation becomes necessary,—power to prohibit certain evils and to meet certain dangers. Hence arises the grant of power to regulate, prohibit, or license certain businesses within the municipal

limits (in the proper sense of the word "license," as distinguished from the imposition of a license tax for revenue). The authorities [565] recognize some businesses as proper subjects of police licenses, but doubt or deny whether others can be declared to be illegal unless permitted. We need not discuss the difference. Suffice it to say that the keeping of lodging houses or rooming houses is a business so far affecting the public interest as to authorize the grant of legislative authority for its regulation and licensing, in order to see that such houses do not become places for the practice of vice or crime or menaces to the public welfare. Munn v. Illinois, 94 U. S. 113, 129, 24 U. S. (L. ed.) 77, 85; Bostwick v. State, 47 Ark. 126, 14 S. W. 476.

2. In regard to conferring upon city officials a discretionary power to grant or refuse licenses in those cases which are proper subjects of police licenses, there are two lines of authority. One holds that there should be some uniform rule of action prescribed, governing the exercise of the discretion; and that the conference of a general discretion without this, at least as to occupations not subject to be wholly prohibited, is invalid as conferring arbitrary power. Montgomery v. West, 149 Ala. 311, 42 So. 1000, 123 Am. St. Rep. 33, 9 L.R.A.(N.S.) 659, 13 Ann. Cas. 651. The other class of decisions holds, that, as it is sometimes difficult for the legislature in advance to prescribe all of the conditions upon which the license shall be issued, it is competent for them to confer upon a municipal council the power in general terms, it not being presumed that this is intended to confer power to act arbitrarily, or that the authorities will so act. 2 Dill. Mun. Corp. (5th ed.) § 598 and citations. In some of the cases the ordinances under consideration appear to have been adopted by virtue of what is called the general welfare clause in municipal charters, and the discussions were based on the general requirements that municipal ordinances must be reasonable. In others the direct question of the constitutionality of such ordinances or acts was passed upon.

Judge Dillon says: "Where the legislature, in terms, confers upon a municipal corporation the power to pass ordinances of a specific and defined character, if the power thus delegated be not in conflict with the constitution, an ordinance passed pursuant thereto cannot be impeached as invalid because it would have been regarded as unreasonable if it had been passed under the incidental power of the corporation, or under a grant of power general in its nature. In other words, what the legislature distinctly [566] says may be done cannot be set aside by the courts because they may deem it to be unreasonable or against sound policy. But where the power to legislate on a given subject is conferred, and the mode of its exercise is not prescribed, then the ordinance passed in pursuance thereof must be a reasonable exercise of the power, or it will be pronounced invalid." 2 Dill. Mun. Corp. (5th ed.) § 600. Some occupations are of such a character that they may be prohibited altogether. The one most frequently before the courts is that of selling intoxicating liquors. There are other occupations which cannot be prohibited, though they may be regulated. 2 Dill. Mun. Corp. (5th ed.) § 666. So there are certain things which a person has no inherent right to do, such as using the public streets or places for purposes other than their normal use. Some of the decisions, in upholding the grant of general discretionary powers, have taken note of the distinction between things which might be prohibited, and those which could not be. But others have not done so.

In the case at bar, the business of keeping lodging houses is a legitimate business. The power to regulate and license it is conferred by express legislation. The question therefore arises upon the validity of the act of the legislature. In Buffalo v. Hill, 79 App. Div. 402, 79 N. Y. S. 449, and ordinance was adopted under a charter power to regulate and license the sale of meats. The ordinance provided for the issuance of a license by the mayor upon direction of the council after a two-thirds vote. Spring, J., in delivering the opinion of the court, said: "The right of the individual to carry on any gainful, lawful occupation without municipal interference unless conducted in a manner detrimental to the public is guaranteed to him as one of his inalienable prerogatives. On the other hand, the right of the legislature, and by its delegation the municipality, to enact laws or ordinances for the preservation of the public health, even though individual loss results, is a necessary power incident to the government of cities. The maxim salus populi lex suprema est is more than a mere sentiment, and has become one of the props of the police power, an elastic mantle whose ample folds cover much municipal legislation which finds no other justification. Between these two clashing principles it is often difficult to determine when the action of the municipality transcends its powers and trangresses upon [567] the rights of the individual." And see Davis v. Massachusetts, 167 U. S. 43, 17 S. Ct. 731, 42 U. S. (L. ed.) 71 (an ordinance prohibiting the making of any public address upon public grounds, except in accordance with a permit from the mayor); Wilson v. Eureka City, 173 U. S. 32, 19 S. Ct. 317, 43 U. S. (L. ed.) 603 (a prohibition against moving

any frame building over any of the public streets or squares, without the written permission of the mayor); Gundling v. Chicago, 177 U. S. 183, 20 S. Ct. 633, 44 U. S. (L. ed.) 725 (an ordinance requiring certain things to be done in regard to an application for a license to sell cigarettes; and providing that "if the mayor shall be satisfied that the persons before mentioned are of good character and reputation and are suitable persons to be entrusted with the sale of cigarettes, he shall issue a license"); Reetz v. Michigan, 188 U. S. 505, 23 S. Ct. 390, 47 U. S. (L. ed.) 563 (an act providing for the determining by a board of registration of the qualification of persons seeking to practice medicine); Fischer v. St. Louis, 194 U. S. 361, 24 S. Ct. 673, 48 U. S. (L. ed.) 1018 (an ordinance prohibiting the maintaining of a dairy and cow stable in the city, without having first obtained permission so to do from the municipal assembly; which ordinance was authorized by a statute declaring that the mayor and assembly were authorized to prohibit the erection of cow stables and dairies within prescribed limits and to remove and regulate the same); New York v. Van De Carr, 199 U. S. 552, 26 S. Ct. 144, 50 U. S. (L. ed.) 305 (a section of the sanitary code of New York, providing that no milk should be received, held, or kept, either for sale or delivery, without a permit in writing from the board of health, and subject to the conditions thereof, and declaring a violation of the section to be a misdemeanor). From these decisions it will appear that the Supreme Court of the United States has held that the conferring of discretionary power to grant or refuse licenses, in occupations subject to police licenses, is not per se in violation of the fourteenth amendment to the constitution of the United States, on the ground that the exact terms on which the discretion is to be exercised are not prescribed. In some of these cases the occupation or act involved was such as might have been prohibited altogether, but that fact was not always relied on in the decisions. In the last case cited, however, the business under consideration was that of selling milk, which was not of the character mentioned. The decisions of that high court are binding as to the [568] Federal constitution; and we think that in the present instance it is better to follow them in construing the similar "due-process clause" of our State constitution. Whether it would not be fairer and more just, as far as practicable, to prescribe in advance the requisites for obtaining a license, so that they may be known to one desiring to apply, is not the question. We are here dealing with a direct act of the legislature and its constitutionality. Is this power an arbitrary and unlimited one? Arbitrary and absolute power in municipal officers over persons and property is not an American institution; nor is it consonant with constitutional government. In the celebrated case of Yick Wo v. Hopkins, 118 U. S. 356, 369, 6 S. Ct. 1064, 30 U. S. (L. ed.) 220, 226, Mr. Justice Matthews said: "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. . . . For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery." In times of peace and prosperity, when the struggles of the past against the evils arising from the abuse of power are partly forgotten, or recalled only as historic events, there is sometimes a restlessness and impatience with constitutional guaranties and restraints; but the framers of the constitution placed them in that instrument, not as mere glittering generalties, but as profound and lasting safeguards against the dangers of arbitrary power. Among them were the statements that "protection to person and property is the paramount duty of government, and shall be impartial and complete," that "no person shall be deprived of life, liberty, or property, except by due process of law;" and that "no person shall be deprived of the right to prosecute or defend his own cause in any of the courts of this State, in person, or by attorney, or both." Sometimes the discretion conferred in regard to granting licenses has been loosely called "judicial." If it were really so in the sense of being a judgment of an inferior judicatory, another section of our constitution would confer on the superior court the right to review the judgment by writ of [569] certiorari. Civil Code (1910) § 6514. We think that such was not the intent of the act under consideration, but to confer ministerial discretion.

For an arbitrary abuse of such power has the citizen no recourse in the courts? The authorities above cited do not sanction the conferring of arbitrary authority or its exercise. On the contrary, they sustain the general grant of discretionary power to issue licenses under the police power (certainly as to things which can not be prohibited, as the sale of whiskey can be), on the ground that it does not seek to confer arbitrary power, and that if the power is sought to be arbitrarily and wrongfully exercised, the courts will apply a remedy. In Buffalo v.

Hill, 79 App. Div. 402, 79 N. Y. S. 449, supra, it was said: "It will be observed that in some of the cases adverted to, the test upon which the discretion of the mayor was to be exercised was defined in the act or ordinance creating the authority, while in others there was no limitation placed upon it. It does not follow that the omission to prescribe the bounds of the authority carries the conclusion that it is vested arbitrarily in the official or body to whom it is committed. The difficulty of defining, in a given case, what standard shall be applied in the disposition of the petition, and the fact that the conservation of the public health is the basis for the existence of the authority, indicate the reason for the absence of the definition, but it is no warrant for the inference that the power is an arbitrary one to be exercised in ruthless disregard of the rights of any class or individual." And again (p. 409): "While it is unnecessary for us to pass upon the question of the power of the court to review a flagrant abuse of discretion by the common council, suffice it to say that if a case of that kind were properly presented the court would doubtless not lack the ability to find some effective way to reach it for condemnation." In Yick Wo v. Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 30 U. S. (L. ed.) 220, supra, Mr. Justice Matthews said (p. 373): "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution." This, he said, was true, whatever may have been the intent of the ordinances as adopted. In other words, [570] the ruling seems to be that the ordinance itself might be unconstitutional, or that there might be an unconstitutional administration of it by the public authorities, so as to deprive a person of constitutional rights; and in either event relief could be afforded.

In Reetz v. Michigan, 188 U. S. 505, 23 S. Ct. 390, 47 U. S. (L. ed.) 563, supra, while the expression was used by Mr. Justice Brewer that the court knew of no provision of the Federal constitution which forbade a State from granting to a tribunal, whether called a court or a board of registration, the final determination of a legal question, if nothing in the State constitution prevented so doing, it is evident that he merely meant that there need be no provision in the statute for an appeal or certiorari, or like method of review, to satisfy the requirements of the constitution of the United States. He clearly did not mean that arbitrary and capricious action violative of constitutional rights was beyond remedy by the courts; for he distinctly said (p. 508-9): "But while the statute makes in terms no provision for a review of the proceedings of the board, yet it is not true that such proceedings are beyond investigation in the courts."

In People v. Vandecarr, 81 App. Div. 128, 80 N. Y. S. 1108, a section of the sanitary code of New York prohibiting the keeping or selling of milk without a permit from the board of health was attacked as unconstitutional, on the ground that it conferred arbitrary power on the board. The Appellate Division of the Supreme Court of New York held that it was not intended to confer such absolute and arbitrary power in the selection of those who might and those who should not sell milk, but only the power to exercise a reasonable discretion. In the opinion it was said: "Such regulations, however, should be uniform, and the board should not act arbitrarily; and if this section of the sanitary code vested in them arbitrary power to license one dealer, and refuse a license to another similarly situated, undoubtedly it would be invalid: Yick Wo v. Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 30 U. S. (L. ed.) 220 [supra]; Gundling v. Chicago, 177 U. S. 183, 20 S. Ct. 633, 44 U. S. (L. ed.) 725 [supra]; Noel v. People, 187 Ill. 587, 58 N. E. 616, 52 L.R.A. 287, 79 Am. St. Rep. 238; Dunham v. Rochester, 5 Cow. (N. Y.) 462; Brooklyn v. Breslin, 57 N. Y. 591; but such was not its purpose, nor is that its fair construction." The decision of the Appellate Division was affirmed by the Court of Appeals of New York, 175 N. Y. 440, 67 N. E. 913, [571] 108 Am. St. Rep. 781. On review in the Supreme Court of the United States, Mr. Justice Day said (199 U. S. 552, 559, supra): "The Court of Appeals, affirming the decision of the Appellate Division, did not speak with equal emphasis upon this point, but it leaves no doubt that it sustained the statute as authorizing the exercise of a reasonable discretion." Accepting this construction of the State statute by the highest court of the State, the Supreme Court of the United States held that the statute was not unconstitutional: but Mr. Justice Day added (p. 562): "There is no presumption that the power will be arbitrarily exercised, and when it is shown to be thus exercised against the individual, under sanction of State authority, this court has not hesitated to interfere for his protection, when the case has come before it in such manner as to authorize the interference of a Federal court."

In re Jacobs, 98 N. Y. 98, 50 Am. St. Rep. 636, the Court of Appeals of New York discussed at some length the police power of the State. In the opinion Earl, J., said (p. 108): "The limit of the power can not be

accurately defined, and the courts have not been able or willing definitely to circumscribe it. But the power, however broad and extensive, is not above the constitution. When it speaks, its voice must be heeded. It furnishes the supreme law, the guide for the conduct of legislators, judges, and private persons; and in so far as it imposes restraints, the police power must be exercised in subordination thereto." The constitution of this State not only recognizes the necessary power of the courts to declare laws in violation of the State or Federal constitution void (a power already known to exist), but expressly declares it to be their duty to hold such acts void. Civil Code (1910) § 6392.

From what has been said, it will be seen that the legislature had power to confer on the municipal council authority to exercise a reasonable discretion in granting or refusing a license to one desiring to keep a lodging house or rooming house; and that the conference of this power in general terms did not ipso facto render the act void; but that the legislature could not constitutionally confer upon the council arbitrary or unlimited power, or prevent the citizen wronged by an arbitrary or capricious exercise of the power, not based on a legitimate use of discretion, from appealing to the courts to protect him from oppression.

3. The act under consideration declares: "That the Mayor and [572] General Council be and they are hereby authorized to regulate hotels, lodging houses, dance halls, rooming houses, and similar places, and they are further authorized and empowered, by ordinance, to require all person or persons owning or operating such hotels, houses, or halls to apply for a license for the operation of same, and such license may be granted or refused in the discretion of the Mayor and General Council, and their action in the premises shall be final." No attack is made upon the provision in regard to regulation. We have also ruled as to the power to exercise discretion in granting a license. It remains to refer to the clause "and their action in the premises shall be final." It will be noticed that the terms of the act include not only lodging houses and rooming houses, but also hotels. If the mayor and council have the power arbitrarily and capriciously to refuse a license to a lodging-house keeper, with no mode of relief, they can do the same thing as to the proprietor of a hotel. If this be so, then the continued operation of every hotel in the City of Atlanta can be made to depend upon the favor or caprice of municipal officers. One may be preferred over another without cause, and there is no remedy, if their "action is final" in the sense that there can be no resort to the courts for relief. It is no answer to this to say that the present officials may be of such character that they will not be likely to abuse the power, or that there is no presumption that this will be done. This clause is susceptible of two constructions,—one, that the grant of discretionary power, with the added provision that the action of the mayor and general council shall be final, operated to confer arbitrary power and to prevent resort to the courts for relief even in cases of arbitrary or capricious action; the other, that the section gave to the officials a reasonable administrative discretion, and provided that their action should be final in the sense that no appeal to any other body or to a court would lie to review their action without attempting to debar the applicant from seeking the aid of the courts under proper circumstances. From what has already been said it will be seen that, under the former construction, the provision would be unconstitutional; under the latter it would not be. Under the rule that in such cases the construction which will uphold the constitutionality of the law is rather to be preferred, we adopt the second construction hypothetically stated above.

[573] 4, 5. We next come to consider the exercise of equitable jurisdiction and whether a case for it is made by the allegations of the plaintiff. It has been announced a number of times by this court that generally equity will not interfere with the administration of the criminal law as such; and that the rule is ordinarily applicable to proceedings to punish for the violation of municipal ordinances which are quasi criminal in character. But it has also been frequently added that there are exceptional cases; and it has been pointed out that there is some difference between the State and a municipality as to immunity from suits. The subject has been discussed in Georgia R. etc. Co. v. Oakland City, 129 Ga. 576, 59 S. E. 296; and Shellman v. Saxon, 134 Ga. 29, 67 S. E. 438, 27 L.R.A.(N.S.) 452. In the latter case it was said: "In some cases, involving special facts, injunction may be granted against the unlawful enforcement of municipal ordinances, although they are penal in character, for the protection of property or property rights or franchises against irreparable injury; as, for instance, where, under the guise of enforcing a penal ordinance, it is manifest that prosecutions and arrests are threatened for the sole purpose of unlawfully taking or destroying property, or preventing the exercise of a franchise granted by the State."

In Peginis v. Atlanta, 132 Ga. 302, 63 S. E. 857, 35 L.R.A.(N.S.) 716, the power was claimed by the municipal authorities of Atlanta to revoke any business tax license, and an illegal effort was made by an ex parte resolution to declare that the business of the

keeper of a lunch counter or restaurant (who also sold cigarettes, cigars, tobacco, and "soda-fount drinks") had been maintained in such manner as to become a nuisance, to revoke the license of the proprietor, and to compel him to cease business. He showed that irreparable damage would result from closing his business, or preventing him from continuing to conduct it, by means of continued prosecutions or otherwise; and he prayed for an injunction. This court held that he was entitled to it. In the opinion Mr. Justice Atkinson said: "If such power were conceded to the city authorities, they might refuse to allow any dry goods merchant, hardware dealer, hotel proprietor, confectioner, butcher, or baker to conduct his business, by simply refusing to issue him a business license, or might destroy his business at will, after its establishment, [574] by revoking his license. No such arbitrary power is conferred on municipal councils or municipal authorities." It is true that the license there involved was one to raise a license tax, under the revenue power; but the decision throws light on two points: (1) that hotels were mentioned along with other useful and lawful occupations; and (2) it held that, under the facts of the case, equity would restrain an arbitrary and unlawful effort to stop the business of the plaintiff and to work irreparable damage to him, although repeated prosecutions might be used as one means of accomplishing that end. It moreover shows how far-reaching a power has been contended for by municipal authorities.

If we look to the allegations of the present petition, they set out, in substance, oppressive conduct on the part of the chief of police, strenuous and continuous efforts to find some violation of a law or ordinance on the part of the plaintiff or her lodgers, followed by failure, the perfectly proper conduct by her of the business in compliance with all laws and ordinances, and at a place unobjectionable for the purpose, the submission by her to imposition lest the chief should in revenge prevent her from obtaining a license, which was held up for more than two months, his efforts by letter and personally to prejudice the members of the committee of council, followed by arbitrary action on their part, based on no reason or investigation, and amounting to no real exercise of discretion. She further set out facts showing threats to stop her from doing business, by constant prosecutions in the recorder's court, and danger of irreparable injury to property rights. The allegations are set out in the report of facts.

The municipal authorities did not see fit to deny the allegations of the plaintiff, but relied on a demurrer, which for the present purpose admits the truth of the allegations. They may or may not appear to be true on a hearing. But we think they set out a case sufficient to withstand a general demurrer. This does not, of course, mean that an injunction will be granted if the allegations of facts are not true. If it appears that they are untrue, and that the municipal officers have exercised a reasonable discretion in the matter, the court should not enjoin them. Nor will the court take the place of the council as a licensing authority. But that is a very different thing from contending that, conceding the facts alleged, a court of equity can afford no relief against the irreparable [575] damage which it is claimed will result from an arbitrary or capricious abuse of the power.

Counsel for the city relied strongly on the case of Starnes v. Atlanta, 139 Ga. 531, 77 S. E. 381. It was decided on a headnote; and the facts set out show no reference to any constitutional point, but a ruling that the facts of that case placed it within the general rule rather than within the exceptions thereto. It was argued, however, that the various constitutional points raised in the present case were also raised by the record in that case, and that the dismissal of the petition on demurrer was affirmed by this court. An examination of the record on file will show several material differences in the two cases. No effort to declare the decision of the municipal officers to be final was then before the court. The kinds of business involved were different; in the Starnes case it was the conduct of a sanitarium for the treatment of persons afflicted with nervous troubles and of those addicted to the liquor and drug habit; here it is the conduct of a lodging or rooming house for the accommodation of persons desiring a place to sleep. There it was charged in general terms that the municipal council acted arbitrarily in refusing a license. The general allegations on that subject were specially demurred to as vague and as failing to allege any facts in support of the general statement, and the defendant prayed that the paragraph of the petition on that subject be stricken. There was also an allegation that the ordinance was arbitrarily enforced. This likewise was specially demurred to, and it was prayed that this paragraph be stricken. The same is true as to the allegations seeking to set up irreparable injury, and those in regard to threats of numerous prosecutions. All of the grounds of the demurrer were sustained by the trial court. Such being the case, the ruling made by this court rested on different facts from those here involved. In the case now before us there was no special demurrer for want of sufficient specifications on any particular subject; but the defend-

ant relied on a general demurrer. There is a difference in what will withstand a general demurrer and what will be good as against a special demurrer. Seaboard Air-Line Ry. v. Pierce, 120 Ga. 230, 47 S. E. 581. Here also there were much more specific allegations of fact on the subjects mentioned, of arbitrary action and irreparable damage to property rights.

[576] Of the case of Neall v. Atlanta, 141 Ga. 31, 80 S. E. 284, it need only be said that Neall did not apply for any license, and therefore no question of arbitrary conduct in refusing to grant one arose. He claimed that his business was not within the purview of the ordinance as to sanitariums, although it was alleged that he had already been found guilty in the recorder's court. These two cases, therefore, do not control the present one.

We do not discuss cases arising on applications for mandamus, as no such point is here involved. We may only remark that our Civil Code (1910) § 5441, does not accord with some of the decisions as to the limitations upon such a proceeding. No question is raised as to the propriety of making the recorder a party.

The petition sets out a cause of action sufficient to withstand a general demurrer, and dismissing it on such a demurrer was error.

Judgment reversed. All the Justices concur.

NOTE.

Validity of Statute or Ordinance Licensing or Regulating Hotels, Lodging or Rooming Houses, or the Like.

Scope of Note, 290.
General Rule, 290.
Application of Rule:
- In General, 291.
- Delegation of Licensing Power to Board or Commission, 292.
- Imposition of Several Taxes, 293.
- Requirement as to Fire Protection, 294.
- Regulation and Licensing of Soliciting, 294.

Limitation of Rule, 295.

Scope of Note.

This note discusses the validity of a statute or ordinance licensing or regulating hotels, lodging or rooming houses and other places of a similar character such as restaurants and boarding houses, but omits from consideration those regulations which concern the sale of intoxicants.

The cases treating of the validity and construction of a statute providing for the inspection of inns or hotels are collected in the note to Hubbell v. Higgins, Ann. Cas. 1912B 822.

General Rule.

A statute or ordinance providing for the reasonable regulation or licensing of hotels, lodging houses and rooming houses is a valid exercise of the police power. State v. Adams, 16 Ark. 497; Russellville v. White, 41 Ark. 485; Bostick v. State, 47 Ark. 126, 14 S. W. 476; State v. Sumpter, 53 Ark. 342, 13 S. W. 933; Helena v. Miller, 88 Ark. 263, 114 S. W. 237; Com. v. Muir, 180 Pa. St. 47, 36 Atl. 413; Hubbell v. Higgins, 148 Ia. 36, Ann. Cas. 1912B 822, 126 N. W. 914; Albert v. Brewer, 9 La. Ann. 64 (statute imposing tax on "coffee houses"); St. Louis v. Bircher, 76 Mo. 431, *affirming* 7 Mo. App. 169; State v. Freeman, 38 N. H. 426 (ordinance requiring restaurants to be closed after ten o'clock); Landon v. Gilbert, 86 N. J. L. 551, 91 Atl. 1035; Lewis v. Harris, 12 Ga. App. 305, 77 S. E. 108; State v. Snipes, 161 N. C. 242, 76 S. E. 243; St. Johnsbury v. Thompson, 59 Vt. 300, 9 Atl. 571, 59 Am. St. Rep. 731 (ordinance requiring victualing shops to be licensed). See also Munn v. Illinois, 94 U. S. 113, 24 U. S. (L. ed.) 77; Henry v. State, 26 Ark. 523; Ex p. Lemon, 143 Cal. 558, 77 Pac. 455, 65 L.R.A. 946; San Francisco v. Larsen, 165 Cal. 179, 131 Pac. 366; Louisville v. Kean, 18 B. Mon. (Ky.) 9; State v. Tibbetts, 36 Me. 553; State v. Fletcher, 5 N. H. 257; Smith v. Hightstown, 71 N. J. L. 276, 57 Atl. 901; Meehan v. Board of Excise Com'rs, 75 N. J. L. 557, 70 Atl. 363; Conover v. Atlantic City, 73 N. J. L. 596, 64 Atl. 146; State v. Stone, 6 Vt. 295; Bancroft v. Dumas, 21 Vt. 456. And see the cases cited infra in the subdivision *Application of Rule.*

In Bostick v. State, 47 Ark. 126, 14 S. W. 476, in sustaining a statute requiring every person keeping a public tavern to procure a license, it was said: "The innkeeper's occupation is a useful and necessary one, and if the statute we are considering imposes a tax, it is inconsistent with the constitution of 1868 and has not been re-enacted since that constitution ceased to be in force. The true answer to this objection, doubtless, is that it is not a tax at all, but a valid exercise of the police power of the state, and that the object aimed at is not the raising of revenue, but the regulation of the business. . . . Whenever the owner of property devotes it to a use in which the public has an interest, he, in effect, grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public for the common good. This gives by implication the power to regulate . . . inn-

keepers, etc." In Helena v. Miller, 88 Ark. 263, 114 S. W. 237, it was said of a statute empowering cities and towns to regulate hotels and other houses for public entertainment: "The power thus conferred upon municipalities to regulate includes the power to license as a means of regulating. . . . A fee may be charged for the license to defray the reasonable expense of issuing the same and the enforcement of such police inspection or superintendence may be lawfully exercised over the business." In State v. Snipes, 161 N. C. 242, 76 S. E. 243, it was said of a statute conferring on a municipality the power to impose a license tax on restaurants and an ordinance passed thereunder requiring a keeper of restaurants to be licensed: "The statute is constitutional, conferring ample power, and the ordinance, applying to all alike and providing for the privilege on payment of a reasonable fee, whether regarded as a police regulation or as an exercise of the taxing power, must be held valid."

Application of Rule.

In General.

A statute or ordinance is not unreasonable because it graduates the amount to be paid for a hotel or restaurant license according to the size of the establishment or the amount of business done. St. Louis v. Bircher, 7 Mo. App. 169, *affirmed* 76 Mo. 431; Cobb v. Durham County, 122 N. C. 307, 30 S. E. 338; Fulgum v. Nashville, 8 Lea (Tenn.) 635; Ex p. Lemon, 143 Cal. 558, 77 Pac. 455, 65 L.R.A. 946. See also Sights v. Yarnalls, 12 Grat. (Va.) 292. In Cobb v. Durham County, supra, the court in discussing the validity of a statute imposing a license tax on hotels the amount of which varied according to the gross receipts of the hotel, and which exempted certain hotels altogether from its provisions, said: "The irresistible inference from the imposition of taxes upon those hotels, etc., whose gross receipts amount to $1000 or more is that the hotels whose gross receipts are less than $1000 are exempt from the payment of the license tax; and in such exemption the plaintiff's counsel insisted that there was a discrimination between those engaged in the same business. But when the counsel came down to the real point in the case, that is, whether the exemption of hotels whose gross receipts did not amount to $1000 and the taxing of others whose receipts were more than $1000, he had to admit that the act exempted the former from the payment of the tax. On this point in our minds there is no doubt that the General Assembly may in its discretion impose either a specific tax or one graduated to the extent of the business done—the gross receipts derived from the business, . . . and that such tax is uniform and consistent with the constitution when it is equal on all persons in the same class. . . . But in our case the additional element enters of an exemption from the operation of the general rule of certain hotels whose yearly receipts are less than a certain amount. We have no decisions on the question, but we are of the opinion that the General Assembly has the right to make such an exemption, provided the exemption is not palpably against the spirit of the constitution." In St. Louis v. Bircher, 7 Mo. App. App. 169, *affirmed* 76 Mo. 431, it was said: "There is nothing unreasonable or oppressive in graduating the amount to be paid for a hotel license by the number of rooms which may be devoted to the accommodation of the public. Nor is there any intelligible reason why the number of rooms actually occupied should be proved in order to justify the license tax. The assessment is not upon the rooms, but upon the business of keeping a hotel." And in Fulgum v. Nashville, 8 Lea (Tenn.) 635, an ordinance imposing a license tax for hotels and exempting those having less than ten rooms from its operation was held to be valid, the court saying: "We do not see that exempting small hotels having less than ten rooms, renders this law objectionable. The city was not bound to tax all hotels the same amount for the privilege, regardless of the value of the privilege granted, as measured by the amount of business done, or capable of being done, by reason of the extent of accommodations possessed. . . . All hotels having ten or more rooms are taxed for the privilege, under this ordinance, according to rental value. The fact that others not belonging to the class are not taxed is no more a subject of complaint than if they were taxed at a much smaller sum, the tax being unequal in the latter cases, and the inequality being only increased by a total exemption." In Ex p. Lemon, 143 Cal. 558, 77 Pac. 455, 65 L.R.A. 946, it was said of the validity of an ordinance imposing a lower license tax on the keeper of a restaurant or boarding house where the meals were cooked and served by the proprietor or a member of his family than in other cases: "It is further urged by petitioner that the provision of the ordinance relating to restaurants, boarding-houses, and places where meals or board is furnished for pay, other than hotels and private boarding houses, is void, in that it unreasonably discriminates between such places where the meals are cooked and served by a proprietor or members of his family and those where the meals are not so cooked and served, the license-tax upon the former class being three dollars per month, and the tax upon the latter being eight dollars per

month. The method of classification here adopted is somewhat unique, but we cannot say that it was beyond the power of the council. The right to regulate the license-tax to be paid by persons engaged in the same occupation according to the amount of business done is well recognized; in fact, it is often required by charter provision or legislative enactment that the license-tax shall be proportionate to the amount of business. . . . It is clear that, as a general rule, a restaurant or boarding house where the meals are wholly cooked and served by the proprietor and members of his family must be a very small affair, hardly rising to the dignity of a 'restaurant' or 'boarding house.' Ordinarily, the accommodations and service at such a place must necessarily be very limited, and the amount of business done must consequently be very small. There may be exceptional cases, it is true, where by reason of the magnitude of the proprietor's family a very pretentious and prosperous business might be conducted without the aid of a single employee. We must, however, judge of the reasonableness of the ordinance in question by what we know of the general conditions, and not hold it void simply because in some exceptional case it may result in imposing unequal burdens. Absolute uniformity in the practical application of laws relating to taxation can never be attained, and to prohibit the enforcement of laws which fail to bring such absolute uniformity would be to abolish all taxation. The classification here adopted is probably no more likely to practically result in unfair discrimination between those similarly situated as to amount of business than a classification according to the number of rooms in a hotel or the number of employees in a laundry, and the ordinary effect of the enforcement of the provision as it stands will be, that those doing the greater amount of business will pay the higher tax fixed thereby." In St. Louis v. Siegrist, 46 Mo. 593, it appeared that the charter of a city gave it power to "license, tax and regulate. . . . taverns." The court in disposing of a contention that this did not give the city the power to require hotels to be licensed, said: "The distinction, as respects inn and tavern keepers, observed in England, under the common law, does not exist with us, and different names are applied to them, though 'hotel' and 'house' are usually and commonly used to denote a higher order of public houses than the ordinary tavern or inn. The legislature, in making use of the word 'tavern,' undoubtedly and manifestly intended to apply it to the whole class, and make it comprehend all hotels and houses that entertain and accommodate the public for compensation."

In White v. Mears, 44 Ore. 215, 74 Pac. 931, a statute providing that a "sailors' boarding house" should not be conducted at points situated on the Willamette and Columbia rivers without a license to be obtained from the "board of commissioners for licensing sailors' boarding houses" was held not to be invalid as a local law.

In Helena v. Miller, 88 Ark. 263, 114 S. W. 237, it was held that an ordinance imposing a license tax of $25 on hotels was reasonable, and the fact that the ordinance did not provide for inspection was held to be immaterial. It was also held that the testimony of members of the city council that the ordinance was passed for the purpose of raising revenue was immaterial and therefore inadmissible.

In San Francisco v. Larsen, 165 Cal. 179, 131 Pac. 366, it was held that a charter provision denying the right of a city to impose taxes on any person "who at any fixed place of business in the city and county, sells or manufactures goods, wares or merchandise" did not make invalid an ordinance imposing a license tax on owners or keepers of hotels, boarding houses, lodging houses, apartment houses, and restaurants, and on caterers.

Delegation of Licensing Power to Board or Commission.

A statute delegating to a board of commission the power to grant or refuse licenses to hotels, lodging houses, or boarding houses is valid unless the power delegated is arbitrary. White v. Mears, 44 Ore. 215, 74 Pac. 931. See also Matter of Tai Kee, 12 Hawaii 164: White v. Holman, 44 Ore. 180, 1 Ann. Cas. 843, 74 Pac. 933; Larsen v. Salt Lake City, 44 Utah 437, 141 Pac. 98. In White v. Mears, supra, it was held that a statute providing that a "sailors'" hotel or boarding house should not be conducted in certain territory without a license having been obtained from "the board of commissioners for licensing sailors' boarding houses," was not invalid as giving the board of commissioners arbitrary power in granting or refusing licenses. The court said: "It is maintained by plaintiffs' counsel that the act in question is void for the reason that it vests in the board arbitrary power to grant or deny applications for licenses, in violation of section 20 of article 1 of the organic law of the state. . . . The right of the board to reject any application they may deem advisable is the power vested in them to deny a license when, from the evidence submitted, they conclude that the applicant does not possess the necessary qualifications, or that his accommodations for keeping sailors are not suitable, or that he will not comply with the provisions of the act. If, however, the evidence satisfactorily shows that he possesses these qualifications, has suitable accommodations, and will comply with the

terms of the statute, the obligation imposed upon the board to issue the license is mandatory, for the act, in referring to them, states: 'They . . . shall issue to said person . . . a license.' True, the law does not prescribe the degree of respectability or competency which the applicant must possess, nor does it specify what accommodations shall be deemed sufficiently suitable to entitle the issuance of a license; but it must be assumed that the board, acting as reasonable and prudent men, imbued with a sense of the duty to the public and to the applicant devolving upon them, will discharge that obligation fairly and fearlessly." But in White v. Holman, 44 Ore. 180, 1 Ann. Cas. 843, 74 Pac. 933, the court in discussing the power of "the board of commissioners for licensing sailors' boarding houses" to deny an application for a license for a sailors' boarding house said: "The keeping of a sailors' boarding house is, in our opinion, a legitimate business, in the performance of which any citizen may engage as a matter of common right; and, this being so, it must be assumed that the legislative assembly, having in view section 20 of article 1 of the constitution of the state, did not intend to restrict the business by limiting the number of persons who may engage therein, but, as such occupation is peculiarly susceptible of abuse, the statute attempts to correct it by licensing those who possess the prescribed qualifications therefor, and who will comply with the provisions of the act, which is a valid grant of power. If it be conceded, however, that it was the intention of the legislature to invest the board of commissioners for licensing sailors' boarding houses with authority to reject any application for a license that they might deem advisable, without considering the prescribed qualifications of the applicant or the suitableness of his accommodations, the business sought to be restricted being legitimate, so much of the act as attempts to confer such arbitrary power is in violation of the organic law of the state, and therefore void. . . . The board of commissioners for licensing sailors' boarding houses can exercise no greater power than was possessed by the legislative assembly; and, as that body could not create a monopoly of a legitimate business in which every person can engage of common right, a fortiori, its creatures, the board, are likewise prohibited from doing so. It is possible that the petitioners are unworthy and incompetent, and therefore not entitled to a license; but, from an inspection of the bill of exceptions, we are forced to the conclusion that the refusal was based upon the board's desire to restrict the number engaged in the business, and, as we have attempted to show, that under a clause of our organic law a monopoly cannot be created in cases of this kind, it follows that the judgment should be affirmed, and it is so ordered." In Matter of Tai Kee, 12 Hawaii 164, a statute providing that no license for a lodging house or hotel should be issued which the "Executive Council" believed to be objectionable was held to be invalid because it delegated arbitrary power to the "Executive Council."

In Larsen v. Salt Lake City, 44 Utah 437, 141 Pac. 98, it was held that an ordinance requiring rooming houses to be licensed was valid but that the board of commissioners, in passing on an application for a license, could not arbitrarily deny a license. The presumption was, however, indulged in that the board of commissioners in refusing a license refused it for good cause.

Imposition of Several Taxes.

It seems that a statute or ordinance segregating the different businesses embraced in the keeping of a hotel and requiring a license tax to be paid on each business is valid. McClure v. Krumbholz, 9 Pa. Dist. 544. See also Ft. Smith v. Gunter, 106 Ark. 371, 154 S. W. 181; New Galt House Co. v. Louisville, 129 Ky. 341, 111 S. W. 351, 17 L.R.A.(N.S.) 566, 33 Ky. L. Rep. 869. *Compare* Atlantic City v. Hemsley, 76 N. J. L. 354, 70 Atl. 322. "It is within the power of the legislature . . . to impose an additional burden upon hotel keepers by requiring them to also take out licenses for eating houses." McClure v. Krumbholz, 9 Pa. Dist. 544. In New Galt House Co. v. Louisville, 129 Ky. 341, 111 S. W. 351, 17 L.R.A.(N.S.) 566, 33 Ky. L. Rep. 869, the foregoing rule was neither affirmed nor denied but the question was expressly left undecided. It was held, however, that an ordinance requiring hotels and restaurants to be licensed did not require a person operating a hotel on the "European plan" to pay another license for conducting a restaurant. See to the same effect, McClure v. Krumbholz, 9 Pa. Dist. 544. But in Atlantic City v. Hemsley, 76 N. J. L. 354, 70 Atl. 322, it was said of an ordinance imposing a sleeping room license fee on a hotel: "It is essential to the grant of the license to the inn or hotel that it should have at least two spare beds and be well provided with house room for the accommodation of guests. . . . The granting of the license by the city to the prosecutor to keep an inn and tavern at the Hotel Brighton of necessity requires and allows him to keep bedrooms for the accommodation of his guests, and the city, having granted him such license, cannot tax him again for something which he already has a license to do. The rule is that a person who has taken out a license for, or

paid a tax on, a certain business cannot be compelled to take out another license or pay another tax for anything which constitutes an essential part of such business. . . . . In view of the fact that the premises in question were licensed as an inn or hotel by the city, under the powers conferred by its charter, and that it was essential to such grant, and to the maintenance of such inn or hotel, that it should have spare rooms for the accommodation of its guests, and of the further fact that the section of the city charter, under which the ordinance in question was passed, does not specifically empower the city council to pass ordinances imposing a sleeping-room tax upon inns or hotels or to otherwise license or regulate the same, we think that the power to enact the ordinance in question, so far as it applies to hotels, is at least doubtful. Statutes delegating such power are to be construed strictly, and if there is any doubt as to the existence of the power it must be resolved in favor of the public and against the city. . . . Accordingly, we hold that the city council was without power to impose the room tax upon the hotel in question by the ordinance under review."

In Fulgum v. Nashville, 8 Lea (Tenn.) 635, it was held that an ordinance imposing a license tax on hotels was not invalid because a property tax was paid on the hotel property.

And in Cobb v. Durham County, 122 N. C. 307, 30 S. E. 338, a statute imposing a tax on the privilege of conducting a hotel was held not to be invalid as to a corporation conducting a hotel, the corporation being subject under another section of the same statute to the payment of a tax on its corporate franchise.

In Sights v. Yarnalls, 12 Grat. (Va.) 292, it was held that a city tax on "ordinaries" was valid although a state tax might also have been levied.

Requirement as to Fire Protection.

A statute or ordinance requiring hotels, boarding houses and similar places to be provided with fire escapes and to provide other protection against fire is valid. New York Department Buildings v. Field, 12 App. Div. 258, 42 N. Y. S. 691; Strahl v. Miller, 97 Neb. 820, 151 N. W. 952, *affirmed* 239 U. S. 426, 36 S. Ct. 147; Adams v. Cumberland Inn Co. 117 Tenn. 470, 101 S. W. 428. See also Johnson v. Snow, 201 Mo. 450, 100 S. W. 5; Yall v. Snow, 201 Mo. 511, 9 Ann. Cas. 1161, 100 S. W. 1, 119 Am. St. Rep. 781, 10 L.R.A.(N.S.) 177. "The ordinance of the city of La Follette, imposing upon the owners of hotels, lodging houses, and the other buildings therein mentioned the duty of placing fire escapes upon them, was authorized by the charter of the city, and is a reasonable and valid police regulation." Adams v. Cumberland Inn Co. supra. In Strahl v. Miller, 97 Neb. 820, 151 N. W. 952, it was held that a statute providing that a watchman to guard against fire must be kept in hotels or lodging houses, was not unconstitutional. And on appeal of that case to the federal supreme court it was held that the fact that the statute was directed only to keepers of hotels having more than fifty rooms did not deprive them of the equal protection of the laws. See Miller v. Strahl, 239 U. S. 426, 36 S. Ct. 147. But in Radley v. Knepfly (Tex.) 124 S. W. 447, it was held that an ordinance stipulating that all rooms above the second floor of lodging houses, "shall be provided with more than one way of egress or escape from fire placed as near as practicable at opposite ends of the rooms leading to fire escapes on the outside of the building or to stairways provided with proper railings," was not authorized by a provision of the charter of a city conferring on it the power to require the construction of fire escapes on lodging houses. It was also held that the ordinance was under the evidence of the case unreasonable and oppressive and therefore void.

Regulaton and Licensing of Soliciting.

It seems that an ordinance regulating or licensing the business of soliciting or drumming for hotels, boarding houses and restaurants is valid. Fayetteville v. Carter, 52 Ark. 301, 12 S. W. 573, 6 L.R.A. 509; Hot Springs v. Curry, 64 Ark. 152, 41 S. W. 55; Emerson v. McNeil, 84 Ark. 552, 106 S. W. 479, 15 L.R.A.(N.S.) 715; Taylor v. Moore, 99 Ark. 412, 138 S. W. 634. *Compare* Thomas v. Hot Springs, 34 Ark. 553, 36 Am. Rep. 24. "The evidence shows that, prior to the enactment of this ordinance, there had been serious annoyance to the traveling public by hackmen and hotel porters gathering at the steps of the train coaches and importuning passengers alighting therefrom. Whether this conduct had become dangerous or a public nuisance is not certain, but it is certain that it was a serious annoyance to the traveling public and the railway employees, and to remedy the mischief the ordinance in question was passed. Trains only stop at this town from two to five minutes, and the ordinance only covers this period of time. Therefore it cannot be considered a prohibition of a lawful business. . . . Section 5438 of Kirby's Digest confers upon cities and incorporated towns the power 'to regulate drumming or soliciting persons who arrive on trains, or otherwise, for hotels, boarding houses.' Section 5454 empowers them 'to

regulate . . . hotels and other houses for public entertainment.' Under these powers, the municipality had the right to pass the ordinance in question. . . . And the power conferred and exercised is not obnoxious to, or an interference with, any common right, but is a proper exercise of the police power, and is universally sustained. . . . The fact that the platform upon which they are forbidden to solicit customers at this interval was the property of the railroad company does not affect the power." Emerson v. McNeil, supra.

Limitation of Rule.

A statute or ordinance for the regulation and licensing of hotels and lodging houses is invalid where it is unreasonable or arbitrary. Matter of Tai Kee, 12 Hawaii 164; Bailey v. People, 190 Ill. 28, 60 N. E. 98, 83 Am. St. Rep. 116, 54 L.R.A. 838; White v. Mears, 44 Ore. 215, 74 Pac. 931; Radley v. Knepfly (Tex.) 124 S. W. 447; Bonnett v. Vallier, 136 Wis. 193, 116 N. W. 885, 128 Am. St. Rep. 1061, 17 L.R.A.(N.S.) 486. See also Helena v. Miller, 88 Ark. 263, 114 S. W. 237. In Bonnett v. Vallier, supra, it was said of the reasonableness of a regulation relating to lodging houses: "The degree of regulation of the construction, maintenance, and manner of occupancy of tenement houses and lodging houses which is reasonable must vary greatly according to density of population and other circumstances. What would be reasonable in a very large city might be highly unreasonable in the country or in the small cities and villages of the state. Requirements as to large structures to be occupied by many persons might be very unreasonable as to the smaller class of the same general class of structures to be occupied by very few persons." In Bonnett v. Vallier, 136 Wis. 193, 116 N. W. 885, 128 Am. St. Rep. 1061, 17 L.R.A.(N.S.) 486, it was doubted whether a provision of a statute prohibiting a person from permitting another not a member of his family to have the use of a room in his house for sleeping purposes without having his house classed as a lodging house and subject to the numerous requirements of the statute relating to lodging houses, was valid. In Bailey v. People, 190 Ill. 28, 60 N. E. 98, 83 Am. St. Rep. 116, 54 L.R.A. 838, a statute making it unlawful for more than six persons to occupy the same room in a lodging house for sleeping was held to be invalid. The court said: "The right to entertain lodgers in a lodging house, and to fix, by contract with them, the price to be paid for such accommodation and the number who shall occupy the same room at the same time for sleeping purposes, is a liberty and also a property right. Any restriction upon or abridgement of this right deprives the citizen of both liberty and property. . . . This legislation is directed only against lodging house keepers. Keepers of boarding houses, inns, hotels and taverns do not fall within the purview of its prohibition. If the enactment is a valid one, inn or hotel keepers and the keepers of boarding houses may lodge seven or any greater number of guests or patrons in the same room, at the same time, for sleeping purposes, as may suit their convenience, subject, only, to the consent of their patrons or guests, without incurring the penalties which, under the provisions of this enactment, would be visited upon a lodging house keeper should he allow more than six persons to occupy the same sleeping apartment at the same time. This is to discriminate against the lodging house keepers as a class, and to deprive them of liberty and a property right which other persons engaged in business of the same general character and similarly conducted may freely exercise without let or hindrance. . . . The attorney-general concedes that the term 'lodging house' and the words 'inn,' 'hotel' or 'boarding house' are none of them convertible terms or words, and that a distinction exists between these several institutions and a lodging house, but he insists that the act, though it has no penalties against the inn or hotel keeper or boarding house keeper, may be legally enforced against keepers of lodging houses as a sanitary measure, under the police power. Some lodging houses, as it is urged, may be, and doubtless are, the recognized abiding places of unclean, diseased and vermin-infected guests or patrons, who, together with the owners or keepers of the lodging houses are wholly indifferent to sanitary conditions, rendering such houses sources of contagious and infectious diseases. But it cannot be asserted that all lodging houses are of this character; neither can it be said boarding houses, inns and hotels are not to be found which shelter the same class of patrons, and whose keepers are likewise indifferent to sanitary conditions. The public health is less endangered by a cleanly and well conducted lodging house than by a filthy, ill-managed, disease-breeding hotel or boarding house. The lodging of more than six persons in any one room in a cleanly lodging house cannot be condemned, from a sanitary point of view, any more than the lodging of a like number of guests in one room in a hotel or boarding house. If intended as a measure to protect health, the act should have been directed against the evil which threatens to introduce sickness or disease, whether found in a lodging house, boarding house or hotel, and as its penalties are not so leveled it can but be regarded as partial and discriminatory legislation."

An ordinance regulating hotels or lodging houses or requiring them to be licensed is invalid where the power to pass an ordinance of this character is not conferred on the municipality by its charter or by a statute. Chicago v. M. & M. Hotel Co. 248 Ill. 264, 93 N. E. 753; Smith v. Hightstown, 71 N. J. L. 276, 57 Atl. 901; Atlantic City v. Hemsley, 76 N. J. L. 354, 70 Atl. 322; Radley v. Knepfly (Tex.) 124 S. W. 447. See also State v. Sumpter, 53 Ark. 342, 13 S. W. 933; Crosby v. Snow, 16 Me. 121. In Chicago v. M. & M. Hotel Co. supra, the court in discussing the power of a municipality to license and regulate hotels said: "It may be conceded that the business of innkeeper is not strictly *juris privati* and that it has an aspect of public interest which would warrant the legislature in passing an act for the regulation of such business, or we may with safety go one step farther and concede that this power exists in the legislature and that it may be either exercised by it directly or delegated to municipalities, but the answer to this contention is, that the power to license and regulate hotels has not been exercised by the legislature directly nor has it authorized its exercise by cities and villages."

MUTUAL FILM CORPORATION

v.

INDUSTRIAL COMMISSION OF OHIO ET AL.

United States Supreme Court—February 23, 1915.

236 U. S. 230; 35 S. Ct. 387.

Moving Pictures — Censorship — Validity of Statute.

The censorship by a state board of censors, conformably to 103 Ohio Laws, 399, of motion picture films which are "to be publicly exhibited and displaced in the state of Ohio," is not an unlawful burden on interstate commerce, even as applied to films which are brought in from another state, but which are in the hands of film exchanges, ready for rental to exhibitors, or have passed into the possession of the latter.

[See note at end of this case.]

Same.

The freedom of speech and publication guaranteed by Ohio Const. art. 1, § 11, with responsibility only for abuse, is not violated by the provisions of 103 Ohio Laws, 399, for the creation of a board of censors which is to examine and censor, as a condition precedent to exhibition, motion picture films which are to be publicly exhibited and displayed in the state, and is to pass and approve only such films as are, in its judgment, of a moral, educational, or amusing and harmless character.

[See note at end of this case.]

Same.

Legislative power is not unlawfully delegated by the provisions of 103 Ohio Laws, 399, for the creation of a board of censors which is to examine and censor, as a condition precedent to exhibition, motion picture films which are to be publicly exhibited and displayed in the state, and is to pass and approve only such films as are, in its judgment, of a moral, educational, or amusing and harmless character.

[See note at end of this case.]

Appeal from United States District Court, Northern District of Ohio.

Action for injunction. Mutual Film Corporation, plaintiff, and Industrial Commission of Ohio et al., defendants. Judgment for defendants. Plaintiff appeals. AFFIRMED.

[231] Appeal from an order denying appellant, herein designated complainant, an interlocutory injunction sought to restrain the enforcement of an act of the General Assembly of Ohio passed April 16, 1913 (103 Ohio Laws, 399), creating under the authority and superintendence of the Industrial Commission of the State a board of censors of motion picture films. The motion was presented to three judges, upon the bill, supporting affidavits and some oral testimony.

The bill is quite voluminous. It makes the following attacks upon the Ohio statute: (1) The statute is in violation of §§ 5, 16 and 19 of article 1 of the constitution of the State in that it deprives complainant of a remedy by due process of law by placing it in the power of the board of censors to determine from standards fixed by itself what films conform to the statute, and thereby deprives complainant of a judicial determination of a violation of the law. (2) The statute is in violation of articles 1 and 14 of the amendments to the Constitution of the United States, and of § 11 of article 1 of the constitution of Ohio in that it restrains complainant and other persons from freely writing and publishing their sentiments. (3) It attempts to give the board of censors legislative power, [232] which is vested only in the General Assembly of the State, subject to a referendum vote of the people, in that it gives to the board the power to determine the application of the statute without fixing any standard by which the board shall be guided in its determination, and places it in the power of the board, acting with similar boards in other States, to reject, upon any whim or caprice, any film which may be presented, and power to determine the legal status of the foreign

board or boards, in conjunction with which it is empowered to act.

The business of the complainant and the description, use, object and effect of motion pictures and other films contained in the bill, stated narratively, are as follows: Complainant is engaged in the business of purchasing, selling and leasing films, the films being produced in other States than Ohio, and in European and other foreign countries. The film consists of a series of instantaneous photographs or positive prints of action upon the stage or in the open. By being projected upon a screen with great rapidity there appears to the eye an illusion of motion. They depict dramatizations of standard novels, exhibiting many subjects of scientific interest, the properties of matter, the growth of the various forms of animal and plant life, and explorations and travels; also events of historical and current interest—the same events which are described in words and by photographs in newspapers, weekly periodicals, magazines and other publications, of which photographs are promptly secured a few days after the events which they depict happen; thus regularly furnishing and publishing news through the medium of motion pictures under the name of "Mutual Weekly." Nothing is depicted of a harmful or immoral character.

The complainant is selling and has sold during the past year for exhibition in Ohio an average of fifty-six positive prints of films per week to film exchanges doing business in that State, the average value thereof being the sum of [233] $100, aggregating $6,000 per week or $300,000 per annum.

In addition to selling films in Ohio complainant has a film exchange in Detroit, Michigan, from which it rents or leases large quantities to exhibitors in the latter State and in Ohio. The business of that exchange and those in Ohio is to purchase films from complainant and other manufacturers of films and rent them to exhibitors for short periods at stated weekly rentals. The amount of rentals depends upon the number of reels rented, the frequency of the changes of subject, and the age or novelty of the reels rented. The frequency of exhibition is described. It is the custom of the business, observed by all manufacturers, that a subject shall be released or published in all theaters on the same day, which is known as release day, and the age or novelty of the film depends upon the proximity of the day of exhibition to such release day. Films so shown have never been shown in public, and the public to whom they appeal is therefore unlimited. Such public becomes more and more limited by each additional exhibition of the reel.

The amount of business in renting or leasing from the Detroit exchange for exhibition in Ohio aggregates the sum of $1,000 per week.

Complainant has on hand at its Detroit exchange at least 2,500 reels of films which it intends to and will exhibit in Ohio and which it will be impossible to exhibit unless the same shall have been approved by the board of censors. Other exchanges have films, duplicate prints of a large part of complainant's films, for the purpose of selling and leasing to parties residing in Ohio, and the statute of the State will require their examination and the payment of a fee therefor. The amounts of complainant's purchases are stated, and that complainant will be compelled to bear the expense of having them censored because its customers will not purchase or hire uncensored films.

The business of selling and leasing films from its offices [234] outside of the State of Ohio to purchasers and exhibitors within the State is interstate commerce, which will be seriously burdened by the exaction of the fee for censorship, which is not properly an inspection tax and the proceeds of which will be largely in excess of the cost of enforcing the statute, and will in no event be paid to the Treasury of the United States.

The board has demanded of complainant that it submit its films to censorship and threatens, unless complainant complies with the demand, to arrest any and all persons who seek to place on exhibition any film not so censored or approved by the censor congress on and after November 4, 1913, the date to which the act was extended. It is physically impossible to comply with such demand and physically impossible for the board to censor the films with such rapidity as to enable complainant to proceed with its business, and the delay consequent upon such examination would cause great and irreparable injury to such business and would involve a multiplicity of suits.

There were affidavits filed in support of the bill and some testimony taken orally. One of the affidavits showed the manner of shipping and distributing the films and was as follows:

"The films are shipped by the manufacturers to the film exchanges enclosed in circular metal boxes, each of which metal boxes is in turn enclosed in a fibre or wooden container. The film is in most cases wrapped around a spool or core in a circle within the metal case. Sometimes the film is received by the film exchange wound on a reel, which consists of a cylindrical core with circular flanges to prevent the film from slipping off the core, and when so wound on the reel is also received in metal boxes, as above described. When the film is not received on a reel, it is, upon receipt, taken from the metal box, wound on a reel and then replaced in the

metal box. So wound and so enclosed in metal boxes, the films are shipped by the film [235] exchanges to their customers. The customers take the film as it is wound on the reel from the metal box and exhibit the pictures in their projecting machines, which are so arranged as to permit of the unwinding of the film from the reel on which it is shipped. During exhibition, the reel of film is unwound from one reel and rewound in reverse order on a second reel. After exhibition, it must be again unwound from the second reel from its reverse position and replaced on the original reel in its proper position. After the exhibitions for the day are over, the film is replaced in the metal box and returned to the film exchange, and this process is followed from day to day during the life of the film.

"All shipments of films from manufacturers to film exchanges, from film exchanges to exhibitors, and from exhibitors back to film exchanges, are made in accordance with regulations of the Interstate Commerce Commission, one of which provides as follows:

" 'Moving picture films must be placed in metal cases, packed in strong and tight wooden boxes or fibrewood pails.' "

Another of the affidavits divided the business as follows:

"The motion-picture business is conducted in three branches; that is to say, by manufacturers, distributors, and exhibitors, the distributors being known as film exchanges. . . . Film is manufactured and produced in lengths of about one thousand feet, which are placed on reels, and the market price per reel of film of a thousand feet in length is at the rate of ten cents per foot, or one hundred dollars. Manufacturers do not sell their film direct to exhibitors, but sell to film exchanges, and the film exchanges do not resell the film to exhibitors, but rent it out to them."

After stating the popularity of motion pictures and the demand of the public for new ones and the great expense their purchase would be to exhibitors, the affidavit proceeds as follows:

[236] "For that reason film exchanges came into existence, and film exchanges such as the Mutual Film Corporation are like clearing houses or circulating libraries, in that they purchase the film and rent it out to different exhibitors. One reel of film being made today serves in many theaters from day to day until it is worn out. The film exchange, in renting out the films, supervises their circulation."

An affidavit was made by the "general secretary of the national board of censorship of motion pictures, whose office is at No. 50 Madison Avenue, New York City." The "national board," it is averred, "is an organization maintained by voluntary contributions, whose object is to improve the moral quality of motion pictures." Attached to the affidavit was a list of subjects submitted to the board which are "classified according to the nature of said subjects into scenic, geographic, historical, classic, educational and propagandistic."

William B. Sanders, Walter N. Scligsberg and *Harold T. Clark* for appellant.

[239] *Robert M. Morgan, Timothy S. Hogan, James I. Boulger* and *Clarence D. Laylin* for appellees.

Waldo G. Morse and *Jacob Schechter* as *amici curiæ*.

McKENNA, J. (*after stating the facts*).—Complainant directs its argument to three propositions: (1) The statute in controversy imposes an unlawful burden on interstate commerce; (2) it violates the freedom of speech and publication guaranteed by § 11, art. 1, of the constitution of the State of Ohio;[1] and (3) it attempts to delegate legislative power to censors and to other boards to determine whether the statute offends in the particulars designated.

It is necessary to consider only §§ 3, 4 and 5. Section 3 makes it the duty of the board to examine and censor motion picture films to be publicly exhibited and displayed [240] in the State of Ohio. The films are required to be exhibited to the board before they are delivered to the exhibitor for exhibition, for which a fee is charged.

Section 4. "Only such films as are in the judgment and discretion of the board of censors of a moral, educational or amusing and harmless character shall be passed and approved by such board." The films are required to be stamped or designated in a proper manner.

Section 5. The board may work in conjunction with censor boards of other States as a censor congress, and the action of such congress in approving or rejecting films shall be considered as the action of the state board, and all films passed, approved, stamped and numbered by such congress, when the fees therefor are paid shall be considered approved by the board.

By § 7 a penalty is imposed for each exhibition of films without the approval of the

[1] "Section 11. Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted."

board, and by § 8 any person dissatisfied with the order of the board is given the same rights and remedies for hearing and reviewing, amendment or vacation of the order "as is provided in the case of persons dissatisfied with the orders of the industrial commission."

The censorship, therefore, is only of films intended for exhibition in Ohio, and we can immediately put to one side the contention that it imposes a burden on interstate commerce. It is true that according to the allegations of the bill some of the films of complainant are shipped from Detroit, Michigan, but they are distributed to exhibitors, purchasers, renters and lessors in Ohio, for exhibition in Ohio, and this determines the application of the statute. In other words, it is only films which are "to be publicly exhibited and displayed in the State of Ohio" which are required to be examined and censored. It would be straining the doctrine of original packages to say that the films retain that form and composition even when unrolling and exhibiting to audiences, or, being ready for [241] renting for the purpose of exhibition within the State, could not be disclosed to the state officers. If this be so, whatever the power of the State to prevent the exhibition of films not approved—and for the purpose of this contention we must assume the power is otherwise plenary—films brought from another State, and only because so brought, would be exempt from the power, and films made in the State would be subject to it. There must be some time when the films are subject to the law of the State, and necessarily when they are in the hands of the exchanges ready to be rented to exhibitors or have passed to the latter, they are in consumption, and mingled as much as from their nature they can be with other property of the State.

It is true that the statute requires them to be submitted to the board before they are delivered to the exhibitor, but we have seen that the films are shipped to "exchanges" and by them rented to exhibitors, and the "exchanges" are described as "nothing more or less than circulating libraries or clearing houses." And one film "serves in many theaters from day to day until it is worn out."

The next contention is that the statute violates the freedom of speech and publication guaranteed by the Ohio constitution. In its discussion counsel have gone into a very elaborate description of moving picture exhibitions and their many useful purposes as graphic expressions of opinion and sentiments, as exponents of policies, as teachers of science and history, as useful, interesting, amusing, educational and moral. And a list of the "campaigns," as counsel call them, which may be carried on is given. We may concede the praise. It is not questioned by the Ohio statute and under its comprehensive description, "campaigns" of an infinite variety may be conducted. Films of a "moral, educational or amusing and harmless character shall be passed and approved" are the words of the statute. No exhibition, therefore, or "campaign" [242] of complainant will be prevented if its pictures have those qualities. Therefore, however missionary of opinion films are or may become, however educational or entertaining, there is no impediment to their value or effect in the Ohio statute. But they may be used for evil, and against that possibility the statute was enacted. Their power of amusement and, it may be, education, the audiences they assemble, not of women alone nor of men alone, but together, not of adults only, but of children, make them the more insidious in corruption by a pretense of worthy purpose or if they should degenerate from worthy purpose. Indeed, we may go beyond that possibility. They take their attraction from the general interest, eager and wholesome it may be, in their subjects, but a prurient interest may be excited and appealed to. Besides, there are some things which should not have pictorial representation in public places and to all audiences. And not only the State of Ohio but other States have considered it to be in the interest of the public morals and welfare to supervise moving picture exhibitions. We would have to shut our eyes to the facts of the world to regard the precaution unreasonable or the legislation to effect it a mere wanton interference with personal liberty.

We do not understand that a possibility of an evil employment of films is denied, but a freedom from the censorship of the law and a precedent right of exhibition are asserted, subsequent responsibility only, it is contended, being incurred for abuse. In other words, as we have seen, the constitution of Ohio is invoked and an exhibition of films is assimilated to the freedom of speech, writing and publication assured by that instrument and for the abuse of which only is there responsibility, and, it is insisted, that as no law may be passed "to restrain the liberty of speech or of the press," no law may be passed to subject moving pictures to censorship before their exhibition.

[243] We need not pause to dilate upon the freedom of opinion and its expression, and whether by speech, writing or printing. They are too certain to need discussion—of such conceded value as to need no supporting praise. Nor can there be any doubt of their breadth nor that their underlying safeguard is, to use the words of another, "that opinion is free and that conduct alone is amenable to the law."

Are moving pictures within the principle, as it is contended they are? They, indeed, may be mediums of thought, but so are many

things. So is the theater, the circus, and all other shows and spectacles, and their performances may be thus brought by the like reasoning under the same immunity from repression or supervision as the public press, —made the same agencies of civil liberty.

Counsel have not shrunk from this extension of their contention and cite a case in this court where the title of drama was accorded to pantomime; [1] and such and other spectacles are said by counsel to be publications of ideas, satisfying the definition of the dictionaries,—that is, and we quote counsel, a means of making or announcing publicly something that otherwise might have remained private or unknown,—and this being peculiarly the purpose and effect of moving pictures they come directly, it is contended, under the protection of the Ohio constitution.

The first impulse of the mind is to reject the contention. We immediately feel that the argument is wrong or strained which extends the guaranties of free opinion and speech to the multitudinous shows which are advertised on the bill-boards of our cities and towns and which regards them as emblems of public safety, to use the words of Lord Camden, quoted by counsel, and which seeks to [244] bring motion pictures and other spectacles into practical and legal similitude to a free press and liberty of opinion.

The judicial sense supporting the common sense of the country is against the contention. As pointed out by the District Court, the police power is familiarly exercised in granting or withholding licenses for theatrical performances as a means of their regulation. The court cited the following cases: Marmet v. State, 45 Ohio St. 63, 72, 73, 12 N. E. 463; Baker v. Cincinnati, 11 Ohio St. 534; Com. v. McGann, 213 Mass. 213, 215, 100 N. E. 355; People v. Steele, 231 Ill. 340, 344, 345, 83 N. E. 236, 121 Am. St. Rep. 321, 14 L.R.A. (N.S.) 361.

The exercise of the power upon moving picture exhibitions has been sustained. Greenberg v. Western Turf Ass'n, 148 Cal. 126, 82 Pac. 684, 113 Am. St. Rep. 216; Laurelle v. Bush, 17 Cal. App. 409, 119 Pac. 953; State v. Loden, 117 Md. 373, Ann. Cas. 1913E 1300, 83 Atl. 564, 40 L.R.A.(N.S.) 193; Block v. Chicago, 239 Ill. 251, 87 N. E. 1011, 130 Am. St. Rep. 219; Higgins v. Lacroix, 119 Minn. 145, 137 N. W. 417, 41 L.R.A. (N.S.) 737. See also State v. Morris, 1 Boyce (Del.) 330, 76 Atl. 479; People v. Gaynor, 77 Misc. 576, 137 N. Y. S. 196, 199; McKenzie v. McClellan, 62 Misc. 342, 116 N. Y. S. 645, 646.

It seems not to have occurred to anybody in the cited cases that freedom of opinion was repressed in the exertion of the power which was illustrated. The rights of property were only considered as involved. It cannot be put out of view that the exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio constitution, we think, as part of the press of the country or as organs of public opinion. They are mere representations of events, of ideas and sentiments published and known, vivid, useful and entertaining no doubt, but, as we have said, capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition. It was this capability and power, and it may be in experience of them, that induced the State of Ohio, in addition to prescribing penalties for immoral exhibitions, as it does in its Criminal [245] Code, to require censorship before exhibition, as it does by the act under review. We cannot regard this as beyond the power of government.

It does not militate against the strength of these considerations that motion pictures may be used to amuse and instruct in other places than theaters—in churches, for instance, and in Sunday schools and public schools. Nor are we called upon to say on this record whether such exceptions would be within the provisions of the statute nor to anticipate that it will be so declared by the state courts or so enforced by the state officers.

The next contention of complainant is that the Ohio statute is a delegation of legislative power and void for that if not for the other reasons charged against it, which we have discussed. While administration and legislation are quite distinct powers, the line which separates exactly their exercise is not easy to define in words. It is best recognized in illustrations. Undoubtedly the legislature must declare the policy of the law and fix the legal principles which are to control in given cases; but an administrative body may be invested with the power to ascertain the facts and conditions to which the policy and principles apply. If this could not be done there would be infinite confusion in the laws, and in an effort to detail and to particularize, they would miss sufficiency both in provision and execution.

The objection to the statute is that it furnishes no standard of what is educational, moral, amusing or harmless, and hence leaves decision to arbitrary judgment, whim and caprice; or, aside from those extremes, leaving it to the different views which might be entertained of the effect of the pictures, permitting the "personal equation" to enter, resulting "in unjust discrimination against some propagandist film," while others might

[1] Kolem Co. v. Harper, 222 U. S. 55 Ann. Cas. 1913A 1285, 32 S. Ct. 20, 56 U. S. (L. ed.) 92.

be approved without question. But the statute by its provisions guards against such variant judgments, and its terms, like other [246] general terms, get precision from the sense and experience of men and become certain and useful guides in reasoning and conduct. The exact specification of the instances of their application would be as impossible as the attempt would be futile. Upon such sense and experience, therefore, the law properly relies. This has many analogies and direct examples in cases, and we may cite Gundling v. Chicago, 177 U. S. 183, 20 S. Ct. 633, 47 U. S. (L. ed.) 725; Red "C" Oil Mfg. Co. v. Board of Agriculture of North Carolina, 222 U. S. 380, 32 S. Ct. 152, 56 U. S. (L. ed.) 240; Monongahela Bridge Co. v. U. S. 216 U. S. 177, 30 S. Ct. 356, 54 U. S. (L. ed.) 435; Buttfield v. Stranahan, 192 U. S. 470, 24 S. Ct. 349, 48 U. S. (L. ed.) 525. See also Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 29 S. Ct. 220, 53 U. S. (L. ed.) 417. If this were not so, the many administrative agencies created by the state and National governments would be denuded of their utility and government in some of its most important exercises become impossible.

To sustain the attack upon the statute as a delegation of legislative power, complainant cites Harmon v. State, 66 Ohio St. 249, 64 N. E. 117, 58 L.R.A. 618. In that case a statute of the State committing to a certain officer the duty of issuing a license to one desiring to act as an engineer if "found trustworthy and competent," was declared invalid because, as the court said, no standard was furnished by the General Assembly as to qualification, and no specification as to wherein the applicant should be trustworthy and competent, but all was "left to the opinion, finding and caprice of the examiner." The case can be distinguished. Besides, later cases have recognized the difficulty of exact separation of the powers of government, and announced the principle that legislative power is completely exercised where the law "is perfect, final and decisive in all of its parts, and the discretion given only relates to its execution." Cases are cited in illustration. And the principle finds further illustration in the decisions of the courts of lesser authority but which exhibit the juridical sense of the State as to the delegation of powers.

Section 5 of the statute, which provides for a censor [247] congress of the censor board and the boards of other States, is referred to in emphasis of complainant's objection that the statute delegates legislative power. But, as complainant says, such congress is "at present nonexistent and nebulous," and we are, therefore, not called upon to anticipate its action or pass upon the validity of § 5.

We may close this topic with a quotation of the very apt comment of the District Court upon the statute. After remarking that the language of the statute "might have been extended by descriptive and illustrative words," but doubting that it would have been the more intelligible and that probably by being more restrictive might be more easily thwarted, the court said: "In view of the range of subjects which complainants claim to have already compassed, not to speak of the natural development that will ensue, it would be next to impossible to devise language that would be at once comprehensive and automatic."

In conclusion we may observe that the Ohio statute gives a review by the courts of the State of the decision of the board of censors

Decree affirmed.

NOTE.

Moving Pictures.

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I. Introductory.

Although the moving picture has been in existence only a comparatively short time yet the tremendous growth and development of the business based on it during the decade just passed has given rise to much litigation, so that at present there is a considerable body of law on the subject. It is the purpose of this note to collect and review the cases which deal with the subject of moving pictures in any of its phases. Some aspects of the subject have been discussed in earlier volumes of this series, and as to these, in order to make the present treatment topical, reference is made to the earlier discussions and the recent cases are here presented.

II. Statutory Regulation.

1. In General.

The earlier cases discussing the statutory regulation of moving pictures are collected in the note to State v. Loden, Ann. Cas. 1913E 1300.

The holding of the reported case that the police power of a state extends to the regulation of moving picture exhibitions finds support in several recent decisions. Mutual

Film Corp. v. Hodges, 236 U. S. 248, 35 S. Ct. 393, 59 U. S. (L. ed.) 561; Mutual Film Corp. v. Chicago, 224 Fed. 101, 139 C. C. A. 657; Jewel Theater Co. v. State Fire Marshal, 178 Mich. 399, Ann. Cas. 1915C 1212, 144 N. W. 835; Jeup v. State Fire Marshal, 182 Mich. 231, 148 N. W. 340.

It has been held that the giving of a moving picture exhibition called "The Inside of the White Slave Traffic," depicting the working of prostitutes on the streets and the inside of houses of prostitution, the alleged methods of so-called cadets and the unfortunate women who are living within their influence, is in violation of a penal law which prohibits exhibitions which "tend to the corruption of the morals of youth and others," and that the police department will not be restrained, pendente lite, from interfering with such a show. Sociological Research Film Corp. v. New York, 83 Misc. 605, 145 N. Y. S. 492, wherein the court said: "Some of the films, I repeat, depict scenes supposed to be enacted in a house of ill fame where women are subjected to involuntary prostitution. As is well known that to maintain such a place is in itself a criminal offense, I am unable to perceive why the public exhibition for money of scenes supposed to transpire therein should be entitled to the protection of a court of equity. It is contended by the plaintiff, in affidavits furnished by disinterested individuals whose motives it is not within the province of this court to question, that the pictures contain a great moral lesson to fathers and mothers, calculated to impress upon their minds the urgent need of protecting their daughters from the influence of evil associations. The answer to this is that the exhibition has not been confined to fathers and mothers; that there is no evidence before me that the owners thereof propose or desire to so confine it, and that the evidence shows they are conducting the enterprise not for the uplift of public morals, but for private gain."

In St. Louis v. Nash (Mo.) 181 S. W. 1145, it appeared that a city ordinance prohibited the erection of a fourth-class building within a city district known as the fire limits. The ordinance defined a building as "any structure for the support, shelter, or inclosure of persons, animals or chattels," and a fourth-class building as a building not of the first, second or third classes. It was held that a structure built for moving picture purposes which consisted of a floor of wooden planks nailed to larger planks sunk in the earth, a canvas top supported by telegraph poles set in the ground, and a stage of wood and canvas, was a fourth-class building and not a tent, and came within the prohibitory terms of the ordinance.

In Jewel Theater Co. v. State Fire Marshal, 178 Mich. 399, Ann. Cas. 1915C 1212, 144 N. W. 835, wherein the court sustained a statute prohibiting moving picture exhibitions in any building not having its audience room at the street level, it was said: "If the business of giving moving picture shows was innocuous in itself, and if the reasonableness of the particular regulation with which we are concerned was questioned, a different question might be presented. The business is innocuous in so far as it is true that, if neither an explosion nor a fire attends it, it is not harmful to life, limb or property. But the general reasonableness of a regulation forbidding the giving of such shows on other than the first floors of buildings is not questioned. And we may take notice of the fact, which experience has demonstrated, that peculiar hazards attend the handling and exposing of the films in the giving of exhibitions; that the hazard to human life and limb is increased as the means of exit from the places of exhibition are limited. Regulation, in such a case, extends as well to designating the place where a thing may be done as to prescribing the way in which it may be done. If the public safety or welfare demands that a particular business shall not be conducted in a particular place, the legislative power may be exercised to prevent it. Generally it is by experience only that the necessary regulations of business are indicated, and the legislative power is not limited because the thing which experience has demonstrated should not continue is continuing when the legislature speaks."

In Nohser v. Chicago (Ill.) 111 N. E. 119, an ordinance prohibiting the location of a moving picture show within two hundred feet of any church was sustained.

It has been held that Congress has power, under the commerce clause of the Constitution to pass an act which makes it unlawful "to bring or cause to be brought into the United States from abroad, any film or other pictorial representation of any prize fight or encounter of pugilists, under whatever name, which is designed to be used, or may be used, for purposes of public exhibition." Kalisthenic Exhibition Co. v. Emmons, 225 Fed. 902. To the same effect see Weber v. Freed, reported in full, post, this volume, at page 317. And the fact that such films are to be shown only to clubs, societies, athletic clubs, associations, *and their guests*, does not make such a statute inoperative under the provision therein that such films must be used for "purposes of public exhibition" as an exhibition cannot be said to be private where such masses of people are to be invited to see it. Kalisthenic Exhibition Co. v. Emmons, supra.

In the reported case it is held that a state statute creating a state board of moving picture censors with power to require the ex-

hibition of films to the board for their approval or disapproval before the films shall be delivered to the exhibitor for exhibition, for which a fee is charged and requiring the film to be stamped or designated in a proper manner, and further providing for the imposition of a penalty on the exhibition of films without the approval of the board with a right to a review of its decision by the state courts, does not violate either the State or the Federal Constitution, as it does not deprive the owners of moving pictures of their property without due process of law, and does not interfere with interstate commerce or abridge the liberty of opinion, or delegate legislative power to administrative officers. To the same effect see Mutual Film Corp. v. Chicago, 224 Fed. 101, 139 C. C. A. 657; Buffalo Branch Mut. Film Corp. v. Breitinger, 250 Pa. St. 225, 95 Atl. 433. And see Mutual Film Corp. v. Hodges, 236 U. S. 248, 35 S. Ct. 393, 59 U. S. (L. ed.) 561, wherein it was held that a law of the same general import as the one just set forth but which provided that only exhibitors or those who permitted exhibitions of unapproved films were liable to the penalties of the act, could not be attacked by a moving picture film exchange company which was not within either of the two classes mentioned in the statute.

In People v. Samwick, 127 App. Div. 209, 111 N. Y. S. 11, it was held that a person who admitted a boy of seven years and one of fourteen years to a moving picture show did not violate a section of the Penal Code providing that "a person who admits to, or allows to remain in, any . . . museum, skating rink, . . . or in any place of entertainment injurious to health or morals . . . any child . . . under the age of sixteen years unless accompanied by parent or guardian . . . is guilty of a misdemeanor," where it did not appear that the children were not accompanied by a person who, although not a parent or a legal guardian, stood in the relation of guardian for the time being within the meaning of the statute.

2. License Law.

For the earlier cases discussing the licensing of motion picture exhibitions, see the note to State v. Loden, Ann. Cas. 1913E 1300.

Under a statute providing for the licensing of circuses and declaring that "every building . . . where . . . theatrical performances are exhibited shall be deemed a circus . . ." it has been held that, as a matter of law, a moving picture show must be licensed. State v. Morris, 1 Boyce (Del.) 330, 76 Atl. 479.

In Weistblatt v. Bingham, 58 Misc. 328, 109 N. Y. S. 545, it was held that a moving picture show conducted in connection with an ice cream saloon for the purpose of drawing trade was within the purview of an ordinance prohibiting the conducting of a common show without a license.

In Com. v. Donnelly, 51 Pa. Super. Ct 61, *overruling* 21 Pa. Dist. 21, it was held that under a statute which taxed a "theatrical or operatic entertainment" five hundred dollars, a person was liable for the tax where it appeared that he operated, in addition to moving pictures, a show which included music, costumed actors, and scenic effects on an arranged stage, minstrel performances, and sketches of dramatic art. However, in Com. v. Spiers, 21 Pa. Dist. 25, 51 Pa. Super. Ct. 59, *affirmed* 51 Pa. Super. Ct. 59, it was held that where a performance consisted only of moving pictures and illustrated songs and there was no stage in the building, the conductor thereof was not liable to the state tax of five hundred dollars for conducting a "theatrical or operatic entertainment" but was subject only to the one hundred dollar license fee levied on operators of moving picture shows.

Where an ordinance names the town clerk as the person from whom a license to conduct a moving picture show shall be obtained it is not necessary, in a mandamus petition to compel the issuance of such a license to make the mayor and the members of the city council parties thereto. Krier v. Walsenburg, 26 Colo. App. 150, 141 Pac. 505.

In Life Photo Film Corp. v. Bell, 90 Misc. 469, 154 N. Y. S. 763, it appeared that the plaintiff was a moving picture film manufacturer and had leased to a theater proprietor a film which depicted an army officer in a German uniform performing acts of cruelty which subsequently brought on him punishment from his superior officer. In an action by the film company for an injunction to restrain the license commissioner of New York city from revoking the theater proprietor's license for showing the picture, it was held that as the only objection made to the film was on the part of the national board of moving picture censors and of a deputy of the license commissioner who objected on the ground that the exhibition of the picture might occasion racial differences, an injunction would issue to restrain the commissioner from carrying out his threat to revoke the theater license, and that the film company was a proper party plaintiff because it had no other way to protect itself from the loss of profits it had a right to expect under its contract with the theater proprietor to exhibit the film.

In People v. Rand, 91 Misc. 276, 154 N. Y. S. 293, it was held that as the power to

license vested in a mayor was discretionary and not mandatory, he should refuse a license where in his judgment the opening of a theater would work to the detriment of the community but that his power was not absolute, and that if he acted arbitrarily or capriciously a person aggrieved thereby had a remedy through mandamus proceedings. And it was held in Edelstein v. Bell, 91 Misc. 620, 155 N. Y. S. 590, that it was not an abuse of the discretionary licensing power vested in him for the commissioner of licenses of the city of New York to deny the right to produce in moving picture theaters a play based on the Leo Frank murder case, which play had been disapproved by the national board of censors, and that the producer of such a film was not entitled to an injunction restraining the commissioner from interfering with the exhibition thereof in New York city theaters.

It has been held, however, that one who fully complies with an ordinance regulating the issuance of a license for a moving picture exhibition, which is not inherently dangerous to the peace and good order of a city, is entitled prima facie thereto, and if valid reasons exist for withholding from him the right to engage in this business it is incumbent on the licensing authorities to disclose them. Krier v. Walsenburg, 26 Colo. App. 150, 141 Pac. 505. And where one section of an ordinance provided that no moving picture show should be maintained in any residence district of a city "without the consent of the common council approved by the mayor," etc. and stated that its provisions should not apply to a moving picture show which had been located, built, constructed and in use for such purposes prior to December 1, 1912, and another section of the ordinance provided that the mayor might also grant a permit to any firm or corporation to use any building or premises which were and had been used on and prior to December 1, 1912, for the purposes of a moving picture show if the applicant had met all lawful prerequisites of law relating to health, public safety from fire and the reasonable regulations of the health and fire departments of the city, it was held that an applicant for a permit to conduct a moving picture show in a building within the residential district was entitled thereto where it appeared that he had met all the conditions prescribed by law, as the granting of the permit was a ministerial duty plainly prescribed. Walker v. Fuhrman, 84 Misc. 118, 146 N. Y. S. 519.

3. Sunday Law.

a. *Generally.*

The earlier cases passing on the application of Sunday laws to moving picture shows are discussed in the note to Ex p. Lingenfelter, Ann. Cas. 1914C 765.

In one jurisdiction the view has been taken in recent cases that a moving picture show is unlawful when conducted on Sunday. Ex p. Mussett, 72 Tex. Crim. 487, 162 S. W. 846; Lempke v. State (Tex.) 171 S. W. 217; McLeod v. State (Tex.) 180 S. W. 117. A person cannot avoid a statute prohibiting Sunday amusements "for which an admission fee is charged" by keeping his moving picture show open on Sunday without selling tickets therefor but using as a substitute a free offering plan by which those who witness the exhibition may drop coins in an urn placed near the ticket office as they pass in or out. McLeod v. State (Tex.) 180 S. W. 117.

b. *Rule in New York.*

While there were some earlier cases to the contrary (see the note to Ex p. Lingenfelter, Ann. Cas. 1914C 765) the recent cases in New York hold that the Penal Law of that state (Penal Code § 277) does not prohibit the exhibition of indoor moving pictures on Sunday. People v. Lent, 166 App. Div. 550, 152 N. Y. S. 18; Klinger v. Ryan, 91 Misc. 71, 153 N. Y. S. 937; People v. Ryan, 91 Misc. 276, 154 N. Y. S. 293; Hamlin v. Bender, 92 Misc. 16, 155 N. Y. S. 963, criticising the rule but bowing to it under stare decisis doctrine.

It has been held that a municipality cannot, without express legislative authority, enforce the Sunday closing of moving picture shows. People v. Lent, 166 App. Div. 550, 152 N. Y. S. 18, *affirmed* 215 N. Y. 626, 109 N. E. 1088; Klinger v. Ryan, 91 Misc. 71, 153 N. Y. S. 937. Thus in People v. Lent, 166 App. Div. 550, 152 N. Y. S. 18, it appeared that a city had power, under its charter which gave it a right to regulate amusements and common shows, to license moving picture exhibitions. A city ordinance prohibited such a show on Sunday and provided a fine for its violation. In a habeas corpus proceeding by one who had been arrested for a breach thereof it was held that a license under the ordinance might be given on condition as to the hours of opening, etc., but that as the legislature alone had the right to command how Sunday should be kept, and as municipal charters, however broad, were subject to such restriction as might be imposed by general laws, the city could not independently compel and enforce Sunday closing by means of fine or imprisonment unless such prohibition was part of the law and policy as declared by the legislature, and that the writ should be issued and the relator discharged.

Although equity will, by injunction, prevent irreparable injury by unlawful trespass of the police on private property (Fairmount

Athletic Club v. Bingham, 61 Misc. 419, 113 N. Y. S. 905), yet the general rule is that equity will not interfere to prevent the enforcement of the criminal law, even though the police are mistaken in their opinion as to what constitutes a crime. Under this rule it has been held that equity will not enjoin the police from entering on premises wherein a moving picture show is proposed to be given on Sunday in order to prevent the show. Shepard v. Bingham, 125 App. Div. 784, 110 N. Y. S. 217; Klinger v. Ryan, 91 Misc. 71, 153 N. Y. S. 937; In Shepard v. Bingham, supra, the court said: "Under this injunction members of the police force are prevented from entering these premises except to serve a warrant which of course could only be obtained upon evidence that a crime had been committed, or for the arrest of persons who had committed a felony or misdemeanor in their presence. But they being enjoined from entering the building during these Sunday entertainments, a crime committed in the building at that time would not be in their presence. There is thus segregated from the rest of the city of New York a territory in which during a considerable portion of each Sunday the police are powerless to enforce the criminal law and in which during that period crime may be committed with impunity. No policeman could enter these premises during these entertainments without disobeying the order of the court unless armed with a warrant for the arrest of a person charged with crime in the building, or unless he knew of the commission of a crime and followed its perpetrator into the building for the purpose of arresting him. In other words, the enforcement of the criminal law is suspended by an order of a court of equity during a considerable portion of each Sunday solely upon the allegation that the plaintiff intended to do an act which he claimed was not a crime, and that a police captain had told somebody who had told the plaintiff that he intended to arrest the plaintiff or his employees for the performance of that act as criminal. If equity has jurisdiction to entertain such applications and determine whether or not a party is innocent or guilty of a crime, there would be no necessity for the existence of criminal courts. The question of what was or was not criminal could be determined in equity, and if an alleged criminal is entitled to the interposition of the court to protect him from arrest, I can see no reason why the police would not also be entitled to its process to enjoin a person charged with a crime from interposing any objection to his punishment. It is perfectly clear that the whole question is one over which a court of equity has no jurisdiction."

Under the well established rule that acts otherwise lawful may become wrongful in consequence of the time or place or manner of performing them, it was held in Hamlin v. Bender, 92 Misc. 16, 155 N. Y. S. 963, that where a person's moving picture theater in which he proposed to give a show on Sunday was on a most thickly populated street, in the immediate vicinity of a large church and parish buildings connected therewith where religious services were largely attended and Sunday school held, and that people who attended the divine services as well as children who attended Sunday school would be called on to pass and repass the place of amusement and that crowds were likely to gather about the entrance, such a performance on Sunday was a nuisance and injunctive relief therefrom would be granted at the suit of the commissioner of public safety of the city on whom a statute conferred express power to restrain nuisances.

4. Copyright Law.

Under an act of Congress which provides that "any citizen of the United States . . . who shall be . . . the author or proprietor of any . . . photograph or negative thereof . . . shall upon complying with the provisions of this chapter have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same" (2 Fed. St. Ann. 256), it has been held that a series of pictures which represent an act or event, or a series of pictures which tell a story which are for use in a moving picture machine may be copyrighted. Edison v. Lubin, 122 Fed. 240, 58 C. C. A. 604; American Mutoscope, etc. Co. v. Edison Mfg. Co. 137 Fed. 262. But if the moving pictures are a part only of a single performance which in addition to the pictures consists of songs and a common-place dialogue the whole act is not a subject of copyright under the act. Barnes v. Miner, 122 Fed. 480, 487.

It is well established that the copyright of a novel or a dramatization covers a photoplay presentation of the same subject. Atlas Mfg. Co. v. Street, 204 Fed. 398, 122 C. C. A. 568, 47 L.R.A.(N.S.) 1002; U. S. v. Motion Picture Patents Co. 225 Fed. 800.

In Herbert v. Fields, 152 N. Y. S. 487, it was held that where an opera was the work of the original author who wrote the play in German, of S. who adapted the play, after translation, to the American stage, of H. who wrote the words of the lyrics, and of B. who composed the music thereto, and where the copyrighted book contained only the music and the lyrics, the libretto was a separable and separate work and the moving picture rights thereto were entirely in the owner of the work who might deal with them independently of the composer of the music. It was held further that the production of the

moving pictures of a play to large crowds at low prices of admission did not "destroy" the work within the meaning of the rule that the rights of a co-owner do not extend to the destruction of the article owned.

Where a person is the first to translate a French play and puts in his version variations from it and additions to it and copyrights his translation in the United States, it has been held that a moving picture company will be restrained at the suit of the assignee of the first translator from producing in moving pictures a play which contains the variations from and additions to the French play which are original to the first translator's version. Stevenson v. Fox, 226 Fed. 990.

In Frohman v. Fitch, 164 App. Div. 231, 149 N. Y. S. 633, it appeared that a playright and a theater manager entered into an agreement whereby the former was to write a play and the latter was to produce it. In the contract there was provision that the playright was to "sell, assign and transfer" to the manager "the exclusive right to produce the said play in the United States of America and in Canada," for a certain sum to be paid to the writer. Three years later the contract was modified by permitting the plaintiff to lease the play to stock companies thereby allowing the play to be produced in stock-theaters whereas the original contract called for production in first class theaters in a first class manner. The play was written, produced and was successful. The playwright died and his rights under the contract passed to his father who made a contract with a movpicture company by which he assumed the right to grant to the company the right to produce the play throughout the United States and Canada by means of moving pictures. It was held that the manager had acquired exclusive property rights to the play enforceable in equity and could not be deprived of any part of his rights merely because, since the contract was executed, a new method, not contemplated by the parties at the time, had made it possible to produce it in a different way.

It has been held that where a person wrote a novel and assigned his right to copyright it to a company which duly secured copyright, and the company subsequently assigned all dramatization rights to the original author and the latter made an assignment of all his rights, including moving picture rights, to a third person who failed to record the assignment as provided for by the federal statute, one who took a later assignment of the moving picture rights from the original author without notice of his previous assignment and recorded it, was entitled to equitable enforcement of his right exclusively to produce moving pictures based on the novel. Photo-Drama Motion Picture Co. v. Social Uplift Film Corp. 220 Fed. 448, 137 C. C. A. 42, *affirming* order 213 Fed. 374, wherein it was also held that since the amendment of the Copyright Act in 1912 (Fed. St. Ann. 1914 Supp. p. 48), dramatizations for acting on the stage, and for moving picture purposes were separable and there might be a copyright for each kind and that each was assignable independent of the other.

It has been held that a moving picture which presented "Nick Carter, the Great American Detective, Solving the $100,000.00 Jewel Mystery" and which did not appropriate either the title, plot, or situation of any story published by a copartnership which published a weekly periodical devoted to detective stories and which had registered the words "Nick Carter" as a trademark, did not infringe any right held by those who had registered the name and that they were not entitled to restrain the production of the moving picture as named. Atlas Mfg. Co. v. Street, 204 Fed. 398, 122 C. C. A. 568, 47 L.R.A.(N.S.) 1002; wherein it was said: "It is not thought that the public will be deceived into belief that it is seeing a reproduction of one of complainants' stories when it witnesses that displayed from defendants' film. But if so it is no more deceived than when it reads a book of the same name as one theretofore published, but unprotected. It may be that the defendants are profiting by the use of a name made distinctive by complainants, but this is true of one who sells a brand of cigars named after a famous book or a famous personage. In the absence of some positive legal right in complainants, these are conditions for which equity cannot undertake to create a remedy."

Where it appeared that a person had bought a certain version of a play, which was a dramatization in part of an earlier novel called "Monte Cristo" and had continued in open, uninterrupted possession of it for about thirty years and had performed in the play during that time to such an extent that his name became closely identified with it, it was held, in an action by him to restrain a company from distributing and leasing moving picture films of a play called "Count of Monte Cristo" that an injunction would issue giving the plaintiff the relief prayed for as it was shown that the moving pictures were similar to the play in many scenes and dramatic climaxes and that a number of scenes omitted by the original author of the play were absent from the moving picture version. O'Neill v. General Film Co. 152 N. Y. S. 599, wherein it was also held that a performance of the play as first dramatized by the author in England on October 19, 1868 was not such a publication as would destroy the common-law rights in such a

manuscript play in the United States, and that the plaintiff had not surrendered his rights in the play at common law either by putting out posters depicting scenes in the play for advertising purposes or by licensing a company to produce it in moving picture form, where the licensee copyrighted the films in the manner prescribed by the amendment to the Copyright Act of August 24, 1912 (Fed. St. Ann. 1914 Supp. p. 48). That case is also authority for the holding that where a person comes rightfully into possession of a play from the ostensible owner and is for thirty years in open and notorious possession thereof and has during that period successfully maintained the exclusive right thereto against the world he has a valid title to the play by adverse possession.

In Universal Film Mfg. Co. v. Copperman, 218 Fed. 577, 134 C. C. A. 305, *affirming* decree 212 Fed. 301, it appeared that a Danish company had composed an original scenario and produced a photoplay therefrom but did not copyright either in England. It sold throughout Europe, however, positive films of the play with the stipulation that they should not be resold or hired out for use, except in the country in which they were bought, and should not be exported or sold for export. A company in the United States purchased one of the films from an English dealer and exhibited it and hired it out to others. Subsequent to this purchase by the American company, the Danish company copyrighted the photoplay in the United States, but did not copyright the scenario. This copyright was assigned to an American moving picture company and they seized the film in the possession of the other American company on the ground of infringement. It was held, in an action to uphold this seizure that there was no infringement, as neither the Danish company nor its assigns in the United States could repudiate the license it had given before the copyright to the purchaser of the film in England and its assigns to use it and to hire it out in the country where it was bought. The court said: "The title of the Nordisk Company in England was its common-law right of property in the intellectual conception of the scenario of the play expressed in words and in the intellectual conception of the photoplay expressed in actions. It could perform the written play itself, or license others to perform it, without prejudice to its common-law ownership, and so it could itself perform and license others to perform the photoplay in the same way. When it sold a positive film, which was the only means of performing the play, it conferred the performing right on the purchaser and his assigns. No one, by virtue of that sale, would acquire the right to reenact the play and take a negative of it, or make, if that could be done, a new negative from the positive film. This would be inconsistent with the Nordisk Company's common-law property in the photoplay and with the mere performing right which it had conferred on the owner of the film. But exercise of the performing right by one or by many purchasers of positive films would be entirely consistent with the Nordisk Company's common-law property in the play itself."

Under the Copyright Act 1911 of England it has been held that a person violates sections thereof which provide that "copyright means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever" and that "copyright in any work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright" where he agrees with the owner of a copyrighted moving picture film to exhibit it only at two certain places and in violation of his agreement advertises an intention, by means of bills and posters, to show it at a third place. Fenning Film Service v. Wolverhampton [1914] 3 K. B. 1171, 83 L. J. K. B. 1860 [1914] W. N. 338.

III. Construction of Theater Lease.

For the earlier cases construing theater leases, see the note to Rothenberg v. Packard, Ann. Cas. 1914B 1.

In Hammerstein Opera Co. v. Belasco, 161 App. Div. 199, 146 N. Y. S. 341, it appeared that a lease of a theater contained clauses that the premises were "to be used and occupied by the said tenant as a first-class theater" and that the tenant would not use them or permit them to be used "for any business purpose deemed disreputable or extrahazardous on account of fire under penalty of damages and forfeiture." The lessee, though at first he conducted high class shows, later allowed a moving picture film called the "Traffic in Souls" to be shown at the theater at prices lower than he formerly received for seats. It was held that a proper case had been made out for the granting of an injunction pendente lite, as the use of the theater for moving picture exhibitions appeared to be a violation of the clause in the lease with regard to increasing the fire hazard. It was further held that although the lessor had accepted rent, which had accrued since the new use of the theater, it did not thereby consent to that use because it had insisted then and since that the lessee was using the premises in violation of the lease.

IV. Construction of Film Lease or Sale.

In Biograph Co. v. International Film Traders, 76 Misc. 436, 134 N. Y. S. 1069, it

appeared that the plaintiff was a manufacturer of moving picture films and was licensed by a patentee company to manufacture and lease films to such exhibitors or owners of moving picture shows as held licenses from the patentee company. It was held that an action of replevin for films manufactured by it could be maintained by the plaintiff against one who had obtained the films wrongfully and who was not a licensee of the patentee company.

In Lubin Mfg. Co. v. Swaab, 240 Pa. St. 182, 87 Atl. 597, an action of replevin for the recovery of moving picture films it appeared that the plaintiff was the licensee of a patentee company with power under the license to manufacture and lease films to other concerns known as exchanges and the latter were licensed to sublet the films to exhibitors who had secured a license from the patentee company to exhibit them. The defendant was licensed as an exchange and under the terms of his license he had the right only to sublet or to use the films, the ownership thereof remaining in the lessor. The license contract also contained a provision that on the termination of the agreement by the licensor it had a right to the possession of all of its motion pictures twenty days after notice of the ending of the agreement was given to the exchange. On the label of the boxes in which each film was shipped to the defendant were further contract conditions to the effect that the licensee had only the right to sublet the motion picture contained in the box while his license agreement with the patentee company remained in full force and effect, and that a violation of any of the conditions printed on the label would entitle the plaintiff "to immediate possession of this motion picture." It was held that the title to the films was never in the defendant under the licensing arrangement and that the right of the defendant to sublet the films ceased when its license was canceled by the patentee company, but that the action had been brought prematurely as it did not plainly appear that the very films covered by the replevin writ had been sublet by the defendant which breach of the label agreement would have given the plaintiff the immediate right to possession of the films. To the same effect see Vitagraph Co. v. Swaab, reported in full, post, this volume, at page 311.

In Gilligham v. Ray, 157 Mich. 488, 122 N. W. 111, 16 Detroit Leg. N. 426, it was held that one who obtained from the owner and controller of certain moving picture films the exclusive right to exhibit the films could restrain another from wrongfully exhibiting the same films within the time and place specified. But in Davis v. Epoch Producing Corp. 91 Misc. 631, 155 N. Y. S. 597, it was held that an alleged contract for the exhibition rights of the "Birth of a Nation" film in seventeen states made by the owner of the film with a theatrical manager would not be specifically enforced against the owner of the film where it appeared that the so-called contract consisted of telegrams between the parties with an appointment for a meeting in New York "to consummate the deal," and that the telegrams contained only indefinite and uncertain terms which in moving picture exhibition contracts are usually many and varied because of the nature of the business, and where it further appeared that before the meeting in New York the owner had sold the right to exhibit the film in a part of the territory which it had included in the tentative agreement with the plaintiff.

In Jesse L. Lasky Feature Play Co. v. Celebrated Players Film Co. 214 Fed. 861, it appeared that in a contract granting the exclusive right to show certain moving pictures in three states there was a provision that if any films were not passed by the duly appointed moving picture authorities in a city because of objectionable scenes and such scenes were modified without materially injuring the whole production then the grantee should be required to accept the films, but with the further provision that the grantee might elect to take them even though the authorities refused a license for their exhibition, and that in case the grantee refused to accept on the ground of a disapproval by the municipal authorities the grantor should have the right to sell the production in the granted territory to some other person. It was held in an action for injunctive relief by both parties, that the grantor company acted too hastily in reselling the rights to another company five days after a film was modified where it was shown that the delay was caused by the grantee company in an endeavor to have the censorship of certain parts of the film modified, which parts were of material value to the production.

It has been held that where the principal business of a corporation was that of renting films for moving picture exhibition purposes, it was not a corporation engaged principally in trading or mercantile pursuits within the meaning of the provisions of the bankruptcy act as they existed at the time the petition in the case was filed. In re Imperial Film Exch. 198 Fed. 80, 117 C. C. A. 188.

V. Unlawful Use of Portrait or Name.

Under a statute providing that "a person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of

his or her parent or guardian, is guilty of a misdemeanor" and that an equitable action may be maintained by a person aggrieved to restrain the use of such picture or portrait and to recover damages by reason of such unlawful use, it has been held that a named portrait shown in moving pictures, which is represented to be a true portrait of one who has taken part in a certain event, but which in fact has been posed for by a moving picture actor, is a use for purposes of trade within the terms of the statute and the person whose picture is so used, not having consented thereto, may restrain a company of film manufacturers from further using the picture and also recover damages for its unlawful use. Binns v. Vitagraph Co. of America, 210 N. Y. 51, Ann. Cas. 1915B 1024, 103 N. E. 1108, L.R.A. 1915C 839, *affirming judgments* 147 App. Div. 783, 132 N. Y. S. 237, 140 App. Div. 925, 125 N. Y. S. 786, 67 Misc. 327, 124 N. Y. S. 515. See also Merle v. Sociological Research Film Corp. 166 App. Div. 376, 152 N. Y. S. 829. But where a person's name, as used in a moving picture production appears merely because it is on a building which is a part of the picture, it has been held that such a use is not for "advertising purposes" or for the "purpose of trade" within the statute forbidding such practices. Merle v. Sociological Research Film Corp. 166 App. Div. 376, 152 N. Y. S. 829. In that case, however, it appearing that a moving picture entitled "The Inside of the White Slave Traffic" showed a person's name on the outside of a factory wherein many girls were employed and showed the inside of a factory gotten up by the producer of the film, it was held that the only fair inference to be drawn from the picture was that it charged that such person's place of business was one where white slave trafficeers plied their trade and implied such moral wrong on the part of the owner of the factory in not suppressing that condition as to bring him into general disrepute and thus to give him a right of action for libel against the moving picture company without his alleging special damages.

VI. English Cinematograph Act.

Where a company is the owner of a number of theaters in which cinematograph exhibitions are given it has been held that the company and not its servant is the "occupier" of the premises of a theater where the exhibitions are held, within the meaning of a section of the English Cinematograph Act which provides penalties to be imposed on the "occupier" of premises who uses them for such exhibitions without first having obtained a license therefor. Bruce v. McManus Div. Ct. [1915] 3 K. B. 1, 84 L. J. K. B. 1860, 13 L. G. R. 727, 113 L. T. N. S. 332 [1915] W. N. 170, 79 J. P. 294, 31 Times L. Rep. 387. And it has been held that the word "exhibition" in the clause of the act providing that an exhibition of pictures by means of a cinematograph shall be given only when certain conditions have been complied with, ought not to be construed so as to include a demonstration of films for the purposes of a sale thereof, by the English agents of an American firm where nobody but prospective purchasers of films are admitted to such demonstration. Atty.-Gen. v. Vitagraph Co. [1915] 1 Ch. 206, 85 L. J. Ch. 142, 13 L. G. R. 148, 112 L. T. N. S. 245 [1914] W. N. 437, 79 J. P. 150, 31 Times L. Rep. 70, 59 S. J. 160.

A regulation made under the act that the seating accommodations in a building used for moving picture exhibiting purposes shall be arranged so as to allow free ingress and egress of audiences and which requires the passages leading to the exits to be left free from obstruction is broken when a proprietor of a cinema theater into which all the seats allowed by law have not been put, allows the passageways and the exits to be blocked and crowded by standing people who are unable to find seats. Potter v. Watts, 112 L. T. N. S. 508.

In a prosecution under the act for not having a license to conduct on certain premises a cinematograph exhibition in which inflammable films were used, wherein it was demonstrated that the films burned readily when a naked light was applied to them, it was held that the films were "inflammable" within the meaning of the word as used in the act, as the term was not used in the restricted sense of being readily ignited when actually in use in the cinematograph machine. Victoria Pier Syndicate v. Reeve, 10 L. G. R. 967, 76 J. P. 374, 28 Times L. Rep. 443.

Under the clause of the statute which provides that "a county council may grant licenses to such persons as they think fit to use the premises specified in the license . . . on such terms and conditions and under such restrictions as, subject to regulations of the secretary of state, the council may by the respective licenses determine" it has been held that the county council has power to insert in a cinematograph show license a condition that the licensee will not open his premises on Sundays, Good Friday or Christmas Day. Lond. County Council v. Bermondsey Bioscope Co. [1911] 1 K. B. 445. And the fact that a licensee under the act is using noninflammable films during an exhibition on a Sunday does not warrant his acquittal for opening on Sunday even though the first section of the act provides that "an exhibition of pictures . . . by means of

a cinematograph for the purposes of which inflammable films are used" shall not be given unless certain conditions are complied with, such conditions having reference to the use of the premises and not necessarily to the use of them for exhibition with inflammable films. Ellis v. North Metropolitan Theatres [1915] 2 K. B. 61, 84 L. J. K. B. 1077, 13 L. G. R. 735, 112 L. T. N. S. 1018 [1915] W. N. 61, 79 J. P. 297, 31 Times L. Rep. 201.

In Theatre De Luxe v. Gledhill [1915] 2 K. B. 49, 84 L. J. K. B. 649, 13 L. G. R. 541, 112 L. T. N. S. 519 [1915] W. N. 16, 79 J. P. 238, 31 Times L. Rep. 138, it was held that a cinematograph exhibition license granted by a county council which provided that "children under fourteen years of age shall not be allowed to enter into or be in the licensed premises after the hour of 9 P. M. unaccompanied by a parent or guardian" and that "no child under the age of ten years shall be allowed in the licensed premises under any circumstances after 9 P. M." was ultra vires on the ground that the licensing authorities under the act were not the judges of the broad question of public policy as to whether children should go to such exhibitions after nine o'clock.

VII. Miscellaneous.

Where a moving picture producing company and an actress of exceptional and unique ability entered into an agreement in October, 1914, for her services, one of the terms of which was a stipulation that she would "not sign for a motion picture with any other picture company prior to June 15, 1916," and she was induced by fraudulent representations made by another picture company to the effect that the company with which she had contracted had made no arrangements for a play in which she should appear and that her contract with such company could not be enforced against her, to sign a contract for moving picture posing with the second company, it was held that the first company was entitled to an injunction to restrain the second company from producing any picture play in which the actress appeared, or to advertise that she would appear in any play except one produced by the first company. Jesse L. Lasky Feature Play Co. v. Fox, 157 N. Y. S. 106.

In an English case it has been held that a performer who had agreed to give certain music hall proprietors his exclusive service and in his agreement stipulated that he would not, within a certain area, permit any colorable representation, imitation, or version of his performance, would not be restrained as for a breach of this agreement where it appeared that one of his sketches had been presented, by means of a cinematograph at a picture theater within the restricted area, as it was not proved that he had taken part in the reproduction. London Theater of Varieties v. Evans, 31 Times L. Rep. (Eng.) 75.

Where a person rents a moving picture machine to another and it is contemplated by the parties to the agreement that the property shall be used in the state where the contract is made and the property is located, and the contract is not required to be recorded under the state law, the owner of the property who acts as soon as he learns the fact may recover it in another state from a person who buys it from the bailee in good faith and without notice. Adams v. Fullers, 88 S. C. 212, 70 S. E. 722, 35 L.R.A.(N.S.) 385.

It has been held that the operation of a moving picture show is a trade or profession within the meaning of a statute which reserves to every family exempt from every species of forced sale for the payment of debts, "all tools, apparatus and books belonging to any trade or profession" and that the metal machine outfit and machines which are absolutely essential to the conducting of the business are exempt, but that the chairs used by an audience do not come within the meaning of the terms "tools" or "apparatus." Campbell v. Honaker's Heirs (Tex.) 166 S. W. 74. But in Higgins v. Beauchamp [1914] 3 K. B. (Eng.) 1192, 30 Times L. Rep. 687, it was held that where a partnership deed provided that the business of the firm should be that of proprietors and managers of picture palaces, cinematograph theaters and exhibitions, etc., such a business was not a trading business within the meaning of the term so as to give the managing partners thereof implied authority to borrow money for partnership purposes.

A combination of moving picture producing companies has been held to be a combination in violation of the federal Anti-Trust Act of July 2, 1890 (7 Fed. St. Ann. 336), where it appeared that although some of the companies held patents on moving picture apparatus yet their efforts as a combination were directed, not only to the protection of their rights under the patents, but to the imposition of restrictive rules for doing business on the trade in general, such as the requiring of every theater to pay a royalty for the use of a projecting machine even when the machine had been owned by the exhibitor before the combination was formed, and the withholding of permission to film exchanges and exhibitors to use films unless the exchanges and exhibitors were approved by all of the companies in the combination. U. S. v. Motion Picture Patents Co. 225 Fed. 800.

It has been held that the trustees of a Special Tax School District had no right to

lease the school property for moving picture exhibition purposes. Special Tax School Dist. No. 1 v. Lewis, 63 Fla. 691, 57 So. 614.

In Flanagan v. Goldberg, 137 App. Div. 92, 122 N. Y. S. 205, wherein the plaintiff asked for damages for injuries caused by being struck by a board while she was attending a moving picture show in the defendants' theater, it was held that a charge of the court below to the effect that the burden was on the defendants to show that they were not negligent after the plaintiff was admitted to the show and seated and not on the plaintiff to show that the defendants were negligent, was erroneous.

VITAGRAPH COMPANY OF AMERICA

v.

SWAAB.

Pennsylvania Supreme Court—March 15, 1915.

248 Pa. St. 478; 94 Atl. 126.

Replevin — Pleading — Plaintiff's Ownership Not Denied.

Since an issue is a disputed point, and the Replevin Act of April 19, 1901 (P. L. 88), intends that only the disputed averments of fact in the declaration and affidavit of defense shall constitute the issues, plaintiff's ownership of the property in controversy is not in issue, where it is not denied by the affidavit of defense.

Moving Pictures — Lease of Film.

Evidence in an action to replevin motion picture films, held to show not only that defendant had received the films from plaintiff under a lease, but that plaintiff owned same.

[See note at end of this case.]

Same.

Evidence in an action by the lessor to replevin motion picture films leased to defendant under a lease canceled by plaintiff by reason of a breach thereof by defendant held insufficient to show that the cancellation of the lease and taking of the films was pursuant to a special conspiracy between the lessor and other lessees such as entitled defendant to exemplary damages.

[See note at end of this case.]

Replevin — Liability for Unfounded Suit — Exemplary Damages.

That the sheriff in executing a writ of replevin necessarily went to defendant's place of business, and thereby caused him some inconvenience, does not entitle defendant to exemplary damages.

Moving Pictures — Lease of Film.

Where a license contract for the use of motion picture films provided that the contract could be terminated by the licensor on 14 days' notice, and that the right to possession of all films should revert 20 days after notice of such termination to the licensor, replevin issued one day before the time thus fixed is premature.

[See note at end of this case.]

Same.

In view of the fact that, though defendant in such case could have held possession of the films on hand even after expiration of the 20 days, he had no right to use them, he is entitled only to nominal damages by reason of the premature issuance of the replevin.

[See note at end of this case.]

Torts — Lawful Act Induced by Improper Motion.

Where a plaintiff has a legal right to replevin property, it is immaterial what motives induce him to assert such right.

[See Ann. Cas. 1912D 798.]

Appeal from Court of Common Pleas, Philadelphia county: BARRATT, Judge.

Action of replevin. Vitagraph Company of America, plaintiff, and Lewis M. Swaab, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. MODIFIED.

Alex. Simpson, Jr., and *Joseph L. McAleer* for appellant.

James Gay Gordon, Alfred Aarons and *Henry N. Wessel* for appellee.

[480] MOSCHZISKER, J.—The Vitagraph Company of America, a New York corporation, instituted this action in replevin, and the jury rendered a verdict for the defendant as follows: "Value of goods, $2,000; damages for detention, $8,424; exemplary damages, $10,000." Judgment was entered upon the verdict and the plaintiff has appealed.

The Act of April 19, 1901, P. L. 88, provides the form of pleadings in replevin, and Section 6 stipulates that "the declaration and affidavit of defense as originally filed, or as amended by leave of court, shall constitute the issues under which, without other pleadings, the question of title to, or right of possession of, the goods and chattels as between all the parties shall be determined by a jury."

The plaintiff claimed 27 moving picture films and averred, in its original declaration, that a corporation known as the Motion Picture Patents Company was the owner of certain patents relating to the manufacture of such films; that the Patents Company did not sell, manufacture, or use the films, but licensed others, including the plaintiff, to manufacture and lease, but not to sell, them

to other concerns known as exchanges, which were [481] likewise licensed by that company to sublet these patented films to exhibitors who had secured a license from it to exhibit motion pictures; that the defendant was duly licensed as an exchange on January 20, 1909, and had entered into a license agreement in writing, which was attached as an exhibit; that the 27 replevied films were the property of, and had been manufactured by, the plaintiff; that they had been delivered to the defendant upon the terms and conditions of his license agreement; that this agreement provided the ownership of each film should remain in the licensed manufacturer and that whenever the agreement was terminated the right to the possession of the film should revert to the manufacturer "twenty days after notice of such termination," a copy of which agreement was attached as an exhibit; that each of the films claimed had thereon the plaintiff's trademark (a spread eagle) and was delivered in a box to which was attached a printed label stipulating, inter alia, "The lessee shall not have the right to sublet such motion picture until such lessee has entered into an agreement in writing with the Motion Picture Patents Company containing terms and conditions . . . . and only while such lessee complies with such terms and conditions and while such agreement remains in full force and effect," a copy of the label being attached as an exhibit; that each shipment of the replevied films was accompanied by a bill which stipulated that the films were leased and not sold and that they were subject to the conditions of the license granted by the Motion Picture Patents Company and to the conditions expressed on the box label, a copy of this bill being attached as an exhibit; that the defendant's license was "canceled in accordance with the terms of the said exchange license agreement" and the defendant notified to that effect on January 3, 1911; on the foregoing averments of fact, it was claimed that "twenty days thereafter the right to possession of all the licensed motion pictures delivered to the defendant [482] by the plaintiff, under said exchange license agreement, reverted to the manufacturer . . . , the plaintiff in this action."

The defendant's original affidavit of defense, after first calling attention to alleged defects in the statement of claim, and entering certain defenses which were not pressed at trial, averred that the plaintiff was not entitled to maintain any action based on the defendant's license agreement because the plaintiff, together with the Motion Picture Patents Company, seven other corporations and two individuals (all except the Patents Company being licensed exchanges) form a combination "in restraint of trade and in violation of the laws of the State of Pennsylvania and of the acts of congress" relating to monopolies; that the notice of the termination of his license was not given to him on January 3, 1911, as averred in the declaration, but on January 4, 1911. None of the material averments of fact as to the ownership of the films, the terms of the contracts, or concerning the cancellation of the defendant's license, is specifically denied in this affidavit of defense, but it ends with a mere general denial that amounts to no more than a statement of the defendant's conclusion that he had not "at any time or in any manner violated the terms and conditions of any agreement between him and the Motion Picture Patents Company;" after which the defendant, without controverting the plaintiff's ownership of the films, denied that the plaintiff "at the time of the issuance of the writ in this case had any right of possession in and to the films taken," and asserted that the notice of the cancellation of his license was "unfounded, malicious and false and resulted from a conspiracy between the plaintiff and the Motion Picture Patents Company and others to ruin and oppress the defendant and to destroy his trade and business."

After the defendant's affidavit had been filed, the plaintiff, by leave of court, filed an amended declaration in which it reiterated the averments concerning its [483] ownership of the property and the cancellation of the defendant's license by the Motion Picture Patents Company, adding that after such cancellation and notice thereof to the defendant, he, "contrary to the terms and conditions of said labels and invoices and contrary to the terms and conditions of his said exchange license agreement, did sublet motion pictures . . . including the films above referred to (the 27 replevied films) or some of them, from time to time, to persons or corporations not licensed by the Motion Picture Patents Company," naming persons to whom the defendant had let the films after the cancellation of his license, but not designating when or to whom any one of the 27 films in question had been delivered. The amended statement also contains an averment that the defendant, contrary to the terms of his license and of the label and invoices, had permitted films leased to him by the plaintiff to be exhibited in unlicensed theaters or places of exhibition with unlicensed motion pictures, particularly stating a number of instances, with names and places, where this had occurred. The amended statement ends with the averment that "by reason of the facts aforesaid, the plaintiff, prior to the commencement of this suit, became entitled to immediate possession" of the replevied films.

The defendant filed an amended affidavit of defense in which he increased his claim of damages and alleged that the writ had been

sued out "without color of right," and that the taking of the films under the replevin was "attended by circumstances of hardship, vexation and outrage . . . all of which was part of a scheme to deprive the defendant of his lawful livelihood and to remove him from the field of competition . . . and was an unlawful and malicious abuse of the process of law."

It is to be noticed that the supplemental affidavit of defense does not contain any denial of the material facts averred as justifying the Motion Picture Patents Company's cancellation of the defendant's license, or of the [484] facts depended upon by the plaintiff to substantiate its claim of ownership in the replevied films. Hence, since the statute intends that the averments of the declaration and affidavit of defense (meaning, of course, the averments of fact: Miller v. Jackson, 34 Pa. Super. Ct. 31, 37) shall make the issues to be passed upon by the jury, and, since an issue is a disputed point, it is apparent that the only material issues which were properly in dispute at the time of trial concerned the questions of the right of possession to the films, the value of such right, and the defendant's claim for exemplary damages. In other words, there was no issue raised as to the ownership of the property, for, by the pleadings, that was impliedly conceded to be in the plaintiff, and, under the circumstances, it could not properly be contended that the writ was without color of right.

Not only the pleadings, but the proofs at trial showed the plaintiff's title, and hence its color of right to the writ, for we find on the record either copies of the actual invoices introduced by the defendant or evidence indicating that such documents were produced and identified, which show that he received from the Vitagraph Company certain of the 27 films in controversy. In addition, there was testimony that the films were shipped to the defendant by the plaintiff company, each in a tin box with the license label thereon. Furthermore, when called under cross-examination, the defendant admitted that he had received from the plaintiff a large number of the films, all between April 13, 1909, and July 5, 1910, and that they were accompanied by the plaintiff's bills and invoices. Thus, aside from the pleadings, the evidence was amply sufficient to prove that most of the films in controversy (all but two) were actually shipped by the plaintiff and received by the defendant. Moreover, there was testimony to show that the bills accompanying these films contained the following, "The films covered by this invoice are leased and not sold; subject to the conditions of a license issued to lessee by the [485] Motion Picture Patents Company . . . and to the conditions expressed on the labels of the boxes in which these films are shipped;" that the license above referred to contained this condition, "The ownership of each licensed motion picture leased under this agreement shall remain in the licensed manufacturer and importer from whom it may have been leased;" and that the labels had this stipulation printed thereon, "The lessee . . . shall have only the right to sublet or use such motion picture." The documentary proofs put in evidence by the defendant showed that he was notified by the Motion Picture Patents Company at the time of its incorporation that "hereafter licensed motion pictures will not be sold outright, but will be leased by the various licensed manufacturers and importers, so that the latter may at all times retain title;" and the defendant testified that after January 20, 1909, when he entered into his agreement with the plaintiff company, "I received the films from them, paid their bills and used the films only for rental purposes . . . under that contract or lease I had the right to use the films I purchased for seven months . . . then I was to return to the Vitagraph Company 80 per cent. of the films I had purchased seven months, prior, but I was not confined to Vitagraph films, I could send any positive film;" so it may be seen that the documentary evidence and testimony of the defendant showed not only that he had received the films from the plaintiff, but the ownership of the latter.

Notwithstanding the apparent ownership of the plaintiff, as impliedly conceded in the pleadings and shown by the evidence, the defendant contended at trial that the 27 replevied films belonged to him; he said that in 1909, at the time of his license contract, he had on hand about 1,000 films, purchased outright and belonging absolutely to him; that the arrangement was, at first, that he should at the end of each month return all the films received during the seventh month prior; that the Patents Company, in February, 1910, changed this to [486] 80 per cent. and permitted "any age and make" of film which a lessee had on hand to be returned; that acting under and by virtue of this extended privilege he had used his own films in making returns, and had "returned all the films called for by the various manufacturers;" therefore, he contended that the particular films on hand at the time of the replevin belonged to him absolutely, and were not the property of the plaintiff. No such issue was raised by the pleadings, but waiving that point for the moment, it appears that the defendant was receiving films from other licensed manufacturers in addition to those secured from the plaintiff company, and we find no testimony that he

in fact returned any of his own films to the plaintiff, the nearest approach to this being an assertion to the effect that "some of them (his own films) undoubtedly were returned to the Vitagraph Company for films I had received from them seven months prior." This assertion was a mere expression of opinion and cannot be accepted as evidence of a fact. On such a state of proof, in the face of the documentary evidence showing the ownership of the plaintiff, the evidence relied upon was entirely insufficient to prove a transfer of title to the defendant. Whether, should he prove that certain of his own films were delivered to the plaintiff company, the defendant could, in a proper action, recover such films or recompense therefor, is a point not necessary now to determine; but it is quite clear that there was no testimony to sustain a finding that any of the replevied goods belonged to the defendant. The uncontested averments of the plaintiff's declaration, and the very evidence produced or relied upon by the defendant, showed that the films had been manufactured by the former and leased by it to the latter, and there is nothing to justify or sustain a finding that they belonged to the defendant, or that the writ was issued without color of right.

Before taking up the question of the right of possession to the replevied films at the time the suit was [487] brought, we shall first consider the subject of exemplary damages. Even though the plaintiff showed title to the films, nevertheless, the defendant was entitled to a verdict, for, under the terms of the license agreement, the replevin issued prematurely, and the plaintiff did not sufficiently aver or prove a breach of the label contract by showing a letting of any particular film covered by the writ after the termination of the defendant's license; upon these points see Lubin Mfg. Co. v. Swaab, 240 Pa. St. 182, 87 Atl. 597. While the defendant alleged, in his affidavits of defense, a general, unlawful combination in restraint of trade, and that the notice from the Patents Company canceling his license was issued with a wicked intention to harm him, yet, when the case came to trial, he stated he did not claim that the Patents Company and its system of issuing licenses "was in the nature of an illegal combination." He did contend, however, that the Patents Company, with the ten licensed manufacturers, had entered into a combination with another concern known as the General Film Company, likewise a licensed manufacturer, to drive him out of business, and that the writ of replevin was the climax of this conspiracy. The General Film Company was incorporated April 18, 1910, most of the incorporators being officers of the other ten licensed manufacturers and one of them the treasurer of the Vitagraph Company. A member of the board of the General Film Company was also a director of the Vitagraph Company; but, the defendant's witness testified that all the incorporators of the General Film Company acted individually—for their own respective interests—and not as representatives of any other concern. The General Film Company is not referred to in either the affidavit or supplemental affidavit of defense as a member of the alleged conspiracy against the defendant; but evidence was offered to show that this concern had entered into negotiations with the latter, in the summer of 1910, for the purpose of purchasing his business, that a price was agreed upon, that subsequently [488] the defendant became dissatisfied with the arrangement and the company then called the whole transaction off by a letter, to which the defendant replied, "I have no criticism to make and accept with good grace your ultimatum." The defendant now contends, however, that this negotiation was not in good faith—that it was part of the conspiracy against him; but we have read every line of the testimony offered at the trial, together with all the documentary evidence, and feel there is absolutely nothing therein to justify an inference that the effort to buy the defendant out was commenced or carried on in other than good faith.

From the evidence produced, we do not see how, justifiably, either the General Film Company or the plaintiff could be found to have been a member of a conspiracy such as the defendant alleges existed against him. The arrangement under which he was working appears to have been entered into with his eyes open and with a full knowledge of its terms; so he must have known that his license could be revoked at any time by the plaintiff company, either with or without a cause. He admitted that he was one of four film exchanges in Philadelphia that went into this licensing arrangement, when other dealers, although offered a license, refused to do so, and that competitors are "in existence to-day notwithstanding that they could not get that license;" but, as before stated, when it came to trial the defendant did not depend upon his averments of a general conspiracy in restraint of trade, but alleged a special conspiracy against him, to prove which he called a witness who showed that a meeting was held in New York, in December, 1910, that was attended by a representative of the Patents Company and by representatives of most of the ten licensed manufacturers; that this was a gathering which took place every year at about the same time; that at this particular meeting the licensed manufacturers approved a de-

termination that had previously been reached by the Patents Company to cancel the defendant's license; [489] that before canceling licenses of film exchanges it was usual in all cases to secure a vote of confirmation from the licensed manufacturers, because they were vitally interested in keeping as many exchanges in existence as possible; that they did not cancel such licenses except on complaint and after investigation had shown to their satisfaction violations by the exhcange of the terms of its license agreement; and that on the occasion in question a general discussion concerning the conduct of the defendant's exchange took place before the Patents Company's decision to cancel his license was approved. There was no proof as to who attended the meeting on behalf of the plaintiff company, or whether the representative of that company voted for or against the cancellation of the license, nor was any prior corporate action by the plaintiff company upon this subject shown; and, finally, it appeared that everything done at the meeting, in connection with the cancellation of the defendant's license, was in accord with the general custom adhered to in dealing with such matters. The witness who gave this testimony, although called by the defendant, stated he was the president of the General Film Company, but that he had no connection with the plaintiff company, and this witness, in stating the purposes for which the Patents Company and the General Film Company were formed, if his testimony were accepted, showed them to have been incorporated for proper purposes and to have been conducted without a thought of injuring any one; in fact, from this testimony and the documentary proofs relied upon by the defendant, the whole licensing scheme seems to have been an arrangement to protect the use and to prevent the abuse of the patents possessed by the Patents Company and used by its licensees, for the mutual benefit of all concerned.

Whatever the real fact of the matter may be, the defendant failed to prove any special combination to work against him or his interests—the only combination [490] shown being the general one existing between the Patents Company and all the licensed manufacturers—and he likewise failed to show that in the working of this general combination anything unusual occurred in connection with his case. The licensed combination or connection between the Patents Company and its lessees and sub-lessees, was conceded to exist by all parties, but the defendant and all his licensed customers were to a degree a part of that general combination as well as the plaintiff company, and, as we have already stated, no evidence sufficient to show a special combination with an evil purpose toward the defendant was presented. Whenever such a conspiracy is claimed to exist it must be proved by "full, clear and satisfactory evidence," and, in each case, it is for the court to say whether evidence sufficient, if believed, has been presented to meet this burden: Ballantine v. Cummings, 220 Pa. St. 621, 70 Atl. 546. Under the evidence at bar, it must be held that the proofs depended upon were entirely insufficient to show such a conspiracy as here alleged; therefore, there is nothing to sustain the finding of exemplary damages unless it could be found that the taking of the goods was attended by undue aggravation, vexation and hardship. As to this, an examination of the evidence shows no such circumstances. The conditions at the time of the levy were as stated in Lubin Mfg. Co. v. Swaab, supra, and we need only repeat what is there said (p. 192): "In the nature of things, when the sheriff's officers came to the defendant's place of business the proceeding was bound to cause him inconvenience," but he is not entitled to damages on that score.

The questions we now have to determine are: Did the plaintiff prove a present right of possession to the replevied films, and, if not, what was the value of the possession to the defendant. The license contract contains several provisions concerning its termination, one of them stipulating that it might be terminated by the licensor at any time upon fourteen days' notice; but [491] the particular provision here involved (since the defendant's license was revoked thereunder) is this: "It is further agreed by the licensee that if this agreement is terminated by the licensor for any breach of any condition hereof, the right to possession of all licensed motion pictures shall revert, twenty days after notice of such termination, to the respective licensed manufacturers and importers from whom they were obtained and shall be returned to such licensed manufacturers and importers at once after the expiration of that period." As already stated, the replevin issued one day before the time set in the above quoted provision had expired; this being so, a then present right of possession was not in the plaintiff, but in the defendant. The question remains, however,—What was the value to the defendant of this right of possession? In determining this point we must again refer to the defendant's license agreement and the label contract, for by the latter the appropriate terms of the former were read into the letting of every film to the defendant. The label contract particularly stipulates that the defendant shall have only the right to sublet the film to which it is attached "while such agreement remains in full force and effect," and the license agreement provides that, immediately upon the

expiration of twenty days after notice of its cancellation, all films rented by the defendant shall be returned to the respective manufacturers. Of course, the defendant could physically hold possession of the films which he had on hand, even after the expiration of the twenty days, but he had no right to use or sublet them, for it was his duty to return them to the manufacturer from whom they had come. In other words, he could not make any use of the licensed films twenty days after the termination of his license agreement unless he breached his contract duty to return them at that time, and that he would commit such a breach we cannot assume as a possibility in determining the value of his right of possession; all of which brings us to the conclusion [492] that this right of possession in the replevied films had but a nominal value.

We are conscious of the fact that in the like case of Lubin Mfg. Co. v. Swaab, supra, we said (p. 191), "Owing to the position in which the defendant is placed by the terms of the license contract under which he operated his business, the damages which it is possible for him to recover may be inconsiderable, but we cannot say as a matter of law that they would be merely nominal," but more mature study and consideration have brought the conviction that we erred in determining that the defendant's possession had more than a nominal value, and since the present writer was the author of that opinion, he does not hesitate so to state at this first opportunity.

Most of the cases cited by the appellee were presented on the theory that the evidence was sufficient to sustain the findings of fact necessary to support the verdict of the jury as to the ownership of the films and the damages awarded; but, since we have determined the evidence to be insufficient in those respects, an extended review of the authorities becomes unnecessary; we have examined all of them, however, and find nothing in conflict with the views expressed in this opinion. McDonald v. Scaife, 11 Pa. St. 381, 51 Am. Dec. 556; Schofield v. Ferrers, 46 Pa. St. 438; Herdic v. Young, 55 Pa. St. 176, 93 Am. Dec. 739; Rafferty v. Haldron, 81 Pa. St. 438; Craig v. Kline, 65 Pa. St. 399, 3 Am. Rep. 636; Dennis v. Barber, 6 Serg. & R. (Pa.) 420, and Wiley v. McGrath, 194 Pa. St. 498, 45 Atl. 331, 75 Am. St. Rep. 709, are all instances of verdicts for plaintiffs where the evidence showed that the actual taking was attended by circumstances of "outrage and oppression" comprising "vindictiveness, wantonness, fraud, deceit or real violence," or that the detention was accompanied by "vexation and oppression." In Cummings v. Gann, 52 Pa. St. 484, 491, we said that it must be "a rare case of misconduct" when exemplary damages are allowed in an action of replevin, and in Carey v. Bright, 58 Pa. St. 70, 85, we said that where the evidence failed to show such misconduct the court should not permit exemplary damages. McCabe v. Morehead, [493] 1 Watts & S. (Pa.) 513, 516, is an instance where judgment on a verdict for the defendant which included exemplary damages was reversed because an "examination of the evidence" showed nothing "in the conduct of the plaintiff in taking out the replevin and claiming and detaining the property manifesting malice or wanton vexation," and we there cite Cable v. Dakin, 20 Wend. (N. Y.) 172, and Brizsee v. Maybee, 21 Wend. (N. Y.) 144, two cases where the verdicts were for the defendants, in the latter of which the rule is laid down that exemplary damages cannot be allowed unless the evidence shows that the writ had "obviously been perverted to the purpose of a wilful injury with a full consciousness in the plaintiff that he had no claim." Finally, in Cox v. Burdett, 23 Pa. Super. Ct. 346, exemplary damages were struck out in affirming a verdict for the defendant. We have not been referred to any Pennsylvania case, and we know of none, in which exemplary damages were allowed to the defendant where the plaintiff had a color of right to the writ and no special circumstances of hardship at the time of its service appeared. The general principle is that where a plaintiff has a legal right to a particular remedy it matters not what motives may induce him to assert it (Jenkins v. Fowler, 24 Pa. St. 308, 310; Wilson v. Berg, 88 Pa. St. 167, 172); but it is not necessary to discuss whether, in view of the plaintiff's ownership of the films, the present defendant could, under any circumstances, recover exemplary damages in replevin, for, as already decided, the evidence relied upon was insufficient for that purpose.

We have written at some length in order to develop plainly the reasons which impelled us to the conclusion that the large monetary awards comprehended in the present verdict could not be sustained; but it is not necessary to pass specifically upon each of the 23 assignments of error, many of which concern mere details of the trial; without adding further to this already too [494] lengthy opinion, we shall follow the practice pursued in Duroth Mfg. Co. v. Cauffiel, 243 Pa. St. 24, 33, 89 Atl. 798, and enter the following order: The record is returned to the court below with directions to strike out the monetary awards, and to permit the judgment in favor of the defendant to remain for nominal damages and costs; to this extent the judgment is affirmed.

NOTE.

It is held in the reported case that where a license is granted a film exchange to use and to sublet motion picture films with a condition in the license that the films may be retaken by the licensor twenty days after a notice to the licensee that his license has been canceled, the title to the films is never in the licensee, but that an action of replevin for the films brought only nineteen days after a notice to cancel the contract has been given, is premature, and gives rise to a right of action on the part of the licensee for nominal damages for the unlawful taking. Other cases dealing with the subject of moving picture film leases are collected in the note to Mutual Film Corp. v. Industrial Commission of Ohio, reported ante, this volume, at page 296.

WEBER

v.

FREED.

United States Supreme Court—December 13, 1915.

239 U. S. 325; 36 S. Ct. 131.

Moving Pictures — Importation of Prize Fight Films — Validity of Statute.

The contention that Congress exceeded its power under the commerce clause of the Federal Constitution by enacting the provisions of the act of July 31, 1912 (37 Stat. at L. 240, chap. 263, Fed. St. Ann. 1914 Supp. p. 326), § 1, making it unlawful to bring into or to cause to be brought into the United States from abroad, any film or other pictorial representation of any prize fight which is designed to be used, or may be used, for purposes of public exhibition, is so obviously devoid of merit that a bill which, on the ground of the unconstitutionality of such statute, sought to compel the collector of customs to permit the entry of photographic films of a foreign prize fight, states no cause of action, and is properly dismissed by a Federal district court.

Appeal from United States District Court, of District of New Jersey.

Action for injunction. L. Lawrence Weber, plaintiff, and Frederick S. Freed, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. AFFIRMED.

Benjamin F. Spellman and *Charles A. Towne* for appellant.

Assistant Attorney-General Warren for appellee.

[328] WHITE, C. J.—The act of July 31, 1912, § 1, c. 263, 37 Stat. 240 (Fed. St. Ann. 1914 Supp. p. 326), makes it unlawful "to bring or cause to be brought into the United States from abroad, any film or other pictorial representation of any prize fight or encounter of pugilists, under whatever name, which is designed to be used or may be used for purposes of public exhibition." With this provision in force, in April, 1915, the appellant brought to the port of entry of the City of Newark in the State of New Jersey photographic films of a pugilistic encounter or prize fight which had taken place at Havana and demanded of the deputy collector of customs in charge the right to enter the films. On refusal of the official to permit the entry appellant filed his bill of complaint to enforce the right to enter by a mandatory injunction and by other appropriate relief to accomplish the purpose in view. The ground relied on for the relief was the averment that the prohibition of the act of Congress [329] in question was repugnant to the Constitution because in enacting the same "Congress exceeded its designated powers under the Constitution of the United States and attempted, under the guise of its powers under the Commerce Clause, to exercise police power expressly reserved in the States." The collector moved to dismiss on the ground that the bill stated no cause of action because the assailed provision of the act of Congress was constitutional and therefore on the face of the bill there was no jurisdiction to award the relief sought.

The motion was sustained and a decree of dismissal was rendered, and it is this decree which it is sought to reverse by the appeal which is before us, the propositions relied upon to accomplish that result but reiterating in various forms of statement the contention as to the repugnancy to the Constitution of the provision of the act of Congress. But in view of the complete power of Congress over foreign commerce and its authority to prohibit the introduction of foreign articles recognized and enforced by many previous decisions of this court, the contentions are so devoid of merit as to cause them to be frivolous. Buttfield v. Stranahan, 192 U. S. 470, 24 S. Ct. 349, 48 U. S. (L. ed.) 525; The Abby Dodge, 223 U. S. 166, 176, 32 S. Ct. 310, 56 U. S. (L. ed.) 390; Brolan v. U. S. 236 U. S. 216, 35 S. Ct. 285, 59 U. S. (L. ed.) 544.

It is true that it is sought to take this case out of the long-recognized rule by the proposition that it has no application because

the assailed provision was enacted to regulate the exhibition of photographic films of prize fights in the United States and hence it must be treated not as prohibiting the introduction of the films, but as forbidding the public exhibition of the films after they are brought in—a subject to which, it is insisted, the power of Congress does not extend. But aside from the fictitious assumption on which the proposition is based, it is obviously only another form of denying the power of Congress to prohibit, since if the imaginary premise and proposition based on its were acceded to, the contention [330] would inevitably result in denying the power in Congress to prohibit importation as to every article which after importation would be subject to any use whatever. Moreover, the proposition plainly is wanting in merit, since it rests upon the erroneous assumption that the motive of Congress in exerting its plenary power may be taken into view for the purpose of refusing to give effect to such power when exercised. Doyle v. Continental Ins. Co. 94 U. S. 535, 541, 24 U. S. (L. ed.) 148; McCrary v. U. S. 195 U. S. 27, 53–59, 1 Ann. Cas. 561, 24 S. Ct. 769, 49 U. S. (L. ed.) 78; Calder v. Michigan, 218 U. S. 591, 598, 31 S. Ct. 122, 54 U. S. (L. ed.) 1163.

Affirmed.

NOTE.

The reported case is authority for the doctrine that the bringing into the United States motion pictures of prize fights may be prohibited by Congress under the commerce clause of the Constitution. Other cases involving the regulation of moving pictures are collected in the note to Mutual Film Corp. v. Industrial Commission of Ohio, reported ante, this volume, at page 296.

STATE

v.

LAPOINT.

Vermont Supreme Court—October 13, 1913.

87 Vt. 115; 88 Atl. 523.

Burglary — Breaking and Entry — Opening Partly Opened Door.

One who finds the door of a freight car partly open and pushes it further open in order to effect an entry for the purpose of committing larceny therein commits a "breaking" which is sufficient to support a charge of burglary, since the breaking is the removal of an obstruction which, if left as found, would prevent an entrance, and the fact that a portion of the space needed for the entrance is already open will not relieve the defendant from the penalty.

[See note at end of this case.]

Trial — Sufficiency of Exception to Charge.

Where one accused of crime submits 23 requests for charges, some of which are complied with, and excepts to the refusal to charge in accordance with each request and to the charge as given on the subject-matter of each request, the exception is too general.

Same.

An exception to a charge that an intent to steal may be inferred from the larceny alone as being improper under the circumstances of the case is not sufficient to direct the court's attention to a complaint that the court charged that the only way the intent can be determined is from the surrounding circumstances, thus excluding from consideration the defendant's testimony concerning his intent.

Criminal Law — Necessity of Instructing as to Circumstantial Evidence.

Where one charged with burglary admits the entry and the subsequent larceny, but denies that he intended to commit larceny at the time of the entry, it is not necessary for the court to charge that, in order to convict where the only evidence of intent is circumstantial, the circumstances must be such as to exclude every reasonable hypothesis except that of guilt.

[See 97 Am. St. Rep. 790.]

Exceptions from Chittenden County Court: TAYLOR, Judge.

Criminal action. Louis Lapoint convicted of burglary and alleges exceptions. The facts are stated in the opinion. AFFIRMED.

Joel W. Page and *Guy M. Page* for defendant.

Theodore E. Hopkins and *Henry B. Shaw* for state.

[116] MUNSON, J.—The respondent was tried on an information in two counts, the first of which charged burglary and the second larceny; and a conviction was had on the first count. The place entered was a freight car, forming part of a train moving from Richmond to Waterbury. The only direct evidence as to the breaking was that of the respondent, who testified that he and his associate found the door of the car open about an inch, and pushed it open about half way and climbed in. The respondent [117] has raised by several motions and exceptions the question whether this was sufficient to constitute a breaking.

It may be conceded at the start that by all the earlier cases, and by the great weight of authority to the present day, the further opening of a door left ajar, of a window slightly raised, is not such a breaking as is essential to the crime of burglary. This being the situation, our examination of the cases will have reference mainly to the reasons given for the rules adopted, and the consistency with which the rules have been applied.

Blackstone says that "if a person leaves his doors and windows open it is his own folly and negligence." 4, *226. This is the same as saying that the law will not undertake to protect by its penalties a man who is not diligent to protect himself. But this is not the rule in other branches of the criminal law; and we do not see that the fact that this crime consists merely of an entrance with intent to commit a further crime calls for any distinction. A man may recklessly and unnecessarily pass through a group of men excited to the point of violence, but if he is assaulted the penalty will follow. A man may issue a check so carelessly drawn as to afford an attractive opportunity for alteration, but the man who makes the alteration will be guilty of forgery. A woman may associate with men under circumstances of great imprudence, but if a criminal advantage is taken of her situation the act will nevertheless be rape. Then why should not one who is tempted to enter a dwelling with felonious intent by seeing a door which has carelessly been left ajar, be held guilty of burglary?

But let us keep the discussion within the limits of the law of the subject. A man may have locks on all his doors and windows, and if he closes the doors and windows without turning a lock, this is not to be accounted negligence. But if in addition to the non-use of his fastenings he leaves a window sash slightly raised, his negligence becomes a shield to the intruder. This distinction evidently turns upon the theory, prominent in both early, and recent cases, that the manifest carelessness of the householder tempts the passer-by to enter. It is doubtless true that a window partly raised or a door standing ajar may attract attention and be a temptation to one who might not be disposed to try a window or door to see if it was unfastened. But other conditions quite as likely to attract attention and [118] tempt the observer have been held sufficient to support the charge; for instance, a network of twine covering a window space otherwise open, or a chain attached to the outside of a door and hooked over a nail. Com. v. Stephenson, 8 Pick. (Mass.) 354; State v. Hecox, 83 Mo. 531. And one court has disagreed upon and left undecided the question of breaking, where the covering of a window opening was a cloth hanging from two nails in the top of the window frame. Hunter v. Com. 7 Grat. (Va.) 641, 56 Am. Dec. 121.

The word "breaking" implies the use of force, but it is universally held that the slightest force will be sufficient. It is evident that the question of force has no bearing upon the distinctions affecting this case as they are established by the decisions. The mere lifting of a closed window is a sufficient breaking, but the further raising of a partially opened window is not. The pushing open of a closed but unlatched door is a sufficient breaking, but the pushing back of one found standing ajar is not. And yet the force used in the two cases of either class is of the same character and degree, differing only in the continuance of the effort.

It is said by way of a general designation that the thing moved or displaced to permit the entrance must be something which is relied upon as a security against intrusion and a means of safety to person and property. The cases show how little this means. No provision for safety is required beyond what is included in the barest construction of a building intended to meet the requirements of civilized life. The occupant may rely upon substances and conditions which are altogether wanting in real security,—provided no opening whatever is left. The requirement, as applied to the ordinary means of entrance, is limited to measures which are about equally adapted to guard against the entering of strangers bent on crime and the unceremonious intrusion of friends.

It has always been held that an entrance through a chimney is a breaking. It is said that a chimney is as much closed as the nature of things will permit—that it is a necessary opening and needs protection. The pushing open of a closed but unfastened transom, that swings horizontally on hinges over an outer door of a dwelling-house, is a breaking. Timmons v. State, 34 Ohio St. 426, 32 Am. Rep. 376. But if it were left to hang slightly away from the frame it would not be a breaking to push [119] it further,—unless it were held otherwise on the ground that the position of the transom was such that the condition in which it was left would not be likely to attract attention. In other words, if such a transom is left in a position to serve in the slightest degree the purpose for which it was put on hinges, an entrance by way of it will not be a breaking. If an upper sash sustained only by a pulley weight is left in position, it will entitle the household to the protection of the law. Rex v. Haines, R. & R. C. C. (Eng.) 451. But if it be left a little lowered, an entrance effected

by pulling it down will not subject the intruder to the penalty. As far as the law is concerned, the necessities of convenient, unobstructed and adequate ventilation have thus far yielded to the theories which burden the inmate with the duty of protecting the outsider from temptation. The incongruity of this situation cannot well be overlooked in a time when the necessity of a constant and abundant supply of fresh air is so generally recognized.

Whatever reasons may formerly have existed for making this distinction, there seems to be none for maintaining it longer. The offence consists in breaking and entering with felonious intent; and the real breaking is the removal of the obstruction which, if left as found, would prevent the entering. The fact that a quarter of an inch of the space needed to effect an entrance existed before the intruder commenced operations ought not to relieve him from the penalty. The point has never before been brought to decision in this State. The only cases we know of which directly support the view taken are Claiborne v. State, 113 Tenn. 261, 83 S. W. 352, 68 L.R.A. 859, 106 Am. St. Rep. 833; People v. White, 153 Mich. 617, 117 N. W. 161, 17 L.R.A.(N.S.) 1102, 15 Ann. Cas. 927; State v. Sorenson, 157 Ia. 534, 138 N. W. 411. Convenient references to the cases generally will be found in the notes to People v. Richards, 2 Am. St. Rep. 383; State v. Vierck, 139 Am. St. Rep. 1047.

The respondent submitted twenty-three requests to charge, some of which were complied with. He excepted to the refusal to charge in accordance with each request, and to the charge as given on the subject-matter of each. The exception was too general to be of avail.

Complaint is made that the court charged that the only way the intent could be determined was from the surrounding circumstances, thus excluding from consideration the respondent's [120] testimony regarding his intent. The exception taken was to the charge that "an intent to steal may be inferred from the larceny alone, as improper under the existing circumstances of the case." There was nothing in this to direct the court's attention to the point now argued.

It is claimed that the court misstated the testimony as to the door being closed when the train left St. Albans, and as to its being closed until after the car was looked over at Bolton, and in saying that the respondent's evidence tended to show that Bolton was the place where the car was broken into. The first statement was incorrect but harmless; the second was justified by the testimony of the conductor; and no exception was taken covering the third.

The court charged fully on the subject of reasonable doubt as applied to the element of intent. The respondent excepted to the failure to charge that in order to convict where the only evidence of intent is circumstantial, the circumstances must be such as to exclude every reasonable hypothesis consistent with the respondent's innocence. The respondent's testimony negatived the existence of an intent to steal at the time of entering. The evidence of felonious intent adduced by the State, unless of confessions by the respondent, is necessarily circumstantial. It has not yet been held in this State that the failure to give the above instruction where the evidence is wholly circumstantial, is error; and it certainly ought not to be so held in respect to burglarious intent, where the respondent has testified to the entering and to a subsequent larceny, and has also testified regarding his intent.

Judgment that there is no error and that the respondent take nothing by his exceptions.

NOTE.

Burglary by Opening, Sufficiently to Gain Entrance, Door or Window Partly Open.

This note reviews the recent cases discussing burglary by opening, sufficiently to gain an entrance, a door or window partly open. The earlier cases are collected in the notes to People v. White, 15 Ann. Cas. 929; State v. Vierck, 139 Am. St. Rep. 1047.

The recent cases adhere to the view that to push open a door or window, partly open, sufficiently to gain an entrance constitutes a breaking within a statute defining burglary. State v. Sorenson, 157 Ia. 534, 138 N. W. 411; Goins v. State, 90 Ohio St. 176, 107 N. E. 335, L.R.A.1915D 241. And see the reported case. See also People v. Kaiser, 150 App. Div. 541, 135 N. Y. S. 274, *order affirmed* 206 N. Y. 46, 99 N. E. 195. Martin v. State, 1 Tex. App. 525. *Compare* Rex v. Burns, 36 Nova Scotia 257. Thus in State v. Sorenson, 157 Ia. 534, 138 N. W. 411, it appeared that the defendant pushed in a loose sliding door to an extent that enabled him to crowd into a storehouse through the opening thus made. Instructions were asked and refused to the effect that "if the door were 'partly open,' a pushing of the same further open could not constitute a breaking." In upholding the ruling, Evans, J. said: "There is a conflict in the authorities on this question. The numerical majority of the cases favor the contention of the defendant to the effect that, if a door be partly open, it is not a 'breaking' to push the same further open. Indeed, the older cases were practically unanimous to this effect. . . . In the later cases some of the courts have repudiated this rule as being unreasonable and illogical. . . . The majority of this court are dis-

posed to follow the lead of the last cited cases, and to hold that, if a door be so nearly closed that the accused could not enter through the opening without pushing the door further open, then such pushing will constitute a 'breaking' within the meaning of the law. The minority, including Justice Weaver and the writer hereof, are disposed to concede the force of logic in the majority view. In view, however, of the great weight of previous authority to the contrary, they think that the present holding savors somewhat of the ex post facto. It has always been in the power of the legislature to adopt a definition of 'breaking' in accord with the present holding, but it has not done so. In section 4791 it did provide that an entry without breaking should be punishable where such entry was in the nighttime, and the building a dwelling house. In all other respects the definition of burglary is left to judicial decision. In view of the uniform judicial definition, so long followed by the courts and acquiesced in by legislatures, it is the minority view that an innovation ought not to be lightly adopted." So in Goins v. State, 90 Ohio St. 176, 107 N. E. 835, L.R.A.1915D 241, the court affirmed a conviction of burglary for maliciously and forcibly breaking into and entering a certain chicken house and stealing chickens therefrom. The following were the facts: "The only means of ingress to and egress from the chicken house was through a doorway of ordinary size. On the evening before the chickens were stolen the door of the chicken house, which was hung upon hinges, was open about fifteen or eighteen inches, being held open by means of a fence post placed on one side thereof and a brick on the other side. The owner of the property, Mary Linton, testified that the door had been propped open in that way, 'just so that the chickens and myself could pass in and out.' She stated that the door was not open wide enough to permit her to walk in—she had to take hold of the edge of the door and then pull around the corner.' It appears from the evidence that the morning after the chickens were stolen the door was from one-half to two-thirds open, and the fence post and brick were moved out of place." The court said: "If the door of the chicken house was further opened, in order to make the opening sufficiently wide to admit the plaintiffs in error (and this was a question for the jury) unquestionably some force was required, and, however slight it may have been, it was all that was required to constitute a 'forcible breaking' under the statute, and, taken with the other facts established, made a case of burglary." In People v. Kaiser, 150 App. Div. 541, 135 N. Y. S. 274, *order affirmed* 206 N. Y. 46, 99 N. E. 195, wherein it appeared that the defendant gained admission to a dwelling house through an open basement gate, an uncovered hoistway and a cellar door partly open, the court said that "the manner in which he entered the house meets the statutory definition of breaking." Likewise in Martin v. State, 1 Tex. App. 525, the court by way of dictum said: "Under our statute the entry into the house at night includes every kind of entry but one by the free consent of the occupant, or of one authorized to give consent, and it is not necessary that there should be any actual breaking when the entry is made at night. In this state, whenever any force is applied, even if it be the pushing wider a partly-open door, or pushing up a window partly raised, so as to enable the person to enter the house without the free consent of the occupant, or of one authorized to give consent, with the intent to steal the property of another from said house, the party so entering said house is guilty of burglary."

However, in Rex v. Burns, 36 Nova Scotia 257, wherein it appeared that the accused entered a dwelling house either by lifting one window which was open a few inches and resting on a can, or through another window which was closed and locked, the trial judge instructed the jury that his entry either way constituted a burglarious breaking and entry. The appellate court said: "Clearly he did not commit the crime charged if he 'entered by the porch window partly open.' It was not proved by which window he entered. It was absolutely necessary to prove that he effected an entrance through the closed window. The jury were led to believe that an entrance by either would be sufficient. It is, therefore, quite evident that he may have been convicted of a crime which he did not commit. It was left open to the jury to do so, and the conviction cannot be upheld."

BROWN

v.

JOHNSON.

Utah Supreme Court—May 8, 1913.

43 Utah 1; 134 Pac. 590.

Findings of Fact — General Conclusion Improper.

Where, in an action on a note for money loaned, the evidence without dispute showed that the transaction was effected through agents of both parties, and plaintiff contended at the trial that she did not enter into a corrupt and usurious agreement, as claimed

by defendant, knew nothing about it, received none of the fruits thereof, and never ratified the transaction, a finding that the agreement was entered into "between plaintiff and defendant" is not a finding of fact but a conclusion of law and improper; it being the duty of the court to specifically find the facts with regard to the matters and then draw his conclusion from the facts found.

Usury — Contract of Agent — Responsibility of Principal.

Where money is left by a principal with an agent to be loaned, and the agent takes usury, but without the knowledge of the principal or her receiving any fruits of the transaction, the principal is not chargeable with the effects of the agent's misconduct.

[See note at end of this case.]

What Is Usurious Rate — Monthly Interest.

Under the statute permitting any rate of interest not exceeding 12 per cent. per annum, a note calling for interest at the rate of 1 per cent. per month is not usurious.

Proof of Usury — Clear Proof Essential.

Under the usury statute, providing that, whenever it shall satisfactorily appear by admission of the party or by proof that any bond, bill, etc., has been taken or received in violation of the provisions of the act, then, and not otherwise, shall the lender forfeit the whole sum expressed in the contract to the borrower, a forfeiture for usury will not be declared except on evidence clear and convincing that the lender participated in or benefited by the transaction.

Appeal from District Court, Salt Lake county: LOOFBOUROW, Judge.

Action on promissory note. Carrie Brown, plaintiff, and Sarah M. Johnson, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. REVERSED.

Allen T. Sanford for appellant.
Adam Duncan for appellee.

[2] FRICK, J.—This was an action to recover upon a promissory note given for $350. The only defense interposed is usury. A trial to the court resulted in findings and judgment for defendant, and the plaintiff appeals.

The interest specified in the note did not exceed the rate permitted by our statute, and hence the defendant undertook to prove usury by parol evidence. We have carefully gone over and examined all of the evidence that was produced at the trial, and which was certified up by the trial court in appellant's bill of exceptions. The material evidence produced by both parties is substantially as follows: Some time [3] in 1910 Mrs. Mansfield, the mother of respondent, applied to one Adolph Lochwitz to obtain a loan of $250 or $300 which she said she needed immediately to pay certain materialmen for material which they had furnished and were furnishing for a new dwelling house she was then building. In this connection she testified that she went to Mr. Lochwitz and asked him for the money, and after telling him that she could secure its payment by a chattel mortgage upon her daughter's (respondent's) property he said that he would see what he could do for her by way of obtaining the money and that he advised her that she needed at least $350; that within a day or two thereafter she saw him again and he told her that he could let her have the money but that she would have to pay fifty dollars for it for ninety days; that pursuant to this arrangement she, at his request went to the office of Mr. Sanford, as attorney at law, to have the necessary papers drawn to evidence the loan and there to obtain the money; that she met Mr. Sanford and Mr. Lochwitz at the office of the former and he prepared the papers and she signed them by signing her daughter's name, by herself, as attorney in fact; that after the papers were signed Mr. Sanford counted out $300, placing the same in three separate parcels, and also counted out an additional fifty dollars and placed it in a separate parcel and shoved the whole amount across the office desk toward her; that she was about to take the money when Mr. Lochwitz said that the interest and expenses for drawing the papers should be deducted from the amount. After this the witness' memory is not clear with respect to just how the transaction terminated. Mr. Sanford, however, testified that he obtained the $350 from his stenographer, with whom Mr. Lochwitz had left it, and that he counted all of it and shoved it across the desk to Mrs. Mansfield when Mr. Lochwitz spoke up and said that the interest called for in the note, to wit, one per cent. a month, should be taken out of the amount, and further that one-half of the expenses for drawing the papers should also be deducted therefrom. He accordingly asked Mr. Sanford what the expenses were and was informed that they would be five [4] dollars. Mr. Sanford then sought to take the amount of the interest, namely, $10.50, and his expenses, five dollars, out of the $350, but could not do so because he could not make the change correctly. Mr. Lochwitz then paid Mr. Sanford the portion of the expenses Mrs. Mansfield was to pay and immediately left the office to go with her to the bank where she wanted to deposit the money so that she could check against it, where she said she would repay him her share of the expenses. As to what happened at the bank, the witnesses are greatly at variance, but, in view of the

conclusions reached, the precise nature of the transaction there is not material. Mrs. Mansfield, however, asserts that Mr. Lochwitz took the whole fifty dollars for interest, while he insists that all he took was $10.50 and one-half of the expenses, and that Mrs. Mansfield gave him thirty-seven dollars as compensation for his efforts in obtaining the money in question and to further assist her to obtain a loan upon her house she was then building. He says that this came about in this way: When Mrs. Mansfield asked him for the money in question he asked her what means she had to repay the loan if made; that she said she wanted to secure $1,200 by mortgaging her house, and if she could do so she could repay the loan from him out of that. After considering her wants as detailed by her, he told her that she had better make a loan of $1,600, and that in consideration of the fifty dollars she offered to pay him he would assist her to obtain the loan from some real estate men with whom he was acquainted. She disputes the latter statement and insists that the fifty dollars was asked as a compensation for the use of the money in question. The evidence is without contradiction that the money in question belonged to the appellant, who is a niece of Mr. Lochwitz, and at the time the loan was made lived and still lives in San Francisco; that some time prior to the transaction in question she had lived at Price, Utah, and from there came to Salt Lake City for surgical treatment; that after she was operated upon and was about to leave Salt Lake City for San Francisco she had more money than she needed and she gave $400 to her [5] uncle, Mr. Lochwitz, telling him to use it or do with it as he thought best, and when she needed it he could upon request return it to her. Mr. Lochwitz states that after he had tried in vain for a number of days to obtain the money for Mrs. Mansfield, and after she had offered him fifty dollars as compensation to obtain it, he finally let her have $350 of the $400 aforesaid and took a chattel mortgage as security; that his niece had no knowledge whatever that he was about to make or that he had made the loan until afterwards, when he advised her of the fact and asked her to execute a power of attorney to him so that he might do everything that might be required of him in collecting the money; that she did not know anything about the arrangements between him and Mrs. Mansfield respecting the interest, commission, or bonus (whatever it may be called), and never obtained any part or share of the same; that no arrangement or understanding of any kind was ever had or talked of between him and his niece about the making of this or any other loan, or about his services in case he made a loan, and that his niece furnished the entire $350. Respondent introduced the aforesaid power of attorney in evidence, which was dated and was executed some time after the note in question was made and delivered. It is not necessary to detail the evidence further.

The only findings of fact made by the court, except the formal ones, are as follows:

"That the said note and mortgage were made and delivered to the plaintiff upon an agreement between the plaintiff and defendant that the defendant should pay to plaintiff, and that the plaintiff should take, receive, reserve, and secure to herself for the loan of the principal sum therein mentioned, a greater sum than at the rate of twelve per centum per annum upon said principal sum, to wit, at the rate of one per cent. per month from date of said note, as provided therein, and in addition thereto the sum of thirty-four dollars; and, in addition to the said interest so reserved by the said note at the rate of 1 per cent. per month from date thereof until paid, the defendant at the time of the execution and delivered thereof paid to the plaintiff, and the plaintiff took and received [6] in pursuance of said agreement, the said further sum of $34 as additional interest or compensation for the loan of the said principal sum."

Upon the foregoing findings the court made conclusions of law and entered judgment in favor of respondent in which the note and chattel mortgage were canceled and appellant was adjudged to pay the costs of the action. Appellant complains that the findings aforesaid are not sustained by the evidence and that the court's conclusions of law and judgment are contrary to law.

We think it requires no extended, if any, argument to show that in view of the evidence to which we have referred the so-called findings of fact are merely a blending of conclusions of fact and conclusions of law interspersed with some ultimate facts. The finding that an agreement was entered into "between the plaintiff and defendant" is, in view of the evidence a conclusion of law pure and simple, since the evidence is without dispute that Mr. Lochwitz acted as agent for and on behalf of the appellant and that Mrs. Mansfield acted as such for and on behalf of the respondent. In view, therefore, that the transaction was effected through the agents of both parties, and since appellant contended, at the trial and now contends that she did not enter into a corrupt and usurious agreement, knew nothing about it, and neither received any of the fruits thereof nor ratified the transaction, the court should have specifically found the facts with regard to those matters and should have made his conclusions of law from the facts found.

There is not the slightest evidence in this record from which any inference can legitimately be deduced that the appellant authorized her uncle to enter into a usurious contract unless such inference is permissible from the mere fact that she left the money with him under the conditions hereinbefore detailed and from the execution of the power of attorney to him after the loan was made. Nor is there any evidence of ratification, nor that she knowingly received or retained any of the fruits of the illegal transaction, nor that she received anything forbidden [7] by law. We think the great weight of authority is to the effect that the facts in this case are clearly insufficient to justify the inference above referred to. We shall refer to some of the cases upon this point further on in this opinion.

The court, however, also found that the note in question upon its face provided for a higher rate of interest than is permitted by our statute in that it calls for interest at the rate of one per cent. a month while the statute permits interest at a rate "not to exceed twelve per cent. per annum." If this were so, the finding is useless, since the note speaks for itself. The finding is, however, a mere conclusion of law, but whether it is called a conclusion or a finding of fact it cannot be sustained because there is no evidence whatever to support it. Nor does the language of the note support it if it be assumed to be a mere legal conclusion. This is easily demonstrable. The statute permits any rate of interest not exceeding twelve per cent. per annum. This means a period of twelve months, no more no less. One per cent. a month is precisely twelve per cent. per annum, and this is especially so where the loan is for less than a whole year. If the interest reserved in the note in question be calculated, we find that upon the $350 it amounts to $3.50 a month and for twelve months to forty-two dollars. Interest at the rate of twelve per cent. per annum would amount to forty-two dollars for a year on $350 and $3.50 for each month, and for three months to $10.50, just the amount reserved in the note. If it were true that the note on its face called for a usurious rate, then we cannot see how the appellant could escape the consequences of a usurious contract, and the judgment would be correct regardless of the findings of fact, and there would have been no need of an extended opinion in this case. We are, however, clearly of the opinion that the note upon its face called for legal interest merely, and hence the usury must be established, if established at all, from facts *aliunde*. The question, therefore, is, Does the evidence in this case establish usury in the sense that it vitiates the note under our statute as between appellant and respondent? While the courts with regard to when a [8] principal is bound by the acts of an agent in entering into usurious contracts or transactions are seemingly not in harmony, yet from a careful examination of the cases it will be found that their divergent views are more apparent than real.

In Boylston v. Bain, 90 Ill. 285, the Supreme Court of Illinois states the law upon the subject thus:

"If the plaintiff did not authorize his agent to charge a higher rate of interest than is given by the statute, and if he had no knowledge that a higher rate was charged, and did not receive the interest paid in excess of that allowed by statute, as stated in the instruction, we perceive no ground upon which the defense of usury could be rested. An unlawful and corrupt intent is the very essence of a usurious transaction, and how the plaintiff could be charged with an intent to violate the law if he had no knowledge that a usurious rate of interest was charged, and never received the illegal interest, as declared in the instruction, it is difficult to understand."

The Supreme Court of Iowa in Greenfield v. Monaghan, 85 Ia. 211, 52 N. W. 193, in the headnote, lays down the following rule:

"Where an agent, for a person lending money upon a promissory note, charged the borrower a rate of interest in excess of that allowed by law, retaining the difference between the rate charged and the legal rate for his own use, held, that the loan was not usurious unless the charge of illegal interest was authorized or ratified by the principal, and that upon such issue the burden of proof was upon the party charging usury."

In Call v. Palmer, 116 U. S. 102, 6 S. Ct. 303, 29 U. S. (L. ed.) 559, the Supreme Court of the United States, after reviewing the Iowa cases in connection with a number of others, says:

"These decisions seem to be founded on plain principles of justice and right. For when two persons (the agent and the borrower) conspire together and for their own purposes violate the law, how can punishment for their acts be justly imposed on the innocent third party (the lender)?"

What have we in this case except a secret arrangement between Mrs. Mansfield and Mr. Lochwits, the former being anxious to obtain the money and the latter desirous of receiving [9] the bonus or a commission (call it what you will) from her out of the money loaned without the knowledge or consent of appellant whose money was loaned? Why should she be made to suffer for their acts from which each expected some benefits while she could obtain none except the interest allowed by law?

The editor in a footnote to the case of Newport Bank v. Cook, 60 Ark. 288, 30 S. W. 35, 46 Am. St. Rep. 197, 29 L.R.A. 761,

after reviewing many of the cases, states the substance of the decisions in the following language:

"If the person to whom a commission or bonus is paid is an agent of the lender, the question whether such payment can be taken into consideration in determining whether the transaction is usurious depends upon whether or not the lender is to profit directly or indirectly by the transaction. If he does not know that a commission has been, or is agreed to be, paid and has no notice of such facts as impose upon him the duty of inquiry, and he does not knowingly receive any benefit from the commission or bonus, he certainly has no usurious intent, and, having neither usurious, nor a usurious profit, the cases agree that he is not to be subjected to the penalties of usury."

Many cases are cited as supporting the foregoing statement of the editor.

Without making further excerpts from the decisions, we refer to the following cases, all of which are in harmony with the cases referred to and in which many others are cited: Estevez v. Purdy, 66 N. Y. 446; Conover v. Van Mater, 18 N. J. Eq. 481; Rogers v. Buckingham, 33 Conn. 81; Franzen v. Hammond, 136 Wis. 239, 116 N. W. 169, 19 L.R.A.(N.S.) 399, 128 Am. St. Rep. 1079; Silverman v. Katz, 120 N. Y. S. 790.

In the case of Rogers v. Buckingham, supra, the transaction there involved, like the one in this case, was the only one that had been entered into by the agent for the principal, and the court held that a single transaction by an agent, where no arrangement existed between the principal and such agent with regard to the compensation he should receive or the rate he should reserve, was insufficient to authorize [10] an inference or presumption of fact that the agent was authorized to exact usury. That case is frequently cited and approved by the courts upon the question of establishing authority upon the part of the agent to bind the principal upon a usurious contract made by the agent.

It has, however, also been frequently held that, where an agent enters into a usurious contract with a borrower, the lender under certain circumstances may be bound by the acts of the agent, although the former did not know of nor directly authorize the particular transaction. The rule in this respect is perhaps as well stated by the Supreme Court of Minnesota as it is anywhere in the headnote to the opinion in the case of Hall v. Maudlin, 58 Minn. 137, 59 N. W. 985, 49 Am. St. Rep. 492, which we quote:

"Where a money lender intrusts the entire management of his business to a general agent, with unlimited authority to conduct it according to his own discretion, and with the understanding that he shall obtain the compensation for his services as agent from the borrowers, in the form of bonus or commission, if the agent exacts from a borrower a bonus or commission which, together with the interest reserved in the contract, amounts to more than the maximum rate of interest allowed by law, the transaction is usurious."

The following cases clearly support the rule as there stated: Robinson v. Blaker, 85 Minn. 242, 88 N. W. 845, 89 Am. St. Rep. 541; Payne v. Henderson, 106 Ky. 135, 50 S. W. 34; Payne v. Newcomb, 100 Ill. 611, 39 Am. Rep. 69; Fowler v. Equitable Trust Co. 141 U. S. 384, 12 S. Ct. 1, 35 U. S. (L. ed.) 786; Clarke v. Havard, 111 Ga. 242, 36 S. E. 837, 51 L.R.A. 499; Whaley v. American, Freehold Land-Mortg. Co. 74 Fed. 73, 20 C. C. A. 306. See, also cases cited in the footnote to Newport Bank v. Cook, 60 Ark. 288, 30 S. W. 35, 46 Am. St. Rep. 198, 199.

In addition to the cases just cited there are a few in which the principal's liability is extended to all acts which were within the apparent scope of the agent's authority. All that the courts in those cases seemed to inquire into was whether the agent had the authority to make the loan and if he had the principal was held bound by the agent's acts, although the agent transcended the express directions of his principal.

[11] To this effect is an early case from Nebraska which is referred to by Mr. Justice Sullivan in Hare v. Winterer, 64 Neb. 551, 90 N. W. 544. In the latter case it is, however, expressly stated that it was not necessary to go, and that the court did not go to that extent in a later case. The later Nebraska case may therefore be classed as belonging to the second group of cases cited above. Another case which perhaps goes to extent of the early Nebraska case is Austin v. Harrington, 28 Vt. 130.

It is also claimed by respondent that the case of Algur v. Gardner, 54 N. Y. 360, supports the doctrine laid down in the Vermont case. It will be observed that the case of Estovez v. Purdy, supra, to which we have referred, and which is a later New York case, squarely lays down the doctrine of the Illinois case which we have quoted from. Moreover, the reasoning in the opinion in 54 N. Y. is not satisfactory and we have not found the case cited nor followed by any of the later New York or other cases, while the case in 66 N. Y. has frequently been cited and followed.

There is still another case decided by the Supreme Court of Missouri, Western Storage, etc. Co. v. Glasner, 169 Mo. 38, 68 S. W. 917. The decision in that case is, however, squarely based upon a local statute and is therefore not controlling here. There may be a few more sporadic cases which follow the rule laid down by the Vermont court, but

we have not found them. We desire to add in this connection that, when all of the cases from which we have quoted, and the others to which we have referred, except the ones from Nebraska, Vermont, and Missouri, and possibly the one in 54 N. Y., are carefully examined and analyzed, it will be found that all of them support the doctrine laid down by the Supreme Court of Illinois in the case of Boylston v. Bain, supra. We are also of the opinion that the doctrine as there laid down is the correct one. The question of whether the agent had authority to enter into a contract in violation of law should not be limited to the mere formal inquiry of whether he had the express or implied authority to lend the principal's money. While that question, as a matter of course, is always an [12] element and lies at the very threshold of the inquiry where the authority of the agent is involved, yet, where the transaction involves the violation of a statute, the inquiry should go farther and it should be ascertained whether the agent had the authority to enter into the contract which is alleged to be in violation of law. To establish such authority it need not be shown that the principal expressly conferred it, but it may be shown in the same manner as it usually is shown by proving the facts and circumstances from which the authority may legally be inferred or implied. And in this regard, if it be shown that there was an understanding, express or implied, between the agent and the principal whereby the former should look to the borrower for a commission or bonus as compensation, or if he has made loans for his principal in which such a course was pursued and the principal knew of it, or approved of it, or if there are any other facts or circumstances from which authority may be clearly implied, it may be found to exist. In the case at bar, as we have seen, there is nothing from which authority may be deduced except the naked fact that the uncle of appellant was authorized to exercise his best judgment in making use of the $400 she had left with him. Assuming that all that Mrs. Mansfield claims is true, still the question remains, What authority has the court to declare appellant's money forfeited to the respondent? Certainly our statute does not require that under such conditions the latter's money should be forfeited to the borrower.

The statute says "whenever it shall satisfactorily appear by the admission of the party or by proof that any bond, bill, etc., . . . has been taken or received in violation of the provisions" of the statutes, then, and not otherwise, shall the lender forfeit the whole sum expressed in the contract to the borrower. We held in Culmer Paint, etc. Co. v. Gleason, 42 Utah 344, 130 Pac. 66, that when the plea of usury is interposed and forfeitures are involved, and "especially such as have the effect of taking property from one and giving it to another (the forfeiture) should be enforced only when the proof is clear and convincing, [13] if not beyond a reasonable doubt." We think that this is what is contemplated by the language of the statute which is, when it shall satisfactorily appear by the admission of the party or by proof that the provisions thereof have been violated, a forfeiture, etc., shall be declared by the court. If this means anything, it means that the proof showing a violation of the statute should be clear and convincing. The proof, in order to be satisfactory, can be no less than this.

Entirely apart, however, from the terms of our statute, the overwhelming weight of authority is clearly to the effect that the burden of proof is upon him who alleges usury and that he must establish it by at least clear and convincing evidence and not merely by a preponderance thereof. Webb, Usury, section 417; Yellow Medicine County Bank v Cook, 61 Minn. 452, 63 N. W. 1093; Wood v. Babbitt, 149 Fed. 818; Conover v. Van Mater, supra; Short v. Post, 58 N. J. Eq. 130, 42 Atl. 569. The evidence as it now stands is therefore clearly within the rule laid down in Yellow Medicine, County Bank v. Cook, supra, and is insufficient to support the conclusions of law and judgment.

Appellant further contends that the court erred in overruling her motion to strike the testimony of Mrs. Mansfield. This contention is not tenable. While Mrs. Mansfield's testimony, standing alone, was clearly insufficient to make out a case as against the appellant, yet the testimony was properly received by the court. There is a further assignment that the court erred in admitting and excluding certain evidence.

We have carefully gone over the court's rulings in that regard, and we do not find any error excepting in one particular in connection with the claim advanced by appellant, namely, Mr. Lochwitz claimed that he was to receive the fifty dollars as compensation for obtaining a loan upon Mrs. Mansfield's house and lot and for what he had done in looking up persons who had money to lend before the loan in question was made, and in connection with the claim he attempted to prove that he had in fact assisted Mrs. Mansfield, and he offered to show [14] just what he had done in that respect. The court ruled that he could prove the agreement between himself and Mrs. Mansfield, but also ruled that he could not show what he had done after the loan in question was made. Where usury is attempted to be proved by parol evidence or otherwise, it is always proper for either party to go into the whole

transaction for the purpose of disclosing all of the circumstances relating thereto. The evidence offered by appellant, while somewhat remote, was nevertheless proper in view of the claim made by Mr. Lochwitz. The question was one of weight and not of relevancy. The only objection was that it was not material. It clearly was material and, as we have seen, was otherwise proper. If this were the only error, we should not reverse the judgment, because it appears from the record that most of the offer to which we have referred was nevertheless before the court, as upon cross-examination Mr. Lochwitz was permitted to state about all of the facts in that regard. We have only mentioned the matter as a guide to the court in case a retrial of the case is had.

For the reasons stated, the judgment is reversed, the case is remanded to the district court, with directions to grant a new trial and to proceed with the case in accordance with this opinion. Appellant to recover costs.

McCarty, C. J., and Straup, J., concur.

NOTE.

Act of Agent in Entering into Usurious Contract as Binding Principal.

Agent's Conduct Not Known or Authorized, 327.
Agent's Conduct Known or Authorized:
In General, 328.
Agent Authorized to Look to Borrower for Compensation, 329.
Agent's Usurious Commission Divided with Principal, 330.
General Agent, 331.
Rule in Nebraska, 331.
Rule in Washington, 332.

Agent's Conduct Not Known or Authorized.

It is the prevailing doctrine that a principal is not liable for a usurious agreement of his agent which is entered into without the knowledge or consent of the principal and under circumstances which do not impute knowledge to the principal.

United States.—Call v. Palmer, 116 U. S. 98, 6 S. Ct. 301, 29 U. S. (L. ed.) 559, *affirming* 7 Fed. 737, 2 McCrary 522. See also Dryfus v. Burnes, 53 Fed. 410; Whaley v. American Freehold Land-Mortg. Co. 74 Fed. 73, 20 C. C. A. 306.

Alabama.—*Compare* Pearson v. Bailey, 23 Ala. 537.

Arkansas.—Short v. Pullen, 63 Ark. 385, 38 S. W. 1113; Sherwood v. Haney, 63 Ark. 249, 38 S. W. 15; Sherwood v. Swift, 64 Ark. 662, 43 S. W. 507 mem.

District of Columbia.—See Richards v. Bippus, 18 App. Cas. 293.

Georgia.—Boardman v. Taylor, 66 Ga. 638; McLean v. Camak, 97 Ga. 804, 25 S. E. 493; Wacasie v. Radford, 142 Ga. 113, 82 S. E. 442. See also McCall v. Herrin, 118 Ga. 522, 45 S. E. 442.

Illinois.—Bolyston v. Bain, 90 Ill. 283; Cox v. Massachusetts Mut. L. Ins. Co. 113 Ill. 382; Chicago Fire Proofing Co. v. Park Nat. Bank, 145 Ill. 481, 32 N. E. 534, *affirming* 44 Ill. App. 150; Gantzer v. Schmeltz, 107 Ill. App. 641, *modified* Gantzer v. Schmeltz, 206 Ill. 560, 69 N. E. 584.

Iowa.—Gokey v. Knapp, 44 Ia. 32; Brigham v. Myers, 51 Ia. 397, 1 N. W. 613, 33 Am. St. Rep. 140; Ammerman v. Ross, 84 Ia. 359, 51 N. W. 6; Greenfield v. Managhan, 85 Ia. 211, 52 N. W. 183; Richards v. Purdy, 90 Ia. 502, 58 N. W. 886, 48 Am. St. Rep. 458.

Kansas.—Lusk v. Smith, 71 Kan. 550, 81 Pac. 173.

Minnesota.—Jordan v. Humphrey, 31 Minn. 495, 18 N. W. 450; Mackey v. Wrinkler, 35 Minn. 513, 29 N. W. 337; Brainard v. Prouty, 66 Minn. 343, 69 N. W. 3; Babcock v. Murray, 69 Minn. 199, 71 N. W. 913; Commonwealth Title Ins. etc. Co. v. Dakko, 89 Minn. 381, 94 N. W. 1088. See also Bovee v. Butters, 92 Minn. 149, 99 N. W. 641. *Compare* Robinson v. Blaker, 85 Minn. 242, 88 N. W. 845, 89 Am. St. Rep. 541.

New Jersey.—Muir v. Newark Sav. Inst. 16 N. J. Eq. 537; Manning v. Young, 28 N. J. Eq. 568; Forbes v. Baaden, 31 N. J. Eq. 381; Coudent v. Flagg, 31 N. J. Eq. 394; Nichols v. Osborn, 41 N. J. Eq. 92, 3 Atl. 155; Lane v. Washington L. Ins. Co. 46 N. J. Eq. 316, 19 Atl. 618.

New York.—Condit v. Baldwin, 21 N. Y. 219, 78 Am. Dec. 137; Bell v. Day, 32 N. Y. 165, *following* Condit v. Baldwin, supra; Esteves v. Purdy, 66 N. Y. 446, *reversing* 6 Hun 46; Guardian Mut. L. Ins. Co. v. Kashaw, 66 N. Y. 544; Van Wyck v. Watters, 81 N. Y. 352, *affirming* Van Wyck v. Watters, 16 Hun 209; Phillips v. Mackellar, 92 N. Y. 34; Stillman v. Northrup, 109 N. Y. 473, 17 N. E. 379; Flanagan v. Shaw, 174 N. Y. 530, 66 N. E. 1108, *affirming* 74 App. Div. 508, 77 N. Y. S. 1070; Sniffen v. Koechling, 45 Super. Ct. 61, *affirmed* 84 N. Y. 677; Lee v. Chadsey, 3 Abb. App. Dec. 43; North v. Sergeant, 33 Barb. 350; Fellows v. Commissioners, etc. 36 Barb. 655; Moore v. Bogart, 19 Hun 227; Ditmars v. Sackett, 92 Hun 381, 36 N. Y. S. 690; Cowenhoven v. Pfluger, 22 App. Div. 464, 47 N. Y. S. 1122; Friedman v. Bruner, 25 Misc. 474, 54 N. Y. S. 997; McWhirter v. Longstreet, 39 Misc. 831, 81 N. Y. S. 334; Brown v. Jones, 89 Misc. 538, 546,

152 N. Y. S. 571; Silverman v. Katz, 120 N. Y. S. 790; Jones v. Gay, 139 N. Y. S. 158. See also Baldwin v. Doying, 114 N. Y. 452, 21 N. E. 1007. *Compare* Bliss v. Sherrill, 24 App. Div. 280, 49 N. Y. S. 561, *reversing* 42 N. Y. S. 432.

Oregon.—Barger v. Taylor, 30 Ore. 228, 42 Pac. 615, 47 Pac. 618.

Texas.—Williams v. Bryan, 68 Tex. 593, 5 S. W. 401; Carden v. Short, 31 S. W. 246, *citing* Williams v. Bryan, *supra*. See also Texas Loan Agency v. Hunter, 13 Tex. Civ. App. 402, 35 S. W. 399.

Utah.—See the reported case.

Vermont.—See Baxter v. Buck, 10 Vt. 548.

Wisconsin.—Franzen v. Hammond, 136 Wis. 239, 116 N. W. 169, 128 Am. St. Rep. 1079, 19 L.R.A.(N.S.) 399.

Thus in Brown v. Jones, 89 Misc. 538, 546, 152 N. Y. S. 571, it was said: "And to make out a case against a lender, in a case where the usurious loan has been made by his agent, it must be made to appear that the lender had knowledge of the usurious agreement and assented to it." And in McLean v. Camak, 97 Ga. 804, 25 S. E. 493, the court said: "'The general rule is now well settled, that commissions paid or agreed to be paid by the borrower to an agent of the lender for his services in procuring or advising the loan, and which, if added to the stipulated interest, would exceed the statutory limit, do not render the contract of the loan usurious, provided that such commissions are not in any manner shared in by the lender and are not exorbitant or unreasonable in amount; or, if excessive, that they were exacted by the agent without the lender's knowledge or consent.' 27 Am. & Eng. Enc. of Law, p. 1004." In Lusk v. Smith, 71 Kan. 550, 81 Pac. 173, wherein it appeared that a son obtained five thousand dollars from his mother and loaned it at usurious interest which was paid to his mother, it was said: "The facts proved, considering the relationship of the parties, lead to the conclusion that the payment of usurious interest for more than ten years by the son to his mother was not made in compliance with a contract in which she exacted the rate received. It is a more rational view to attribute the sums paid every month to a recognition of filial duty on the son's part, regardless of whether the mother's money earned the amount paid to her or not. The court cannot escape from giving heed to those sentiments of parental affection which tend to excite liberality in a son when the support and welfare of his mother are concerned. If the deceased received the money for the purpose of investing it for his mother, the fact that he may have exacted and collected usurious interest from persons to whom he loaned it, and paid the usurious rate to his mother, is immaterial in this case." In Brigham v. Myers, 51 Ia. 39, 1 N. W. 613, 33 Am. Rep. 140, it was held that the act of a husband who loaned his wife's money and exacted a usurious commission without the knowledge or consent of his wife did not bind the wife. In Richards v. Purdy, 90 Ia. 502, 58 N. W. 886, 48 Am. St. Rep. 458, wherein it appeared that an agent who negotiated a loan was an agent of both lender and borrower, a commission charged by the agent and unauthorized or unknown to the lender was held not to be binding on the lender as usurious.

But in Bliss v. Sherrill, 24 App. Div. 280, 49 N. Y. S. 561, *reversing* 42 N. Y. S. 432, wherein it appeared that a husband made a loan of fifty thousand dollars and obtained as a commission ten thousand dollars, five thousand dollars of which he deposited to his wife's credit, the court disregarded the wife's testimony that she was ignorant of the transaction on the theory that she was under a duty to exercise supervision over a loan of that magnitude and that her acceptance of the benefit of the loan constituted a ratification of the agreement. The court said: "It was the duty of the plaintiff to know something about her bank account—to have her husband report to her what he was doing with this large amount of her property. She could not, without investigation and care, permit her husband to proceed with this property, violate the law, oppress the public by usurious contracts, giving her the benefit of it, and she neglecting and refusing to know anything about it. 'Left all my matters to Mr. Bliss,' as she says, 'gave him the entire control,' 'paid no attention to the details of business.' In so doing she infringes another principle of the law of agency, which requires that 'a principal should, within a reasonable time, examine his agent's report and disavow such acts as are unauthorized, and, if he fails to do so, his silence will be deemed good evidence of a ratification.' (1 Am. & Eng. Enc. of Law [2d ed.], 1206, and cases cited in note 3.)"

It has been held that the usurious contract of an agent in lending money binds an undisclosed principal who knows nothing of the usurious character of the loan. Glick v. Bramer, 78 Ia. 568, 43 N. W. 531.

The mere fact that an agent represented that a bonus exacted by him was for his principal has been held not to alter the rule that a principal is not bound by the unauthorized usurious transaction of his agent. Estevez v. Purdy, 66 N. Y. 446, *reversing* 6 Hun 46.

Agent's Conduct Known or Authorized.

In General.

Where the usurious agreement of an agent is either expressly or impliedly authorized or

ratified by the principal, or where the circumstances are such that the agent's conduct is presumed to be known by the principal, the courts have been fairly uniform in holding that the principal is bound.

United States.—New England Mortg. Security Co. v. Gay, 33 Fed. 636; In re Kellogg, 113 Fed. 120, *affirmed* 121 Fed. 333, 57 C. C. A. 547. See also Best v. British, etc. Mortg. Co. 79 Fed. 401.

Arkansas.—Banks v. Flint, 54 Ark. 40, 14 S. W. 769, 16 S. W. 477, 10 L.R.A. 459. See also Martin v. Adams, 60 Ark. 10, 48 S. W. 494.

District of Columbia.—Richards v. Bippus, 18 App. Cas. 293.

Georgia.—McCall v. Herring, 116 Ga. 235, 42 S. E. 468.

Illinois.—Meers v. Stevens, 100 Ill. 549.

Iowa.—See Griswold v. Dugane, 148 Ia. 504, 127 N. W. 664.

Indian Territory.—McEwin v. Humphrey, 1 Ind. Ter. 550, 45 S. W. 114.

Kentucky.—See Fitzgerald v. Maupin, 5 Ky. L. Rep. 242 (abstract.)

Minnesota.—Lukens v. Hazlett, 37 Minn. 441, 35 N. W. 265; Kemmitt v. Adamson, 44 Minn. 121, 46 N. W. 327; Robinson v. Blaker, 85 Minn. 242, 88 N. W. 845, 89 Am. St. Rep. 541.

New Jersey.—O'Neil v. Cleveland, 30 N. J. Eq. 273; Anonymous, 40 N. J. Eq. 502, 2 Atl. 369; Demarest v. Vandenberg, 41 N. J. Eq. 63, 3 Atl. 69; Pfenning v. Scholer, 43 N. J. Eq. 15, 10 Atl. 833; Hughson v. Newark Mortg. Loan Co. 57 N. J. Eq. 139, 41 Atl. 492. See also Leipziger v. Van Saun, 64 N. J. Eq. 37, 53 Atl. 1; Knoup v. Carver, 74 N. J. Eq. 449, 70 Atl. 660; McFadden v. Palmer, 83 N. J. Eq. 621, 92 Atl. 396; Zabriskie v. Spielman, 46 N. J. L. 35. See also Borcherling v. Trefz, 40 N. J. Eq. 502, 2 Atl. 369.

New Mexico.—Scottish Mortg. etc. Invest. Co. v. McBroom, 6 N. M. 573, 30 Pac. 869.

New York.—Wyeth v. Braniff, 84 N. Y. 628; Fellows v. Longyor, 91 N. Y. 324; Bliven v. Lydecker, 130 N. Y. 102, 28 N. E. 625; *reversing* 55 Hun 171, 7 N. Y. S. 867; Schwarz v. Sweitzer, 202 N. Y. 8, 94 N. E. 1090, *affirming* 134 App. Div. 939, 118 N. Y. S. 1140, *following* Bliven v. Lydecker, supra; Braine v. Rosswog, 13 App. Div. 249, 42 N. Y. S. 1098; Dunlop v. Toy, 19 Misc. 627, 44 N. Y. S. 388.

South Carolina.—Brown v. Brown, 38 S. C. 173, 17 S. E. 452; Land Mortg. Invest. etc. Co. v. Gillam, 49 S. C. 345, 26 S. E. 990, 29 S. E. 203; American Mortg. Co. v. Woodward, 83 S. C. 521, 65 S. E. 739.

Wisconsin.—McFarland v. Carr, 16 Wis. 259.

Canada.—See Kietzkowski v. Dorion, 14 L. C. Jur. 29.

Thus in Richards v. Bippus, 18 App. Cas. (D. C.) 293, it was said: "The note or obligation is affected with usury if the principal makes the loan, knowing that his agent has exacted a bonus or commission, though for his own sole benefit, which, with the interest payable to the principal, would amount to more than the rate permitted by law." And in Braine v. Rosswog, 13 App. Div. 249, 42 N. Y. S. 1098, it was held that the circumstances therein presented made it fairly inferable that the lender knew that her agent was making a usurious bargain. The court said: "It is undoubtedly the rule that the plaintiff must also show that the act of the agent was authorized by the principal, or that he took the bonus with the lender's knowledge and assent, so that the latter, at least by acquiescence, became a party to the usurious transaction. But here there was more than an ordinary agency. The parties were clearly acting in concert to evade the usury law. They were father and daughter. They lived together. The proceeds of the usury went to support them both. There was no pretense of compensation to the father for his services. The daughter knew that he was exacting compensation from the lender, or else that he was acting gratuitously. It seems that she had a small capital deposited in bank in her own name. Upon that the business was transacted. It was what is known as a chattel mortgage business. The father did the business and the daughter signed the checks. That, in fact, was all she did." In McCall v. Herring, 116 Ga. 235, 42 S. E. 468, it was held that the retention by an attorney of a commission which, added to the interest, made the contract usurious, being done with the knowledge of principal, bound the principal.

In McFadden v. Palmer, 83 N. J. Eq. 621, 92 Atl. 396, it was held that a guardian's usurious contract was binding on his infant ward. And in O'Neil v. Cleveland, 30 N. J. Eq. 273, a usurious contract entered into by an executor was held to bind the estate. On the other hand in Fellows v. Longyor, 91 N. Y. 324, a guardian's usurious contract was declared not to bind the estate.

AGENT AUTHORIZED TO LOOK TO BORROWER FOR COMPENSATION.

A principal who authorizes his agent to look to the borrower for compensation as a result of which the agent exacts a commission over and above the legal rate of interest to compensate him for his services is chargeable with the usurious character of the transaction. Fowler v. Equitable Trust Co. 141 U. S. 384, 12 S. Ct. 1, 35 U. S. (L. ed.) 786; Vahlberg v. Keaton, 51 Ark. 534, 11 S. W. 878, 14 Am. St. Rep. 73, 4 L.R.A. 462;

Thompson v. Ingram, 51 Ark. 546, 11 S. W. 881; Payne v. Newcomb, 100 Ill. 611, 39 Am. Rep. 69; Ammondson v. Ryan, 111 Ill. 506; Payne v. Henderson, 106 Ky. 135, 50 S. W. 34, 20 Ky. L. Rep. 1789; Avery v. Creigh, 35 Minn. 456, 29 N. W. 154; Hall v. Mandlin, 58 Minn. 137, 59 N. W. 985, 49 Am. St. Rep. 492; Brown v. Archer, 62 Mo. App. 277, 1 Mo. App. Rep. 465; Texas Loan Agency v. Hunter, 13 Tex. Civ. App. 402, 35 S. W. 899; Nesbit v. Goodrich, 25 Tex. Civ. App. 28, 60 S. W. 1017. See also Union Mortg. Banking, etc. Co. v. Hagood, 97 Fed. 360; Whaley v. American Freehold Land-Mortg. Co. 74 Fed. 73, 20 C. C. A. 306. Thus in Texas Loan Agency v. Hunter, supra, it was said: "But when a lender authorizes his agent to make loans for him, under a general agreement that he must look to the borrower for his compensation, and such agent, for the lender, effects a loan, and charges the borrower a commission, this will make the contract usurious, whether the lender knew of the charge or not (Fowler v. Equitable Trust Co. 141 U. S. 385, 12 S. Ct. 1, 35 U. S. (L. ed.) 786); for this exaction is by the authority of the lender, the principal. American Freehold Land Mortg. Co. v. Whaley, 63 Fed. 746; Dayton v. Dearholt [86 Wis. 151] 55 N. W. 148. In this case, Mr. Bright testified: 'We advised, and so agreed with the parties who left money with us, that they should have so much net interest, and that all expenses for loaning and handling the money should come out of the borrower.' Therefore this testimony brings the case squarely within the rule just quoted." In Fowler v. Equitable Trust Co. 141 U. S. 384, 12 S. Ct. 1, 35 U. S. (L. ed.) 786, it was held that the exaction by a lender's agent of an amount of money over the legal interest from the borrower to pay the agent's commission was usurious as against the principal. It was said: "It is not consistent with the law of Illinois, as declared by its highest court, that the lender, when taking the highest rate of interest, shall impose upon borrowers the expense of maintaining agencies in different parts of the state through which loans may be obtained. We, therefore, hold that the exaction by the Trust Company's agent, pursuant to his general arrangement with it, of commissions over and above the ten per cent interest stipulated to be paid by the borrower, rendered this loan usurious." But *compare* Acheson v. Chase, 28 Minn. 211, 9 N. W. 734, wherein it appeared that an agent was directed by his principal to loan money at the highest legal rate with the understanding that the agent could collect a reasonable compensation from the borrower. The agent procured a loan at the highest legal rate of interest and received a bonus of fifty dollars from the agent of the borrower for effecting the loan. This the court held did not charge the principal with liability for the usury.

AGENT'S USURIOUS COMMISSION DIVIDED WITH PRINCIPAL.

It has been held that whenever it appears that an agent acting for his principal has obtained a usurious bonus or commission and divided the amount thereof with his principal, the latter thereby confirms and ratifies the usurious act of his agent. McBroom v. Scottish Mortg. etc. Invest. Co. 153 U. S. 318, 14 S. Ct. 852, 38 U. S. (L. ed.) 729; Sherwood v. Roundtree, 32 Fed. 113; Pottle v. Lowe, 99 Ga. 576, 27 S. E. 145, 59 Am. St. Rep. 246; Byrnes v. Labagh, 42 Hun 659, 4 N. Y. St. Rep. 522, 25 N. Y. W. Dig. 461, *affirmed* 106 N. Y. 669, 13 N. E. 936; Williams v. Rich, 117 N. C. 235, 23 S. E. 257; Collamer v. Goodrich, 30 Vt. 628. Thus in Sherwood v. Roundtree, supra, it was held that an agent who exacted a usurious bonus on a loan and divided the same with his principal bound the principal. The court said: "Now, the agreement by which Mrs. Roundtree promised to pay twenty per cent., in addition to the eight per cent. per annum interest, to pay all premiums of insurance, all taxes, and to pay off all liens, is part of the plaintiff's case; it is an essential part of the contract, and was put in evidence by the plaintiff. Unquestionably it is the rankest usury. It is not disputed that one who negotiates a loan may be allowed reasonable compensation for his expenses and trouble, in addition to interest. But where there is no expense, and no trouble, there cannot properly be charged any such remuneration. Tyler, Usury, 335. And no decision can be found where a court of justice has sustained a charge of twenty per cent., where any knowledge of such charge was traceable to the money lender. But here is twenty per cent. in addition to eight per cent. per annum." And in Byrnes v. Labagh, 42 Hun 659, 4 N. Y. St. 522, 25 N. Y. Wkly. Dig. 461, *affirmed* 106 N. Y. 669, 13 N. E. 936, in speaking of a transaction of this character the court said: "To such a transaction the law against usury clearly attached for it is a necessary consequence that the bonus paid to the lender by the agent for the loan to the borrowers is in legal effect paid by the principal as a bonus or excessive interest for the use of the money beyond the six per cent reserved in the mortgages. None of the cases go so far as to uphold such a transaction as this, although some of them, it must be conceded, go very far to overthrow the statute against usury. The cases that hold that the exaction from the borrower by the agent of the lender of a bonus for his own benefit

unbeknown to the lender, and in which the latter does not participate is not usury, have no application to this case."

General Agent.

Some cases seem to make a distinction between general and special agents and hold that the principal of a general agent entrusted with the full care and control of his principal's property and to make loans is presumed to know the character of his agent's transactions and is therefore liable for a usurious contract entered into by the agent. Rogers v. Buckingham, 33 Conn. 81; Clarke v. Havard, 111 Ga. 242, 36 S. E. 837, 51 L.R.A. 490; Callender v. Roberts, 17 Ill. App. 539; McNeely v. Ford, 103 Ia. 508, 75 N. W. 672, 64 Am. St. Rep. 195; France v. Munro, 138 Ia. 1, 115 N. W. 577, 19 L.R.A.(N.S.) 391; Lewis v. Willoughby, 43 Minn. 307, 45 N. W. 439; Stein v. Swensen, 44 Minn. 218, 46 N. W. 360, *citing* Lewis v. Willoughby, supra; Adamson v. Wiggins, 45 Minn. 448, 48 N. W. 185, *citing* Lewis v. Willoughby, supra; Hawkins v. Sauby, 48 Minn. 69, 50 N. W. 1015; Horkan v. Nesbitt, 58 Minn. 487, 60 N. W. 132; Cromb v. Olson, 60 Minn. 534, 63 N. W. 108; Western Storage, etc. Co. v. Glasner, 169 Mo. 38, 68 S. W. 917; Little v. Hooker Steam Pump Co. 122 Mo. App. 620, 100 S. W. 561; Austin v. Harrington, 28 Vt. 130. Thus in Cromb v. Olson, supra, wherein it appeared that a bank cashier was in the habit of loaning the bank's money at a usurious rate, it was held that a usurious loan made by him without the knowledge of the bank bound the bank. To substantially the same effect see Stephens v. Olson, 62 Minn. 295, 64 N. W. 898. In McNeely v. Ford, 103 Ia. 508, 72 N. W. 672, 64 Am. St. Rep. 195, it appeared that a husband entrusted with the entire management of his wife's estate and authorized in giving loans to exact whatever terms he saw fit, loaned money at a usurious rate of interest. The wife subsequently sued on a note which included the usurious interest. The court declared the defense of usury to be good against the wife. In Rogers v. Buckingham, 33 Conn. 81, it was declared that a usurious contract entered into by a general agent of a money lender gave rise to a presumption of authority by the lender and therefore of liability, but it was further held that the presumption could be rebutted by proof of the actual nonexistence of such authority.

In Austin v. Harrington, 28 Vt. 130, it was held that the action of a general agent who in making a loan, exacted a usurious commission in the form of an additional charge on a pair of horses that were sold simultaneously with the loan, was binding on the principal who was the agent's mother, the court presuming that the mother was aware of the nature of the transaction. In Lewis v. Willoughby, 43 Minn. 307, 45 N. W. 439, it appeared that an agent entrusted with the general management of an estate procured a usurious commission which was included in the securities given to the principal. It was held that the principal was presumed to have knowledge of the transaction and was bound by the agent's conduct.

Rule in Nebraska.

In Nebraska the courts seem to hold unqualifiedly that a principal who entrusts money to an agent for the purpose of effecting loans is bound by the usurious contracts of the agent whether made with the knowledg of the principal or not. Cheney v. White, 5 Neb. 261, 25 Am. Rep. 489; Cheney v. Woodruff, 6 Neb. 151; Cheney v. Eberhardt, 8 Neb. 423, 1 N. W. 197; Olmsted v. New England Mortg. Security Co. 11 Neb. 487, 9 N. W. 650; Courtnay v. Price, 12 Neb. 188, 10 N. W. 698; New England Mortg. Security Co. v. Hendrickson, 13 Neb. 157, 12 N. W. 916, 13 Neb. 574, 14 N. W. 519; Joslin v. Miller, 14 Neb. 91, 15 N. W. 214; Anderson v. Vallery, 39 Neb. 626, 58 N. W. 191; Hare v. Hooper, 56 Neb. 480, 76 N. W. 1055. In Hare v. Winterer, 64 Neb. 551, 90 N. W. 544, the court said that it was not necessary in that case to assert such a rule, the evidence showing actual notice, but reviewed the previous decisions as follows: "The doctrine has been repeatedly asserted in this state that where an agent of the lender exacts for the use of money a bonus or commission from the borrower in addition to the highest lawful rate of interest, the transaction is usurious. Hare v. Hooper, 56 Neb. 480, and cases there cited. In such case it is said the whole transaction is but one contract and that the principal, although ignorant of the wrongful act of his agent, is affected by it. Philo v. Butterfield, 3 Neb. 256; Olmsted v. New England Mortg. Security Co. 11 Neb. 487, New England Mortg. Security Co. v. Hendrickson, 13 Neb. 157. In the Olmsted Case, Maxwell, C. J., after remarking that the borrower cannot ground a defense of usury upon the acts of his own agent, goes on to say: 'But on the other hand, if a person places money under the control of another to loan for him, and the agent charges the borrower unlawful interest, or receives a bonus from him for such loan, either with or without the knowledge of the principal, he is affected by the act of his agent. The reason is, the principal has entrusted the business of making loans to him and has placed the money in his hands for that purpose, and in transacting the business by agency, there cannot be a distinct agree-

ment between the lender through his agent with the borrower, and a different one between the agent and borrower, as it is in consideration of the loan that the unlawful interest or bonus is paid. The whole transaction is but one contract, which being made by his agent, the lender is bound by it.'"

Rule in Washington.

In Washington it appears that a statute exists by virtue of which a principal is bound by the usurious contracts of his agent though entered into without the actual knowledge of the principal. Ridgway v. Davenport, 37 Wash. 134, 79 Pac. 606, wherein it was said: "The contention that the lender is not bound by the wrongful act of his agent not within the scope of his authority is right in the face of the statute, which provides that, in all cases where there is illegal interest contracted for by the transaction of any agent, the principal shall be held thereby to the same extent as though he had acted in person. The statute provides, in so many words, that no person shall directly or indirectly take or receive any money, goods, or thing in action, or in any other way, any greater interest, sum or value for the loan or the forbearance of any money, goods or thing in action, than twelve per cent per annum. In this case it is evident that there was taken and received in money a greater interest than twelve per cent, the sum received amounting to about six per cent per month on the money advanced to the respondent. The indirect taking, then, in this case cannot be disputed, and, under the further provision of the statute that the principal shall be held to the same extent as though he had acted in person, there is no escape from the conclusion that the contract was usurious as to the appellant J. R. Davenport." See also Washington F. Ins. Co. v. Maple Valley Lumber Co. 77 Wash. 686, 138 Pac. 553; Testera v. Richardson, 77 Wash. 377, 137 Pac. 998.

ECHOLS ET AL.

v.

SPEAKE.

Alabama Supreme Court—December 18, 1913.

185 Ala. 149; 64 So. 306.

Guardian and Ward — Powers of Guardian — Sale of Personalty.

A guardian of a minor having the same jurisdiction over the minor's choses in action as an executor has over the personal property of his testator, the guardian, at his peril and the peril of his bondsmen, may assign and transfer notes belonging to the minor's estate.

[See note at end of this case.]

Appeal from Chancery Court, Morgan county: LOWE, Special Chancellor.

Action by D. W. Speake, plaintiff, against James L. Echols et al., defendants. Judgment for plaintiff. Defendants appeal. REVERSED.

[149] The case made by the bill is: That the complainant became indebted to one William C. Preston, a minor, in the sum of $1,500, and, to secure the payment of said indebtedness, executed a mortgage to secure five promissory notes, each in the sum of $300, bearing date August 11, 1906, and maturing, respectively, on the 1st of August, 1907, 1908, 1909, 1910, and 1911; said notes [150] bearing interest from date and the interest being payable annually. That, after the execution of the notes and mortgages, Preston, the guardian, discounted the notes falling due in 1907 and 1908, and transferred them and the mortgage to secure them to one Samuel Irwin, without the consent of complainant or without his knowledge, and it is also alleged on information and belief that Irwin transferred, before the first note matured, the said notes and mortgages transferred to him to one James L. Echols; the same being without recourse on said Irwin, and being made without the consent or instigation of complainant. That on August 20, 1907, complainant paid to Preston, as guardian of said minor, the first of said notes, and the interest on the other four notes, and declined to pay said note to Echols, believing that he had no right or title thereto. It is then alleged that Marvin West had succeeded William C. Preston as guardian of the minor Harry Preston. That Echols is threatening to proceed by foreclosure to collect the two notes, and that West, the guardian, is demanding of complainant the payment of the note, with interest thereon, and that complainant is ready, able, and willing to pay and discharge the debt as soon as it can be ascertained to whom it is payable. The notes and mortgages are made exhibits, and both Echols and West answered; each setting up their respective claims. Upon the pleadings and proof and the testimony noted, chancellor held and decreed that the sale by Preston of the note passed no interest to his transferees, and that the title to said notes and mortgages remained in the guardian, and directed the surrender and delivery of the notes and mortgages to the guardian.

Osceola Kyle for appellant.

Callahan & Harris and *Wert & Lynne* for appellee.

[151] DEGRAFFENRIED, J.—In the case of Mason v. Buchanan, 62 Ala. 110, this court, through Brickell, C. J., speaking of the authority of a guardian over the choses in action of his ward, said: "As to these, he may exercise the power which an executor or an administrator may exercise over choses in action coming into his hands for administration. A want of diligence in the exercise of the power will render him liable, but third persons, dealing with him in good faith, are not the guarantors of his prudence; they answer only for their [152] own fair dealing." While much was said by this court in that case which was unnecessary to a determination of the question then before the court, we take it that the quoted excerpt from the opinion is but a statement of the common-law rule on the subject, and it is a familiar proposition that statutes are not to be held to abolish a well-established rule of the common law unless it plainly appears that it was the legislative purpose to abolish the common-law rule. Cook v. Meyer, 73 Ala. 580.

In the case of Butler v. Gazzam, 81 Ala. 493, 1 So. 17, this court said: "Our past decisions sustain the rule that the executor or administrator has the full legal title to all choses in action due the estate of the decedent, and that he may, in the absence of fraud or collusion, release, compound, or discharge them as fully as if he were the absolute owner, being answerable only for any improvidence in the exercise of the power." This quoted rule was approved by this court in Logan v. Central Iron, etc., Co., 139 Ala. 548, 36 So. 729, and we take it that the quoted rule clearly indicates that an administrator certainly before the adoption of the Code of 1907, may sell, without an order of the court, at his peril and the peril of his bondsmen, the choses in action of the estate of his intestate. If, then, this court, in Mason v. Buchanan, supra, was correct in its statement of the law that a guardian may exercise the power which an executor or administrator might exercise, as above stated, over the choses in action of his intestate, then it would follow, as a necessary conclusion, that a guardian, without an order of court, may, at his peril and at the peril of his bondsmen, sell the choses in action of his ward. Schmidt v. Shaver, 196 Ill. 108, 63 N. E. 655, 89 Am. St. Rep. 250.

In a note by Mr. Freeman to the above case of [153] Schmidt v. Shaver, which note is to be found in 89 Am. St. Rep. 281, we find the following:

"(1) General Rule.—Except in South Carolina, the right of a guardian, in the absence of a statute, to dispose of the personal property of his ward is well settled. As is said in Wallace v. Holmes, 9 Blatchf. 65, 5 Fish. Pat. Cas. 37, 29 Fed. Cas. No. 17,100: 'His duty to pay debts and to provide for the support, maintenance, and education of the ward, and generally to manage the estate, . . . all imply the power of the guardian in this respect. In this management, he is under a rigid responsibility, not only for the property, but for its management and disposal for the best interests of the ward.' It is therefore the rule, supported by the great weight of authority, that a guardian may, without application to, or an order of court, sell the personal property of his ward. Woodward v. Donally, 27 Ala. 198; Lee v. Lee, 55 Ala. 590; Mason v. Buchanan, 62 Ala. 110; McConnell v. Hodson, 2 Gilman (Ill.) 640; Schmidt v. Shaver (principal case), 196 Ill. 108, 63 N. E. 655, 89 Am St. Rep. 250; Schmidt v. McBean, 98 Ill. App. 421; Humphrey v. Buisson, 19 Minn. 221; Field v. Schieffelin, 7 Johns. Ch. (N. Y.) 150, 11 Am. Dec. 441; Thomas v. Bennett, 56 Barb. (N. Y.) 197; Tuttle v. Heavy, 59 Barb. (N. Y.) 334; Truss v. Old, 6 Rand. (Va.) 556, 18 Am. Dec. 748; Virginia Bank v. Craig, 6 Leigh (Va.) 399; Maclay v. Equitable L. Assur. Soc. 152 U. S. 499, 14 S. Ct. 678, 38 U. S. (L. ed.) 528; Mullen v. Wine, 26 Fed. 206; Wallace v. Holmes, 9 Blatchf. 65, 5 Fish. Pat. Cas. 37, 29 Fed. Cas. No. 17,100. A guardian may therefore dispose of his ward's interest in a patent right (Wallace v. Holmes, 9 Blatchf. 65, 5 Fish. Pat. Cas. 37, 29 Fed. Cas. No. 17,100), a right to locate public land as a homestead (Mullen v. Wine, 26 Fed. 206), or a judgment in favor of his ward (Schmidt v. Shaver [principal case], 196 Ill. 108, 63 N. E. 655, 89 Am. St. Rep. 250).

[154] "(2) Assignment of Choses in Action.—The most frequent exercise of this right is, however, in the sale and assignment of promissory notes or other choses in action, in the larger number of cases secured by mortgage. The right of the guardian to assign in such case undoubted (McConnell v. Hodson, 2 Gilman (Ill.) 640; Humphrey v. Buisson, 19 Minn. 221; Tuttle v. Heavy, 59 Barb. (N. Y.) 334; Field v. Schieffelin, 7 Johns. Ch. (N. Y.) 150, 11 Am. Dec. 441; Fletcher v. Fletcher, 29 Vt. 98), especially where the choses in action are made payable to the guardian (Gentry v. Owen, 14 Ark. 396, 60 Am. Dec. 549; Fountain v. Anderson, 33 Ga. 372; Jenkins v. Sherman, 77 Miss. 884, 28 So. 726; Gillespie v. Crawford (Tex.) 42 S. W. 621), or if shares of stock stand in his name (Atkinson v. Atkinson, 8 Allen (Mass.) 15; Virginia Bank v. Craig, 6 Leigh (Va.) 399)."

It will be noticed that in the above note the case of Mason v. Buchanan is cited by the

learned annotator as sustaining the position assumed by him, and we think that, certainly in so far as the sale of choses in action is concerned, the case sustains the conclusions of the annotator.

It would seem, therefore, that in this state a guardian may sell the choses in action of his ward at his peril and at the peril of his bondsmen without an order of court.

The decree of the chancellor is not in accordance with the above views, and the decree is therefore reversed, and a decree is here rendered granting to appellant the relief prayed for in his cross-bill.

Reversed and rendered.

Dowdell, C. J., and Anderson, Mayfield, Sayre, and Somerville, JJ., concur. McClellan, J., dissents.

Rehearing denied February 5, 1914.

NOTE.

Power of Guardian to Sell Personal Property of Ward.

Power to Sell Upheld:
Generally, 324.
Statutory Requirements, 335.
Power to Sell Denied, 336.

Power to Sell Upheld.

GENERALLY.

By the weight of authority a guardian, if not restrained from doing so by statute, may sell the personal property of his ward without an order of court.

United States.—Wallace v. Holmes, 9 Blatchf. 65, 5 Fish. Pat. Cas. 37, 29 Fed. Cas. No. 17,100; Lamar v. Micou, 112 U. S. 452, 5 S. Ct. 221, 28 U. S. (L. ed.) 751; Maclay v. Equitable L. Assur. Soc. 152 U. S. 499, 14 S. Ct. 678, 38 U. S. (L. ed.) 528; Mullen v. Wine, 26 Fed. 206 (appeal dismissed 136 U. S. 654, 10 S. Ct. 1076, 34 U. S. (L. ed.) 553.

Alabama.—Woodward v. Donolly, 27 Ala. 198 (*overruling* Hudson v. Helmes, 23 Ala. 585); Mason v. Buchanan, 62 Ala. 110. See also Lee v. Lee, 55 Ala. 590. And see the reported case.

Arkansas.—Gentry v. Owen, 14 Ark. 396, 60 Am. Dec. 549; Nashville Lumber Co. v. Barefield, 93 Ark. 353, 20 Ann. Cas. 968, 124 S. W. 758.

Georgia.—Fountain v. Anderson, 33 Ga. 372.

Illinois.—McConnell v. Hodson, 2 Gilman 640; Schmidt v. Shaver, 196 Ill. 108, 63 N. E. 656, 89 Am. St. Rep. 250; Schmidt v. McBean, 98 Ill. App. 421.

Kentucky.—See Clark v. Layne, 97 Ky. 290, 30 S. W. 644, 17 Ky. L. Rep. 176; Layne v. Clark, 152 Ky. 310, 153 S. W. 437.

Massachusetts.—Ellis v. Essex Merrimac Bridge, 2 Pick. 243 (the statute of 1817, c. 190, § 35, which nullified the effect of this decision has been repealed—see Rev. Stats. p. 825); Gardner v. Beacon Trust Co. 190 Mass. 27, 5 Ann. Cas. 581, 76 N. E. 455, 112 Am. St. Rep. 303, 2 L.R.A. (N.S.) 767 (*distinguishing* Atkinson v. Atkinson, 8 Allen 15). See also Brewster v. Seeger, 173 Mass. 281, 53 N. E. 814.

Minnesota.—Humphrey v. Buisson, 19 Minn. 221; Pardoe v. Merritt, 75 Minn. 12, 77 N. W. 552. See also Cox v. Manvel, 56 Minn. 358, 57 N. W. 1062.

Mississippi.—Jenkins v. Sherman, 77 Miss. 884, 28 So. 726.

New York.—Tuttle v. Heavy, 59 Barb. 334; Field v. Schieffelin, 7 Johns. Ch. 150, 11 Am. Dec. 441; Clare v. Mutual L. Ins. Co. 201 N. Y. 492, 94 N. E. 1075, 35 L.R.A. (N.S.) 1123, *affirming* 128 App. Div. 908, 112 N. Y. S. 1124; Cabble v. Cabble, 111 App. Div. 426, 97 N. Y. S. 773; Tonges v. Vanderveer Canarsie Imp. Syndicate, 148 N. Y. S. 748. See also Thomas v. Bennett, 56 Barb. 197.

Virginia.—Virginia Bank v. Craig, 6 Leigh 399; Hunter v. Lawrence, 11 Grat. 111, 62 Am. Dec. 640; Truss v. Old, 6 Rand. 556, 18 Am. Dec. 748.

West Virginia.—Buskirk v. Sanders, 70 W. Va. 363, 73 S. E. 937.

In Wallace v. Holmes, 9 Blatchf. 65, 5 Fish. Pat. Cas. 37, 29 Fed. Cas. No. 17,100, the court said: "It is not doubtful, that a guardian of the person and estate of an infant, appointed by the court of probate, has, as incidental to his office and duties, the power to sell personal property of his ward. His duty to pay debts, and to provide for the support, maintenance, and education of the ward, and, generally, to manage the estate, and his trust, indicated and expressed in the bond he is required to give, conditioned to manage, dispose of, and apply the same, and to account for all property and the proceeds thereof, all imply the power of the guardian in this respect. In this management, he is under a rigid responsibility, not only for the property but for its management and disposal for the best interest of the ward."

The rule has been applied to permit the sale of promissory notes whether payable to the ward or to the guardian. Gentry v. Owen, 14 Ark. 396, 60 Am. Dec. 549 (payable to guardian); Fountain v. Anderson, 33 Ga. 372 (payable to guardian); McConnell v. Hodson, 2 Gilman (Ill.) 640; Humphrey v. Buisson, 19 Minn. 221; Jenkins v. Sherman, 77 Miss. 884, 28 So. 726 (payable to guardian); Fletcher v. Fletcher, 29 Vt. 98 (payable to ward or bearer and transferred to a

person for collection for benefit of ward's estate). See also Brewster v. Seeger, 173 Mass. 281, 53 N. E. 814 (payable to guardian). And see the reported case.

So it has been held that a guardian may sell a bond and mortgage, Tuttle v. Heavy, 59 Barb. (N. Y.) 334; Field v. Schieffelin, 7 Johns. Ch. (N. Y.) 150, 11 Am. Dec. 441; Tonges v. Vanderveer Canarsie Imp. Syndicate, 148 N. Y. S. 748; Hunter v. Lawrence, 11 Grat. (Va.) 111, 62 Am. Dec. 640; a right to make a homestead entry, Mullen v. Wine, 26 Fed. 206, appeal dismissed 136 U. S. 654, 10 S. Ct. 1076, 34 U. S. (L. ed.) 553; Pardoe v. Merritt, 75 Minn. 12, 77 N. W. 552; see also Cox v. Manvel, 56 Minn. 358, 57 N. W. 1062; shares of stock, Lamar v. Micou, 112 U. S. 452, 5 S. Ct. 221, 28 U. S. (L. ed.) 751; Ellis v. Essex Merrimac Bridge, 2 Pick. (Mass.) 243; Cabble v. Cabble, 111 App. Div. 426, 97 N. Y. S. 773; Virginia Bank v. Craig, 6 Leigh (Va.) 391; an interest in a patent right, Wallace v. Holmes, 9 Blatchf. 65, 5 Fish. Pat. Cas. 37, 29 Fed. Cas. No. 17,100; and an interest as beneficiary in a policy of life insurance, Clare v. Mutual L. Ins. Co. 201 N. Y. 492, 94 N. E. 1075, 35 L.R.A.(N.S.) *affirming* 1123, 128 App. Div. 908, 112 N. Y. S. 1124. See also Pratt v. Globe Mut. L. Ins. Co. (Tenn.) 17 S. W. 382.

In Field v. Schieffelin, 7 Johns. Ch. (N. Y.) 150, 11 Am. Dec. 441, the court said: "The bond and mortgage which the plaintiff claims, were taken by William James Stewart, in his character of guardian of the person and estate of Hopkins, the infant, and to which trust he had been duly appointed by this court. That he had a legal control over that bond and mortgage, and a right to collect and receive the money due thereon, and a legal right to sell and assign the same, in the due exercise of his discretion as guardian, is a proposition that does not seem to admit of dispute. The bond was not due when it was assigned to the plaintiff; but if the money was wanting for the purposes of the trust, either for discharging incumbrances, or for making more advantageous investments, or for payments of debts, and for the better maintenance and education of the ward, or for any purpose whatever, connected with the faithful discharge of the trust, and beneficial to the infant, the guardian had just right and lawful authority to raise the money by the assignment of the bond and mortgage. The necessity or expediency of the measure rested entirely in the judgment and discretion of the guardian."

In Schmidt v. Shaver, 196 Ill. 108, 63 N. E. 655, 89 Am. St. Rep. 250, wherein it appeared that a guardian sold a judgment in the sum of five thousand dollars, which had been recovered on behalf of his ward, it was said by the court that as the sale of the judgment was not within the terms of any statute, the guardian undoubtedly had a right to dispose of it at its face value, and might also, as in the case at bar, sell it for a lower price when authorized to do so by the court. And in Black v. Keenan, 5 Dana (Ky.) 570, wherein an executor was prevented from buying an infant's legacy from a guardian at a low price, the court said: "It is, at least, extremely doubtful whether the guardian had any right to sell the infant's legacy before it was due, and when the time at which it would be payable was uncertain, and its value for this and other reasons incapable of exact estimate. It is certain that the executor has no right to make personal profit by such a traffic. The transaction in this case, if regarded as a sale of the legacy, is the more obnoxious to jealousy and suspicion, because all of the circumstances on which any probable estimate of its value could be made, were more within the knowledge of the executor than of the guardian."

In Cox v. Manvel, 56 Minn. 358, 57 N. W. 1062, it was held that although a guardian might have the right, in the absence of an order of the court, to dispose of the personal property of his ward, yet where it appeared that the court had made an order with regard to a specific piece of personalty which belonged to the ward, the guardian was controlled by that order and could not pass a valid title in defiance thereof.

Statutory Requirements.

In some jurisdictions it is expressly provided by statute that a guardian must obtain an order from a court authorizing him to sell his ward's personality before he can lawfully dispose of it. Kendall v. Miller, 9 Cal. 591; De La Montagnie v. Union Ins. Co. 42 Cal. 290; Baltimore v. Norman, 4 Md. 352; Gentry v. Bearss, 82 Neb. 787, 118 N. W. 1077 (construing Oklahoma statute); Washabaugh v. Hall, 4 S. D. 168, 56 N. W. 82; Browne v. Fidelity, etc. Co. 98 Tex. 55, 80 S. W. 593 (modifying judgment Brown v. Fidelity, etc. Co. (Tex.) 76 S. W. 944). Gillespie v. Crawford (Tex.) 42 S. W. 621. See also Schmidt v. Wieland, 35 Cal. 343.

In *Canada* a tutor is prohibited from disposing of his minor's shares in a joint stock company without the authority of a judge or prothonotary. Raphael v. McFarlane, 18 Can. Sup. Ct. 183.

In Harrison v. Ilgner, 74 Tex. 86, 11 S. W. 1064, it was held that a sale by a guardian of his ward's personal estate must be confirmed by the court in addition to being ordered by it, before the sale will be valid.

In *Iowa* a statute provides that "guardians of the property of minors must prosecute and defend for their wards," and "must also,

in other respects, manage their interests under the direction of the court," and that "they may thus lease their lands or loan their money during their minority, and may do all other acts which the court may deem for the benefit of the wards." It has been held that this statute modifies the common-law rule as to the power of a guardian over the property of his ward and that an order of the court must precede the sale of the ward's personalty. Bates v. Dunham, 58 Ia. 308, 12 N. W. 309; Slusher v. Hammond, 94 Ia. 512, 63 N. W. 185; McCutchen v. Roush, 139 Ia. 351, 115 N. W. 903.

A *Nebraska* statute provides that "the courts of probate in their respective counties, on the application of a guardian, or of any person interested in the estate of any ward, after such notice to all persons interested therein as the court shall direct, may authorize or require the guardian to sell and transfer any stock in public funds, or in any bank or corporation, or any other personal estate or effects held by him as guardian, and to invest the proceeds of such sale, and also any other moneys in his hands, in real estate, or in any other manner that shall be most for the interest of all concerned therein, and the said court may make such further orders and give such directions as the case may require for managing, investing, and disposing of the estate and effects in the hands of the guardian." Under that act it has been held that a sale or transfer of the personal property of a ward must be by authorization of the court. Hendrix v. Richards, 57 Neb. 794, 78 N. W. 378; In re O'Brien, 80 Neb. 125, 113 N. W. 1001.

In Merchants, etc. Sav. Bank Co. v. Schirk, 27 Ohio Cir. Ct. Rep. 125, wherein a *Missouri* statute was construed, it was held that an act which provided that "when it shall appear that it would be for the benefit of the ward that his real estate, or any part thereof, be sold or leased, or his personal property, or any part thereof, be sold . . . the probate court may authorize and color such sale" and that the court may "after a full examination . . . make an appropriate order for such sale," etc., gave a guardian no power to sell his ward's personal estate without an order of court.

Where statutes give a guardian the power to sell his ward's personal estate only "when for the interest of the ward," it has been held that one who buys promissory notes from a guardian at less than their face value without inquiring whether by the sale thereof the interests of the ward will be promoted or sacrificed, and with knowledge that they belong to a trust fund, gets no title to them and therefore holds the notes in trust for the ward. Strong v. Strauss, 40 Ohio St. 87, *reversing* Strong v. Hope, 7 Ohio Dec. (Reprint) 700, 4 Cinc. L. Bul. 1034. *Compare* Engel v. Ortmann, 8 Ohio Dec. (Reprint) 237, 5 Wkly. L. Gaz. 53.

Power to Sell Denied.

It has been held in South Carolina that a guardian has no power to dispose of the personal estate of his ward and that, if he does so the purchaser gets only a voidable title to the property. Bailey v. Patterson, 3 Rich. Eq. 156; Moore v. Hood, 9 Rich. Eq. 311, 70 Am. Dec. 210; McDuffie v. McIntyre, 11 S. C. 551, 32 Am. Rep. 500. In McDuffie v. McIntyre, *supra*, the court said: "The cases of Bailey v. Patterson, 3 Rich. Eq. 156, and Moore v. Hood, 9 Rich. Eq. 311, are conclusive on the point that a guardian has no legal title to the personal property of his ward, and that a sale by him is voidable at the option of the infant, when he comes of age. In the former the purchaser was made to deliver up the property, while in the latter case the court said: 'It is not intended to be intimated that the purchaser in this case could not have been successfully pursued if he and the slaves had been found within the jurisdiction.' Page 327. The appellants only ask against the purchaser the proceeds of the judgment of foreclosure. They are entitled to that relief. The bond and mortgage have been held by the purchaser in trust for them, and must now be turned over to them as the legal owners. The remedy for the purchaser, if he has any, is against the guardian."

In Woodbridge v. Pope, 22 La. Ann. 293, the court said: "The general rule is, that persons acting in a fiduciary capacity, such as syndics, executors, tutors, etc., have no right to transfer, by indorsement, the promissory notes, bills and other paper held by them in their representative capacity, except under an order of court, and, in the case of tutors, with the advice of a family meeting. But this, like other general rules, is not without its exceptions. Thus it has been held that such a transfer is not an absolute nullity, and if the transfer be made in the interest of the party, in whose favor the restriction or rule is made and this fact be proved by the transferee, the bona fide ownership is established, and the holder may recover on the note." And see Pertuit v. Damare, 50 La. Ann. 893, 24 So. 681.

It was held in Michael v. Fripp, L. R. 7 Eq. (Eng.) 95, 19 L. T. N. S. 257, 17 W. R. 23, that without express provisions in a shipping act empowering him to do so, a guardian had no authority to sell or mortgage his ward's ship.

PARKER-WASHINGTON COMPANY

v.

CITY OF CHICAGO.

Illinois Supreme Court—February 17, 1915.

267 Ill. 136; 107 N. E. 872.

Contracts — Freedom of Contract — Intent of Parties Controls.

Parties competent to contract, and free to do so may, in the exercise of their judgment, make their own contracts; and when their intention is ascertained, it is ordinarily the duty of the courts to carry it out, if not in conflict with any rule of law, good morals, or public policy.

Damages — Contracts Liquidating Damages.

Contracts by which parties, who are under no compulsion, agree beforehand upon the amount of damages which shall be allowed for a breach, are as lawful as any others, unless inhibited by some rule of law.

Penalty or Liquidated Damages.

Where the intention of the parties to a contract is in doubt, the courts are inclined to construe a sum stipulated for in case of breach as a penalty, since the general theory of the law is that compensation shall be the rule, and the application of that rule works justice between the parties.

[See note at end of this case.]

Same.

In determining whether a stipulated sum to be paid for the breach of a contract was intended to be a penalty or liquidated damages, the language used and the subject matter of the contract will be considered to ascertain the intention of the parties, and generally the language used will control; but the use of the word "liquidated" is not always controlling.

[See note at end of this case.]

Same.

If a provision in a contract fixing a stipulated sum in case of breach has reference to uncertain damages, and it appears that serious damage might have been incurred, and no fraud has been used in procuring the contract, the courts cannot interfere, and the stipulated sum furnishes the measure of damages.

[See note at end of this case.]

Same.

Where different acts to be performed under a contract are of unequal degrees of importance, some resulting in great damage, and others in trifling and inconsiderable loss, a stipulated sum in gross, to be paid for a failure to perform any one of the acts, will be construed as a penalty.

[See note at end of this case.]

Same.

A stipulation in a contract with a city for the construction of a pumping station for pumping water to be distributed to certain parts of the city for the use of the inhabitants and for protection against fire, for the payment of $50 for each day that completion was delayed beyond a time fixed, is a stipulation for liquidated damages, and not for a penalty, as the contract was made for the purpose of preserving the health and promoting the convenience and welfare of citizens, and protecting them and their property, and there can be no estimate of the damages, or compensation for the inconvenience to the public, especially where the contract recites that the damages from such delay cannot be calculated with any degree of certainty.

[See note at end of this case.]

Liquidated Damages — Defenses to Recovery — Delay in Other Work.

Under a contract for the construction of a pumping station for a city, providing for the payment of $50 for each day that the completion of the contract was delayed as liquidated damages, such damages are recoverable, though the pumping station was designed to bring water through a tunnel which was not completed until after the completion of the pumping station; the contracts for the construction of the tunnel having provided for its completion nine months before the time fixed for completion of the pumping station.

Error to Branch "D" Appellate Court, First District.

Action by Parker-Washington Company, plaintiff, against City of Chicago, defendant. Judgment for defendant in Municipal Court of Chicago; COTTRELL, Judge. Judgment affirmed by Appellate Court. Plaintiff brings error. The facts are stated in the opinion. AFFIRMED.

Olsen & Boord and *Clarence N. Boord* for plaintiff in error.

William H. Sexton, George L. Reker and *Max M. Korshak* for defendant in error.

[137] CARTWRIGHT, C. J.—On September 10, 1909, the Parker-Washington Company, plaintiff in error, entered into a contract by which it agreed to construct for the city of Chicago, defendant in error, the foundations of a boiler room, auxiliary buildings and chimney of a pumping station at One Hundred and Fourth street and Stewart avenue, in the city of Chicago, and to complete the same by December 22, 1909. The work was not completed until March 5, 1910, seventy-three days after the date fixed for its completion. The contract contained the following provision: "It is distinctly understood and agreed by the parties hereto that the work to be performed hereunder shall be completed within the time hereinabove fixed for its completion. Inasmuch as failure to complete the same within the time herein fixed will work an injury to the city of Chicago, and as damages arising from such failure cannot

be calculated with any degree of certainty, it is hereby agreed that if such work is not fully [138] completed within the time fixed herein there shall be deducted from the contract price and retained by said city, as its ascertained and liquidated damages, the sum of fifty dollars ($50) for each and every day passing after the date fixed for the completion, until said work is fully completed as specified." When the work was completed the defendant in error retained the stipulated sum of $50 a day for the seventy-three days as liquidated damages and the remainder of the contract price was paid. The plaintiff in error brought suit in the municipal court of Chicago for the sum so retained and also for a balance due on another contract. The court tried the case without a jury and found in favor of the plaintiff for a balance due on the other contract, but found against the plaintiff on this contract on the ground that the defendant was justified in retaining $3050 as liquidated damages. Judgment was entered accordingly, and the plaintiff appealed to the Appellate Court for the First District and assigned as error the holdings of the municipal court on propositions of law and the refusal to allow the full sum claimed on both contracts. The Appellate Court affirmed the judgment, and a writ of *certiorari* was awarded to bring the record to this court for review.

The law permits parties competent to contract and free to do so, in the exercise of their judgment, to make their own contracts, and the proper function of courts is to enforce such contracts as made, where they do not conflict with any rule of law or good morals or the declared public policy of the State. When the intention of the parties to a contract is ascertained it is ordinarily the duty of the courts to carry it out (U. S. v. Bethlehem Steel Co. 205 U. S. 105, 27 S. Ct. 450, 51 U. S. (L. ed.) 731), and they cannot properly assume a guardianship over those who have the requisite capacity and are free to make such contracts as they may choose. Contracts by which parties who are under no compulsion agree beforehand upon the amount of damages which shall be allowed for a breach are as lawful as any others unless they [139] are inhibited by some rule of law. There is a class of contracts in which stipulations for liquidated damages are not permitted because the law has fixed a definite standard for such damages and an agreement to pay more is necessarily in violation of the law. Those are cases where there is an agreement to pay a certain sum of money, or in default to pay a sum exceeding the lawful rate of interest, as liquidated damages. (Tiernan v. Hinman, 16 Ill. 400; 13 Cyc. 101.) That rule was alluded to in Peine v. Weber, 47 Ill. 41; and in the case of Scofield v. Tompkins, 95 Ill. 190, 35 Am. Rep. 160, where the agreement was held to be for a penalty and not liquidated damages, the contract was to pay $22,770 as the price of land, and also as liquidated damages in case the sum was not promptly paid. Where the agreement does not interfere with any rule of law the intention of the parties, as in all other cases, must govern. Where the intention of the parties is in doubt the courts are inclined to construe the stipulated sum as a penalty, because the theory of the law generally is that compensation shall be the rule and the application of that rule works justice between the parties. (Iroquois Furnace Co. v. Wilkin Mfg. Co. 181 Ill. 582, 54 N. E. 987.) In order to determine whether a stipulated sum to be paid for the breach of a contract was intended to be a penalty or liquidated damages, the court will consider the language used and the subject matter of the contract to ascertain the intention of the parties. The use of the word "liquidated" does not always determine the question, and in the case of Iroquois Furnace Co. v. Wilkin Mfg. Co. supra, the fact that the supplemental contract recited that the purchaser was desirous that the contract should contain a penalty in the nature of stipulated damages was given weight. With respect to the subject matter of the contract, if the provision has reference to uncertain damages and the case shows that serious damage might have been incurred, and no fraud has been used in procuring the contract, the courts cannot interfere and the stipulated sum furnishes the full [140] measure. Generally, the language in which the parties have expressed their intention will control. One matter to be considered is the question whether different acts to be performed are of unequal degrees of importance, some resulting in great damage and others in trifling and inconsiderable loss. In such a case, if a stipulated sum in gross is to be paid for a failure to perform any one of the acts the sum will be construed as a penalty, because it cannot be presumed that the parties intended to satisfy a breach of either condition by the same stipulated sum. (19 Am. & Eng. Enc. of Law, 40; 13 Cyc. 101.) That doctrine does not apply to this case, for the reason that the sum agreed upon as liquidated damages related to the completion of the entire work. Where the damages that will result from a failure to perform the contract are of such a nature that they can not be definitely ascertained or proved and the parties have stipulated a sum as liquidated damages, there is no reasonable ground for saying that the parties did not intend to fix and define the amount of damages and their agreement will be upheld. These rules are to be gathered from the following decisions: Peine v. Weber, supra; Poppers v. Meagher, 148 Ill. 192, 35 N. E. 805; Gobble v. Linder,

76 Ill. 157; Hennessy v. Metzger, 152 Ill. 505, 38 N. E. 1058, 43 Am. St. Rep. 267; Westfall v. Albert, 212 Ill. 68, 72 N. E. 4; Pinkney v. Weaver, 216 Ill. 185, 74 N. E. 714; Western Gas Constr. Co. v. Dowagiac Gas, etc. Co. 146 Mich. 119, 10 Ann. Cas. 224, 109 N. W. 29.

We do not see how there can be any doubt as to the meaning of the parties as expressed in this contract, inasmuch as they specified that the failure to complete the work would work an injury to the city and the damages arising from the failure could not be calculated with any degree of certainty, which brings the case exactly within the rule of law on the subject. Not only did they express the fact that the damages could not be calculated with any degree of certainty, but that was the truth. The construction contracted for was a part of a pumping station for pumping [141] water from Lake Michigan, to be distributed to the south and southwest parts of the city for the use of the inhabitants and for protection against fire. The city, in its corporate capacity, would suffer no damages by the failure to complete the work, but the citizens in whose behalf the contract was made would suffer damages which it would be practically impossible to prove. The contract was made by the city for the purpose of preserving the health and promoting the convenience and welfare of its citizens and protecting them and their property. (Brooks v. Wichita, 114 Fed. 207, 52 C. C. A. 209.) It is beyond question that there could be no estimate of damages or compensation for the inconvenience to the public or damage resulting from a failure to complete the contract as agreed (Harley v. Sanitary Dist. 226 Ill. 213, 80 N. E. 771) and if the parties did not intend that the stipulated sum should be liquidated damages they did not intend that any damages could be recovered, since none could be proved.

Counsel insist that the defendant could retain nothing as liquidated damages because contractors for other work did not complete their contracts, and the pumping station, therefore, could not be used before the plaintiff completed its work. The pumping station was designed to bring water through a tunnel from Lake Michigan, and the tunnel was divided into three sections and different contracts were let for the construction of the sections. By these contracts all the work was to be completed more than nine months before the time fixed for the completion of this contract, but the tunnel was not completed until after the work of the plaintiff had been finished. Neither the intention of the parties nor the construction of the contract can depend upon what happened afterward, which was not reasonably in contemplation when the contract was made. Cases where the actual damages suffered have been capable of ascertainment and could be considered by the parties do not apply to the situation here. It was intended that each contract [142] should be performed within the time agreed upon, and if there was a similar stipulation in every contract, the argument would lead to the conclusion that each one could say that nothing could be deducted from his contract price because someone else had not performed.

The contract was construed by the municipal court in accordance with the views we have expressed and the propositions of law held were in harmony with such views.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

NOTE.

The reported case discusses at length the various considerations which control in determining whether a stipulated forfeiture for breach of a contract is a penalty or liquidated damages. Applying the rules laid down, it is held that a provision for a forfeiture of fifty dollars for each day of delay in completing a municipal pumping station is recoverable as liquidated damages. The subject is fully treated in the notes to Stony Creek Lumber Co. v. Fields, 1 Ann. Cas. 242; Western Gas Constr. Co. v. Dowagiac Gas, etc. Co, 10 Ann. Cas. 224; Webster v. Bosanquet, Ann. Cas. 1912C 1019, and Stillwell v. Paepcke-Leicht Lumber Co. 108 Am. St. Rep. 42. For the application of the rules for determining the nature of the stipulation to a deposit by a tenant to secure the performance of the terms of the lease, see the note to Cunningham v. Stockton, 19 Ann. Cas. 212.

WILLARD ET AL.

v.

HIGDON.

Maryland Court of Appeals—June 24, 1914.

123 Md. 447; 91 Atl. 577.

Landlord and Tenant — Estoppel to Deny Landlord's Title — Right to Crops.

Where on a conveyance of leased land the landlord's interest in a growing crop is reserved, the rule that a tenant cannot deny his landlord's title does not prevent the tenant from defending an action by the grantee for the value of such crop on the ground that it has been delivered to the grantor.

Statute of Frauds — Transfer of Growing Crop.

Growing crops, if fructus industriales, such as a crop of wheat, are chattels, and may be sold without complying with the requirements of the statute of frauds, especially in view of Uniform Sales Act (Code Pub. Civ. Laws, art. 83), § 97, providing that "goods" includes all chattels personal other than things in action or money, and that the term includes emblements, industrial growing crops, and things attached to or forming a part of the land which are agreed to be severed before sale or under the contract of sale.

Part Payment — Reservation of Part on Sale.

Within the provision of the Uniform Sales Act (Code Pub. Civ. Laws, art. 83) that a contract to sell or a sale of goods of the value of $50 or upward shall not be enforceable by action unless the buyer shall accept part of the goods and actually receive them or give something in earnest to bind the contract or in part payment, etc., if a reservation of a growing crop by a grantor amounts to a contract to sell or a sale, the grantor both accepts and receives the crop and gives something in part payment, where the crop is subsequently delivered to him by a tenant; the conveyance of the property constituting payment in full.

Effect of Statute — Oral Contract as Defense.

A party may rely upon an oral contract as a defense, though the contract could not be enforced on account of the statute of frauds, especially in view of the provision of the Uniform Sales Act (Code Pub. Civ. Laws, art. 83), that a contract to sell or a sale "shall not be enforceable" unless the buyer shall accept part of the goods and actually receive them, etc.

[See 11 Ann. Cas. 479.]

Parol Reservation of Growing Crop.

As a growing crop may be sold by parol, a parol reservation of such a crop upon a conveyance of land is valid, since a crop may be so dealt with as to make it personal property, and therefore does not necessarily pass with the land upon which it is growing.

[See note at end of this case.]

Harmless Error — Exclusion of Evidence — Effect of Verdict.

In an action by the grantee of leased premises against the tenant to recover the value of a growing crop delivered by the tenant to the grantor, defended on the ground that the crop was orally reserved by the grantor, where the jury finds for defendant, the exclusion of a question asked the grantee as to what steps he took to protect himself against the delivery of the crop is harmless.

Appeal from Circuit Court, Frederick county: URNER, WORTHINGTON and PETER, Judges.

Action by Charles F. Willard et al. plaintiffs, against Henry W. Higdon, defendant. Judgment for defendant. Plaintiffs appeal. The facts are stated in the opinion. AFFIRMED.

Albert S. Brown, Charles McC. Mathias and *Emory L. Coblenz* for appellant.

Milton G. Urner, John S. Newman and *Benjamin F. Reich* for appellee.

[448] BOYD, C. J.—The appellee rented a farm from David H. Roelkey from April 1st, 1910, to April 1st, 1911 by an agreement in writing which contained various provisions—amongst others that Mr. Roelkey was to have one-half of all the wheat, corn, oats, clover seed, timothy seed, rye and hay raised on the farm, which the appellee agreed to deliver to any point within five miles therefrom free of cost to Mr. Roelkey. On December 27th, 1910, Mr. Roelkey agreed to sell the farm to the appellants. At that time the following note was given to him:

[449] "Knoxville, Md., Dec. 27, 1910.

"Ninety days after date we jointly and severally promise to pay to David H. Roelkey five hundred dollars for value received as part payment of purchase of farm known as Locust Grove, containing 284 acres, more or less, except part reserved between two farms, of about two or three acres, more or less, purchase price to be $18,000.00."

That was signed by C. F. Willard, E. H. Willard and M. L. Willard. On the same day Mr. Roelkey gave the appellants a receipt as follows:

"Knoxville, Md., December 27th, 1910.

"Received of C. F. Willard, E. H. Willard and M. L. Willard five hundred dollars in form of note as forfeit on farm known as Forest Grove, price to be $18,000.

"$500. DAVID H. ROELKEY."

On March 25th, 1911, Roelkey and wife executed a deed to the appellants for two tracts of land described by courses and distances, which in the aggregate contained 284 acres, more or less, and it seems to be conceded that the land conveyed by the deed was the same intended to be sold as referred to in the note and receipt above. There is no such reservation in the deed, but Roelkey claims that at the time of the sale, it was agreed, distinctly but orally that he was to have the half of the wheat crop then growing, to which under the terms of the lease to the appellee he was entitled. The appellants deny that there was such an agreement and contend that there could be no binding reservation made by parol, as it would be in contradiction of the written agreement and of the deed. Roelkey claims that he positively

refused to sell the farm for less than $18,000 and the reservation of the half of the wheat crop, and that when he insisted upon there being inserted in the agreement provisions that the appellee was to remain on the farm and that he reserved [450] the growing wheat crop, Charles F. Willard, who wrote the papers, said: "It is not worth while, it is not like strangers, we have been friends all our lives, we want only what is right." He had made a mistake in one of the papers which had to be written over again, and Roelkey claims that he again insisted upon those provisions being inserted, and said his son did not understand the omission, and Willard then turned to the son and, addressing him, said: "Dave, Mr. Higdon is to stay on there and your father reserves the growing wheat crop, is that plain enough to you?" Roelkey claims that the reservations were accordingly omitted at the instance of Willard.

The appellee delivered the half of the wheat to a mill for Roelkey, instead of delivering it to the appellants who notified him of their claim to it. The appellants sued him and at first simply had six of the usual common counts in the *narr.*, but amended by adding a seventh count, "For money due for the use and occupation of the plaintiffs' lands in Frederick County, Maryland." The plaintiff finally abandoned all of the counts in the declaration except the seventh. There are twelve bills of exception containing rulings as to the admissibility of evidence, and the thirteenth embraces the prayers,—the plaintiffs having offered seven, all of which were rejected excepting the fourth, and the defendant three, the first and second of which were rejected and the third granted. The case resulted in a judgment for the defendant, and from that this appeal was taken.

As the important question in the case is whether there could be a valid reservation of the wheat crop by parol, notwithstanding the agreement of December 27th, 1910, and the deed in evidence, we will consider that question before referring to the exceptions and prayers separately. Before doing so, however, it will be well to say that we do not understand how the question whether a tenant can deny his landlord's title is involved in this case. That was argued at some length orally and in the brief of the appellants, but there can be no difficulty about the law on that subject. If it was [451] validly agreed between the appellants and Roelkey that the latter was to have the one-half of the wheat crop, it could hardly be contended that the appellee could not defend against this suit by reason of the fact that he is the tenant of the appellants. If, for example, the deed had contained such a reservation, the right of the appellee to defend on the ground that he had delivered the wheat in pursuance of that reservation could not have been questioned, and therefore we say that the important question is whether there was a valid reservation of the wheat crop.

It cannot be doubted that in this State growing crops, if *fructus industriales*, such as a crop of wheat, are regarded as chattels and can be sold without complying with the requirements of section 4 of the Statute of Frauds (29 Charles II, Ch. 3). Purner v. Piercy, 40 Md. 212, 17 Am. Rep. 591; Wilson v. Fowler, 88 Md. 601, 42 Atl. 201, 71 Am. St. Rep. 452, 42 L.R.A. 849. In this State even a sale of growing trees to be presently cut and removed by the vendee is not within the operation of that section. Smith v. Bryan, 5 Md. 141, 59 Am. Dec. 104; Leonard v. Medford, 85 Md. 666, 37 Atl. 365, 37 L.R.A. 449. If prior to the passage of the Uniform Sales Act of 1910 (Ch. 346, p. 272) there could have been any doubt about growing crops being chattels, that statute dispels it. In section 97 of Article 83, it is declared that, "'Goods' include all chattels personal other than things in action or money. The term includes emblements, industrial growing crops, and things attached to or forming a part of the land which are agreed to be severed before sale or under the contract of sale." As that act took effect June 1st, 1910, it is applicable to this agreement, which was made December 27, 1910.

Under the decisions in Eichelberger v. McCauley, 5 Har. & J. (Md.) 213, 9 Am. Dec. 514, and Rentch v. Long, 27 Md. 188, a sale of a crop not yet thrashed, shucked or gathered was not within the 17th section of Statute of Frauds (29 Charles II, Ch. 3), because work and labor being necessary to prepare it for delivery, it was not a sale of goods, wares and merchandise within the meaning of that section, but that has been changed by the Uniform Sales Act, which reads as follows:

[452] (1) "A contract to sell or a sale of any goods or choses in action of the value of fifty dollars or upward shall not be enforceable by action unless the buyer shall accept part of the goods or choses in action, so contracted to be sold, or sold and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

(2) "The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract or sale be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or

rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

(3) "There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods expressed by words or conduct his assent to becoming the owner of those specific goods."

Although sub-section (2) has changed the rule announced by our predecessors, if the alleged agreement as to the crop between the appellants and Mr. Roelkey can be said to amount to a contract to sell or a sale, then the latter is the buyer, and the further question arises as to whether he had done any of the things which are a compliance with the statute. That must be answered in the affirmative, as Roelkey did actually accept and receive the wheat and he did give something in part payment—indeed in payment in full—as he conveyed the property for which the consideration was the $18,000.00 and the reservation of the wheat crop, if his contention in that respect be correct. Moreover, section 25 says that a contract to sell or a sale, shall "not be *enforceable by action*, unless," etc. Under our decisions a party may defend although the contract cannot be enforced on account of the [453] statute of frauds. Crane v. Gough, 4 Md. 333; Webster v. LeCompte, 74 Md. 258, 22 Atl. 233; see also 29 Am. & Eng. Enc. of Law (2d ed.) 818, 822.

We must therefore consider the question of the validity of a reservation by parol, with the understanding that a growing wheat crop may be treated as a chattel and that the statute of frauds does not stand in the way of the defense in this case of such a reservation. The authorities are not uniform on the subject, but inasmuch as the growing crop can be treated as a chattel, and the owner of the land can undoubtedly sell it as such, we are of the opinion that it is more reasonable and more in accord with the spirit of the decisions in this State to hold that such a crop can be reserved by parol. Of course if a third party deals with the vendee of the real estate, without knowledge of the reservation, another question might arise, but as between the vendor and vendee it seems to us to be more logical to hold that such a crop can be reserved by parol, without infringing upon the rule that the terms of a written instrument or a deed cannot be varied by parol, although there are many decisions to the contrary in other jurisdictions.

In 2 Devlin on the Law of Real Property and Deeds, section 980C, it is said: "On the ground that parol evidence is inadmissible to contradict or alter the terms of a written instrument, the rule announced in many cases is that it cannot be shown by parol that the grantor reserved the growing crops upon the land conveyed. But in a number of cases a contrary rule is announced. In the first class of cases it is said that to admit the reservation, by parol, of growing crops would be in direct conflict with the rule forbidding the introduction of parol evidence to vary the terms of a written instrument. In the other class it is said that the allowance of a parol reservation of a growing crop is not to contradict the deed, but to show what, in some instances, would pass with the land as a part of the realty has, by the agreement of the parties, been transformed into personalty." The case [454] of Grabow v. McCracken, 23 Okla. 612, 102 Pac. 84, is annotated in 23 L.R.A.(N.S.) 1218, and also in 18 Ann. Cas. 503, and in both of those volumes many authorities are cited in the notes. In that case it was held that a matured crop of corn and wheat standing ungathered upon a tract of land may be specifically reserved by parol in the sale of the land as a part of the contract price or consideration of the deed. The Court cited a large number of cases in which it had been permitted to prove by parol that there was a consideration in addition to the one mentioned in the deed, as that was not contrary to the general doctrine that parol evidence could not be admitted in contradiction of or to vary a written instrument or deed.

In the notes referred to, cases on both sides of the question are cited; among those holding that the vendor may avail himself of a parol exception of growing crops, and that parol evidence is admissible to show that a crop growing on the land was excepted from the operation of the deed, are Heavilon v. Heavilon, 29 Ind. 509; Harvey v. Million, 67 Ind. 90; Benner v. Bragg, 68 Ind. 338; Hisey v. Troutman, 84 Ind. 115; Bourne v. Bourne, 92 Ky. 211, 17 S. W. 443; Flynt v. Conrad, 61 N. C. 190, 93 Am. Dec. 588; Walton v. Jordan, 65 N. C. 170; Baker v. Jordan, 3 Ohio St. 438; Youmans v. Caldwell, 4 Ohio St. 72; Backenstoss v. Stahler, 33 Pa. St. 251, 75 Am. Dec. 592; Harbold v. Kuster, 44 Pa. St. 392; Kerr v. Hill, 27 W. Va. 576. Without now quoting from any of these cases, we are of the opinion that they sustain the position apparently adopted by the lower Court that in this State a reservation of a wheat crop can be validly reserved by the parol agreement of the parties, and the fact that the deed does not include the reservation does not defeat it. There can be no doubt that under our law this wheat crop could be treated by the parties as personal property and if they did agree that it should

be reserved by the vendor when he executed the deed it is manifest that it was not intended to convey it.

[455] While Roelkey was the owner of the reversion he could undoubtedly have sold his interest in the growing crop of wheat by parol, and after the appellants became such owners they could have sold the landlord's interest in the crop, if it was not reserved by Roelkey. As then it is permissible for a vendor to sell such a crop by parol before he conveys the land and as the vendee can sell it, if still his, by parol after he becomes the owner of the land, it seems to us to be illogical to hold that although before executing the deed the vendor and vendee agreed that it should be reserved to the vendor, yet because it was not reserved in the deed itself the execution and delivery of the deed operate to so reattach this chattel to the real estate as to make it realty, and not personalty, and thereby convey to the grantee what was expressly and at the time validly agreed should not go to the grantee. An interest in a growing crop is of a temporary character, and it uselessly burdens a deed in fee simple to insert such a reservation in it. If a growing crop would necessarily pass by a deed of real estate, regardless of what had been done with reference to it before the deed was made, that would be a good reason for requiring it to be reserved when the deed for the real estate is executed, but as the sale of a growing crop such as this is not the sale of an interest in land but of a chattel, and is now so declared by statute, a deed for the land does not necessarily convey the crop. If Roelkey had sold his interest in this wheat crop to the appellee, or to some other third person, and the appellants knew it, could it be pretended that they could nevertheless in an action for use and occupation recover from the appellee one-half of the value of the wheat simply because the deed did not reserve it? Certainly not, and why then can they recover it, if they agreed that it should be paid to Roelkey? If the appellee had a valid lease, of which the appellants had notice, could they eject him because there was no reservation in the deed in favor of his lease? A tenant may have property so attached to the land as to appear to be a part of the realty, but if it [456] was such property as a tenant has the right to remove, there can be no doubt of his right to prove that it was his, and remove it—notwithstanding a deed had been made which made no such reservation. The case of Baker v. Jordan, 3 Ohio St. 438, is so well reasoned out and in our judgment announces such a wise and correct rule, that we will quote at some length from it. It concludes as follows: "A deed purports to convey the realty. But what is the realty? Growing corn may be part of it, for some purposes, but it is generally to be considered as personalty. If the parties to a deed either by words or their behavior signify their understanding that as between them it is personalty, the law will so regard it, and will respect their intention in the construction of the deed. When the evidence of such understanding is produced, it is not to contradict the deed, for with that it is perfectly consistent, but it is to show that what in some instances would go with the lands as part of the realty, was, in that case, converted into personalty by the will of the parties, and thus to hold the deed to its true meaning and effect."

Without deeming it necessary to determine whether under our decisions it could be shown that the reservation of the wheat crop was a part of the consideration for the deed, and therefore parol evidence was admissible on that ground, we are satisfied to base our conclusion on the ground announced in Baker v. Jordan, supra, and other cases adopting the same view. We understand the position taken by such cases in effect to be, that a conveyance of land may or may not have been intended by the parties to include growing crops, such as wheat, corn, etc., and hence that such a crop does not necessarily pass by a deed for the land, but on the contrary if before the conveyance it has been by the action or agreement of the parties converted into personalty, parol evidence is admissible to prove that fact. That is so for the obvious reason that when a deed for real estate is made, it does not convey personal property on or in the land, and if a crop [457] has been so dealt with by the parties before the execution and delivery of the deed as to make it personal property, the parties did not intend the crop to pass with the land. In other words the crop is not included in the sale of the land, and if it be not permitted to prove the previous dealings of the parties the deed would convey what was not sold. A growing crop of wheat is not such a character of property under our decisions, or under our statutes, as to necessarily pass with the land in which it is growing, in the absence of a reservation in the deed of conveyance.

We therefore hold that it was permissible to submit to the jury the question whether it was agreed between the appellants and Roelkey before the sale was consummated that the latter should have the growing crop of wheat, and that if they so found (as they did) this action could not be maintained against the appellee.

We will briefly refer to the exceptions. The first and second are not pressed. The third, fourth, fifth, sixth, seventh, eighth, ninth and tenth were to the admission of testimony in reference to the parol agreement

about the wheat crop. From what we have said it will be seen that such testimony was admissible. The eleventh was to the action of the Court in sustaining an objection to a question asked Charles F. Willard: "What steps did you take to protect yourself against the delivery of the wheat?" We do not understand how that ruling could have injured the appellants, in view of our conclusion on the main question. There was no error in the twelfth exception. Without discussing the prayers separately, we are of opinion that the plaintiff's fourth and the defendant's third, which were granted, were sufficient to fairly present to the jury the real question involved in the case, and we will affirm the judgment.

Judgment affirmed, the appellants to pay the costs.

NOTE.

Validity of Parol Preservation of Crops by Vendor of Land.

The reported case seems to be the only recent decision involving the validity of a parol reservation of crops by a vendor of land. The authorities are not uniform on the subject, and in holding that the vendor of land may avail himself of a parol reservation of growing crops, and that parol evidence is admissible to show that a crop growing on land was excepted from the operation of the deed, the Maryland court follows the minority view, as will be seen by reference to the notes to Grabow v. McCracken, 18 Ann. Cas. 503, and Bjornson v. Rostad, Ann. Cas. 1915A 1151, wherein the earlier cases are reviewed. See also the note to In re Anderson, 131 Am. St. Rep. 621.

CANNING

v.

CANNING.

Vermont Supreme Court—February 11, 1914.

87 Vt. 492; 89 Atl. 1088.

Divorce — Separation Agreement as Bar.

A separation agreement reciting that it was made because the marital relations of the parties were not pleasant, and providing that the husband should pay the wife $6 a week during his life, and in case of his death for four years, by which the husband waived all right to the wife's property, and the wife released all her interest in her husband's real estate, and agreed to contract no bills on his credit, cannot be construed as an agreement not to sue for separation for a pre-existing cause unknown to the innocent party.

[See note at end of this case.]

Same.

A valid separation agreement does not bar the husband's petition for divorce from bed and board on the ground of the wife's adultery unknown to him when he entered into such agreement, nor, in the absence of an express stipulation against a suit for divorce for pre-existing causes then known to the other party, prevent either party from maintaining an action for divorce, either absolute or limited, whether the cause therefor occurred before or after such agreement.

[See note at end of this case.]

Same.

An action for divorce for abandonment or desertion occurring after a separation agreement cannot be maintained.

[See note at end of this case.]

Same.

Articles of separation may be taken, in connection with lapse of time and other circumstances, as evidence that a party thereto, petitioning for divorce, is not acting in good faith, so as to be entitled to the favorable consideration of the court.

[See note at end of this case.]

Same.

A separation agreement entered into by the husband, without knowledge of the wife's pre-existing adultery, cannot be held to have condoned the pre-existing cause for divorce, since, without knowledge, there can be no condonation.

[See note at end of this case.]

Same.

A husband's petition for divorce, after entering into a separation agreement, is not dependent upon a rescission of such agreement, which, if valid, may, notwithstanding the divorce, be effective so far as it stipulates for the wife's support.

[See note at end of this case.]

Exceptions from Washington County Court: FISH, Judge.

Action for divorce. James Canning, petitioner, and Martha Canning, petitionee. Judgment for petitioner. Petitionee alleges exceptions. The facts are stated in the opinion. AFFIRMED.

Theriault & Hunt for petitionee.

Fred L. Laird and *Senter & Senter* for petitioner.

[493] TAYLOR, J.—This is a petition for divorce from bed and board. The petitionee pleaded in bar articles of separation. To this plea the petitioner replied that the cause alleged in his petition was unknown to him at the time of the execution of the separation agreement. To the replication the petitionee

demurred. The court below overruled the demurrer and adjudged the replication a sufficient answer to the plea and that the petitioner might maintain his petition for divorce to which the petitionee was allowed an exception and the cause passed to this Court before final hearing.

The plea alleges, in substance, that on the 24th day of October, 1907, because of the fact that the marital relations between the petitioner and petitionee were not pleasant, and being unable to live happily as husband and wife, they entered into the following agreement:

"An agreement, made and entered into by and between James C. Canning, of Montpelier, in the County of Washington and State of Vermont, of the first part, and Martha Canning, [494] of said Montpelier, in the County of Washington and State of Vermont, of the second part.

Witnesseth: That whereas the said James C. Canning and Martha Canning, being husband and wife, and whereas their marital relations are not pleasant; therefore, in consideration of the covenants, agreements, grants, releases and stipulations hereinafter expressed, agreed upon and consented to, the said James C. Canning and Martha Canning are to separate and live separately and apart from each other until said marital relations are severed by the decease of one or the other of said parties.

In consideration of the covenants and agreements hereinafter set forth, the said James C. Canning hereby agrees to pay, or cause to be paid, to the said Martha Canning the sum of six dollars per week, said sum to be paid to the said Martha Canning every week during the lifetime of the said James C. Canning, but if the said Canning should decease within four years from the date of this instrument, then the said six dollars per week is to be paid out of his estate up to a period of four years from October 24th, A. D. 1907.

The said James C. Canning, for himself and his heirs, further agrees, for the consideration hereinafter expressed to remise, release and waive any and all claims to any property, real or personal, which he might have or would have in and to the property of the said Martha Canning, as her husband.

The said Martha Canning, for herself, her heirs and assigns, for the consideration of the agreements above set forth, to be performed by the said James C. Canning, agrees as follows: to accept said six dollars a week during the lifetime of the said James C. Canning; to release all her right, title and interest to and in the real estate of the said James C. Canning by signing, as wife of the said James C. Canning, a deed conveying said real estate to C. P. Pitkin and Antoine Galaise in trust and as trustee for the said James C. Canning; to remise, release and waive any and all claims she may or might have in and to the estate of the said James C. Canning, as his wife, or, at his decease, as his widow; to contract no bills in the name of the said James C. Canning from the date of the execution of this instrument; to vacate the house of the said James C. Canning, located on North Street, in the City of Montpelier, immediately upon the execution of this agreement.

Both of said parties, by this instrument, mutually agree to live apart, and separately from each other during their natural lifetime, and at the decease of either the other shall make no [495] claim to, or assert any interest in, the property of the deceased.

Dated October 24th, A. D. 1907.

JAMES CANNING (L. S.).
MARTHA CANNING (L. S.).

In the presence of
FRED L. LAIRD,
MARY CANNING."

The plea further alleges that the petitionee has fully performed said agreement on her part and that the same is in full force and effect. One of the alleged grounds of divorce is adultery claimed to have been committed by the petitionee prior to the date of the separation agreement. In his replication the petitioner alleges that at the time of making the pretended agreement for separation, set forth in the petitionee's plea, he had no knowledge, information or belief as to the fact that the petitionee had committed the crime of adultery, as alleged in his petition for divorce.

The petitionee contends that the agreement pleaded is an undertaking on the part of both parties to remain husband and wife, living separate and apart from each other, until the death of one of them. Conceding that the agreement amounts to an undertaking to remain husband and wife "until death doth us part," it is, in that behalf, but a confirmation of their marriage vows. It contains no express promise not to sue for separation for causes afterwards arising and we think cannot be construed into an agreement not to do so for a pre-existing cause unknown to the innocent party.

The petitionee relies upon Squires v. Squires, 53 Vt. 208, 38 Am. Rep. 668, in support of her claim that the agreement is a bar to this petition. That was a libel for divorce on the ground of intolerable severity and the contract was entered into after the separation had occurred through the intervention of a third person acting for the wife. From the very nature of the alleged cause of divorce it must have occurred before the separation and must have been known to the petitioner at the time of the agreement was

entered into. In the case at bar the alleged cause for divorce, though antedating the agreement, was then unknown to the petitioner. Unlike the Squires' case the agreement is not by a third party on behalf of the wife but is a contract between husband and wife alone; moreover, in this case the separation had not occurred and it does not [496] appear that it was then imminent. It was said in the Squires' case: "It is not the policy of the law to encourage separation between husbands and wives. The rule established in many cases is that articles calculated to favor a separation which has not yet taken place will not be supported."

The argument in the case at bar proceeded upon the theory that the separation agreement is a valid contract. We think there is room for doubt, (1) whether such a contract entered into between husband and wife without the intervention of a third person can be upheld at law. 1 Bish. Mar. Sep. & Div. § 1286; P. S. 3037; Montpelier First Nat. Bank v. Bertoli, 87 Vt. 297, 89 Atl. 359, and cases cited; Monographic note to Baum v. Baum, 109 Wis. 47, 85 N. W. 122, 83 Am. St. Rep. 859, 53 L.R.A. 650, and cases cited; (2) whether in the absence of allegations that the separation had already taken place, or was fully decided upon prior to and apart from the contract, the plea could be regarded, in any event, as an answer to the petition for divorce. (See note to Baum v. Baum, supra, and cases cited); (3) and whether it should not be held that agreements for separation between husband and wife, so far as they stipulate against cohabitation, are against public policy and so in that respect void and of no force in law. Luttrell v. Boggs, 168 Ill. 361, 48 N. E. 171; note to Baum v. Baum. Bishop in his treatise on Marriage, Separation and Divorce sums up the law on this subject thus: "The law is a harmonious system, and what it forbids the courts to do with the consent of the parties, it does not permit the parties to do out of court. It has always forbidden judicial divorces on default of defendants, on their acknowledgments in and out of court, or on their and the plaintiff's agreements. Marriage is a public institution as well as private; the public is in effect a party to every marriage and every divorce; and two persons who have united in matrimony cannot by their mutual consenting create a separation even from bed and board,—for this is an act requiring also the sanction of the third party, the public. In circumstances pointed out by the laws, the courts will give this sanction in the form of a judicial decree. So that bargaining for a separation, made simply between the married parties, whether with or without the intervention of a trustee, are nugatory. But there is no public interest which under any circumstances forbids a husband to maintain his wife, or invalidates his contracts to provide for her a support. So that articles [497] of separation are good as provisions for maintenance, but not as a bar to cohabitation." 1 Bish. Mar. Sep. and Div. § 1312.

But as the case can be disposed of without deciding those questions we leave them for consideration when a case is presented in which they are argued. Treating the separation agreement as valid, still it does not bar the petition for divorce on the ground of adultery unknown to the petitioner at the time he entered into the agreement. Such an agreement when valid does not prevent either party from maintaining against the other an action for divorce, either limited, as in this case, or absolute, whether the cause therefor occurred before or after such agreement was entered into, unless, perhaps, as to pre-existing causes the agreement expressly stipulates against suit for divorce on grounds known to the other party at the time of the agreement. 2 Bish. Mar. Sep. and Div. § 445; Clark v. Fosdick, 118 N. Y. 7, 22 N. E. 111, 6 L.R.A. 132, 16 Am. St. Rep. 733; J. G. v. H. G. 33 Md. 401, 3 Am. Rep. 183; Fosdick v. Fosdick, 15 R. I. 130, 23 Atl. 140; Winn v. Sanford, 148 Mass. 39, 18 N. E. 677, 1 L.R.A. 512; Franklin v. Franklin, 154 Mass. 515, 28 N. E. 681, 13 L.R.A. 843, 26 Am. St. Rep. 266; Walker v. Walker, 14 Cal. App. 487, 112 Pac. 479; Archbell v. Archbell, 158 N. C. 408, 74 S. E. 327, Ann. Cas. 1913D 261; Clark v. Clark, 143 Mo. App. 350, 128 S. W. 218; Lemmert v. Lemmert, 108 Md. 57, 63 Atl. 380.

This rule is doubtless subject to the limitation that divorce for abandonment or desertion accruing after the separation contract cannot be maintained. Clark v. Clark, supra.

When rightly understood Squires v. Squires does not hold that a separation agreement necessarily bars a subsequent petition for divorce. The holding goes no farther than saying in effect that in a particular case, but not always or as of course, a separation contract taken in connection with the circumstances under which it was made and under which the petition for divorce is brought, may operate as a defense to a divorce suit for a cause known to exist at the time such contract was executed. The opinion concludes with these words: "We think this case belongs to that class when the parties should be held to their own settlement; and that the deed of separation *under the circumstances* is a good defense to this petition." After correctly stating the common-law rule that a voluntary deed of separation is not *per se* a bar to a petition [498] for divorce, the opinion proceeds: "But there are other cases where the deed taken in connection with the

circumstances under which it was given and under which the application for divorce was made, and with the conduct of the parties, was held to constitute a defence." The doctrine of the cases cited is not that the articles of separation are *per se* a bar to a divorce for causes previously existing and known to the petitioner, but only that they may be taken in connection with lapse of time and other circumstance as evidence to show that the petitioner is not prosecuting the petition in good faith and therefore not entitled to the favorable consideration of the court. Excepting the case of Squires v. Squires, all the cases both English and American are to the effect that such articles are not *per se* a bar. Note to Squires v. Squires, 53 Vt. 208, 38 Am. Rep. 668, and cases cited. As is said in Fosdick v. Fosdick, supra: "There is no good reason on which such articles can be held to be a bar unless they can be held to rest on an implied condition that the marital relation shall continue notwithstanding the separation. . . . An agreement for separation and provision for the wife is not inconsistent with divorce, for divorce is only a more absolute separation."

The petitionee contends that the separation agreement operates as a condonation of the pre-existing cause for divorce. It may be that under special circumstances and when expressly stipulated in the contract it would amount to a condonation. 1 Bish. Mar. Sep. and Div. § 1282. In the ordinary case of separation, instead of condoning, or forgiving, the guilty party, the wrong remains unforgiven and is the moving cause of the separation; so it is said that "unless expressed in special terms" such an agreement does not amount to a condonation. But to have condonation there must be knowledge. When, as here, the wrong was unknown at the time of the contract, it cannot in any possible view of the contract be held to have been condoned thereby. 2 Bish. Mar. Sep. and Div. § 269.

The petitionee contends that the bringing of the petition for divorce is an attempt to rescind the agreement which the petitioner cannot do until he has restored what he received under it. But we do not think the right to maintain the petition is dependent upon a rescission of the agreement. If valid, it may, notwithstanding the divorce, still be effective so far as it stipulates for future support of the wife. Besides the county [499] court has ample power to make a just allowance for the wife in view of any property rights she may have relinquished under the contract in case a decree of separation is awarded. 1 Bish. Mar. Sep. and Div. 1633; P. S. 3074, 3098.

The judgment below was in accordance with these views.

Judgment affirmed and cause remanded.

NOTE.

Separation Agreement as Bar to Action for Divorce.

I. Generally, 347.
II. Antenuptial Agreement, 348.
III. Postnuptial Agreement:
1. Divorce for Adultery:
a. Prior Adultery, 349.
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2. Divorce for Cruelty, 351.
3. Divorce for Desertion:
a. Generally, 354.
b. Prior Desertion, 354.
c. Subsequent Desertion, 359.

I. Generally.

It may be stated as a general rule that a separation agreement entered into by a husband and wife is not per se a bar to an action for a divorce of the parties, except that a divorce for desertion is precluded when the agreement operates as giving consent to the acts relied on as a cause of action.

Goslin v. Clark, 12 C. B. N. S. 681, 692, 104 E. C. L. 681, 692; Westmeath v. Westmeath, 2 Hagg. Ecc. 238; Charlesworth v. Holt, L. R. 9 Exch. 38, 43 L. J. Exch. 25; Grant v. Budd, 30 L. T. N. S. 319; Lipman v. Lipman, 60 Sol. J. 157; Adamson v. Adamson, 23 Times L. Rep. 434; Miller v. Miller, 19 British Columbia 563; Riddell v. Riddell, 7 Alberta L. Rep. 4, 25 West. L. Rep. 656, 10 Dominion L. Rep. 222; J. G. v. H. G. 33 Md. 401, 3 Am. Rep. 183; Rogers v. Rogers, 4 Paige (N. Y.) 516, 27 Am. Dec. 84; Clark v. Fosdick, 118 N. Y. 7, 22 N. E. 1111, 16 Am. St. Rep. 733, 6 L.R.A. 132; Henderson v. Henderson, 37 Ore. 141, 60 Pac. 597, 61 Pac. 136, 82 Am. St. Rep. 741; 48 L.R.A. 766; Eby v. Eby, 17 Pa. Co. Ct. 269; Litzenberg v. Litzenberg, 57 Pa. Super. Ct. 123; Blaker v. Cooper, 7 Serg. & R. (Pa.) 500; Mondean v. Mondean, 30 Pittsb. Leg. J. (N. S.) 364; Alleman v. Alleman, 2 Dauphin Co. Rep. 209; Andrus v. Randon, 34 Tex. 536. And see the cases cited throughout this note. Thus in Fosdick v. Fosdick, 15 R. I. 130, 23 Atl. 140, the court said: "With the exception of Squires v. Squires, all the cases, both English and American, are to the effect that such articles are not per se a bar. . . . We can think of no ground on which such articles can be held to be a bar, unless they can be held to rest on an implied condition that the marital relation shall continue notwithstanding the separation. But is any such implication warranted? We think not, where the agreement is only an agreement for separation, with provision for the injured party. Such an agreement is not inconsistent with divorce, for divorce is only a more absolute

separation. It is reasonable to suppose that such a condition, if it had been intended, would have been expressed. It follows that the agreement, whatever effect we might give to it, if it were subject to such a condition, is no bar, and that the divorce, the cause alleged being proved, must be granted." Similarly in J. G. v. H. G. 33 Md. 401, 3 Am. Rep. 183, the court said: "Some cases have arisen upon applications for divorce in the Ecclesiastical Courts, in which a voluntary deed of separation between the parties has been considered, in connection with lapse of time and other circumstances, as sufficient to show that the application was not made bona fide, for the cause assigned; but for some sinister or collateral purpose, and the application for that reason has been denied. . . . But, as we have said, such a voluntary deed has never been considered per se as a bar to the suit. . . . We think it is very clear upon the authorities, that the deed of separation in this case is not per se a bar to the maintenance of the present suit. There is no evidence in the case to impeach the good faith or bona fides of the appellant in bringing this suit. The only circumstance relied on by the appellee for that purpose, is the lapse of time after the execution of the deed, before filing the bill. But this is satisfactorily explained by the proof in the record. It appears the complainant was restrained from instituting this proceeding by conscientious scruples, supposing it to be inconsistent with his religious duty, to seek a divorce for any cause; and it appears also, that the same motive led him to enter into the deed for an amicable separation. Those conscientious scruples were afterwards removed by a decision upon the subject, rendered by the highest ecclesiastical tribunal of the Church of which he and the appellee are members, and to whose authority he felt himself bound to submit, declaring the marriage null. These facts disclosed in the record, while they in no otherwise affect the rights of the parties in this cause, are a sufficient answer to the suggestion, that the appellant has lost his remedy by laches or acquiescence, or that his application for a divorce has not been made in good faith and for the cause assigned." Likewise in Bloom v. Bloom, 8 Pa. Dist. 563, 22 Pa. Co. Ct. 433, it was said that all the causes for a divorce, except perhaps where the ground is desertion, which exist prior to the time a separation agreement is entered into, remain the same and the agreement is not a bar. And in Eby v. Eby, 17 Pa. Co. Ct. 269, wherein it was held that an agreement to separate made after the commencement of divorce proceedings did not bar the action with respect to pre-existing causes, the court said: "The agreement . . . is not a bar to a proceeding by either party for an absolute divorce. It is simply an agreement to live apart, containing the usual provision for the support of the wife and children, and declaring that payment thereof may be enforced in the same manner as if a decree from bed and board with alimony had been entered. In fact, however, no decree of the court was made, and the parties had no power to divorce themselves by agreement. But they might lawfully separate; and as we construe the contract they did not try to do more than this. Moreover they expressly provided that payment of the sum agreed upon for the wife's support should continue until the happening of one of several contingencies, among which is the obtaining of a 'divorce absolute . . . by either party;' implying plainly that either party was free to proceed for an absolute decree. There is nothing in the agreement which compels the party thus proceeding to rely only upon a cause for divorce which might arise after the agreement was signed; and the court has no power to impose such a restriction. A new application, therefore, asking for an absolute decree for reasons which existed when the agreement to separate was executed, would be unobjectionable; and as the same result has been reached by allowing the original libel to be amended, it would be a useless formality to compel the libellant to begin anew."

A distinction should be noted between an agreement of separation and a consent to the commission of an act constituting a cause for a divorce. Cases which deal with the passive consent alone have been excluded from this note as not being within the scope thereof and the discussion is limited to cases involving an active consent as expressed in or implied from an agreement between the parties for a separation. As to the validity of a separation agreement between husband and wife as dependent on the manner of its execution, see the note Archbell v. Archbell, 158 N. C. 408, Ann. Cas. 1913D 261, 74 S. E. 327.

In *England* it has been said that by peculiar expressions in the separation agreement the parties may become bound not to institute a suit for a divorce for a pre-existing cause. See Flower v. Flower, 25 L. T. N. S. 902, 20 W. R. 231; Brunton v. Dixon [1892] W. N. 105.

II. Antenuptial Agreement.

The general rule that a separation agreement does not per se preclude the parties from obtaining a divorce is applicable to an antenuptial agreement that the parties shall live separately. Franklin v. Franklin, 154 Mass. 515, 28 N. E. 681, 26 Am. St. Rep. 266, 13 L.R.A. 843; Donohue v. Donohue, 159 Mo. App. 610, 141 S. W. 465. Thus an antenuptial agreement for a separation and a divorce on

the default of an appearance by the husband does not bar a suit on the ground of the adultery of the wife. Donohue v. Donohue, 159 Mo. App. 610, 141 S. W. 465, Similarly in Franklin v. Franklin, 154 Mass. 515, 28 N. E. 681, 26 Am. St. Rep. 266, 13 L.R.A. 843, wherein it was held that an antenuptial agreement to live separately and apart did not bar a divorce on the ground of the wife's adultery, though it might constitute a bar to an action based on desertion, the court said: "The agreement that they would not live together had no effect upon the marriage contract entered into in regular form in the presence of a magistrate or minister authorized to solemnize marriages. It is against the policy of the law that the validity of a contract of marriage or its effect upon the status of the parties, should be in any way affected by their preliminary or collateral agreements. . . . The consummation of a marriage by coition is not necessary to its validity. The status of the parties is fixed in law when the marriage contract is entered into in the manner prescribed by the statutes in relation to the solemnization of marriages. . . . The libellant is not guilty of such a marital wrong as will prevent him from obtaining a divorce on the ground of his wife's adultery. The parties lived apart by mutual consent, and, on the facts reported, neither could have obtained a divorce from the other on the ground of desertion. In such a separation there was no desertion within the meaning of the word in the statutes in relation to divorce. . . . Living apart by agreement is no bar to a suit for divorce brought by either against the other on the ground of adultery. A voluntary separation is not a license to commit adultery; and it has uniformly been held that, in case of adultery under such circumstances, the innocent party may have a remedy against the other in a suit for a divorce."

Likewise the qualification of the general rule that where a separation of the parties is relied on as a ground of divorce the agreement is a bar if it can be construed in connection with the surrounding facts as a consent to the desertion, applies to antenuptial agreements. McAllister v. McAllister, 71 N. J. Eq. 13, 62 Atl. 1131; Dennison v. Dennison, 52 Misc. 37, 102 N. Y. S. 621. See also Tipton v. Tipton, reported in full, post, this volume, at page 360. Thus in the case last cited it seems to have been held that if the parties agreed prior to the celebration of the marriage to live separately and apart, no divorce could be secured on the ground of desertion until the arrangement was rescinded. Similarly in McAllister v. McAllister, 71 N. J. Eq. 13, 62 Atl. 1131, it was held that though an antenuptial agreement to live separately is void, if it is not followed by an expression by one of the parties of a willingness to live with the other and a demand that they shall live together, it is a bar to a divorce on the ground of desertion. In Dennison v. Dennison, 52 Misc. 37, 102 N. Y. S. 621, wherein it was held that an antenuptial agreement to live separately was a bar to an action for a judicial separation on the ground of abandonment, the court said: "In this case the intention of the parties, after marriage, to continue to live separately as they had done before marriage, prevents such living separately from becoming an abandonment by the husband of the wife in the sense in which the meaning of that term is employed in the statute, as understood and defined by the courts; hence it must be held that the plaintiff has failed to establish a cause of action on the ground of abandonment. It may very well be that an antenuptial agreement that provides for the living separately of husband and wife would be deemed void as against public policy; but, until something has intervened, such as an effort on the part of the wife to live with the husband in a common home, and his refusal and his wilful persistence in living separately from her thereafter, he cannot be deemed to have deserted her and abandoned her in the sense in which 'abandonment' occurs in the statute. No attempt has been made on the part of the plaintiff in this case to require her husband to live with her; and, in that respect, the circumstances have remained the same since the time of the marriage as they did before and at the time of making the antenuptial agreement."

But a voluntary deed of separation between the parties is not per se a bar to a divorce for desertion, especially when the husband has repudiated his obligation under the deed. See Walker v. Walker, 125 Md. 649, 94 Atl. 346. And an antenuptial agreement to live separately beginning four months after the marriage is consummated, obtained by the husband without the real concurrence or the consent of his wife, and without justification, cannot be set up to justify desertion by the husband one month after the marriage on the birth of a child by him. Dagg v. Dagg, 7 P. D. (Eng.) 17, 51 L. J. P. 19, 47 L. T. N. S. 132, 30 W. R. 431.

It has been held that an antenuptial contract by which each party renounces all right to the property of the other is not to be construed as a provision for a separation and does not bar a judicial separation with alimony on the ground of abandonment. See Logan v. Logan, 2 B. Mon. (Ky.) 142.

III. Postnuptial Agreement.

1. Divorce for Adultery.

a. *Prior Adultery.*

An action for a divorce for an act of adultery committed prior to a postnuptial separa-

tion agreement is not per se barred by it. Durant v. Durant, 1 Hagg. Ecc. (Eng.) 733, Beeby v. Beeby, 1 Hagg. Ecc. (Eng.) 789; Kremelberg v. Kremelberg, 52 Md. 553. See the reported case. See also Brown v. Brown, L. R. 7 Eq. (Eng.) 185, 38 L. J. Ch. 153, 19 L. T. N. S. 594, 17 W. R. 98; Mortimer v. Mortimer, 2 Hagg. Const. 310; Anderson v. Anderson, 1 Edw. (N. Y.) 380. Thus a postnuptial deed executed by a husband by which he bound himself to allow his wife five hundred pounds a year should she at any time choose to live separately, followed by a suit by the wife on the deed after a separation consequent on his adultery, has been held not to bar a suit for divorce for acts committed prior and subsequent to the separation. Durant v. Durant, 1 Hagg. Ecc. (Eng.) 733. Similarly articles of separation executed subsequent to the separation are not a bar to the wife's setting up the prior matrimonial offenses of adultery and communication of a veneral disease by way of a recrimination in the husband's suit for a divorce *a mensa* for her adultery. Beeby v. Beeby, 1 Hagg. Ecc. (Eng.) 789. Likewise the reported case holds that while a postnuptial agreement to live separately until the marital relations are severed by the decease of one of the parties may sometimes operate as a condonation of a pre-existing cause for a divorce, in the ordinary case of separation, instead of condoning or forgiving the guilty party, the wrong remains unforgiven and is the moving cause of the separation, so that, unless expressed in special terms, such an agreement does not amount to a condonation of the adultery and when it is unknown it cannot in any case be considered condoned by the separation agreement. And it was said in Mortimer v. Mortimer, 2 Hagg. Const. (Eng.) 310, that a postnuptial separation agreement is not a bar to an action for a divorce based on an act of adultery known at the time of the execution of the agreement. But in Gee v. Gee, 13 Pa. Co. Ct. 382, 2 Pa. Dist. 773, it was said that for adultery committed before the separation agreement, if known by the parties, the courts will not grant a divorce, on the ground that the agreement by either party to separate is a condonation of the crime of the other, so far as to withhold the legal remedy. In Kremelberg v. Kremelberg, 52 Md. 553, it was held that articles of separation executed immediately after the discovery by the husband of the wife's infidelity, not expressly condoning the adultery, did not bar a suit for divorce even after the lapse of a considerable period, the court saying: "We do not understand it to be contended, that there has been any forgiveness or condonation in express terms on the part of the complainant; but the argument is, that the lapse of time between the discovery of his wife's guilt, and the filing of this bill, a period of three years and a half, taken in connection with the deed of separation of October, 1874, and the circumstances under which it was executed, amount in fact to a condonation of offense, and constitute therefore a bar to the relief now prayed. . . . Nor do we understand that it is contended, that a deed of separation will in itself constitute a bar. This question was argued by eminent counsel, and fully considered in J. G. v. H. G. 33 Md. 401, and it was held that a voluntary deed of separation did not operate as a bar to a petition for divorce. And in support of this, the court refers to a number of English decisions, and we have not been able to find a case in which a contrary doctrine has been held. So we think it is quite clear that neither lapse of time nor mere articles of separation will, when separately considered, operate as a bar; and it is equally clear we think, that they cannot have this effect when combined, unless there be other circumstances to show that the application was not made bona fide, but for some sinister or collateral purpose." In Brown v. Brown, L. R. 7 Eq. 185, 38 L. J. Ch. 153, 19 L. T. N. S. 594, 17 W. R. 98, it was said that where the husband executes a deed of separation on the solemn assurance of the wife that she has not been guilty of adultery, he does not thereby condone her prior adultery, although there is a clause expressly condoning all past matrimonial offenses. The court said: "I have always understood that in all proceedings by a husband or wife—for instance, in the case of a proceeding by a husband to obtain a divorce a vinculo from his wife on the ground of adultery—if it can be shown that a condonation has taken place, there is an end of the proceedings of the husband. But it must be a condonation of a known fact, and, therefore, the act of the husband, if it amounted to a condonation in case of his being aware of the adultery, can have no operation when he was in total ignorance of it. Now, if this husband had been aware of his wife's adultery, it can admit of no shadow of doubt, in my mind, that if that be shown to the Court, the deed which he has executed is a complete and final bar against his taking any proceedings in that Court, because he has contracted with her that 'every offence which has been committed, or permitted, by either party against the other shall be considered as, and the same hereby is, forgiven and condoned.'"

b. *Subsequent Adultery.*

Of course the aggrieved party is not precluded from maintaining an action for a divorce for the adultery of the other party committed after the execution of a postnuptial separation agreement. Bourne v. Bourne

[1913] P. (Eng.) 164, 82 L. J. P. 117, 108 L. T. N. S. 1039, 29 Times L. Rep. 657; Durant v. Durant, 1 Hagg. Ecc. (Eng.) 733; Ross v. Ross, L. R. 1 P. & D. (Eng.) 734; Wilson v. Wilson, 40 Ia. 230; Anderson v. Anderson, 1 Edw. 380; Gee v. Gee, 13 Pa. Co. Ct. 382, 2 Pa. Dist. 773. See also Dowling v. Dowling [1898] P. (Eng.) 228, 68 L. J. P. 8, 47 W. R. 272; Rose v. Rose, 8 P. D. (Eng.) 98, 52 L. J. P. 25; Nash v. Nash, 2 Hagg. Cons. (Eng.) 140; Morrall v. Morrall, 6 P. D. (Eng.) 98, 50 L. J. P. (Eng.) 62, 47 L. T. N. S. 50, 29 W. R. 897; Gandy v. Gandy, 7 P. D. (Eng.) 168; Stokes v. Stokes, 1 Mo. 320; Rennie v. Rennie (N. J.) 95 Atl. 571; Carpenter v. Osborn, 102 N. Y. 552, 7 N. E. 823, 3 Cent. Rep. 804. Thus a written agreement between husband and wife to live separately during the course of their natural lives, each agreeing not to hold the other responsible for any obligation growing out of the marriage relations and to release all claims to the property of the other, does not bar an action for a divorce with alimony for the subsequent adultery of the husband. Wilson v. Wilson, 40 Ia. 230. In Bourne v. Bourne [1913] P. (Eng.) 164, 82 L. J. P. 117, 108 L. T. N. S. 1039, 29 Times L. Rep. 657, it appeared that a husband and wife entered into a separation deed by which they agreed to live apart and mutually and expressly covenanted that any matrimonial offenses which might have been committed by either before the execution of the deed were condoned thereby. By another clause it was agreed that if the marriage should be dissolved or if the parties should be judicially separated by reason of any misconduct of the husband occurring after the date of the deed, then all the covenants and provisions therein contained should become void. Cruelty and adultery by the husband before the date of the deed and his adultery afterwards were proved. It was held that the wife was entitled to a decree of divorce on the latter ground at least, the court saying: "It was proved that the respondent had been guilty of cruelty and adultery before the date of the deed; and that he had also committed adultery after its date. The petitioner's counsel contended that the subsequent matrimonial offence revived, either under, or apart from, the deed, the anterior offences which had been expressly condoned. I am of opinion that this contention is not sound. Upon the facts of this case, the petitioner might no doubt obtain a judicial separation on the ground of the adultery committed after the deed. Thereupon the covenants in the deed, including the condonation covenant, would become void. She might then, in other proceedings, obtain a decree of dissolution on the ground of the previous cruelty and the adultery. This would be a circuitous way of obtaining redress." And in Galusha v. Galusha, 116 N. Y. 635, 22 N. E. 1114, 15 Am. St. Rep. 453, 6 L.R.A. 487, it was held that the parties to an agreement entered into after a separation could not provide that they should not have the right to a divorce on the ground of the subsequent adultery of one of the parties, the court saying: "The parties to that agreement were powerless to provide that they should not be visited with the legal consequences of adultery. Any agreement to that effect would have been void. Such was and is the law, and they are presumed to have known it, and to have made their contract with the knowledge and understanding that in the event of the commission of the act of adultery, by either the husband or the wife, the other party would be at liberty either to permit the legal relation of husband and wife to continue or sunder the marriage tie in an action brought for that purpose. No provision was inserted that this contract for maintenance should be affected by the subsequent wrongful act of either party and none can be implied."

It has been held that an agreement between a husband and wife reciting that the husband was then living with another woman and that proceedings were about to be taken on account of his adultery, and providing that if the proceedings should not be taken a certain sum should be settled on the wife, barred a suit for a divorce for the subsequent adultery with the same woman. Thomas v. Thomas, 2 Sw. & Tr. (Eng.) 113. Furthermore it has been said that a deed of separation may virtually amount to the assignment of the wife to a co-respondent to the extent of precluding a divorce on the ground of the continued acts of adultery. See Walton v. Walton, 28 L. J. P. & M. (Eng.) 97. In Ross v. Ross, L. R. 1 P. & D. (Eng.) 734, however, it was held that a deed of separation did not bar a suit for divorce for the subsequent adultery of the husband, where it did not appear that the wife knew of the adultery with the paramour previous to the execution of the agreement, though she knew of their intimacy, and it could not be said under the facts proved that she had consented to the continuance of the adulterous intercourse.

2. DIVORCE FOR CRUELTY.

A postnuptial separation agreement is not per se a bar to an action for a divorce on the ground of cruelty. Williams v. Williams, L. R. 1 P. (Eng.) 178, 35 L. J. P. & M. 85, 14 L. T. N. S. 770, 14 W. R. 1022; Brown v. Brown, L. R. 3 P. & D. (Eng.) 202, 43 L. J. P. & M. 47, 31 L. T. N. S. 272; Bloom v. Bloom, 8 Pa. Dist. 563, 22 Pa. Co. Ct. 433; Yeager v. Yeager, 19 Pa. Dist. 726; Fosdick v. Fosdick, 15 R. I. 130, 23 Atl. 140. See also Matthews v. Matthews, 6 Jur. N. S. (Eng.)

659, 29 L. J. P. & M. 118, 2 L. T. N. S. 472, 1 Sw. & Tr. 499, 8 W. R. 591; Besant v. Wood, 12 Ch. D. (Eng.) 605, 40 L. T. N. S. 445; Kunski v. Kunski, 23 Times L. Rep. (Eng.) 615; Potts v. Potts (N. J.) 42 Atl. 1055; Archbell v. Archbell, 158 N. C. 408, Ann. Cas. 1913D 261, 74 S. E. 327; *Compare* Squires v. Squires, 53 Vt. 208, 38 Am. Rep. 668, distinguished in the reported case. Thus a separation agreement is not a bar to a suit for a divorce based on acts of cruelty committed subsequent to the execution of the agreement. See Kunski v. Kunski, 23 Times L. Rep. (Eng.) 615. Similarly a postnuptial agreement of itself does not preclude a suit for a divorce based on acts of cruelty committed prior to the separation. Brown v. Brown, L. R. 3 P. & D. (Eng.) 202, 43 L. J. P. & M. 47, 31 L. T. N. S. 272; Williams v. Williams, L. R. 1 P. (Eng.) 178, 35 L. J. P. & M. 85, 14 L. T. N. S. 770, 14 W. R. 1022; Bloom v. Bloom, 8 Pa. Dist. 568, 22 Pa. Co. Ct. 433; Yeager v. Yeager, 19 Pa. Dist. 726; Fosdick v. Fosdick, 15 R. I. 130, 23 Atl. 140. See also Potts v. Potts (N. J.) 42 Atl. 1055; Archbell v. Archbell, 158 N. C. 408; Ann. Cas. 1913D 261, 74 S. E. 327. For example, it has been held that articles of separation agreed to and embodied in a deed after the treatment complained of as amounting to extreme cruelty and when the parties were living apart, were not a bar to a divorce on the ground of cruelty. Fosdick v. Fosdick, 15 R. I. 130, 23 Atl. 140. Likewise a postnuptial deed of separation cannot per se be considered a bar to an action for a divorce for the prior cruelty of the husband or a condonation of it. Williams v. Williams, L. R. 1 P. (Eng.) 178, 14 L. T. N. S. 770, 14 W. R. 1072, 35 L. J. P. & M. 85. And a deed of separation made in contemplation of an immediate separation but not executed in accordance with the statutory formalities is no bar to an action for a divorce with alimony for the acts of cruelty committed prior to the separation. See Archbell v. Archbell, 158 N. C. 408, Ann. Cas. 1913D 261, 74 S. E. 327; In Brown v. Brown, L. R. 3 P. & D. (Eng.) 202, 43 L. J. P. & M. 47, 31 L. T. N. S. 272, it was held that where a husband prayed for a dissolution of the marriage on the ground of the adultery of the wife and she denied the acts and charged cruelty prior to the execution of an agreement to live separately, a judicial separation might be granted to her, the court saying: "At the trial the jury found that the respondent was not guilty of adultery and that the petitioner was guilty of cruelty. I was asked, on behalf of the petitioner, not to grant a decree of judicial separation, on the ground that the petitioner and the respondent were, at the time of the institution of the suit, living apart, under a deed of separation, the terms of which have always been complied with by the husband, and to the obligation of which he still remains liable. I have several times expressed an opinion that it is not the duty of the court to discourage the settlement of matrimonial differences by arrangement between the parties rather than by litigation. It is always for the benefit of the children, if there be any, and it is generally to the advantage of the parties themselves that publicity should not be given to their charges and countercharges against one another. A wife who has reason to complain of her husband's conduct may be disposed to submit to very disadvantageous terms rather than injure her children's prospects and run the risk of injury to her own reputation (as in this case, where charges of drunkenness were made against the respondent), by the unavoidable exposure which must follow if she should institute a suit against her husband. But if the husband, by bringing an unfounded charge against the wife, compels her to make known, in self-defence, her own ground of complaint against him, the foundation of the settlement between them is removed, and the consideration fails upon which it was entered into. In such a state of things, it is only just that the wife should be remitted to her original position, and should be allowed to claim the fullest redress to which she is entitled. Her rights, under a decree of judicial separation pronounced by this court, are larger and better assured than those that are gained by a deed of separation, and being driven to appeal to the law, she cannot be restrained from claiming all that the law can give her. This is not the occasion to consider what may be the effect of a deed of separation if one of the parties to it should, without fresh circumstances rendering it necessary, institute a suit for judicial separation, or whether it is of any force in answer to a suit for restitution of conjugal rights." In Potts v. Potts (N. J.) 42 Atl. 1055, it was held that the failure to disclose the existence of a separation agreement in a suit for a divorce based on acts of cruelty committed prior to the execution of the agreement was not a sufficient reason for annulling the decree of divorce and that the mere fact that the husband and wife agreed to live apart did not bar a suit for a divorce for cruelty inflicted before the execution of the agreement, as it did not amount to a condonation of the past matrimonial offenses. The court said: "The articles of separation in this case contain no covenant not to sue, nor any stipulation looking towards a condonation of any preceding conduct. On the contrary, there is a provision that the articles shall be void, except as to the third clause, if the parties become reconciled to each other and resume cohabitation, or if their marriage shall be legally dissolved by a court of competent jurisdiction over the

parties in the cause of action, for any just cause of divorce other than desertion, whether arising before or after the date of this agreement. By this provision for a partial change in the articles of separation in case of divorce, it negatives the idea of any condonation." *Compare* Squires v. Squires, 53 Vt. 208, 38 Am. Rep. 668, *distinguished* in the reported case, wherein it was held that an agreement after the parties had parted, entered into between the husband and the father of the wife acting in her behalf, was a bar to a divorce on the ground of cruelty where the cause accrued prior to the agreement and the husband has acted under the agreement, the court saying: "The question as before stated is as to the effect of this contract, under the circumstances disclosed upon this petition for divorce. It will be noticed that this contract was entered into after the separation and through the intervention of a person acting for the wife. . . . This contract is therefore one of a character that the court may recognize for some purposes. It is not necessarily and utterly void. In this case it is not invoked by the defendant as a bar to the restitution of the libellant to any of her conjugal rights. The separation grew out of trouble between the husband and wife. The alleged cause of divorce then existed in her favor, if it existed at all, and was known to her. In this situation, and after the separation, she, through the intervention of a trustee, agreed upon the terms as to property upon which she would live separate from her husband. This property (including the money specified in the contract), except, as is claimed, a portion of household furniture, was delivered or paid to and accepted by the trustee in her behalf. After all the other provisions as to what property and money she was to have, it was further provided in the contract as follows: 'And the said parties further agree to and with each other that they will not molest, disturb or trouble each other or in any way publish or speak or circulate slanderous matter of or concerning each other, but live separate and apart in a quiet and peaceable way according to the true intent of these presents.' He has substantially performed on his part, and she has received the benefits. The question about the household furniture seems to be one of difference as to what the contract covered in that respect, not a refusal to perform by the husband. The contract was not strictly a condonation of alleged wrongs. The wife, instead of forgiving her husband upon promise of better treatment, agreed with him upon terms of separation, which were satisfactory, and no complaint is now made in regard to them. Nearly two years afterwards this petition was brought. In the English Ecclesiastical Courts it is held that a voluntary deed of separation between husband and wife is not per se a bar to a suit for a restitution of marital rights or to a petition for divorce. . . . But there are other cases where the deed, taken in connection with the circumstances under which it was given, and under which the application for divorce was made, and with the conduct of the parties, was held to constitute a defence, and the application was denied. . . . We think this case belongs to that class where the parties should be held to their own settlement; and that the deed of separation, under the circumstances, is a good defence to this petition."

It has been held, however, that a postnuptial deed of separation taken in connection with the long lapse of time before the institution of a suit for a judicial separation on the ground of cruelty may show bad faith sufficient to preclude a decree in favor of the wife., Matthews v. Matthews, 6 Jur. N. S. (Eng.) 659, 29 L. J. P. & M. 118, 2 L. T. N. S. 472, 1 Sw. & Tr. 499, 8 W. R. 591; Besant v. Wood, 12 Ch. D. (Eng.) 605, 40 L. T. N. S. 445. But in Yeager v. Yeager, 19 Pa. Dist. 726, it was held that an agreement to separate executed thirteen years before the institution of the suit did not bar a divorce on the ground of cruelty since condonation of cruelty could be inferred from a bare agreement to separate and a delay in instituting proceedings where in the interim the parties had lived apart.

An express condonation of all matrimonial offenses committed prior to the execution of a deed under which the parties separate is final and the subsequent adultery of the husband does not revive the wife's right to complain of the cruelty committed before the separation. Rose v. Rose, 8 P. D. (Eng.) 98, 52 L. J. P. 25, wherein Jessel, M. R. said: "Having then power to compromise her right to bring a suit for judicial separation, she has, by the present deed, contracted that she will not in any suit enter into the conduct of her husband before the execution of the deed. This is, in my opinion, a perfectly binding agreement. It appears to me to be perfectly consistent with public policy to hold that there may be what, for want of a better term, I will call final condonation. In the old Ecclesiastical Courts condonation was never final, but I do not see that public policy is against final condonation, indeed I think that it is in favor of allowing it. That bygones should be bygones is as advantageous between husband and wife as between any other parties. The lady here made a final bargain that she would not take any proceedings against her husband in respect of past offenses, nor plead any past offenses in any proceedings as to subsequent offenses. Now she turns round and says that she will repudiate one of the most important stipulations in

the deed. I am of opinion that she cannot do this, and that the decision of the President is right. We were referred to another doctrine: It is said that adultery by a husband, however condoned or got rid of by deed, would prevent his obtaining a decree for dissolution, and that this shows that condonation of matrimonial offenses is not final. That question may come before the Court of Appeal, and I do not mean to give a concluded opinion upon it, but my present impression is that adultery by a husband which has been condoned is not necessarily a bar to his obtaining a dissolution for adultery of the wife, and the point must be considered as open." In Dowling v. Dowling [1898] P. (Eng.) 228, 68 L. J. P. 8, 47 W. R. 272, it appeared that the parties separated under a deed which provided that neither party should take any proceedings against the other to obtain a divorce or judicial separation in respect to any misconduct which had hitherto taken place but that if they should be reconciled and return to cohabitation or if the marriage should be dissolved or they should be judicially separated by reason of any misconduct on the part of either occurring after the date thereof then the covenants were to be void. The husband subsequently committed adultery. It was held that since the deed of separation was not pleaded by the husband, a decree for the dissolution of the marriage on the ground of his prior cruelty and subsequent adultery could be entered, the latter by itself being a ground for a judicial separation only.

3. Divorce for Desertion.

a. *Generally.*

In an action for a divorce on the ground of desertion, a postnuptial separation agreement is not a bar unless it can be construed as giving consent to the separation relied on as constituting cause for the divorce. See the cases cited in the following subdivisions of this note. Of course if the separation agreement can be considered as not being in force, it cannot operate as a bar to a suit for a divorce on the ground of desertion. Hussey v. Hussey, 109 L. T. N. S. (Eng.) 192, 29 Times L. Rep. 673; Cock v. Cock, 10 Jur. N. S. (Eng.) 806, 3 Sw. & Tr. 514, 33 L. J. P. & M. 157, 10 L. T. N. S. 726. See also Curtin v. Curtin, 111 App. Div. 447, 97 N. Y. S. 771. Thus it has been held that a deed of separation entered into some months before the husband left the wife and never acted on was no bar to a suit by her for a divorce on the ground of desertion, in the absence of consent, it appearing also that about the time the husband left the country he cohabited with another woman as his wife. Cock v. Cock, 10 Jur. N. S. (Eng.) 806, 3 Sw. & Tr. 514, 33 L. J. P. & M. 157, 10 L. T. N. S. 726. And the husband's expression of his intention to leave followed by the wife's request for support is not such a mutual agreement to live apart as will bar an action for a judicial separation on the ground of the abandonment. Curtin v. Curtin, 111 App. Div. 447, 97 N. Y. S. 771. Similarly it has been held that where the husband has failed to make the covenanted payments a deed of separation is not a bar to a divorce for desertion. Hussey v. Hussey, 109 L. T. N. S. (Eng.) 192, 29 Times L. Rep. 673. But it has been said that while, it may be true that where a man, determining to abandon his wife, sets about fraudulently, under cover of an agreement which he never intends to fulfil, to induce or extort her consent to their mutual separation, concealing his true purpose under delusive covenants, the agreement will not bar a divorce on the ground of desertion, yet if he merely fails to fulfil his bargain by the continued payment of the stipulated annuity the separation cannot be regarded as in origin and continuance a desertion. Crabb v. Crabb, L. R. 1 P. & D. (Eng.) 601, 37 L. J. P. & M. 42, 18 L. T. N. S. 153, 16 W. R. 650. See also Parkinson v. Parkinson, L. R. 2 P. & D. (Eng.) 25, 39 L. J. P. & M. 14, 21 L. T. N. S. 732.

In a suit for a divorce for desertion, testimony to explain the intent of the parties in signing a contract or deed of separation is inadmissible as the paper speaks for itself, but testimony showing the circumstances surrounding its execution, such as the pendency of the divorce proceedings, the fact that the parties were then separated, and similar facts, are admissible in evidence. Lemmert v. Lemmert, 103 Md. 57, 63 Atl. 380.

b. *Prior Desertion.*

A postnuptial separation agreement executed subsequent to the desertion is not to be construed as per se giving such consent to the desertion as will bar an action for a divorce on that ground. Nott v. Nott, L. R. 1 P. & D. (Eng.) 251; Moore v. Moore, 12 P. D. (Eng.) 193, 51 J. P. 632, 56 L. J. P. 104, 57 L. T. N. S. 568, 36 W. R. 110; Walker v. Walker, 14 Cal. App. 487, 112 Pac. 479; Parker v. Parker, 28 Ill. App. 22; Nichols v. Nichols (Ky.) 11 S. W. 286; Lemmert v. Lemmert, 103 Md. 57, 63 Atl. 380; Caleme v. Caleme, 25 N. J. Eq. 548; Power v. Power, 66 N. J. Eq. 320, 58 Atl. 192, 105 Am. St. Rep. 653, *reversing* 65 N. J. Eq. 93, 55 Atl. 111; Ogilvie v. Ogilvie, 37 Ore. 171, 61 Pac. 627. See also Wood v. Wood, 27 N. C. 675. Thus where it appeared that a husband left his wife without the slightest notice and went

to live with another woman and later the wife at his request made him an allowance and signed a deed of separation, but fearing that if she continued the payments he would not return to her she discontinued them, it was held that he was guilty of desertion. Nott v. Nott, L. R. 1 P. & D. (Eng.) 251. Similarly it has been held that an agreement to live separately, with collateral stipulations concerning property rights, executed after the separation did not amount to the consent of the husband to the separation and that the court would deny by way of recrimination a divorce a vinculo for the subsequent adultery of the husband where it appeared that the wife abandoned the husband before the agreement was executed. Wood v. Wood, 27 N. C. 674. An agreement reciting the desertion of the husband by the wife, settling the property rights and making provision for the custody and care of the children of the marriage is not a bar to a divorce by the husband from the wife on the ground of the desertion. Ogilvie v. Ogilvie, 37 Ore. 171, 61 Pac. 627. Likewise in Power v. Power, 66 N. J. Eq. 320, 58 Atl. 192, 105 Am. St. Rep. 653, *reversing* 65 N. J. Eq. 93, 55 Atl. 111, it was held that an agreement, executed after the husband had left his wife, providing for her living apart from him and fixing the property rights and custody of the children, was no bar to a divorce on the ground of desertion where she protested against the separation. The court said: "The effect upon this desertion produced by the agreement of November 15th, 1899, requires more consideration. It is certain the agreement did not give to either spouse, as against the other, the right to continue the separation. Notwithstanding it, each was entitled to demand of the other a resumption of marital relations. . . . Consequently the only question is whether it either indicates or gave rise to a change in the mental attitude of either party, showing mere consent to the separation instead of protest on the part of the wife, and instead of obstinate persistence on the part of the husband. In solving this question the terms of the instrument are, of course, important, and they militate strongly against the petition of the appellant. But from the very nature of the inquiry they cannot be conclusive; they are only a part of the circumstances from which the truth must be inferred. No matter how explicit the declaration of the wife's agreement to live apart from her husband and to release him from his marital obligations, it is credible that she was but yielding to the necessities of the case, still recognizing, as the law recognized, the continuance of marital duty, both for herself and for her husband. And it is equally credible that the husband was aware of this condition and remained separated from his wife, not because he believed she assented to such separation, but because his resolution never to resume cohabitation was unaltered. If such a state of facts appears, they constitute wilful, continued and obstinate desertion, no matter what is said in article of separation." So in Moore v. Moore, 12 P. D. (Eng.) 193, 51 J. P. 632, 56 L. J. P. 104, 57 L. T. N. S. 568, 36 W. R. 110, it was held that a deed of separation executed subsequent to desertion by the husband but not condoning it expressly was not a bar to a divorce on that ground, the court saying: "The conclusion I have come to is that I ought not to hold that the agreement bars the wife's remedy. There is authority for saying that the court is not bound to take notice of the deed if it is not pleaded, but even if I were bound to take cognizance of the document I should hold that it was no bar to a decree for judicial separation. There is no covenant in the deed not to sue, neither is there anything approaching to such a covenant. There is no condonation of past marital offenses in the deed, and no expression pointing to condonation. The cited decisions were based either on the fact that there was an agreement to live apart before the two years' desertion was completed, or that there was condonation or a covenant not to sue." Also in Walker v. Walker, 14 Cal. App. 487, 112 Pac. 479, it was held that a separation agreement entered into ostensibly for the purpose of settling property rights after the husband's right to a divorce on the ground of desertion had been perfected could not be regarded as a condonation of the abandonment where no intention of the resumption of marital cohabitation was evinced in the instrument. The court said: "At the time the defendant entered into his contract she had given plaintiff a sufficient ground for divorce; she had wilfully deserted him for a period considerably beyond the statutory time prescribed; her matrimonial offense was complete and plaintiff's right of action had accrued. 'If one party deserts the other, and before the expiration of the statutory period required to make the desertion a cause of divorce, returns and offers in good faith to fulfil the marriage contract and solicits condonation, the desertion is cured.' (Civ. Code, sec. 103.) There is no pretense that defendant did this, or even made the slightest conciliatory advance toward her husband. The evidence was that she had previously declared that she never would again live with him. The contract shows on its face that she returned for no purpose of remaining and fulfilling her marital obligations and soliciting condonation, but quite to the contrary, for the agreement declares that 'it has become impossible for them longer to live together in that condition of amity and accord essential between husband and wife;' and she

relinquished to him 'all claims, rights, benefits and privileges to which she may be entitled by reason of their marriage.' It is impossible to find in this agreement any suggestion of a purpose on her part, or either of them, for that matter, ever again to resume the marriage relation. Furthermore, she declared in the agreement, as showing her purpose in making it, that 'it is therefore necessary that some arrangement be arrived at whereby the respective property and personal rights of the parties and their future relations be forever settled and adjusted.' It is in view of this state of the case we are asked to hold that the parties intended by their contract to obliterate the past, execute an accord and satisfaction of any right of action arising out of past conduct and continue the separation, but upon a different footing. . . . There was no such lapse of time here as would bar the action, for there is not the slightest indication of 'connivance, collusion, or condonation of the offense,' and there was no showing of full acquiescence in the desertion 'with intent to continue the marriage relation,' with all its rights and privileges. The 'status of the separation' was not changed by the agreement, for to all intents and purposes this status was to continue precisely as it had existed while the offense was being committed. We are unable to discover anything in the conduct of the parties or in the language of the agreement indicating any intention to condone past offenses or ever again to live together as man and wife. It seems to us that the purpose of the agreement and its sole purpose was to adjust the property rights of the parties and that their agreement to live thereafter separate and apart did not affect the legal consequence flowing from the prior desertion of the wife. Where the offense of desertion has once been committed and has continued for the statutory period, the statute (Civ. Code, sec. 102) points out how 'the desertion is cured.' Anything short of substantial compliance in good faith therewith does not cure the desertion. But it is claimed, and this was apparently the view of the trial court, that the provision of the agreement of separation is a bar to the action by reason of the clause, 'Said first party does hereby release and forever absolutely discharge said party of the second part of and from any and all claims and demands, action and causes of action of any and every name and kind whatsoever as the wife of the said party of the first part.' It will be observed that the language purports only a release of the wife by the husband of all claims and causes of action as the wife. If the husband intended to release all claims and causes of action he had against his wife, the language fails to so express such intention. However, if we treat the clause as intended to import a discharge of any claim or cause of action the husband then had against his wife, it seems to us that, taking the contract in its entirety and considering the context, the intention was to discharge any causes of action involving property rights. The contract was drawn pursuant to the authority given by the code (Civ. Code, secs. 158, 159, supra), and in any construction given it we must keep not only its main purpose in view, but also the statute which authorized it, and this statute forbade altering their 'legal relations except as to property' and except as 'to an immediate separation.'" And in Parker v. Parker, 28 Ill. App. 22, wherein it was held that a separation agreement entered into after the desertion of the husband by the wife made primarily for the division of property did not bar a suit by the husband for a divorce on the ground of desertion, the court said: "Upon this state of facts it appeared that the court held there was collusion and a mutual agreement between the appellant and appellee to live separate and apart. Hence there could be no desertion as claimed in the bill. We are inclined to take a different view of the evidence. The appellant in all his evidence appears to be frank and truthful and is corroborated by all the other evidence in his statement of the facts, even by appellee's own daughter. It appears that he made every reasonable effort to induce his wife to return and she refused and would not give him any answer whether she would ever come back. No doubt she was politic in this as she wanted to get an advantageous compromise. A division of the property was what she wanted. He, no doubt, felt that there was no hope of her ever returning and we think the preponderance of the evidence justified him in so thinking. There is no evidence going to show that he desired a separation but simply yielded to the necessities of the case, and to save himself greater loss, as he thought, made the required division of the property. It seems to us he has tried throughout to do what was right and just by the appellee. She has never made any complaints, so far as the evidence shows, of his treatment of her. We think there was no collusion on his part for her to live separate and apart from him. It was a matter of necessity on his part. As he says he has always held himself in readiness to live with her but she still lives apart from him. We must hold, under the circumstances, that the appellant has made out a case of desertion by, at least, a preponderance of the evidence, and that he is entitled to a divorce under the statute." In Nichols v. Nichols (Ky.) 11 S. W. 286, it was held that a written agreement between a husband and wife executed several months after the abandonment settling the rights of property and

of custody of the children did not bar a suit for a divorce for the desertion. The court said: "We are at a loss to know upon what ground the petition was dismissed, unless it was upon the ground that a writing was filed, executed in March, 1877, several months after the abandonment, in which it was stated that, the appellant and appellee having separated, certain arrangements in reference to their children and property rights and alimony were entered into, from which the chancellor might have drawn the inference that the separation was by mutual consent. In view of the facts stated in the record, such inference would be wholly unjustified; for it conclusively appears that the appellee abandoned the appellant, and that such abandonment was without any fault of his whatever, and that she had lived separate and apart from him without his fault ever since. The judgment dismissing the appellant's petition must be reversed, and the cause remanded, with directions to grant the appellant a divorce in accordance with the prayer of the petition." In Lemmert v. Lemmert, 103 Md. 57, 63 Atl. 380, wherein it appeared that a contract or deed was executed between husband and wife while the latter was living apart and suing for a divorce a mensa though not expressly providing for but evidently contemplating living apart, it was held that the agreement was not a bar for divorce on the ground of abandonment. The court said: "This brings us to the consideration of that paper, which is dated May 24th, 1901. It does not in terms agree that the parties should live apart, although it does undoubtedly imply that they expected to so live. After reciting the marriage and that they had lived together until the 13th of April, 1900, it proceeds: 'Whereas owing to certain disagreements it is impossible for the said parties hereto to live together in peace and happiness, and whereas the said August Lemmert, considering the condition in life and the health of the said Barbara M. Lemmert, and of her ability to support herself, has agreed to pay her the sum of two hundred dollars in full payment, release and satisfaction of all claims and demands of all kind and nature which she has against him or may have for support and maintenance, or against his property, real, personal and mixed, which he now owns or may hereafter acquire,' etc. She then in consideration of that sum of money paid her, the receipt of which she acknowledged, released him and his property from all such claims, and assigned and conveyed and agreed, at any future time, to make other assignments and conveyances to John R. Lemmert, trustee, of all her right, title, interest and claim of all kind and nature which she had against August Lemmert, by virtue of said marriage, or against his property. The contract cannot be read without reaching the conclusion that they did contemplate living apart for they would not have considered 'her ability to support herself,' or provided for a release of all the wife's claim upon her husband and his property, which he then owned or thereafter acquired, if they expected to live together. Such expressions taken in connection with that quoted above, in which they said it was impossible to live together in peace and happiness, do not seem to admit of any other conclusion. But it does not follow from the language used in the contract, when considered in connection with the surrounding circumstances, that the separation was by mutual consent. The proof is that the wife had left the husband more than a year before, and she had filed a bill for a divorce a mensa et thoro and asking for alimony, just three days before the contract was signed. . . . But in this case we have seen that the facts were such that it cannot be said that the appellant gave his consent to his wife's abandonment of him, but she had left him, was demanding alimony and the contract was executed in settlement of that case. No case that we are aware of has held a deed or contract of this character to be a bar under such circumstances as these."

But when the postnuptial agreement construed in the light of the surrounding facts is indicative of consent to the prior desertion, it is a bar to an action for a divorce on that ground. Crabb v. Crabb, L. R. 1 P. & D. (Eng.) 601, 37 L. J. P. & M. 42, 18 L. T. N. S. 153, 16 W. R. 650; Buckmaster v. Buckmaster, L. R. 1 P. & D. (Eng.) 713; Parkinson v. Parkinson, L. R. 2 P. & D. (Eng.) 25, 39 L. J. P. & M. 14, 21 L. T. N. S. 732; Barclay v. Barclay, 98 Md. 366, 56 Atl. 804; Brown v. Brown, 2 Md. Ch. 316, *affirmed* 5 Gill. 249; Eckert v. Eckert, 20 Pa. Dist. 835; McCoy v. McCoy, reported in full, post, this volume, at page 367. Thus where it appeared that the parties never cohabited after the marriage and the wife began by insisting on her rights, but in a short time resigned them in consideration of a hundred pounds, it was held that desertion had not been proved. Buckmaster v. Buckmaster, L. R. 1 P. & D. (Eng.) 713. Similarly a written agreement to live separately executed subsequent to the separation of husband and wife is a bar to a divorce on the ground of desertion where the circumambient circumstances are indicative of consent. McCoy v. McCoy, reported in full, post, this volume, at page 367. And an agreement to live separately and apart with collateral provisions for the maintenance of the wife and child, in conjunction with the mutual consent evidenced by living apart for many years, is a bar to a divorce on the ground of deser-

tion. Barclay v. Barclay, 98 Md. 366, 56 Atl. 804. Likewise in Brown v. Brown, 2 Md. Ch. 316, *affirmed* 5 Gill. 249, wherein it was held that a separation deed executed only a few months before the institution of a suit for a divorce on the ground of abandonment, where the separation had continued for about ten years, precluded the entry of a decree of divorce, the court said: "The parties, we have seen, on the 18th of April last, executed a deed of separation, by which, provision was made for the support of the wife and children, and by which, these parties mutually agreed, during their joint lives, to live separate and apart from each other. This deed, so long as the terms of it are complied with on the part of the husband, exonerates him from the obligation to support his wife, and is a protection against any claim which can be made upon him for supplying her, even with necessaries. . . . Having selected their own remedy by the execution of this deed, after the actual separation had lasted nearly or quite ten years, no sufficient reason has been assigned, why within less than three months from the date of the deed, this court should be called upon absolutely to dissolve the marriage. It is not alleged or proved, that any circumstances have transpired since the execution of the deed, which render it necessary or proper, that the relations of the parties as established by that instrument, should be changed, and the court would be almost reluctant to do so, especially in the manner, and to the extent proposed by this bill, unless a case of strong urgency was made out, as the effect of such a change upon the rights secured by the deed might occasion embarrassing, if not injurious, consequences. The third section of the original Act, authorizes the court of equity, upon applications for divorce a vinculo matrimonii, to decree them a mensa et thoro, if the causes proved are sufficient to entitle the parties to such relief, and it has already been stated, that abandonment and desertion alone, without regard to its duration, or the absence from the state of the party complained against, is sufficient cause for a divorce of this qualified character. But a decree of this description is rendered unnecessary, and would, perhaps, be improper in this case, in consequence of the deed of separation, by which the parties have placed themselves, very much in the condition with respect to each other which the law would have empowered the court to do, by decreeing a limited divorce." In Eckert v. Eckert, 20 Pa. Dist. 835, it was held that an agreement, executed after a separation and pending proceedings for a divorce a mensa and followed by the dismissal of the suit, providing for the parties living separately and against mutual molestation and settling questions of maintenance and property rights, was a bar to divorce on the ground of desertion. The court said: "There is not, nor, either in reason or under the authorities cited by the master, can there be, any doubt that an agreement to live apart entered into between husband and wife robs a separation of the one from the other begun subsequently or within two years previously of the character of a desertion in the sense in which that term is by our statutes made a ground of divorce. In itself separation is not such desertion. To constitute the latter there must be both actual abandonment of matrimonial cohabitation and withdrawal from coresidence, and a lack of cause therefor and of consent thereto, and, in order to entitle the abandoned party to a divorce, it must be causelessly and adversely persisted in for the space of two years. . . . It follows inevitably that the moment a separation, though begun as a desertion, becomes consentable, it ceases to go on as such; the essential element of its continuance as an abandonment of the other party without his or her consent is taken away from it, and it thenceforth loses its ability to ripen into a cause of divorce. Another thing about which there is and can be no dispute in this case is that the agreement . . . is on its face and according to its express and unequivocal terms an agreement of separation. Giving it the effect resulting from its plain language and the purpose and intention to be gathered from it, it is therefore clear that, made within a year after the commencement of the desertion, it would have to be deemed to have interrupted the same and converted it into a separation continuing by mutual consent. Necessarily that would put an end to the libellant's right to ask for a divorce on the ground of a desertion . . . persisted in adversely for over two years. But it is contended on her behalf that this effect ought not to be given to the transaction; that she had no intention of agreeing to a separation; that she inquired from her counsel whether, by signing the agreement, she would be debarred from proceeding for an absolute divorce if the libellant persisted in the separation; that she was advised that she would not; that she executed the agreement upon the faith of this information; that except for it and the impression she received from it she would not have joined in the contract; in short, that she became a party to it under a mistake of law, and that therefore she is not to be held to it or affected by it. This contention was made before the master on the basis of evidence submitted in support of the facts involved in it. He has found that separation was in fact intended by the parties, though libellant may have misunderstood the legal effect of her agreement thereto. He has rejected the conclusion urged upon him in view of the doctrine that equity will not relieve

against a contract because a party to it, not deceived or mistaken as to any matter of fact out of which the law arises, misconceived the latter." In Parkinson v. Parkinson, L. R. 2 P. & D. (Eng.) 25, 39 L. J. P. & M. 14, 21 L. T. N. S. 732, wherein it appeared that shortly after the desertion of a wife by her husband they executed a deed of separation by which he covenanted to pay her an allowance but it was never paid and she covenanted to live apart from him, it was held that the facts did not constitute such desertion as to entitle her to a divorce. And in Crabb v. Crabb, L. R. 1 P. & D. (Eng.) 601, 37 L. J. P. & M. 42, 18 L. T. N. S. 153, 16 W. R. 650, wherein it appeared that the husband left home after an altercation with his wife about a female servant and a month later a deed of separation was executed, it was held that the agreement prevented the separation from being involuntary, precluding a divorce on the ground of desertion. The court said: "The proposition hardly bears stating, unless, indeed, all 'separations,' voluntary or involuntary, be 'desertion,'—the consent of complaining parties unimportant and the person deserted, not he who was left in the common home, but she who quitted it. It was, however, argued that the deed in this case would have been held invalid in a court of equity, because its provisions stripped the father of all control and supervision over his child. It is needless to inquire whether this proposition is correct or not, because, in this court at least, it has always been held that such deeds are utterly inoperative to abrogate the duty of cohabitation involved in the contract of marriage. And if the mere fact that this deed was impotent to maintain and enforce the permanent separation of the parties be material to this question, that fact may be found in the first principles of matrimonial law. For, no doubt it would have been quite competent to either party the day after they parted, in obedience to their mutual agreement, to come to this court in defiance of that agreement and obtain a decree for restitution of conjugal rights. Their separation, therefore, was not only voluntary at first, but has practically continued to be so."

b. *Subsequent Desertion.*

A postnuptial agreement to separate entered into prior to or contemporaneous with the desertion alleged in an action for a divorce is construed as giving consent. Cooper v. Cooper, 17 Mich. 205, 97 Am. Dec. 182; Moores v. Moores, 16 N. J. Eq. 275; Litzenberg v. Litzenberg, 57 Pa. Super. Ct. 123, *affirming* 22 Pa. Dist. 943; Van Voorhees v. Van Voorhees, Wright (Ohio) 636; Bacon v. Bacon, 68 W. Va. 747, 70 S. E. 762. See also Desbrough v. Desbrough, 29 Hun (N. Y.) 592; Curtin v. Curtin, 111 App. Div. 447, 97 N. Y. S. 771; Butler v. Butler, 1 Pars. Eq. Cas. (Pa.) 334. *Compare* Beauclerk v. Beauclerk [1895] P. 220. Thus an agreement executed in contemplation of an immediate separation to continue "for the space of two years . . . and so on from year to year thereafter, unless either party hereto shall have given the other party at least sixty days' written notice prior to the expiration of any year of his or her intention or desire to terminate said agreement," bars a suit for a divorce on the ground of desertion where there is no evidence of an unequivocal notice to the other party of an election to terminate the agreement. Litzenberg v. Litzenberg, 57 Pa. Super. Ct. 123, *affirming* 22 Pa. Dist. 943. Similarly it has been held that articles of separation whereby certain property and the custody of some of the children were secured to the wife, even though later followed by a conditional and temporary resumption of marital relations, barred a suit for a divorce on the ground of desertion because the separation was by mutual consent, Cooper v. Cooper, 17 Mich. 205, 97 Am. Dec. 182. In a case wherein it appeared that the alleged abandonment, which was the sole ground of the action, had no existence, the wife having voluntarily left her husband and agreed to live separately for a good and valuable consideration furnished by him, it was held that a divorce could not be granted. See Desbrough v. Desbrough, 29 Hun 592. Likewise an agreement made in contemplation of an immediate separation and reciting that the parties could not agree and live amicably together as man and wife, followed by a short trip together and then separation, has been held to constitute a bar to a divorce based on the separation as abandonment. Bacon v. Bacon, 68 W. Va. 747, 70 S. E. 762. But where it appeared that the wife avowed her purpose to separate from her husband and never to live with him again and on leaving agreed to release all claims she had against his property on the payment of five hundred dollars, it was held that the husband was not precluded from maintaining a suit for a divorce on the ground of her desertion. Stoffer v. Stoffer, 50 Mich. 491, 15 N. W. 564. In Moores v. Moores, 16 N. J. Eq. 275, wherein it was held that a prior agreement to live separately barred an action based on the separation as a ground of divorce, the court said: "It is further argued that a voluntary agreement by husband and wife to live separate is not regarded by the courts as binding, and hence it is insisted that the agreement of the husband can constitute no defence for the desertion of the wife. It is true that courts do not favor agreements by husband and wife to live apart. They are regarded as against the policy of the law, and although not treat-

ed for all purposes as absolutely void, they constitute no bar to an action by either of the parties for a restitution of marital rights. Nor does it operate, in the eye of the law, as a release of either of the parties from their matrimonial obligations. It will not, therefore, be permitted to stand in the way of the restitution of such rights and the enforcement of such obligations. But the principle is invoked by the complainant, not for the purpose of sustaining the policy of the law and enforcing the performance by the wife of her conjugal duties, but for the purpose of destroying the marriage relation, in direct contravention of the policy of the law. It would be a gross perversion of the principle to abrogate the contract under color of maintaining the rights of the husband, and thus inflict upon the wife the severest penalty for an act done with the husband's assent." In Butler v. Butler, 1 Pars. Eq. Cas. 335, it was said that a separation agreement is a bar to a divorce based on separation by prior consent, the court saying: "Although no court determining on the marriage relation, recognizes such consent-separations as arrangements strictly legal; yet, when it is clearly shown that the withdrawal of a wife or husband from mutual cohabitation, has been the result of such an understanding or agreement; or where the withdrawal of one has received the subsequent approbation of the other, the continuity of absence under such circumstances is not a 'wilful and malicious desertion.' The malice of the desertion arises from its being the perverse act of the one, in refusing the performance of the matrimonial obligations and duties, which the other has the legal right to require. But when such separation has been the result of mutual arrangements, and these clearly established in proof, then each are in equal fault in this particular, and neither can claim a legal right against the other, in consequence of an act in which he or she has been an equal participant. Such assent or acquiescence, however, are revocable acts. And if either party persists in a state of separation after such revocation, he or she thenceforth occupies the position of a party quitting cohabitation on his or her own motion. . . . But so long as the consent on which the original absence was founded, or continued in, is not withdrawn, a continuity of the absence is not desertion within our Act of Assembly. Of course, if either party has the legal right to separate from the other, for causes which lawfully justify such separation, and subsequently a consent-separation takes place between them; a withdrawal of that consent by the aggressor, will leave the party aggrieved in no worse position than that originally occupied. A refusal to renew cohabitation, would be justified or otherwise, according to the state of things which preceded the separation."

TIPTON

v.

TIPTON.

Iowa Supreme Court—February 17, 1915.

169 Ia. 182; 151 N. W. 90.

Divorce — Desertion — Separation Pursuant to Antenuptial Agreement.

Abnormal conditions in the marital relation instituted by mutual agreement between husband and wife will afford neither party ground for judicial action against the other, as where the wife lived with her people apart from the husband from the time of the marriage, except for his occasional visits, but such abnormal conditions are to be considered in determining, if there existed a marital relation for the husband to sever by desertion and in determining if his conduct constituted a desertion.

[See note at end of this case.]

What Constitutes Desertion.

There may be a separation of husband and wife without desertion, and desertion of a wife by her husband without separation.

[See 138 Am. St. Rep. 147.]

Same.

Where husband and wife never lived together in the same house, to establish a desertion by the husband there must be a radical change in such peculiar marital relation as had existed between the parties.

Same.

Where the wife lived with her parents from the time of marriage, receiving visits from her husband several times weekly, and visiting occasionally at his parents' home, where he lived, there is a marital relation that might be severed by the husband by desertion.

Same.

What is a desertion of one spouse by another is a question of fact.

Evidence of Desertion Sufficient.

Evidence held sufficient, in a suit for divorce, to show that defendant had severed the marital relation by desertion, with an intent to do so, and had continued his action for the statutory period prerequisite to the granting of divorce for such cause.

Desertion as Ground for Divorce — Want of Reasonable Excuse.

It is not alone sufficient to justify a divorce that there was a desertion; but the desertion must have been without reasonable excuse.

Pleading — Cross-Petition as Admission.

In a divorce suit, allegations in the dismissed cross-petition of the defendant may be taken against him as admissions.

Divorce — Desertion — Conduct of Wife Not Justifying.

In a suit for divorce, evidence held insufficient to show that plaintiff wife was guilty of misconduct sufficient to bar her of relief and justify later misconduct of her husband, as having refused to live with him at the home of his parents.

[See 119 Am. St. Rep. 626; 138 Id. 156.]

Same.

In a suit for divorce, evidence held insufficient to show that plaintiff wife was guilty of misconduct sufficient to bar her of relief and justify later misconduct of her husband, having refused to keep house with him.

Same.

Where defendant husband, in a divorce suit, requested his wife, then living with her parents, to go to housekeeping, and she wrote asking him not to think of it until spring, because of her condition, defendant's contention is unsound that this was an agreement to remain separated until spring, so that plaintiff cannot succeed in her attempt to prove a desertion begun by such separation.

Same.

In a suit for divorce for desertion, where plaintiff wife asked her husband to postpone going to housekeeping until spring, on account of her illness, to which he made no response, he cannot claim that between the time of the request and the spring he lived apart from his wife on agreement to resume cohabitation, and therefore there could have been no intention to desert her until after the spring.

Same.

Evidence in divorce held to show that a desertion of plaintiff wife by her husband was without reasonable excuse on his part.

Same.

Want of affection of a wife for her husband, giving rise to a dislike of him, that leads her to refuse reconciliation after a separation or desertion, or that makes such a separation or desertion practically with her consent, will excuse the husband for deserting her only when his own evil conduct has not caused the dislike.

Refusal of Reconciliation.

Evidence held sufficient to show that plaintiff's refusal to live with her husband, after his desertion of her, was caused solely by his own conduct.

[See 119 Am. St. Rep. 623.]

Same.

Where the defendant deserted his wife, her refusal of reconciliation, due to his own evil conduct, is not a ground to deny plaintiff wife relief, nor available as defense.

Desertion — Offer to Return after Lapse of Statutory Period.

Where the right of a wife to a divorce for desertion continued for the statutory period is made out, no court has power to deny her relief, when she insists upon divorce merely because her husband promises to return to the marital relation.

Appeal from District Court, Warren county: FAREY, Judge.

Action for divorce. Blanche Tipton, plaintiff, and Ralph Tipton, defendant. From judgment rendered, plaintiff appeals. The facts are stated in the opinion. REVERSED.

Berry & Watson for appellant.

O. C. Brown for appellee.

[183] SALINGER, J.—I. Though defendant responds to the allegation of plaintiff that the parties lived together until October, 1910, by answering that plaintiff never did live with him, and though we concede they did not "live together," as husband and wife ordinarily do, we have no occasion to give these contentions and the departure of the parties from the standard marital relation any exhaustive consideration. Whatsoever they did or failed to do before October was on mutual arrangement, and for mutual convenience, and will afford neither a ground for invoking judicial action against the other. Indeed, none is invoked. Both declare that no fault is found with what occurred before October, 1910, and the desertion charged is based wholly on what occurred after that time. Where the mutual conduct and the relationship maintained contents both parties, the courts are not called upon to standardize conjugal conduct and relationship, and will not divorce parties because they have departed more or less from such standard. But while that which was done upon consent prior to desertion cannot be a basis for granting a divorce, for reasons stated later, we must consider it. At this time we consider it, first, on whether there was a marital relation [184] to sever—and we hold that there was. Second, we must consider it to determine whether the conduct of defendant after October so differed from what it was before as that the difference proves he has severed the marital relation. Ordinarily, it is easy to determine whether there has been a separation. Though separation and desertion are not synonyms, though it is neither true nor essential that the two occur the same instant, though there may be separation without desertion, and though there may be desertion without physical separation by removal to a different domicile,—see Kupka v. Kupka, 132 Ia. 191, 109 N. W. 610,—it remains true that, ordinarily, this element in the proof is made out by showing that the alleged guilty party has removed from the place in which theretofore the parties lived together in the usual way. Whether this defendant severed the

relationship cannot be so determined, because the parties did not live together in the usual way. The wife was immediately after the marriage taken to the home of her parents. From then until October 10, 1910, her father supported her. In strictness, defendant never made his home where he had placed the plaintiff, and up to October the marital relation was maintained by visits of defendant at the home of her parents several times a week, and by occasional short period visits of the wife at the home of his parents. If, then, the defendant severed the marital relationship, it must be by the conduct so differing from what it had been before October 10, 1910, as that therefrom a separation from his wife appears as clearly as though the two had been constantly living in their own house, and defendant had removed himself therefrom.

It is not and cannot well be denied that the conduct of the defendant subsequent to October 10, 1910, does differ from what it had been before. While prior to October, 1910, there was a failure to support a wife not in ill health, thereafter there was a failure to support a sick wife and a baby which was born in 1911. While prior to October, 1910, the parties were on friendly terms and at times at the homes of their [185] respective parents, thereafter, and up to the time of the trial, the defendant had no communication whatever with plaintiff and attempted none. Though advised of her serious illness, and of that of his baby, and though sent for by the wife, he made no response in person or otherwise. He never saw the child, nor attempted to see it, until the day of the trial. It does not appear that he caused it to be brought to the trial, or knew that it would be there; nor that he displayed any sign of natural affection when he did see it. This is emphasized because defendant swears on the trial that he was then willing and able to care properly for both wife and child without a claim that he was not as able earlier.

We hold: (1) Though the manner of living together is a departure from the usual in marital life, if the parties are content therewith, it creates a relation which may be severed in the sense of divorce law. (2) There can be no hard and fast rule as to what constitutes such severance, and whether one party has severed the relation must ordinarily depend upon the facts of each case. (3) The evidence shows the defendant did sever the relationship.

II. But mere severance of the relation is not sufficient. There must be a wrongful intent to desert, continued for the statutory period. This, however, means merely that desertion must be intentional.

"The act is wilful when there is a design to forsake the other spouse wilfully, or without cause, and thereby break up the marital union; deliberate intent to cease living with the other as spouse; abnegation of all duties of the marriage relation, not to return.

"Desertion consists in the actual ceasing of cohabitation and the intent in the mind of the offending party to desert the other." Kupka v. Kupka, 132 Ia. 191, 193, 109 N. W. 610, and cases cited.

[186] We think that what we have set out as being proof that defendant severed the relation between plaintiff and himself, and evidence which we discuss later on other branches of our inquiry, establish the second element—that the desertion was intentional, and that the intent continued for the statutory period.

III. While thus two necessary elements have been established, this will not suffice. The act of separation, and the continued intent to remain separate, must be wrongful in the sense that there is no reasonable excuse for the one who separated with such intent. The real conflict in this case is on this head. In substance, the real defense attempted is that plaintiff was and defendant was not in fault.

What shall herein be said on this head should not be misunderstood. To determine whether defendant entertained a wrongful, because inexcusable, intent to desert, an analysis of and pronouncement upon alleged misconduct of each party, and of excuses offered for conduct, is necessary. But we are not attempting to decide whether the misconduct discussed is or may be a ground for divorce. Here, plaintiff is not entitled to a decree except upon proof that she has suffered a statutory desertion. To determine that ultimate question, conduct which of itself is no ground for divorce and evidence addressed to a ground for divorce other than desertion may or may not be relevant. Nonsupport is no ground for divorce; blows inflicted might warrant a decree on the ground of cruel and inhuman treatment, or might fall short of doing so—but the nonsupport or the blows might or might not be relevant on the ultimate question of whether there has been an unjustifiable desertion within the meaning of our statute. These and kindred lines of testimony may or may not have probative value on this ultimate question. Kupka v. Kupka, 132 Ia. 191, 195, 109 N. W. 610; Smith v. Smith, 55 N. J. Eq. 222, 37 Atl. 49, 52.

Our discussion of alleged misconduct and as to whether, if it exists at all, it was without excuse, is merely a method [187] for determining whether or not there has been a statutory desertion; and what is said in the course of it decides nothing except the bearing such misconduct, and the like, has upon whether defendant has unjustifiably deserted —an ultimate question which involves wheth-

er he separated himself from his wife with a wrongful intent to desert.

1.

The misconduct of plaintiff, which is urged as a warrant for denying her relief, is presented by the answer as follows:

A. Defendant urged her to live with his parents. She refused to do this, and has persisted in living with her parents; and she has not lived with him.

B. About October 10, 1910, he arranged to commence housekeeping with plaintiff; that he arranged for a house and ground, and bought certain provisions; that he urged his wife to come to him in fulfillment of her obligations as a wife in order that a home for both might be made—and that she wholly refused to comply, and persisted in remaining at the home of her parents.

If there was a request that the wife change to living with his parents, it must have been one made before October, 1910. For defendant pleads and attempts to show that the request which he made about and after October 10th was not one to live with his parents, but to live with him in a house which was not the home of his parents. We are fully persuaded the record does not sustain a claim that there was either request or refusal to change the mode of life pursued by plaintiff up to October. While defendant does testify broadly that his wife deserted him and would not come to make her home with his people, and that he could have "taken her home" if she had wanted to go, there is no evidence that his parents were ever willing to let the couple make their home with them; and defendant says, in terms, that he took her to the home of her parents because he had no home for her. Plaintiff's statement that he never asked her to live with his folks, and that she remained with her own because he wanted her to do [188] so, is fully sustained by the record. All the attendant circumstances and the great weight of all the testimony establish the fact that her remaining at her father's home before October 10th was an arrangement natural under all the conditions existing, and one entered into and maintained by mutual consent, for mutual convenience. At the time of the marriage the mother of the plaintiff was in such helpless physical condition as to supply one natural reason for a consent that the daughter might, for a time at least, remain with her. Defendant himself testifies that his wife wanted to remain with her father because the father had a broken leg; that she desired to stay with him until the leg was well, and that it was in accordance with this request that he went to his folks. While, because he has not appealed, his dismissed cross-petition is not, in strictness, to be treated as a pleading in the case, it is still in the record in the sense that its admissions are competent against the one who filed it—and it is therein pleaded that the daughter desired to remain with the father until he recovered; that at the same time she requested the defendant to remain with his parents until some arrangement could be made for their living together, and that he complied with her request. It appears by a clear preponderance that early in July he arranged for her staying until her confinement, which was thought to be due January following, was passed. So far from complaining of her living at the home of her father, he seeks to excuse himself for not visiting her there more frequently on the ground that his work made it practically impossible for him to be with her more; and he asserts that she acquiesced in this and made no objection to his thus attending to his business.

It is very clear that plaintiff was guilty of no misconduct in remaining at the home of her father up to October 10, 1910.

2.

The next contention is that refusing to go to housekeeping, on request made about October 10, 1910, is misconduct.

[189] Unless we reabstract the record in this opinion, it is impossible to do more on this head than to point out the ultimate deductions which we find should be drawn from the evidence. It so appears that about October, 1910, the husband and wife came to an understanding that some time in the next spring they would remove to South Dakota, and so far from then feeling unwilling to live with her husband, she made preparations for that venture. Somehow, defendant concluded it would be an aid to the Dakota project to begin a temporary housekeeping between the middle or end of October and the coming spring, and he requested her to co-operate. By way of arranging for this, he obtained the consent of his family that the couple might live in a house then vacant, on a farm then leased by his folks. He says he thinks the house was all right because a family had lived in it the year before; it looked nice; that he does not know how many rooms it had; that it had a roof, but he couldn't say whether it was good or not. By way of further arrangement he bought two barrels of apples, quite a quantity of tomatoes and cans to can them in, and he also provided for all the potatoes they would want to eat, and for fuel. He provided no furniture, but his mother says that he told plaintiff she could get anything she wanted, and that "he would pay for it and set up housekeeping." There is nothing to show he had credit, and his own testimony, perhaps colored by the fact that alimony was in issue, indicates he

had no means. This sums up the preparations for this housekeeping; and it corroborates the claim of plaintiff that defendant never offered to furnish her a home, any place. The plaintiff responded to this request by letter. Considering her evident inability to express herself aptly in writing, the letter shows an affectionate interest in him. As to the request, she writes: "Ralph, I just can't come down," which is preceded by a statement that she does not feel a bit well. She adds: "Oh, Ralph, don't think about keeping house until spring. I will either be better or be a thing of the past." She writes she hasn't done much that [190] week, and that her mother may not go to Dakota with her father as the latter desires, because she (plaintiff) guesses her mother is afraid to leave her. This letter is relied on as the main evidence of a refusal which constitutes misconduct. We do not so view it, and think that such refusal as the letter amounts to is not unjustified, and is not misconduct. It should be borne in mind that in July preceding, defendant had arranged with plaintiff's father that she should remain at the father's home until her confinement was passed, and that this proposed arrangement to go housekeeping not only overturned that arrangement, but contemplated, as a temporary aid for removal to Dakota, that the wife, then within two or three months of her confinement, should in the winter season go to housekeeping in a "home" thus, and thus only provided. Moreover, the Dakota project was not only abandoned by the defendant, but he claims he informed his wife of that fact early in the year 1911; so that had she gone to this place, if there was one to go to, the reason given for moving there at all would have ceased to be a reason shortly after she had made the change.

This failure to join in the proposed housekeeping was in the circumstances not unreasonable, and did not justify the conduct of defendant thereafter. Kupka v. Kupka, 132 Ia. 193, 194, 109 N. W. 610; Smith's case, supra.

3.

In this connection it becomes necessary to consider a claim that the action is, in any event, prematurely brought, because the letter written by the plaintiff in some way created a time limit which did not expire until the spring of 1911, and that no desertion could begin until then. This proceeds on the theory that the letter was a refusal to live with plaintiff until the spring of 1911 arrived, that this was acceded to, and that plaintiff may not agree to be separated during a fixed period and make separation for that period the basis of claiming a desertion. In our opinion, this contention is not tenable. [191] In the first place, the letter made no request for such an arrangement and it obtained none such. An affectionate request to defer housekeeping until spring, made by one who on consent was to live with her parents until her confinement was over, was not yet confined, and was sick when she asked such postponement of housekeeping, is neither a refusal to live with her husband until spring nor a consent that there shall be a separation until spring. At most, it is a request that the arrangement made for her living at her father's be not changed till spring. In essence, it was a plea that no housekeeping be started then because she was too ill, and a request for mere indulgence in beginning housekeeping, which housekeeping was an illogical, quickly abandoned and inopportune makeshift pending a removal to another state.

Next, as defendant made no response, and there was, therefore, no agreement reached, it cannot well be claimed that between October and the spring following he acted under the belief that for that period he was living apart under agreement to resume cohabitation at the end of the period, and that, therefore, there could be no intent to desert until that period had ended. Of course, if he entertained such belief erroneously, but in good faith, his mere absence up to the spring of 1911 would not prove such intent. But we feel that he did not so believe. Clearly, the letter itself gives no ground for it. He soon abandoned the plan of going to Dakota, and any claimed agreement covers only such absence on his part as was made necessary to carry out his ideas of preparing for the removal to Dakota. If he believed that they would live together and go away together in the spring, how can it be accounted for that between the receipt of the letter and the end of the period covered by such claimed agreement he ceased visiting her and had no communication with her? During that period he failed to visit her in confinement, and her child in its sickness, though sent for. In his answer he declares that he has neither knowledge nor means of information as to how mother and child obtained support. Was this the conduct [192] of one who had no intent to abandon the relations and duties of a husband and who believed that while there was an agreement to delay housekeeping for a fixed time, he and his wife would soon assume full conjugal relationship? We are constrained to believe that the period between October, 1910, and the spring of 1911 is not to be subtracted from the time in which an intent to desert was entertained; that the intent to desert present after the spring of 1911 was in existence before—and hold that the suit was not premature.

IV. From October 10, 1910, to the time of the trial, defendant, as said, had no communication with plaintiff, and attempted

none. Though advised of the wife's serious illness, that a child had been born and, later, that the child was sick unto death, and though sent for by the wife, he responded in no manner. So far as appears, he made no inquiry as to the condition of the mother or as to the birth of the child, and made none after the child was born. He declares in his answer his supreme indifference by stating that he has neither knowledge nor information sufficient to form a belief as to how the wife and child had been kept alive during some two years. He never saw the child until he saw it on the trial. It does not appear that he caused it to be brought there, or knew that it would be there, nor that he displayed any sign of natural affection when he did see it. Yet he insisted on the hearing that he had affection for the child, and we are asked to believe him when he then said that he was then willing and able to care properly for both wife and child. He makes no explanation why he was not able to do this earlier, and why he made no attempt to do it.

The record presents the following excuses for defendant's failure to visit or hold communication with his wife, and for his treatment of his wife and child. He says he was not notified when the child was born; that at the time it was born he was working away from home at some place, he does not "just remember." This, however, is coupled with the statement that he heard of the birth within three or four days, but [193] did not go to see about it; that he "never went near." Another statement is, that he can hardly say why he made no effort to see the baby, and did not see it until the trial, and that, for another thing, "he didn't just exactly like to make the neighbors gossip out of it more than anything else. That is the only reason I can say. By neighbors' gossip I mean that when we wasn't living together it looked kind of bad, you know, for a person to go out to meeting any place like that, and I kind of hated to not being around the child myself and the way I never did, I never was a great hand over children."

Finally, he gives his conclusion that he "wasn't wanted over there;" that at first her father made him feel pretty welcome, but after a while he acted as if he did not care whether he came or not; that he got so he only spoke to him on the street when they met; that he took the hint from this that he wasn't wanted up here and, therefore, he didn't care to go there. He both limits and amplifies this by a statement that his wife wrote him in a letter, which he believes he can but does not produce, that her father was mad at him and that he so had orders to stay away—that this was one of the main reasons for his not going. While his claim that the testimony as to this letter is not denied by plaintiff is technically true, it does not follow that the existence of the letter is established, or that the excuses of defendant are valid. His theory on this head is not undisputed. It is met by the circumstances, by the testimony of plaintiff's father that he knows of no reason why defendant did not come; that they had no trouble whatever; that he was particular not to let him know his visits were distasteful or let it be known that he did not care for him to remain there, and that he talked to him in a friendly way. Defendant's contention is also met by the fact that when his mother went to see the sick baby, she was treated nicely, and that she informed defendant of it.

V. Defendant urges that the plaintiff is wanting in natural affection for him. That she did not desire reconciliation—[194] in effect, that she should have no relief because the separation between the parties was really by her consent. It is undoubted that where one who charges desertion complains of a justified departure, and it appears that if it were not for the contumacy of the plaintiff a return could be brought about, such a showing of want of proper affection on part of the complaining party will authorize a court of equity to deny relief on the ground that such absence is, in effect, assented to by him. Wright v. Wright, 80 Mich. 572, 45 N. W. 365; Smith v. Smith, 55 N. J. Eq. 222, 37 Atl. 49. On the other hand, it is manifest that if the want of feeling on the part of complainant and the absence of a desire for reconciliation is due to the conduct of the defendant, he cannot well defeat relief against him by using a change or want of feeling which is due to his own misconduct. Smith v. Smith, supra. Mr. Justice Pitney, speaking for the Chancery Court of New Jersey in the Smith case, well states the principle:

"*Volenti non fit injuria* does not apply where defendant himself is responsible for the feelings of aversion entertained by the wife. If by his conduct he has alienated her affections and given her good cause to dislike him, and to have no desire to live with him, he cannot take advantage of those feelings to excuse himself for a continued desertion with any serious and honest effort to terminate it."

The case holds, also, that misconduct has probative value on whether refusing to resume relations is due to aversion created by such misconduct. The question is one of evidence.

Plaintiff says that when he left her in October she did want to live with him, and had no other thought or expectation; that for a long time afterwards she was willing to live with him; that she thought well

enough of him; that she sent for him when the baby was sick, and that she certainly would not have done this had she not wanted to see him. While, in strictness, it is true she did not ask defendant to resume [195] marital relations, if we assume that in all the circumstances disclosed by the record she should have asked this of him, the foregoing is fairly equivalent to an effort on her part to have him return, made while she desired his return. If we assume that this effort must be continuous, it is true that she did not continue it. She finally reached a state of mind that makes her say that as he just went off and left her she sees no reason why she should want to live with him; that she never said anything to him about it because she thought he did not want to live with her. In time the attitude of the father to his child added to these feelings resting in wounded pride seems to have had its natural effect, and she writes him complaining that she has suffered everything for his sake, and now he will not notice his own flesh and blood; that she would have tried to live with him but when he would not look at his own baby she just couldn't have the heart to think of living with him. As the decision here cannot be clearer than the facts upon which it is based, we have almost too fully for the purposes of an opinion set out much of the conduct of defendant and have pointed out the weakness of his excuses. These make it fairly plain that the change in the feelings of plaintiff is not merely captious. But there is more.

Defendant was asked if he had not been in trouble "about that time" (probably referring to the time at which he claims plaintiff refused to come to or live with him). He replied that, to his knowledge, he was not in trouble. Being asked if he was not then or shortly afterwards under indictment in that court he answered, "Well, not specially, I think." Being next asked whether it was not an indictment caused by trouble with another woman, he said, "Yes." To the next question, whether at that time he did have trouble with another woman, he answered, "Not that I know of." Then he was asked, "Well, you found it out later on," and he answered, "I don't quite catch your meaning." Finally being pressed with the question, "You found it out later on, anyway, you had been [196] having improper relations with another woman,"—he made no reply.

Plaintiff testifies that in March, 1912, she was informed defendant had another child named Roy; that its mother wrote her so on a postal card; that everybody says there is such a child; that it is younger than her own and is out west of Indianola, and that since hearing this she had never wanted to live with her husband. The trial judge asked her: "Is there any reason, if he would take you and keep you and provide for you, and live with you as your husband, do you know any reason why you couldn't do that?" She answered: "I couldn't possibly. He is the father of my baby and I will educate her all right. I couldn't possibly live with him. He has got another child, and I don't want to live with him. I am not positive he has had intercourse with any other woman since I married him, but they say he has, he said he had."

There is no denial that he said this.

The text of 14 Cyc. page 620, is, that failure to effect or attempt a reconciliation will not constitute desertion where there is just cause for such failure.

It has been held to be a defense for the wife who departed, justifiably, that after returning from a hospital to the home of her parents she remained away from her husband because he was indifferent. Kupka v. Kupka, 132 Ia. 195, 109 N. E. 610. While we do not agree with the contention in the brief of appellant, that she never refused to live with her husband, we conclude that when she finally did refuse, the refusal was justified.

VI. It is finally insisted that when the defendant testified and informed the trial court that he was now willing and able to live with his wife, and to properly care for her and her child, this was an offer of reconciliation, and that her refusal to accept the same justified the dismissal of her petition which ensued. Having found that the intent to desert existed at all times since October 10, 1910, this attempted reconciliation, if we treat it as such, was made after the [197] statute period had elapsed, and is not available as a defense, nor a ground for denying plaintiff relief.

An offer of reconciliation by a guilty spouse after the expiration of the statutory period of desertion does not obliterate the offense and so deprive the innocent spouse of the right to a divorce. 14 Cyc. 620.

Waiving, for the sake of argument, the contention that this attempted reconciliation came too late, it must still have been one which the court could reasonably find to be made in good faith, and likely to be fairly carried out. In the Smith case, supra, there was substantially such an offer of reconciliation and substantially such claim for its nonacceptance. The court held that, assuming what occurred to be an offer of reconciliation, the conduct of the husband in the past was such that his mere promise of amendment, if made, was insufficient; that in such circumstances there should have been some guarantee or assurance—and it is concluded that as to such an issue it is reasonable and fair to judge the future by the past.

VII. Appellee assures us by the brief of his counsel that if there be an affirmance the parties will in all probability, and in the

course of time, accept a suggestion of the trial judge and resume relations; that in that event the plaintiff will have a good husband, able to provide for her, and the little girl will have a father to care for her and provide for her education; that they should be left to their own resources to reconcile whatever difficulties may exist between them, and to take up their reciprocal obligations to each other and their child. There is a remark in the Kupka case to the effect that there is no good reason why the parties should not adjust their differences, "which are not serious," and fulfil the marital obligations which they have assumed. This, of course, was not intended to state the essence of the decision, and on its face discloses that the differences existing are not serious. Giving to that detached phrase in that decision [198] every reasonable weight, it will scarcely authorize us to proceed upon the lines suggested by appellee.

Passing, for the moment, a graver matter, —the question of our power—this record hardly indicates that defendant is pining for a home in which to cherish his wife and child. Judging the future by the past, an impartial observer finds little basis for the optimism of counsel. One point not before noticed throws a sinister light on the tenderness of defendant is likely to display. In the petition, the date of the marriage was fixed as in January, 1910. The answer declared, in at least two places, that it occurred in June. Defendant then went on the stand and in answer to a question which stated that this mistake in date had already been corrected, testified that the marriage took place in June. With the date already corrected, this could have no purpose except to publish that the child born in January, 1911, was begotten out of wedlock.

But, in any event, we have no power to deny divorce because of such assurances as are here given. Such may be given in every divorce appeal, as an inducement to reverse or affirm. Of course, the injured party can forgive and is not obliged to demand a divorce, no matter how much entitled thereto. But how can this court, against the protest of one who demands divorce, and has proven herself entitled to the same, refuse relief because the guilty party is of opinion that if the court will disregard the law a happy marital union may result. Where the court is convinced that the parties may and will become reconciled if there be no divorce, it may have some bearing on determining whether it be conclusively proven that a divorce should be granted. In other words, the feeling of the parties towards each other may be such as to make a reconciliation so very likely as to create a doubt whether, in spite of appearances, any serious wrong was perpetrated by one against the other—but that is surely the limit. We do not exercise the pardoning power, and no matter how sincerely counsel may be of opinion that society will be benefited more by refusing a divorce than granting it, we have no [199] choice where the requirements of the law are met and a litigant demands what the law grants.

We are constrained to differ from the learned trial judge, and to hold that defendant has been guilty of desertion as plaintiff charges. It follows that there must be a reversal.

VIII. In view of the result below, it is possible that the controversy as to alimony was not given any very considerable consideration, and we feel unwilling, and we might say unable, upon the record presented to us, to undertake decreeing what financial aid this defendant should give his wife and child. We, therefore, remand this cause for a decree in harmony with this opinion, and with direction that the trial court, either upon the record now made or such additional one as it may order or the parties may desire to present, make provision in said decree for such arrangements by way of alimony as in its judgment the evidence then before it warrants.

Reversed and remanded.

Dent, C. J., Ladd and Gaynor, JJ., concur.

NOTE.

The reported case holds that while an agreement to live separately precludes a divorce for desertion if the arrangement is by mutual consent, after the consent has been revoked, the wife may maintain an action for a divorce based on the subsequent acts of the husband as constituting desertion. The cases on this point are collated in the note to Canning v. Canning, reported ante, this volume, at page 344.

McCOY

v.

McCOY.

West Virginia Supreme Court of Appeals—
April 7, 1914.

74 W. Va. 64; 81 S. E. 562.

Equity — Effect of Want of Replication.

In the absence of a replication, the answer of a defendant in an equity suit is taken as true for the purposes of the case, if the

defendant has not taken depositions as if one had been filed and thus submitted the case upon its merits.

[See generally 10 R. C. L. tit. *Equity*, p. 478.]

Trial — Admissions in Open Court — Effect.

Admissions and agreements made in open court by the parties to the cause and acted upon by the court are binding and a decree founded therein will not be reversed.

Divorce — Desertion — Effect of Separation Agreement.

A husband's assent to his wife's separation from him exonerates her from the charge of desertion and bars his suit for divorce, founded upon such charge.

[See note at end of this case.]

(Syllabus by court.)

Appeal from Circuit Court, Monongalia county.

Action for divorce. Marshall W. McCoy, plaintiff, and Amanda McCoy, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. AFFIRMED.

Van A. Barrickman and *Chas. E. Hagg* for appellant.

W. S. John and *E. M. Everly* for appellee.

[64] POFFENBARGER, J.—The trial court's refusal, in this cause, of a decree of divorce a vinculo matrimonii, on the ground of desertion for a period of more than three years, is fully sustained by the record.

No replication to the defendant's answer, unqualifiedly denying desertion or abandonment on her part and averring expulsion from her home by the plaintiff, as well as his subsequent consent to her living separate and apart from him and his offer to maintain her elsewhere, was filed, wherefore the answer is taken as true for the purposes of the case and bars the relief prayed for in the bill, notwithstanding the evidence adduced by the plaintiff to sustain its allegations, since the defendant took no depositions. Sansom v. Blankenship, 53 W. Va. 411, 44 S. E. 408; Bierne v. Ray, 37 W. Va. 571, 16 S. E. 804; Snyder v. [65] Martin, 17 W. Va. 276, 41 Am. Rep. 670; Findlay v. Smith, 6 Munf. (Va.) 142, 8 Am. Dec. 733; Cocke v. Minor, 25 Grat. (Va.) 246. Nothing in our own jurisdiction, conflicting with this rule, is cited or has been discovered.

As shown by a nunc pro tunc order, there was produced and read to the court on the hearing a certified copy of a recorded written agreement of separation between the parties, which was made a part of the record and brought up to this court. The order shows no objection to the introduction of the copy of the agreement. On the contrary, it says the fact was admitted and agreed to in the presence of the court and it fully sustains the averment of a voluntary separation. Such admissions and agreements made in court and acted upon by the court are binding. Hogg's Eq. Proc. sec. 847; Savage v. Blanchard, 148 Mass. 248, 19 N. E. 396; Lewis v. Wilson, 151 U. S. 551, 14 S. Ct. 419, 38 U. S. (L. ed.) 267; 30 Cyc. 1280; Jones on Ev. 2 Ed. sec. 257. An agreed separation bars right to divorce. Bacon v. Bacon, 68 W. Va. 747, 70 S. E. 762; Hall v. Hall, 69 W. Va. 175, 71 S. E. 103, 34 L.R.A.(N.S.) 758.

The decree complained of is not erroneous and it will be affirmed.

Affirmed.

NOTE.

In the reported case it is held that a certified copy of a recorded written agreement of separation between a husband and his wife fully sustains an averment of a voluntary separation, barring an action for a divorce on the ground of desertion. For the general discussion of the question whether a separation agreement is a bar to an action for a divorce, see the note to Canning v. Canning, reported ante, this volume, at page 344.

COMMERCIAL NATIONAL BANK OF OGDEN

v.

ECCLES ET AL.

Utah Supreme Court—June 7, 1913.

43 Utah 91; 134 Pac. 614.

Party Walls — Termination of Right — Destruction of Wall.

Where one has acquired an easement of support in a party wall, its accidental destruction determines the easement, and extinguishes all rights arising thereunder.

[See note at end of this case.]

Same.

Plaintiff, by purchase, acquired an easement for the support of its building to the height of three stories in a wall five stories high, standing wholly on defendant's land. Defendant's building was thereafter entirely destroyed by fire, leaving the wall standing and furnishing the same support to plaintiff's building as it did before, but not sufficiently strong to support the kind of building which defendant intended to erect on the same site.

Held, that the plaintiff's easement had not terminated, that defendant had the right to remove the wall using ordinary care to avoid injury to plaintiff's building and to rebuild without unnecessary delay, provided he gave to plaintiff the same right of support in the new wall that he had in the old.

[See note at end of this case.]

Appeal from District Court, Weber county: HARRIS, Judge.

Action for injunction. Commercial National Bank of Ogden, plaintiff, and David Eccles et al., defendants. Judgment for plaintiff. Defendants appeal. AFFIRMED.

[92] This action was originally commenced against David Eccles, S. T. Whitaker, and Roy Sheedy to enjoin them from tearing down and removing a certain stone and brick wall situated along the south of defendant Eccles' land, which constituted the north boundary of the land and building owned by the plaintiff. During the pendency of the action on this appeal, David Eccles died, and the cause is continued in the name of his administrator. For the purpose of brevity and convenience, the name of Eccles will be used in this opinion instead of the administrator. It appears from the record that the other defendants have no interest in the subject-matter of the action other than as employees of the defendant Eccles; hence further reference will not be made to them.

The findings of fact made by the trial court, all of which are within the issues, are so far as material here, as follows:

"(2) That the defendant, David Eccles, is the owner and in possession of the following described real property situated in Ogden City, Utah, to wit: A part of lot seven (7), block twenty-five (25), plat 'A,' Ogden City survey, and further described as beginning at the northeast corner of said lot seven (7), running thence south along the west boundary of Washington Avenue 71.80 feet to the," etc.

"(3) That the plaintiff Commercial National Bank of Ogden, was and is the owner and holds the title to certain lands lying south of the land of the defendant, and that between [93] such lands so owned by the plaintiff and the south boundary of defendant's land described in finding of fact No. 2 there is an intervening irregular strip of land which the plaintiff purchased from the defendant David Eccles in the year 1903, and paid to said defendant for said irregular strip of land the sum of $1894, and upon said strip of land the north side of the plaintiff's building was constructed and is situated.

"(4) That along the south boundary of the premises described in the second finding of fact there is a stone foundation and a brick wall upon said foundation extending upward from the ground three stories; that said foundation is thirty-six inches thick, that the first story of said brick wall is thirty-two inches thick, and the two upper stories are twenty-eight inches thick. That the said wall is situated wholly upon the said ground belonging to the defendant David Eccles.

"(5) That the plaintiff constructed its building upon its land immediately south of the said land of the said defendant David Eccles in the year 1903, and at that time, for the sum of $634.67 paid to the said defendant, the plaintiff purchased and became the owner of an easement in the foundation and brick wall situated along the south boundary of said defendant's premises from the basement to the center of the sills of the third story, and the said plaintiff has used said wall for the support and maintenance of its building situated on its said premises from the time of the construction of the same. That no interest in the wall and foundation other than the easement aforesaid, and no interest in the lands upon which said wall stands was purchased by the plaintiff from the defendant.

"(6) That the joists supporting the roof and different floors of plaintiff's building situated upon its said land along the north side thereof rest upon and are supported by the wall on the south boundary of said defendant's land, and the steam and water pipes attached to and as a part of plaintiff's building are now attached to and placed in said wall, and were placed there at the time of its construction [94] under the rights granted to plaintiff by the said defendant, and that the said wall, together with the openings for the joists and other supports and for the placing the steam and water pipes therein, are necessary for the support of plaintiff's said building, and are a part of said building, and the rights to have the joists and other supports, steam and water pipes placed in the north wall of said defendant's building belong to and are a part of the rights belonging to plaintiff's easement in and to said wall.

"(7) That at the time of the construction of plaintiff's building on its said premises, and prior thereto, and since that date, up to and including the 15th day of November, 1911, there was situated upon the premises of the defendant David Eccles a five-story brick and stone building with a basement, and that the said building was on said 15th day of November, 1911, partially destroyed by fire, but that the walls of said building were left standing, and that the south wall was and is sufficient and ample for the support and maintenance of the plaintiff's building as constructed on its said premises.

"(8) That the said five-story building on the lands of defendant has been twice wholly destroyed by fire, so that the walls alone were left. That by reason of the action of said fires and the elements thereof said south wall has been so impaired and damaged that it is insufficient upon which to safely rebuild or to support such a building as was formerly situated and supported on defendant's land, and that same is insufficient to support such higher modern building as defendant proposes to erect on his land.

"(9) That the plaintiff's building has no other or additional support along its north side, save the support of the said wall, and, that the taking out and removing of said wall would cause the plaintiff's building to fall, and become a mass of ruins.

"(10) That the said defendant David Eccles is desirious of and intends to construct a new and more modern building upon his said land, and that the said south wall of said building is insufficient in its present condition to support [95] the building which the said defendant contemplates and is desirous of and intends to construct upon said premises, and that the said wall cannot be made sufficiently strong to support the contemplated building without great expense and without reinforcing same by taking additional space of the said defendant's premises, and for that reason the said defendant desires to remove and tear down the present wall along the south boundary of his said premises to make room for and permit the construction of the new building as aforesaid.

"(11) That prior to the institution of this action the said defendant David Eccles served written notice upon the plaintiff of his intention to tear down and remove said wall, but without offering any easement or support in the new wall which he proposed to construct, or any protection or support to the plaintiff's premises by reason of the removal of said wall, and maintained and contended that the said plaintiff had no right or interest in the present wall, and should have no right or interest in the wall to be constructed.

"(12) That all of said plaintiff's building is occupied by tenants, and that the Fred M. Nye Company hold the ground or first floor and basement under lease, and have therein an extensive anl large stock of men's furnishing goods."

As conclusions of law the court found:

"(1) That the plaintiff is the owner of an easement for the support of its building in the present wall situated on the defendant's premises along the south boundary thereof, and that the said plaintiff is entitled to a like easement and support and right in the wall to be constructed by said defendant over and along the south boundary of his said premises.

"(2) That the defendant David Eccles is the owner of the said wall and the ground on which it has stood, subject only to the easement of support of the plaintiff in such wall, as stated in the findings of fact.

[96] "(3) That said wall is insufficient to support another building of like kind as that destroyed, and insufficient to support such new and modern building as defendant proposes to erect, and that the defendant David Eccles is entitled to tear down and remove the wall situated along the south boundary of his said premises, exercising such due care and diligence in the prosecution thereof as will prevent injury to the plaintiff's premises.

"(4) That the said defendant will be required to replace said wall at his own expense with such new and stronger wall as will meet the requirements of his said new proposed building, and shall so construct the said wall so as to afford and give to the plaintiff the same easement, right, and support and use for its building in the said wall to be constructed as the plaintiff now has and enjoys in the present wall."

A judgment responsive to and supported by the foregoing findings of facts and conclusions of law was rendered in favor of plaintiff. The judgment, among other things, provides that "David Eccles is hereby permitted to remove the wall mentioned . . . at his own expense with due care so as not to injure plaintiff's building; . . . and the said plaintiff is hereby adjudged and is hereby awarded the same rights, easement, and support in the wall to be constructed by said defendant, David Eccles, and the south boundary of his premises as plaintiff now has and enjoys in the present wall." To reverse the judgment, defendants appeal.

Richards & Boyd for appellants.

Valentine Gideon and *J. G. Heywood* for respondent.

McCARTY, C. J. (*after stating the facts*). —One of the grounds upon which appellants ask for a reversal of the judgment is that the findings of facts are not supported by the greater weight of the evidence. We do not deem it necessary to a clear understanding of the questions presented for us to either review the evidence in detail or set forth the substance thereof. We think it is sufficient to here state that we have carefully examined the record; and, while we find that there is a conflict in the testimony of some of the [97] witnesses on certain issues, we are of the opinion that the findings of fact are supported by a clear preponderance of the evidence. The wall in question is entirely upon the land of appellant Eccles, and, as found by the court, respondent has "no interest in the lands upon which said wall stands."

There is much evidence, however, which tends to show that respondent purchased an interest in and became part owner of the wall up to the third story thereof. But since the court found that respondent acquired an easement only in the wall, and as respondent has not appealed or filed a cross-assignment of errors, we shall, for the purposes of this appeal, assume that respondent acquired no greater property right in the wall than an easement.

The important question, therefore, is: Did respondent's right to an easement in the wall terminate when the wall was rendered useless to appellant Eccles by the destruction of his building of which the wall formed a part? The position of appellants on this question is clearly stated by their counsel in their printed brief as follows: The purposes of the wall were "to support mutually two buildings, one of five stories and the other (respondent's building) of two stories. The rights of the adjoining owners therein were mutual, a cross-easement, each with the right to have its building supported. When from calamity or accident such wall became useless for either of these mutual purposes, the condition or relation ceases. The purposes were gone." And again they say: *"The destruction of a party wall for the purpose for which it was used during the easement attaching thereto ends the easement and all rights thereunder."* Respondent acquired by purchase from appellant an easement in the wall up to the third story thereof, and has used the same as the north wall of its building. The joists of respondent's building are fastened to and rest on the wall.

The authorities practically all agree that, where a party has acquired an easement of support in a party wall, the accidental destruction of the wall terminates the easement [98] and extinguishes all rights arising thereunder. Therefore, if the wall in question had been rendered useless or unsafe as a support to respondent's building, or if it had been entirely destroyed by the fire, it might be argued with much force that such impairment or destruction terminated the easement. But this case does not fall within this well recognized rule. Under existing conditions respondent's easement—property right—in the wall is just as valuable and available as a support to its building as it was before the destruction of appellant Eccles' building. The question therefore arises: May Eccles, because of the destruction by fire of his building which so weakened the wall that it cannot be retained and used as a support for the kind of building he contemplates erecting on the site of the one destroyed, deprive respondent of its property, easement, in the wall which furnishes the same support to its building as it did before the fire occurred? To permit Mr. Eccles to tear down the wall and remove this support from respondent's building without requiring him, at his own expense, to erect another wall in its place, and thereby provide the same support for respondent's building as the present wall furnishes, would in effect be a confiscation of respondent's property.

It does not follow because the wall is unsafe as a support for the kind of building appellant Eccles intends to erect that he has the right to terminate respondent's easement of support therein for its building, and proceed to take down and remove the wall to the irreparable damage of respondent. That Eccles has the right to remove the wall and erect another in its stead suitable for the building he contemplates erecting no one will deny, but in doing so he is bound to use ordinary care to avoid injury to respondent's building and to rebuild without unnecessary delay. (Putzel v. Drovers' etc. Nat. Bank, 78 Md. 349, 28 Atl. 276, 22 L.R.A. 632, 44 Am. St. Rep. 298; Lexington Lodge v. Beal, 94 Miss. 521, 49 So. 883.) In the case last cited the principle of law applicable to the case at bar is well illustrated in the following language:

[99] "Where one of the buildings supported by a party wall has been destroyed, and the wall itself has been so weakened as to be dangerous or insufficient as a support for the building which the owner of the destroyed building is about to erect, he has the right to tear down the insufficient or dangerous party wall and replace it with one stronger and better, provided he gives to the adjoining house the same right of support as it had in the old one. He is but exercising his legitimate rights of property. If it follow from this that the owner of the adjoining building will be put to inconvenience while the work of demolition and construction is going on, this is an unavoidable consequence attendant upon the adoption and use of party walls. It cannot be the law that the fortunate adjoining owner, whose building is not destroyed, and who may be content with the wall, although weakened or partially destroyed, can, by refusing to the co-owner, whose building has been destroyed, permission to tear down and rebuild the wall, compel him either not to build again or to build only such a structure as the wall remaining may suffice to support. . . . While the adjoining owner, whose building has been destroyed, and who wishes to tear down and rebuild an insufficient or dangerous party wall, will be accorded this right, it must be exercised so as to work no avoidable injury to the owner of the adjoining building. He will be liable if the work is done negligently

and damage to the co-owner results therefrom."

See, also, 30 Cyc. 781, 782.

The judgment is affirmed, with costs to respondent.

STRAUP, J.—I concur. The plaintiff, for a valuable consideration, purchased an interest, not in the defendant's building, but a portion of the south wall of his building five stories high. The portion of the wall in which such interest was purchased was but three stories high, and in length that of plaintiff's building. It was purchased to furnish the north wall for its building three stories high, and to support the north side of it. True, it purchased no interest in the soil. But the interest purchased in the wa and the purpose for which it was purchased necessarily gave the plaintiff an interest also in the soil upon which the wall rested, so long as it remained and was suitable for such purpose. Such interest was perpetual and unconditional. The defendant's building was injured by fire. The south wall was injured to such an extent as not to be sufficient, as found by the court, [100] to support a building as was formerly supported on the defendant's land or such a building—ten or eleven stories high—as the defendant proposes and intends to erect. But that portion of the wall in which the plaintiff for a valuable consideration purchased an absolute and perpetual interest was not materially injured, and is sufficient to safely and properly support the plaintiff's building in the future as it did in the past, and for such uses and purposes is substantially as good now as it was before. That interest, that use, that purpose —the thing bought, the thing sold and for which the plaintiff paid its money—was not destroyed or materially impaired. The plaintiff still has what it had bought and what the defendant had sold. That the wall was damaged or impaired for other purposes is the defendant's misfortune. The plaintiff is not to blame for that, nor should it be charged with it by compelling it to surrender that which it bought and paid for and still owns and possesses. Observations are made that the defendant should not suffer the whole loss occasioned by the accidental fire. Every one under such circumstances must bear his own loss. What the plaintiff suffered in such respect it must bear. So, too, must the defendant. The plaintiff with respect to the question in hand suffered none, for it still has about all it had before the fire. That the defendant has not is his, not the plaintiff's loss. And for this reason do I see a distinction between the case here and one where had the wall been wholly destroyed or damaged, or that portion of it in which the plaintiff has an interest. For, in the latter, the interest of the plaintiff as well as that of the defendant would be destroyed or damaged. The thing in which they both had a common interest would no longer exist or be useful to either. But they had no common interest in the whole wall. The common interest was only to the extent of three stories and the length of plaintiff's building. That was all the defendant sold and all the plaintiff bought. Above or beyond that, the defendant granted, and the plaintiff acquired, no interest. The thing so bought and sold and the purpose for which it was [101] bought and sold was unrestricted and unconditional. Of course, they had the right to make their own bargain; but that is the bargain made by them. So above or below the third story, wind may blow and fire rage, but if they do not damage or impair what the defendant sold and granted, and what the plaintiff unconditionally bought and paid for and still possesses and enjoys, I see no reason why it should be compelled to surrender it because the defendant sustained a loss of property in which the plaintiff was given and had no interest whatever. Then it is also said that, if the plaintiff is permitted to use the new wall for the same purpose it used the old, it is granted or given something without consideration. Not so. It now has what it theretofore bought and paid for. The wall, for that purpose, is substantially as good now as it was before the fire. It, however, is not sufficient to support such a building as the defendant proposes and intends to erect. So the court, under its equitable powers, and as is proper, has given the defendant the right to remove it if he will erect another and give back to the plaintiff what he, by tearing down and removing the old wall, will take from the plaintiff. Thus, the surrender of what the plaintiff now has, and what it had theretofore bought of the defendant and now owns, possesses, and enjoys, is the consideration for requiring the defendant, if he takes down and removes the old wall, to erect a new one and give the plaintiff that right and interest in it which it owned, possessed, and enjoyed in the old wall at the time of its removal by the defendant. That is but equity, and is, I think, within the adjudged cases.

FRICK, J. (*dissenting*).—I regret my inabilty to agree with the conclusions reached by my associates. I cannot do so for the reason that, if the judgment in this case becomes the settled law in this jurisdiction, much unnecessary litigation as well as much injustice must inevitably result between the owners of adjoining buildings, one of which, as in this case, is made uninhabitable through its destruction by fire. My associates [102] base their conclusions entirely upon the one

fact found by the court that the wall in question was not entirely destroyed by the fire, but that a portion sufficient for the purposes of respondent was left standing, although such portion is entirely useless as a wall for the proposed building which appellant intends to erect, or for a building similar to the one that was destroyed. It is conceded upon all sides that the wall in question stands entirely upon the land of appellant; that the respondent never had nor now has any interest in the soil on which the wall rests; and that, if it has any rights whatever, it is merely an easement in the remaining wall, and nothing more. It is also conceded that appellant's building was accidentally destroyed by fire, and that the remaining walls are wholly insufficient to support another building, and are therefore practically useless to him. My associates also concede, stating the fact in their own language:

"The authorities practically all agree that, where a party has acquired an easement of support in a party wall, the accidental destruction of the wall terminates the easement, and extinguishes all rights arising thereunder."

In view of this concession, so frankly stated, I need not refer to the authorities upon the subject. They, however, seek to exclude this case from the consequences stated above for the reason, they say, that the remaining wall is just as valuable and available as a support to its (respondent's) building as it was before the destruction of appellant Eccles' building. In this statement, therefore, is contained the theory upon which my associates approve the judgment of the court below. This theory in my judgment is wholly fallacious. By the enforcement of it the loss occasioned by the fire is placed wholly upon appellant, and the respondent is permitted to escape from the consequences thereof, although it is conceded that appellant's building, as such, and his walls for every purpose that he could use them for walls, are destroyed. Moreover, it is in effect held that, while respondent had a right or easement in the building that was destroyed by fire, it nevertheless has sustained no loss. From [103] such holding it follows that if the wall in question had suffered greater destruction, or if it had been entirely destroyed, then respondent's rights or easement thereunder would have been extinguished. From this I am authorized to assume that if respondent had been so unfortunate as to have its building destroyed by the fire in question, or by another, it would have lost all right to join another building to any new building that appellant might choose to erect, but since it had the good fortune not to lose all therefore it has lost nothing, and appellant must not only stand the whole loss, but in case he chooses to improve and use his own property by erecting thereon a suitable building he must yield a portion thereof to the use of respondent without any consideration whatever. I say without consideration since it must be conceded that all respondent purchased was an easement in one of the walls of appellant's building, and when that building was destroyed the easement, in my judgment, was also destroyed. If this be true, how can respondent claim a right in an entirely different wall from that in which it purchased the easement? It seems to me that the fact which in my judgment is controlling is entirely overlooked. This fact is that respondent acquired an easement in a wall only while it was and continued to be a part of a building, and that when the wall from any cause over which the appellant had no control was so affected that it no longer was fit to support the building of which it was a part, so that the building ceased to exist, then the wall must also be held to have ceased to exist for the purposes of the easement. When, therefore, the building was destroyed, the wall for all practical purposes was also destroyed, and hence the easement in the language of my associates was extinguished.

If respondent desires to obtain an easement for all time in any building that appellant might erect in place of the old one, if that should be destroyed, it should have entered into a contract to that effect. Would any one familiar with the record in this case seriously contend that the respondent could have obtained what my associates now hold it did obtain [104] for the amount it paid for the alleged easement in the old wall, namely, an easement in a new wall which may continue for an indefinite period, or for so long as the building may last, and, if the old walls happen to continue to stand, that the easement would continue for all time?

But it is contended that, if respondent is not permitted to attach its building to the new one, it means a practical confiscation of its property rights in the remaining wall. This assumes that the respondent acquired a right in a wall which continued after it had been destroyed to such an extent that it could no longer be used as appellant's building, or as a part of any new one he might erect upon the ruins of the old. Respondent is thus given a right in a thing that has ceased to exist for the purposes contemplated by the parties when the easement was acquired, and has ceased to exist for every purpose except a pile of brick or stone and mortar which by accident, merely, is left large enough to answer the purpose of respondent, although it answers no other purpose whatever. The mere fact that the wall has to be removed by the wrecker instead of having been con-

sumed by the fire cannot change its character either as a matter of fact or as a matter of law. Nor can any amount of words make that a wall which merely constitutes the debris of a ruined building. Neither was it contemplated by the parties that it should be so. The fact that the respondent now claims that the wall is sufficient for its purpose is the result of mere accident and is not based upon any contractual rights. For the purposes of the easement the wall was destroyed when it no longer could be used as a part of appellant's building or as a part of any building he might choose to erect. Had appellant willfully destroyed the building, or torn it down for the purpose of erecting another, with the intention of preventing the respondent from using the wall, the conclusion reached by my brethren might be justified. Under the undisputed facts in this case the conclusion reached, in my judgment, is not only unsound, but it takes from one and gives to another that which the court has no right to take or grant. In my judgment adjoining owners [105] should be permitted to make their own arrangements, if they can, with respect to the rights one may obtain in the property of the other.

The judgment should therefore be reversed and the action dismissed.

NOTE.

Termination of Right to Maintenance of Party Wall.

It is well settled that in the absence of an agreement to rebuild a party wall its accidental destruction terminates the right of either adjoining owner to have it maintained as such. Antomarchi v. Russell, 63 Ala. 356, 35 Am. Rep. 40; Bonney v. Greenwood, 96 Me. 335, 52 Atl. 786; Hoffman v. Kuhn, 57 Miss. 746, 34 Am. Rep. 491 (buildings destroyed); Sherred v. Cisco, 4 Sandf. (N. Y.) 480; Heartt v. Kruger, 121 N. Y. 386, 24 N. E. 841, 18 Am. St. Rep. 829, 9 L.R.A. 135, *affirming* 56 Super. Ct. 382, 5 N. Y. S. 192; Connelly v. Fish, 152 N. Y. S. 371; Fewell v. Kinsella (Tex.) 144 S. W. 1174 (wall torn down by order of city council); Hawkes v. Hoffman, 56 Wash. 120, 105 Pac. 156, 24 L.R.A.(N.S.) 1038; Duncan v. Rodecker, 90 Wis. 1, 62 N. W. 533. See also Moore v. Shoemaker, 10 App. Cas. (D. C.) 6; Dowling v. Hennings, 20 Md. 179, 83 Am. Dec. 545; Partridge v. Gilbert, 15 N. Y. 601, 69 Am. Dec. 632, *affirming* 3 Duer 184; Odd Fellows' Hall Assoc. v. Hegele, 24 Ore. 16, 32 Pac. 679; Ebert v. Mishler, 234 Pa. St. 609, 83 Atl. 596. And see the reported case. In Sherred v. Cisco, supra, the court said: "The parties being confessedly restrained from destroying the wall without mutual consent, how is it when the wall has been destroyed by the elements? The lands on each side are vacant. The agreement upon which the party wall was built related to that wall only. There was no agreement to build a second wall, or to build houses a second time, in the event that the original wall, and the houses which it supported, should be destroyed. . . . It might well have occurred to them, that if the buildings were destroyed, one or the other might not wish to rebuild; or that one might desire to erect a very strong warehouse for heavy goods, requiring thick walls, and the other a private dwelling, with a wall only half as thick. But without pursuing the views which parties may well be supposed to entertain, on their attention being called to the event of a total destruction of the building they are about to erect on a party wall, it suffices to say, that when two owners of adjoining city lots unite in building two stores with a party wall, we have no right to infer, from that act, an agreement binding upon them and their heirs and assigns to the end of time, to erect another like party wall at their mutual expense, when that one is casually destroyed, and so on, as often as the new one shares the same fate."

So it has been held that an adjoining owner who rebuilds a party wall which stands one-half on his land and one-half on the adjoining owner's land, cannot compel his neighbor to pay part of the cost of reconstructing the wall. Antomarchi v. Russell, 63 Ala. 356, 35 Am. Rep. 40; Sherred v. Cisco, 4 Sandf. (N. Y.) 480. See also Partridge v. Gilbert, 15 N. Y. 601, 69 Am. Dec. 632, *affirming* 3 Duer 184; Hawkes v. Hoffman, 56 Wash. 120, 105 Pac. 156, 24 L.R.A.(N.S.) 1038. *Compare* Campbell v. Mesier, 4 John. Ch. (N. Y.) 334. And where one of the adjoining owners rebuilds a party wall which stands on the property of both, the other owner may bring an action of ejectment to recover his portion of the ground which is occupied by the wall. Heartt v. Kruger, 121 N. Y. 386, 24 N. E. 841, 18 Am. St. Rep. 829, 9 L.R.A. 135, *affirming* 56 Super. Ct. 382, 5 N. Y. S. 192; Connelly v. Fish, 152 N. Y. S. 371.

It has been held that no agreement will be inferred on the part of adjoining owners to rebuild a destroyed party wall which stood partly on the land of each merely because originally it had been built jointly by them. Antomarchi v. Russell, 63 Ala. 356, 35 Am. Rep. 40; Sherred v. Cisco, 4 Sandf. (N. Y.) 480. But in Huck v. Flentye, 80 Ill. 258, wherein the doctrine of the reported case was approved, an implied agreement to contribute to the cost of erecting a party wall was found in the fact that both owners of adjoining lands erected connecting buildings at the same time, and the owner

who was asked to contribute to the cost of the party wall which the other had built had full knowledge that it was being constructed.

Where a party wall which stands on the land of adjoining owner is destroyed by fire, and is rebuilt by one of the owners, the other owner may use it as a support for his building without making payment for the use. Antomarchi v. Russell, 63 Ala. 356, 35 Am. Rep. 40; Frisbie v. Bigham Masonic Lodge No. 256, 133 Ky. 588, 118 S. W. 359. See also Douglas v. Coonley, 156 N. Y. 521, 51 N. E. 283, 66 Am. St. Rep. 580, *reversing* 84 Hun 158, 32 N. Y. S. 444. But in Bowhay v. Richards, 81 Neb. 764, 116 N. W. 677, 19 L.R.A.(N.S.) 883, it was held that where the buildings which were supported by a party wall which stood entirely on the land of one adjoining owner were destroyed by fire, an injunction would lie to prevent the other adjoining owner from using a new party wall which was built on the first owner's premises without first paying a portion of the expenses incurred in building the new wall.

Where a party wall has been so weakened by a fire that it will be insufficient to support a building about to be erected, it has been held that the prospective builder may demolish the old wall and erect a new one in its place on condition that he constructs it in such a manner as to give to the adjoining owner the same support which he received from the old wall; Lexington Lodge v. Beal, 94 Miss. 521, 49 So. 833. And see the reported case. The same rule applies where one of the buildings which a party wall supports has become so dilapidated that it must be demolished, which makes it necessary to tear down and replace the common wall. Partridge v. Gilbert, 15 N. Y. 601, 69 Am. Dec. 632, *affirming* 3 Duer 184.

In Brondage v. Warner, 2 Hill (N. Y.) 145, it appeared that by deed a person had been granted a right to make a certain wall a common wall. The grantor's building was destroyed by fire but the wall still answered the purpose for which it had been built. In ejectment proceedings brought by persons claiming under the grantor, it was held that they could not recover the ground on which the wall stood, since the rights of the defendants to it lay in grant, and the wall having not been destroyed, their privilege of support from it still existed.

HALL

v.

MANUFACTURERS' COAL AND COKE COMPANY.

Missouri Supreme Court—July 2, 1914.

260 Mo. 351; 168 S. W. 927.

Trial — Demurrer to Evidence — What Evidence Considered.

In determining whether a demurrer to the evidence should have been sustained or overruled, defendant's evidence tending to show an absence of right to recover cannot be considered, and the demurrer must be tested by the strength of plaintiff's evidence aided by any of defendant's evidence that may help to make out plaintiff's case; plaintiff's evidence and every reasonable inference arising therefrom being taken as true.

Master and Servant — Negligence — Safety of Miner's Working Place.

In a miner's action for injuries caused by rock falling upon him, where there is evidence that he asked the foreman if he thought any more of the roof would fall, that the foreman took a pick, and, after testing the part of the roof which subsequently fell, assured plaintiff that it was sound and safe, that plaintiff was somewhat inexperienced and not familiar with the character of rock in the roof, and, relying on the foreman's assurance of safety, continued to work there until injured, and that if a proper inspection had been made when the foreman made his inspection it could have been discovered that the rock was loose and liable to fall, it is a question for the jury whether the employer was negligent, though plaintiff's evidence tends to show that ordinarily it was his own duty to look after the safety of the roof of his own room.

[See Ann. Cas. 1912B 577.]

Same.

Though ordinarily it is a miner's duty to look after the safety of the roof of the room in which he works and the employer is only required to furnish props necessary for propping the roof, where its foreman undertakes to make an inspection as to the safety or soundness of the roof, it is the employer's duty to exercise ordinary care to ascertain the true condition of the roof and inform the miner of the facts that an ordinarily careful inspection would have revealed.

Contributory Negligence of Miner.

Where the danger of the roof of a mine falling is not so obvious and glaring that a reasonably prudent man would not have continued to work there, a miner is not negligent as a matter of law in continuing work in reliance upon his foreman's assurance that the roof is safe.

Instruction as to Negligence and Contributory Negligence.

An instruction that if plaintiff was employed by defendant in its mine and under the control and direction of its foreman, who had authority to direct the work and the manner in which plaintiff was engaged at the time of the injury, and if it was plaintiff's duty to obey his orders and directors, and if while so engaged the foreman negligently directed plaintiff to clean up the rock and other debris in a room, and prior to such command had assured plaintiff when inquired of whether it was safe to work there on account of overhanging rocks, that it was safe, and if plaintiff, relying upon such assurance, went to work there and was injured by a slab of rock falling upon him, he was entitled to recover, is erroneous, where negligence on the part of the foreman in giving such assurance as to the safety of the roof was relied upon as a ground of recovery and not merely as relieving plaintiff from the effect of contributory negligence or assumption of risk, since it undertakes to cover the whole case so far as defendant's actionable negligence is concerned, and does not require a finding that the assurance as to the safety of the roof was negligently given, but makes the employer an insurer as to the correctness of the information furnished plaintiff.

Same.

The error in such instruction is not cured by a further instruction that if the rock which fell upon plaintiff was in a loose and dangerous condition, and if the foreman inspected and sounded it and found it to be in a loose and dangerous condition and liable to fall, or if by the exercise of ordinary care he could have discovered such condition, and if he assured plaintiff that it would not fall and ordered him to work beneath such rock, then such order was negligently made and such assurance negligently given within the meaning of the instructions, since it merely defines "negligent assurance," a term not used in the instruction authorizing a recovery, and, moreover, it was an attempt to supply facts which should have been required to be found by the main instruction and the incorporation of which in a separate instruction would merely confuse the jury.

Same.

In a miner's action for injuries caused by rock falling upon him, an instruction that though he knew, or by the exercise of ordinary care could have known, that the place where he was working was not safe, this did not defeat a recovery if he was negligently ordered into such place by the foreman and assured that the rock would not fall, and if the danger from such rock was not of such a glaring and dangerous nature as to threaten immediate injury in case he obeyed the order, is erroneous, as it did not require a finding that plaintiff relied upon such assurance of safety.

Witnesses — Falsus in Uno — Instructions.

It was proper to charge that the jury are the sole judges of the weight and credibility of the witnesses, but that, if they find and believe that any witness had wilfully sworn falsely to any material facts, they may disregard the whole or any part of his testimony.

Instructions — Assumption of Facts — Harmless Error.

In an action for personal injuries, though an instruction that in determining the measure of damages the jury might consider the mental and physical pain and suffering endured by plaintiff in consequence of the injury, the character and extent of the injury, if permanent, together with his loss of time and service, and find for him in such sum as would be reasonable compensation for the injury, assuming that he sustained injury and suffered pain and loss of time, this is unimportant where these facts were not disputed.

Damages — Impotency — Necessity of Pleading Specially.

In an action for personal injuries under a petition alleging that plaintiff's body was severely and permanently wounded, bruised, etc.; that the bones, flesh, and ligaments of his hips, pelvis, legs, and ankle were broken, bruised, etc.; that he suffered great bodily and mental pain and anguish as a result thereof; that he was disabled and prevented from attending to his business affairs, or doing anything towards gaining a livelihood; and that he was permanently injured and crippled for life and had suffered and would continue to suffer great bodily pain, annoyance, inconvenience, and expense—evidence is not admissible that the injuries resulted in impotency, as the petition neither alleged such injury nor contained an allegation of a general nature embracing it within its terms, and, where conditions or diseases will not necessarily result from the injuries, they must be pleaded.

[See note at end of this case.]

Appeal from Circuit Court, Knox county: STEWART, Judge.

Action for damages. Colby Hall, plaintiff, and Manufacturers' Coal and Coke Company, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. REVERSED.

Campbell & Ellison and *Higbee & Mills* for appellant.

Fugate & Son and *Chas. E. Murrell* for respondent.

[357] WILLIAMS, C.—This is an action to recover damages for personal injuries received by plaintiff while working in defendant's coal mine near Novinger, Missouri. Suit was instituted in Adair county and on change of venue was sent to Knox county where trial was had resulting in a verdict and judgment in favor of plaintiff in the sum of $23,666. That portion of plaintiff's petition charging negligence is as follows:

"The defendant negligently, carelessly and recklessly set him to work in one of the rooms in said Mine number 50, known as room number 4 off the 10th west entry off the main south entry, at a place in said room where the rock, earth and other materials forming the roof of said room were in a loose and dangerous condition and liable to fall at any time; and did negligently, carelessly and recklessly fail and neglect to warn or notify the said plaintiff that the roof of said room, at the point and place where plaintiff was compelled to be in order to perform the work as directed, was in a loose and dangerous condition as aforesaid; but said defendant, its agents, employees and mine foreman did carelessly, negligently and recklessly assure this plaintiff that the roof of said room at the place aforesaid was in a safe and secure condition, and this plaintiff believing said foreman possessed superior knowledge of said roof, relied upon said statement and assurance and set about the work as directed; and this defendant had negligently, carelessly and recklessly failed and neglected to furnish and provide a safe, competent and proper man in charge of said room, and did negligently, carelessly, and recklessly fail and neglect to furnish and provide safe, competent and proper men in charge of said mine as mine foreman, and did negligently, carelessly and recklessly fail and neglect to furnish the said plaintiff with a reasonably safe, sufficient and proper place in which to perform his duties, and did negligently, carelessly and recklessly fail and neglect to warn or notify the said plaintiff of the [358] dangers of working in said room, this plaintiff being then and there an inexperienced miner, and ignorant by reason thereof of the dangers lurking in said roof of said mine, which said facts the defendant well knew or by the exercise of ordinary care could have known."

The petition further alleges that by reason of the negligence and carelessness of the defendant, as above stated, and without any warning to him, a large slab of rock from the roof of said mine fell upon plaintiff. Defendant's answer contained, (1) a general denial, (2) that plaintiff's injury "was due *solely* to his own negligence and carelessness in not properly taking care of and securing said room and the roof thereof," (3) plea of assumed risk.

Plaintiff's evidence tended to establish the following facts: At the time plaintiff was injured he was working in said mine in a room which was about twenty feet wide and fifty feet long; the roof of the room being a short distance above plaintiff's head. While he was at work picking up some loose rock from the floor of this room, a slab of rock, nine feet wide and about eleven feet long and varying in thickness from a "feather edge" to eighteen inches, fell from the roof of the mine upon him. Prior to the accident, plaintiff had worked in this room about three and one-half days, three days of the time being spent in the work of digging coal. On the day preceding the day of the accident, plaintiff set 33 props under the roof in this room and drilled some holes and loaded them with powder. After he left the mine that day, these holes were fired, as was the custom, by the shot-firers. The next morning (the day that the injury occurred) plaintiff returned to the mine about 6:30 a. m., and after warming himself in the boiler room went down into said mine and to said room. Upon arriving there he found that during the night a considerable quantity of rock had fallen from the roof of the room and that the props had fallen (caused, possibly, by the firing [359] of the shots). It was the custom in the mine that loose rock that fell from the roofs of the different rooms was cleaned up and taken away by special men which the company had in their employ for that work. Defendant's foreman came into plaintiff's room that morning and commented on the amount of loose rock that was down and told the plaintiff to clean out "a couple of cars of coal in front" and that then the company would clean up the rock. To this plaintiff said "all right" and then asked the foreman if he (the foreman) thought any more of the roof would fall. In answer to this question, the foreman took plaintiff's pick and tested the roof above the place where plaintiff was working and after sounding the roof told the plaintiff that it was sound and safe. This was about an hour and a half or two hours prior to the accident. After the foreman left the room, plaintiff cleaned up the two cars of coal and then went to see a Mr. Batley, who was then in the employ of defendant to do the special work of cleaning up the fallen rock from the rooms. Upon being asked by plaintiff as to when he could come and clean up said rock, Batley replied that he could not get to it that day and directed plaintiff to go and see the foreman, Mr. Shaw, about it. Plaintiff thereupon called upon and requested the foreman to get some one else to do the work of cleaning up the loose rock. The foreman made the proposition to plaintiff that he (plaintiff) clean up the loose rock and that the company would pay him "extra" for doing that work. To this plaintiff agreed; returned to his room and started to clean up the loose rock. After having picked up five or six pieces of rock and while he was in the act of lifting another piece the slab fell upon him. The slab fell from that portion of the roof which the foreman had just previously inspected. The slab gave no warning of its breaking away. Plaintiff testified that he did not know that the roof was dangerous; he tes-

tified that he sounded the [360] roof and that it sounded solid to him—but it does not appear from the evidence as to the exact time that plaintiff sounded the roof; as to whether it was on the day of the accident, and after the foreman had sounded the roof, or during the three previous days that he worked in the room, or on the morning of the accident and before the foreman sounded the roof, the evidence is silent. Plaintiff further testified that he was not an experienced coal digger; that, while he had worked in the mines about four years at different times and places, most of his work had been driving mules in the mines, etc., and that he had had only about two months' experience in digging coal. He testified that he was not familiar with the character and formation of the rock in this mine and that when the foreman of the mine sounded the roof and told him it was sound and safe, he relied upon what the foreman said, because he thought the foreman "would know, if anyone would." By plaintiff's other witnesses it was shown that there was a defect in the formation of the rock in the roof of this room. The defect was known as a "clay slip" and that this kind of defect made a roof very dangerous and treacherous and that the air would get into the rock formation at this defective place and sometimes in the night and sometimes in a day and a half or two days the rock would loosen so that it would fall, depending upon the kind of rock and the conditions surrounding it. One of plaintiff's witnesses, an expert miner, testified that he examined the rock after its fall and that it was his opinion that the rock in question loosened by slow process and that the air would strike the rock where it broke and it "would gradually break away from the place where it was exposed to the air." Plaintiff's evidence further tended to show that if this rock had been examined one or two hours before it fell by a practical miner its dangerous and loose condition could have been ascertained. That if the roof is loose and dangerous [361] it will sound hollow and drummy, and that if it is solid, it will sound solid. The evidence tended to show that it was the duty of the miners to look after the safety of the roof in the rooms in which they worked. Plaintiff was receiving $2.56 a day for doing the kind of work he was doing at the time he was injured. As to plaintiff's injuries, the doctor testified that one of plaintiff's legs was broken and one foot was broken in the angle joint, causing two or three bones to protrude through the skin; that the bones of the pelvis were dislocated; that some of the nerves of body were paralyzed and that plaintiff suffered severe pain and was confined to his bed about three months and that he considered plaintiff's injuries permanent. The plaintiff testified, as to his injuries, that he had suffered severe pain; that by reason of the injuries received he was confined to his bed thirteen weeks, and after that it was about four weeks before he could use crutches; that he then used crutches three months and after that and from June until October he moved about by the use of a cane and that at the time of the trial he was able to walk without the use of a cane; that the injuries affected his sleep and rendered him impotent and that as a result of the injuries he had practically lost his sexual desire. The doctor also testified that, if plaintiff was impotent, his impotency was, in his opinion, caused by the injuries. Defendant objected to the introduction of this evidence on the ground only that the petition did not allege an injury of that kind, which objection was overruled by the court and defendant excepted. Plaintiff testified that at the time of trial he was making three dollars a day working as a checkweighman; that his duty was to see that the company weighman correctly weighed the coal for the various miners; that during the summer he had endeavored to do some work shoveling on the streets; that he would be able to work one day if the work was not too heavy and would then [362] have to lay off the next day and that finally he had to quit the work because he could not stand it. The evidence on the part of defendant tended to show that it was the duty of the miner to look after his own room. Charles Batley testified that plaintiff came to him the morning of the accident and told the witness that the roof in his room was bad and that the rock was down and wanted him to come and look at it. Another of defendant's witnesses testified that after the accident plaintiff admitted to him that he was fixing a place to set a prop when the rock fell. Mr. Shaw, the defendant's foreman, at the time of the injury, testified for the defendant that he no longer worked for the defendant but was at present engaged in running a drug store. This witness denied that he was in the plaintiff's room on the morning of the accident and denied that he sounded the roof or that he told plaintiff the roof was solid and that the only talk he had with plaintiff on that day was when plaintiff came to him and he employed plaintiff to clean up the loose rock. This witness further testified that when he first showed plaintiff the room (which was about four or five days before the accident) he told plaintiff of the "clay slip" in the room and that the support must not be taken out from under the roof at that place.

Plaintiff's instructions numbered 1, 2, 3, 4 and 5, which are challenged by appellant, are as follows:

"1. The court instructs the jury that if you believe from the greater weight of evidence in the cause: That at the time plain-

tiff was injured he was in the employ of the defendant company as a laborer in the ground of defendant's mine, and that he was in the charge of and under the control and direction of one D. P. Shaw, as mine foreman in said mine, and that said Shaw was employed by the defendant to act as such foreman; and if you further believe that as such foreman said Shaw had authority, and that it was his duty, to have charge of and direct the work and the manner [363] in which plaintiff was engaged at the time he was injured; and that it was the duty of the plaintiff to obey the orders and directions of said mine foreman as to the place and manner of doing the work in said mine at the time plaintiff was injured; that while so engaged and in obedience to the commands and directions of said mine foreman the said foreman negligently directed plaintiff to clean up the rock and other debris in room No. 4 referred to in plaintiff's petition and prior to said command had assured said plaintiff when inquired of, whether it was safe to work in said room on account of the top or overhanging rocks, that it was safe and that the plaintiff in obedience to said orders, and relying upon said assurance did go to work and commence to clean up the rock and other debris in said room and while in obedience to said orders he was in the discharge of the duty and work assigned him a large slab of rock fell from said top or roof which resulted in plaintiff's injuries then the plaintiff is entitled to recover in this action, unless precluded for some other reason assigned in the further instructions given you.

"2. The court instructs the jury that notwithstanding you may believe from the evidence in the cause that the plaintiff knew, or by the exercise of ordinary care on his part could have known, that the position he was working in, at the time he was injured, in room 4, in question, was not a safe one, yet, this does not and should not defeat his recovery in this case; if you further find and believe from the evidence that he was negligently ordered into this position by the defendant's mine foreman, D. P. Shaw, and was assured by the said Shaw that the slab of rock that fell on plaintiff would not fall and that the danger from the said slab of rock overhanging said place was not of such glaring and dangerous nature as to threaten immediate injury in case he obeyed said order.

[364] "3. The court instructs the jury that if you find and believe from the greater weight of the evidence in the cause that the slab of rock which fell upon and injured the plaintiff was in a loose and dangerous condition in the roof of room number 4 of defendant's mine number 50 on the morning of November 24, 1908, and that the defendant's foreman D. P. Shaw inspected and sounded the same and found the same to be loose and in a dangerous condition and liable to fall or if by the exercise of ordinary care on his part he could have discovered the loose and dangerous condition thereof by said inspection, if the same was in a loose and dangerous condition, if you find that he did so inspect said rock, and assured plaintiff that it would not fall and that after the said assurance on his part he ordered plaintiff to work in said room beneath said slab of rock, then said order was negligently made and said assurance was negligently given within the meaning of these instructions, unless the danger was of such a glaring nature that no prudent person, under the circumstances, would have obeyed the order.

"4. The court instructs the jury that they are the sole judges of weight and credibility of the testimony of the witnesses in this case and if they find and believe that any witness has wilfully sworn falsely to any material facts at issue in this case, then the jury are at liberty to disregard the whole or any part of such witness's testimony.

"5. The court instructs the jury that if you find the issues for the plaintiff, in determining the measure of damages, you may take into consideration the mental and physical pain and suffering endured by plaintiff since said injury in consequence thereof, the character and extent of said injury and its continuance, if permanent, together with his loss of time and service. And you may find for him in such sum as in the judgment of the jury, under the evidence, will be reasonable compensation for the injury, not to exceed [365] the sum of thirty-nine thousand, nine hundred dollars."

I. It is contended that the court erred in overruling defendant's demurrer to the evidence. In support of this contention appellant refers to defendant's evidence which is in conflict with the evidence offered by plaintiff. It is too well settled to need citation of authority, that in determining whether a demurrer to the evidence should have been sustained or overruled, defendant's evidence tending to show absence of plaintiff's right to recover cannot be considered, but the demurrer must be tested by the strength of plaintiff's evidence aided by any of defendant's evidence that may help make out plaintiff's case. And in passing upon the sufficiency of the evidence challenged by demurrer, the general rule is that plaintiff's evidence and "every reasonable inference of fact arising therefrom" is to be taken as true. [Stauffer v. Metropolitan St. R. Co. 243 Mo. 305, l. c. 316, 147 S. W. 1032.] Proceeding, then, to a review of plaintiff's evidence, we find that defendant's foreman came into the

mining room in which plaintiff was the sole worker and that while there plaintiff asked the foreman if he thought more of the roof would fall, thereby inferring that plaintiff had some doubt about the matter. In answer to this question, or request, the foreman took plaintiff's pick and undertook to inspect the roof for the purpose of determining its condition. The foreman inspected the part of the roof that afterwards fell and injured plaintiff and after making an inspection assured plaintiff that the roof was sound and safe. Plaintiff testified that he was somewhat inexperienced, was not familiar with the character of rock in the roof, but thought the foreman would know and relied upon the foreman's assurance; that relying on this assurance of safety, he continued to work in said room and in an hour or two [366] thereafter the slab fell causing plaintiff's injuries. The testimony of expert miners, testifying in plaintiff's behalf, further tended to show that the slab in question became loosened slowly and gradually and that if a proper inspection of the roof had been made at the time the foreman made the inspection it could have been discovered that the rock was loose and liable to fall. The above facts were within the scope of negligence alleged in the petition and were sufficient to make defendant's liability a question for the jury's determination.

It is true that plaintiff's evidence tended to show that, ordinarily, it was the duty of plaintiff to look out for his own safety in the room in which he worked and that the duty of the defendant was to furnish such props as might be required for use in propping the roof. But even though, as a general proposition, this be conceded, yet, when defendant's vice-principal, the foreman, came into the room and in answer to plaintiff's question or request undertook or assumed the duty of making an inspection as to the safety or soundness of the roof it undoubtedly then (if not before) became the duty of the defendant to exercise ordinary care to ascertain the true condition of the roof and (at least) to inform plaintiff of the facts that an ordinarily careful inspection would have revealed.

In discussing a very analogous situation, involving the care that defendant should exercise in performing an assumed duty, the Supreme Court of Illinois in the case of St. Louis Consol. Coal Co. v. Scheiber, 167 Ill. 539, l. c. 545, 47 N. E. 1052, said:

"Whether, therefore, it was the duty of appellant (the defendant company) or not to prop the roof, still, if it assumed that duty and undertook to discharge it, and did so in such a careless manner that the roof was thereby loosened and rendered more liable to fall, and the plaintiff was in the exercise of due care for his own safety, as alleged and as necessarily [367] found by the jury, the appellant would be liable. *Having undertaken to perform the work it became its duty to perform it in a proper manner, whether bound in the first place to perform it at all or not.*" (Italics ours.)

The evidence in the case at bar does not show that the danger was so obvious and glaring that a reasonably prudent man would not have continued to work in said room and plaintiff testified that he relied upon the assurance of safety made by the foreman. Under the facts disclosed by the evidence it should not therefore be said that plaintiff was guilty of contributory negligence as a matter of law. [Swearingen v. Consolidated Troup Min. Co. 212 Mo. 524, 111 S. W. 545; Hamman v. Central Coal, etc. Co. 156 Mo. 232, 56 S. W. 1091.] It follows therefore that the court did not err in overruling the demurrer to the evidence.

II. It is further contended that the court erred in giving plaintiff's instructions numbered 1, 2, 3, 4 and 5. (Instructions are copied in full in foregoing statement.)

It will be seen by comparison of the testimony with the allegations of the petition that the only actionable negligence which the evidence tended to support was the *negligent assurance* given by defendant's foreman to plaintiff as to the soundness or safety of the roof, relied upon by plaintiff and given by the foreman knowing that plaintiff would most likely continue to work in said room, and further perhaps in permitting or "setting plaintiff to work" in said room after giving such negligent assurance without correcting the same.

Plaintiff's instruction number 1 undertakes to cover the whole case, at least the whole case so far as the actionable negligence of defendant is concerned. It will be noticed that this instruction does not require the jury to find that the assurance was negligently [368] given. It does not require the jury to find facts which would amount to a negligent assurance! By that instruction the defendant is made an insurer as to the correctness of the facts disclosed by said assurance without regard to whether the assurance was or was not negligently given. Defendant upon assuming the duty of inspecting the roof was not bound to give plaintiff absolutely correct information about the condition of said roof, but only such information as a reasonably careful inspection, under the circumstances, would have revealed. The negligent assurance, as involved by the facts of the case, lies at the very foundation of plaintiff's cause of action, for if the jury should find that there was no negligence in the giving of the assurance then there would have been no negligence in permitting plaintiff to work in said room under the facts disclosed by the evidence in this case, as discussed in

the preceding paragraph. In support of the correctness of his instructions, plaintiff cites a line of cases of which the following cases are fair samples; Swearingen v. Consolidated Troup Min. Co. 212 Mo. 524, 111 S. W. 545; Carter v. Baldwin, 107 Mo. App. 217, 81 S. W. 204. In fact plaintiff's instruction number 1 so closely resembles instruction number 1 in the case of Carter v. Baldwin, supra, as to indicate that the instruction in the latter case was used as a form or model for the instruction in the case at bar. While the instructions in the Carter case were discussed but slightly, yet, it appears from the facts stated by the court in that case that the question of assurance was in the case to the extent only of relieving plaintiff from the effect of contributory negligence or assumed risks and was not the essence of the actionable negligence as in the case at bar. The same is true as to the question of assurance in the other cases cited by respondent. There is quite a difference between the situation involved in the cases cited by respondent and the case at bar and the distinction is important. In the line of cases relied upon [369] by respondent as above stated the matter of assurance was involved and relied upon to the extent only of relieving plaintiff from the effects of contributory negligence or assumed risks, but in the case at bar the primary function of the matter of assurance is to supply the ground or basis of defendant's actionable negligence. It therefore becomes apparent that the authorities relied upon are so different in their fundamental facts as to afford no authority for the correctness of plaintiff's instruction number 1 under the rather peculiar situation involved in the case at bar. It follows that the giving of said instruction constituted error. Neither can we say that the defect in instruction number 1 was cured by the giving of plaintiff's instruction number 3 which undertakes to set forth what facts would constitute a negligent assurance, etc. The terms, "negligent assurance" or that the "assurance was negligently given," are not contained in instruction number 1, and it could not be said that a definition of those terms would make clear the meaning of instruction number 1 which did not contain such terms. Furthermore, even though instruction number 1 had contained those terms, all the facts constituting the actionable negligence should be required to be found by this instruction which attempted to cover the entire ground of actionable negligence. Instruction number 3 was not an attempt to define, as is usually done, such abstract terms as "negligence" or "carelessness" but it was an attempt to supply facts which should have been required to have been found by the main instruction and when incorporated in the separate instruction would serve to confuse rather than to aid the jury.

Instruction number 2 is subject to criticism in that it fails to require the jury to find that plaintiff relied upon the assurance of safety. See instruction covering [370] same proposition in case of Swearingen v. Consolidated Troup Min. Co. 212 Mo. l. c. 537, 111 S. W. 545.

There was no error in the giving of instructions 4 and 5. It is true that instruction 5 assumes plaintiff's suffering, injury and loss of time which would make the instruction vulnerable had there been a contested issue in the trial court as to whether plaintiff in fact did sustain injury and suffer pain and loss of time. But where, as here, the fact of his being injured, etc., is not questioned or disputed the defect in the instruction becomes unimportant.

III. Plaintiff was permitted to prove that the injuries he received resulted in impotency. Defendant objected to the introduction of this evidence on the ground the petition failed to allege that impotency resulted from the injuries received. The court overruled the objection and defendant saved an exception. The admission of this evidence is assigned as error. The petition describes the injuries and results in the following language: "His body was severely and permanently wounded, bruised, contused, torn and mangled both internally and externally, and that the bones, flesh and ligaments of his hips, pelvis, legs and ankle were broken, bruised, torn and mangled, and that he suffered great bodily and mental pain and anguish as the result of said injuries aforesaid, and was confined to his bed and room, by reason thereof, for a long period of time, to-wit, the period of about thirteen weeks; that by reason of said injuries he was disabled and prevented from attending to his business affairs and interests or doing anything whatever towards gaining a livelihood from the date of said injury to the present time, and is and was, as a result of said injuries, permanently injured and crippled for life, that ever since said injuries and as a result thereof and by [371] reason of said injuries he has suffered, does suffer and will continue to suffer for the remainder of his life, great bodily pain, annoyance, inconvenience and expense."

It will be noticed that the petition fails to specifically allege impotency, neither does it contain an allegation of a general nature which might be said to embrace within its terms the condition of impotency. It is true that impotency might result from the injuries described, so might paralysis and many other diseases or conditions, but it cannot be said that impotency would *necessarily* result from the injuries detailed or described. If a condition or disease necessarily results or

follows an injury there could be no valid reason for requiring the same to be specifically pleaded, because it would be presumed that the defendant would know, or at least be expected to discover before trial, those results or conditions which are necessarily produced by the injury alleged. Under such circumstances defendant would have ample opportunity to inquire into and to investigate the conditions so resulting and thereby be enabled to come to the trial of the cause fully prepared to present to the triers of the facts such defense as the results of his investigation might warrant. But where the condition or result is not a necessary result, how can the defendant be apprised of such issue unless the plaintiff (who certainly has full information on the subject) be required to state such result or condition in his petition? If plaintiff is not required to so plead, then, in effect, he is given license to ambush defendant in the trial contest by springing an issue as to special damages which the defendant could not have foreseen. And where the petition is such as in the case at bar, defendant could not have aided the situation by filing a motion to make more specific, because the petition contains no general terms which would by being made more specific uncover [372] the hidden secret that impotency resulted from the injuries.

"General damages are those which necessarily and by implication of law result from the act or default complained of. . . . Special damages as contradistinguished from general damages have been defined as those which are the natural but not the necessary result of the act complained of." [8 Am. & Eng. Enc. of Law (2d ed.) 542–3; Brown v. Hannibal, etc. R. Co. 99 Mo. 310, 12 S. W. 655; Nicholson v. Rogers, 129 Mo. 136, 31 S. W. 260.]

"Special damages, which are the natural but not necessary result of the injury complained of, must be specifically alleged. Such injuries do not necessarily result from the defendant's wrongful act, but flow from it as a natural and proximate consequence; hence they must be specially alleged in order that the defendant may have notice thereof and be prepared to meet the same upon the trial." [5 Enc. Pl. & Pr. 719, and numerous cases therein cited; Brown v. Railroad, supra; Nicholson v. Rogers, supra; Bliss on Code Pleading (3 ed.) par. 297a, 297b; 13 Cyc. 176.]

The rule above announced seems to be in conflict with what is said on that subject in the case of Gurley v. Missouri Pac. R. Co. 122 Mo. 141, 26 S. W. 953, and the majority opinion in the case of Moore v. St. Louis Transit Co. 226 Mo. 689, 126 S. W. 1013. The exact point raised in the Gurley case is not disclosed with sufficient clearness to enable us to determine whether it in fact conflicts with the conclusions herein announced; but the Moore case, at least in a part of the discussion of the subject and in the result reached on the point, is in conflict with the rule which is herein announced. After a careful review of the authorities, we have come to the conclusion that those cases, in so far as they conflict with the conclusion herein reached, should be no longer followed.

Upon a careful consideration of the subject and review of the authorities we have come to the conclusion that the correct rule, the rule which has for its [373] support the sounder logic and which while it works no unjust hardship upon the pleader yet undoubtedly bespeaks justice and greater fairness for the trial conflict, is stated by Graves, J., in his dissenting opinion in the case of Moore v. St. Louis Transit Co. 226 Mo. 1. c. 710, as follows:

"It is a well known fact that from certain kinds of physical injuries, certain results will thereafter inevitably follow. In other words, that such injuries will naturally produce certain conditions and diseases. In such case an allegation in the petition of the injury inflicted would justify proof of such conditions and diseases as would of necessity follow the injury and as to such conditions and diseases the defendant must come prepared to defend. But, on the other hand, there are other physical injuries which may or may not produce resulting conditions or diseases. For instance, an injury to the lung might superinduce pneumonia, but not necessarily so. An injury to the nervous system might produce blindness, but not necessarily so. These conditions or diseases last mentioned may as readily come from other causes as from the physical injury or injuries. In such case the petition should be specific, to the end that the defendant could come prepared to meet the issues and show that the condition or disease was not caused by the physical injury. This he cannot do if the unpleaded conditions or diseases are sprung upon him for the first time at the trial."

It therefore follows that the allegations of the petition were not sufficient to justify the admission of proof of impotency and the court erred in admitting such evidence over defendant's objection and exception. [Campbell v. Cook, 86 Tex. 630, 26 S. W. 486, 40 Am. St. Rep. 878; Jones v. Niagara Junction R. Co. 63 App. Div. 607, 71 N. Y. S. 647; Missouri, etc. R. Co. v. Cook, 8 Tex. Civ. App. 376, 27 S. W. 769; Page v. Delaware, etc. Canal Co. 76 App. Div. 160.]

[374] By reason of the result reached, it becomes unnecessary to discuss the question raised by appellant as to the excessiveness of the verdict.

The judgment is reversed and the cause remanded. Roy, C., concurs.

PER CURIAM.—By reason of the fact that paragraph III of the foregoing opinion conflicted with the majority opinion of the Court in Banc in the case of Moore v. Transit Company, supra, this cause was transferred to Court in Banc for final determination, and in Banc the opinion of Williams, C., was adopted, Lamm, C. J., and Woolson, J., dissenting.

NOTE.

Necessity That Impotency Be Pleaded Specially in Action for Personal Injuries.

Generally.

The necessity of pleading impotency specially in an action for damages for personal injuries has been passed on by the courts, as a general proposition, in only a few instances. There are, however, other decisions which rule on the admissibility of evidence of impotency, as an element of damage, under a particular pleading presented. Those decisions are reviewed infra in the subdivision *Specific Instances.*

The rule laid down in the reported case that unless impotency or the loss of sexual power is necessarily the result of the injuries detailed or described, it must be alleged specifically in order that it may be proven as an element of damage finds direct support in the following decisions. Jones v. Niagara Junction R. Co. 63 App. Div. 607, 71 N. Y. S. 647; Page v. Delaware, etc. Canal Co. 76 App. Div. 160, 12 N. Y. Ann. Cas. 18, 78 N. Y. S. 454; Johnson v. St. Louis, etc. R. Co. (Mo.) 178 S. W. 239 (following reported case); Campbell v. Cook, 86 Tex. 630, 26 S. W. 486, 40 Am. St. Rep. 878; Missouri, etc. R. Co. v. Cook, 8 Tex. Civ. App. 376, 27 S. W. 769. *Compare* Moore v. St. Louis Transit Co. 226 Mo. 689, 126 S. W. 1013 (disapproved in reported case). In Page v. Delaware, etc. Canal Co. supra, an action for personal injuries, evidence of the fact of an injury to the plaintiff's sexual organs was admitted at the trial over the defendant's objection that the injury was not specified in the pleading. The court quoted the following rule from an early case: "When a plaintiff alleges that his person has been injured and proves the allegation, the law implies damages, and he may recover such as necessarily and immediately flow from the injury . . . under a general allegation that damages were sustained; but if he seeks to recover damages for consequences which do not necessarily and immediately flow from the injury, . . . he must allege the special damages which he seeks to recover." Applying that rule it was said: "Within this rule of law it seems clear that an injury to the plaintiff's sexual organs was not one of the injuries specified in the complaint as caused by the accident, nor was it one of those injuries which necessarily and immediately flow from any injury alleged. The learned trial judge admitted the evidence upon condition that it should thereafter be made to appear that such affection resulted from the injuries sustained; but this holding did not satisfy the rule of law that unless such affection be a consequence which necessarily and immediately results from the injury pleaded, it requires special allegation in the pleading to authorize proof thereof." In Campbell v. Cook, 86 Tex. 630, 26 S. W. 486, 40 Am. St. Rep. 878, the court said: "At the trial the court permitted the plaintiff, over the defendant's objections, to testify, that 'his capacity to have sexual intercourse with his wife was greatly impaired;' to which the defendant objected, 'because there was no allegation in the petition which would authorize the admission of such evidence, and because the petition does not claim such damages.' It is well settled in this state, that a general allegation of damages will let in evidence of such damages as naturally and necessarily result from the wrongs charged; but to admit proof of damages which do not necessarily result from the injury alleged, the petition must set up the particular effects claimed to have followed the injury. . . . The object of pleading is to notify the opposite party of what it is expected to prove on the trial. In this case there was no injury alleged to have been inflicted upon any organ or member of the body from which such 'impairment' would naturally not to say necessarily, follow. The court erred in admitting the evidence." In Jones v. Niagara Junction R. Co. 63 App. Div. 607, 71 N. Y. S. 647, the allegation of the complaint was that the plaintiff was injured in his "back, sides, shoulder and internally, shocking his system and wrenching and straining his body, injuring his spinal column and spinal cord, then and there causing him great pain and suffering which still continues, and causing the plaintiff to take to his bed and preventing him from following his usual occupation." While on the stand evidence was given by the plaintiff without objection to the effect, inter alia, that he was unable to perform any sexual act. This evidence was given in response to questions addressed to the particular fact and was not objected to by the defendant, nor was there any dispute that the alleged condition existed. Afterwards the plaintiff's wife was put on the stand and was asked whether the plaintiff had had any sexual intercourse

with her since the accident. That question was objected to on the ground that it was incompetent, immaterial and not within the pleadings. The objection was overruled and the defendant excepted. The defendant afterwards moved to strike out the testimony in that regard and that motion was also denied. Subsequently the defendant asked the court to charge the jury that they should disregard the evidence given by the plaintiff as to his inability to talk and laugh and as to his loss of sexual power, which the court refused to do. The court was then requested to charge that as the evidence stood there was no evidence showing that the plaintiff had sustained any loss of sexual power, which the court also refused. He was then asked to charge the jury that they were not to allow any sum whatever as damages by reason of any claim of loss of sexual power on the part of the plaintiff, and to this request the court acceded and directed the jury that there was no claim made by the plaintiff in that regard, his only claim being that his loss of sexual power was a symptom, or evidence, that he had in fact received the injury for which he did claim damages. He was further asked to charge that the jury were to allow damages for only so much of his injury as this was a symptom of, and not for the symptom itself, and in response the court charged that they were not to allow any damages for the loss of sexual power. The court said: "In all of these rulings we are of the opinion that no error was committed. It is quite true that under the pleadings no claim was made for damages because of the loss of sexual power, and it would have been improper to allow any damages to the plaintiff in that respect. . . . But they were expressly told that they could not allow any damages on that account, and, so far as that ruling was concerned, no objection was made to it, and it was manifestly proper. The only way the question is raised is by the objection taken to the ruling permitting the plaintiff's wife to testify to the fact of the loss of sexual power. The plaintiff claims that this evidence was competent as proof of a symptom indicating the extent of the injury to the plaintiff's back. We do not agree with that contention, and if the proper objection had been made to the reception of the evidence in the first instance, that it was incompetent under the pleadings, we are inclined to think that it could not properly have been received for the purpose for which the plaintiff offered it."

However, where impotency is the direct and proximate result of the injury inflicted, evidence of that fact is admissible although the complaint does not in terms specify impotency. Thus in Denver, etc. R. Co. v. Harris, 122 U. S. 597, 7 S. Ct. 1283, 30 U. S. (L. ed.) 1146, the court said: "One of the consequences of the wound received by the plaintiff at the hands of the defendant's servants was the loss of the power to have offspring—a loss resulting directly and proximately from the nature of the wound. Evidence of this fact was, therefore, admissible, although the declaration does not, in terms, specify such loss as one of the results of the wound. The court very properly instructed the jury that such impotency, if caused by the defendant's wrong, might be considered in estimating any compensatory damages to which the plaintiff might be found, under all the evidence, to be entitled." And in Morfield v. Weidner (Neb.) 154 N. W. 860, the rule laid down in the foregoing case was approved and applied where it appeared that the action was instituted to recover for an assault and there was evidence of the fact that the defendant had administered a severe kick in the plaintiff's private parts. See to the same effect, Missouri, etc. R. Co. v. Smith (Tex.) 172 S. W. 750.

Specific Instances.

In each of the following cases evidence of impotency or loss of sexual power was held to be inadmissible under the particular pleadings presented, the cases being closely allied in principle to those maintaining the general rule stated supra. In Missouri, etc. R. Co. v. Cook, 8 Tex. Civ. App. 376, 27 S. W. 769, it appeared that the allegations of injury were that "the plaintiff was wounded, skinned, and bruised; was greatly shocked and injured in his head, chest, lungs, back, spine, and limbs, and had his nervous system seriously impaired, and thereby sustained serious external and internal injuries." At the trial, the court, over the objection of the defendant, permitted the plaintiff to testify that his genital and urinary organs were impaired. The court held that the admission of such evidence was reversible error and said: "These allegations are general, and, as has often been decided in this state, will admit proof of such injuries as are the natural and necessary result of wrong complained of; as upon an allegation that plaintiff was cut, bruised, and wounded internally and externally about his hip and spine, evidence of physical pain and mental suffering was held to be admissible. . . . But the damages of a special character to be proved must be alleged." In Johnson v. St. Louis, etc. R. Co. (Mo.) 178 S. W. 239, the rule laid down in the reported case was specifically followed and approved. The petition alleged with respect to the plaintiff's injuries and the results flowing therefrom as follows: "That he was thrown violently across the arms of the seat from which he had arisen,

his back striking the upright or corners of said seat about the coupling of the back, and a little to the left of the spine, thus and thereby bruising and permanently injuring his back and spinal column; that his head and neck were thrown violently back over and against the top of two seats which were turned together, thus and thereby greatly bruising plaintiff's head and neck and the muscles thereof, and permanently injuring his neck and head and the muscles thereof, and that in undertaking to catch himself and protect himself from the fall aforesaid his left hand was thrown violently against a seat in said train, bruising and spraining and dislocating the joints of his left thumb; that the blow or lick on the left of the spine and near the coupling of the plaintiff's back and the blow or lick on plaintiff's neck and head when his neck and head were thrown back over the tops of said seats, as aforesaid, caused plaintiff's left side to be partially paralyzed and has impaired permanently the sight of plaintiff's left eye, and has permanently injured plaintiff's nervous system; that the blow or lick near the spine or coupling of plaintiff's back, as aforesaid, caused plaintiff to partially lose the use of his right side; that the blow or fall as aforesaid near the coupling of plaintiff's back has permanently disordered plaintiff's kidneys and liver and other vital organs, and the bruise near the spine or at or near the coupling of plaintiff's back, together with the other injuries received, has caused plaintiff to become affected and afflicted with lumbago, and vertigo and paralysis; and plaintiff states that his back and spine are permanently injured, and that his left eye and vision is permanently injured, and that because of the paralysis produced as aforesaid his left leg and arm are permanently injured, and he has partially lost the use of the same." The court said: "The petition does not allege, either directly or indirectly, specifically or generally, that impotency resulted from the injuries alleged to have been sustained by plaintiff, and it cannot be said that impotency would necessarily result from the injuries which the petition alleges that plaintiff received. Plaintiff's own physician testified that impotency was not a necessary result of such injuries, though it might follow therefrom."

However, in each of the following cases evidence of a similar character was admitted under the averments of the complaint presented to the court. In Missouri, etc. R. Co. v. Smith (Tex.) 172 S. W. 750, the court held that the evidence of the plaintiff and his wife that as a result of the injuries that he had received, he was rendered impotent and incapable of sexual intercourse was properly received under a complaint which averred inter alia that the injuries he suffered had caused "progressive degenerative diseases of the spinal cord to set in" and had "set up a degenerative process and condition in the plaintiff's brain and other organs, causing plaintiff to have, among other afflictions and troubles, a partial paralysis of his left side," and further, that the "injuries among other things have caused a degeneration of the central nervous system to the impairment of his mental capacity," etc. The court said: "No effort was made by exceptions interposed to the petition to have appellee to specify the 'other organs' than the brain affected, nor the 'other afflictions and troubles' than the paralysis suffered, as charged, because of the 'degenerative process and condition' caused by the injury to the spinal cord, nor to specify the 'other things' beside impairment of his mental capacity, alleged to have been caused by the 'degeneration of the central nervous system.'" It was further pointed out by the court that on the trial one of the physicians had testified that "impotency is one of the natural things to follow an injury of that kind." This testimony was regarded as bringing the evidence of impotency, in the case, at bar, within the rule of a "natural and necessary" result of the injury alleged. In Strauss v. Atlantic Coast Line R. Co. 94 S. Ct. 324, 77 S. E. 1117, an action for damages, the trial resulted in a verdict for the plaintiff and the defendants appealed on several exceptions among which was the following: "That his Honor erred in permitting the plaintiff to testify in response to the following question: 'What effect has it on your powers of manhood, on your sexual powers?' Objection. Mr. Moss: 'We object. That is a particular injury and should be specifically alleged. They have not set that up in the complaint and it is therefore incompetent.' The court: 'Answer the question. They have been materially decreased.' Mr. Moss: 'Will your Honor have our exceptions noted?' Mr. Raysor: 'I will withdraw the question.' We respectfully submit that it is improper to permit a question to be asked and on objection and after it has been answered for counsel to withdraw the question, especially when the jury has heard the answer of the witness." The court said: "The injuries alleged in the complaint were, that 'The plaintiff has suffered grievous and long-continued bodily pain; was and is, and always will be, incapacitated for work . . . has been maimed and permanently injured, and prevented from pursuing any active calling in life, and otherwise hurt.' Not only was the question admissible under the allegations of the complaint, but it would have been admissible under general allegations of injury, in order that the jury might be able to render a proper verdict." In Hoyt v. Metro-

politan St. R. Co. 73 App. Div. 249, 76 N. Y. S. 832 (*affirmed* 175 N. Y. 502, 67 N. E. 1083), it was held that the complaint was sufficient to authorize proof of the fact, inter alia, that plaintiff had suffered loss of sexual power. The court said: "Its averments are nearly identical in language, and entirely so in substance, with the complaint the subject of examination in Ehrgott v. New York, 96 N. Y. 264." The complaint referred to averred that the plaintiff had suffered great bodily injury; that he became, and still continued to be, sick, sore and disabled; that he was obliged to spend large sums in attempting to cure himself, and was prevented for a long time from attending to his business. The court in Hoyt v. Metropolitan St. R. Co. supra, in commenting on the foregoing averments in the case of Ehrgott v. New York, supra, said: "These allegations are sufficient to authorize proof of any bodily injury resulting from the accident, and if the defendant desired that they should be more definite, it could have moved to have them made more specific, or for a bill of particulars." In Galveston, etc. R. Co. v. Collins, 31 Tex. Civ. App. 70, 71 S. W. 560, the defendant assigned as error the refusal of the trial court to charge the jury to disregard the plaintiff's testimony that he was unable to perform family duty, because the testimony did not contribute any legal basis for the estimation of damages, and because the plaintiff did not show that such disability was the result of the accident, or that previously he was not in the same condition, or that the loss of that power had occasioned any mental pain or suffering. The particular allegation of injury in the complaint does not appear. The court said: "Plaintiff testified that this condition was the effect of his injuries. Dr. Caffery testified that such injuries as plaintiff's impaired this capacity. Appellant cites nothing which holds that such a disability may not be considered in estimating damages. We overrule the assignment." In Postal Telegraph-Cable Co. v. Likes, 225 Ill. 249, 80 N. E. 136, by an amendment to his amended declaration the plaintiff alleged that on account of the injuries received by him he was rendered impotent for the rest of his natural life. He testified that he was in perfect health up to the time he was injured. On his direct examination he was asked by his counsel: "Now, Mr. Likes, how have you been with reference to your virility since the accident?" He replied, "Almost entirely gone." The court said: "The evidence shows that the plaintiff's nervous system was very seriously impaired by reason of the injuries received by him; that he has temporary periods of insanity and has suicidal and homicidal tendencies, and that it will eventually be necessary to confine him in an asylum for the insane. We think that the evidence tended to show that all of the plaintiff's disorders, including loss or impairment of virility, were the result of the injuries received by him November 4, 1901. There was therefore no error in the action of the court in refusing to strike out the testimony of Likes that his virility was almost entirely gone."

Somewhat analogous to the foregoing cases are a number of decisions in actions instituted by women for damages for personal injuries resulting inter alia, in incapacity for sexual intercourse. Thus, in Lake Shore, etc. R. Co. v. Ward, 135 Ill. 511, 26 N. E. 520, the averment was that the plaintiff was knocked down on the ground and thereby bruised, hurt and wounded, and that divers bones of her body were broken, and that she was grievously wounded internally, and became sick, sore, lame and disordered, and had so remained, and that she feared greatly that her said injuries were of such a grievous nature that she might not recover therefrom for a long time and possibly not during the term of her life. The pleading was held to be broad enough to include injuries to the internal reproductive organs and sufficient to admit evidence tending to show that the injuries had produced permanent sterility or incapacity to perform the sexual duties incident to the marriage state. In Dallas v. Jones, 54 S. W. 606 (*reversed* on other grounds 93 Tex. 38, 49 S. W. 577, 53 S. W. 377), evidence to the effect that, as a result of an injury to the spine sustained by the plaintiff, the "violent and excessive exertion connected with the sexual act would throw her into spasms" was held to be admissible although there was no allegation in the plaintiff's petition to support it, but there being evidence by a physician, however, to the effect that the condition could be attributed to nothing but the injury. In Gulf, etc. R. Co. v. Pendery, 14 Tex. Civ. App. 60, 36 S. W. 793, the court said: "The plaintiff . . . without objection on the part of the defendant, testified as follows: 'My wife is in such a condition that she cannot receive the approaches of myself as her husband in the generative relation without pain, and always has been since the time of the accident to the present time.' The effect of this testimony the defendant sought to avoid by submitting to the court special charges . . . the refusal of which is complained of in the . . . assignments of error. These charges were to the effect that the jury, in assessing the plaintiff's damage, would not take into consideration any evidence of mental or physical pain experienced by the wife during sexual intercourse with her husband. It is insisted that the court erred in refusing these special instructions, upon the proposition that the damages thus indicated are not the necessary consequences of the injury, and should not have been submitted to the

jury in the absence of special allegations. The plaintiff's petition alleging injury is as follows: 'Wounding and bruising plaintiff's said wife in the pit of her stomach and in her back, then and there causing her great pain and suffering, and serious internal and permanent injuries, and causing her to suffer in both body and mind, and then and there damaging plaintiff in the sum of fifteen thousand dollars.' The testimony of physicians, witnesses for the plaintiff, . . . is to the effect that one of the 'serious internal and permanent injuries' inflicted upon the plaintiff's wife was the displacement or prolapsus of the right ovary, and that as a result of this condition of the ovary sexual intercourse would be very painful to the woman. It thus appears that the testimony of the husband which the defendant thus indirectly sought to exclude from the consideration of the jury, was within the scope both of the pleadings and of the evidence, which tended, as we have shown, to indicate that the pain testified about was the natural and necessary consequence of the injury inflicted. No exception was taken to the pleading on account of its general character. If the defendant had desired to be advised of the special character of the 'serious internal and permanent injuries' complained of, we think it should have addressed a special exception to the petition calling for specific information in that connection." In Southern Bell Telephone Co. v. Lynch, 95 Ga. 529, 20 S. E. 500, the plaintiff was permitted to testify as follows over the defendant's objection: "I just can't sleep with him and be with him as a wife should be with her husband. I can't stand nothing like that." The court said: "Although the declaration did not specifically allege any injuries to the sexual organs of the plaintiff, there was no error in allowing the plaintiff to testify to such injuries, it appearing that her evidence as to the same was admitted solely for the purpose of throwing light on the general nature of her injuries and her pain and suffering, and that the jury was instructed not to consider the same for any other purpose."

TOWN OF WAITSFIELD
v.
TOWN OF CRAFTSBURY.

Vermont Supreme Court—January 28, 1914.

87 Vt. 406; 89 Atl. 466.

Paupers — Reimbursement of Town Furnishing Aid — Notice.

P. S. 3668, requiring the notice given by a town furnishing aid to a pauper to the town of the pauper's last residence to disclose the condition of the alleged pauper, refers to his pecuniary or financial condition.

Same.

Mere informalities in the notice given to the town of a pauper's residence by a town furnishing assistance, required to be given before commencement of an action, do not vitiate the notice.

Duty to Furnish Aid — Notice to Overseer.

Under P. S. 3665, requiring overseers of the poor to see that indigent persons are suitably supported and relieved at the charge of the town, an overseer of the poor must afford such relief whenever he is informed in any manner that relief is required.

Reimbursement of Town.

The right of a town to be reimbursed by another town for expenditures made in assisting paupers chargeable to such other town must necessarily be governed by arbitrary regulations.

Same.

The notice required by P. S. 3668 (Acts 1892, No. 55), providing that no action shall be commenced by a town furnishing assistance to a pauper until the overseer of the poor has given notice of the pauper's condition to the overseer of the town where he last resided for three years, and until such overseer has neglected to provide for such person for 60 days after such notice, must be in writing

Same.

The fact that the overseer of the poor of a town sought to be charged with supplies furnishing a pauper, upon receiving notice from plaintiff town, visited the pauper's family, and ascertained their financial condition, and conferred with the overseer of plaintiff town as to their condition, would not prevent such town from defending an action by plaintiff to recover for assistance furnished the pauper on the ground of the insufficiency of the notice given pursuant to P. S. 3668.

Same.

The fact that, after notice was given by plaintiff town to defendant town of the furnishing of supplies to a pauper from defendant town, the overseer of the poor, in refusing to pay for supplies, placed his refusal upon the ground that he did not consider such person a pauper would not prevent defendant from defending an action to recover for such supplies on the ground of the insufficiency of the notice prescribed by P. S. 3668.

Overseer of Poor — Powers.

Since the function of relieving the poor is governmental in its nature, the overseer of the poor is a public officer rather than a general agent of the town, and hence cannot by his conduct relieve a town from liability for relief of the poor under the ordinary rules as to waiver of rights by the conduct of an agent.

Who Is "Poor Person."

The fact that a person owned a horse and cow did not conclusively show that he was

not a "poor person" in need of assistance from a town within the pauper laws.

[See note at end of this case.]

Exceptions from Washington County Court: STANTON, Judge.

Action to recover money expended in support of pauper. Town of Waitsfield, plaintiff, and Town of Craftsbury, defendant. Judgment for defendant. Plaintiff alleges exceptions. The facts are stated in the opinion. AFFIRMED.

F. L. Laird and *Burton E. Bailey* for plaintiff.

Horace F. Graham and *Benjamin Gates* for defendant.

[407] HASELTON, J.—This is assumpsit under the pauper law to recover for money expended in the support of one Jerry Doying and his family. At the close of the plaintiff's evidence a verdict was directed for the defendant town. The plaintiff excepted.

[408] March 10, 1910, the overseer of the town of Waitsfield sent to the overseer of the town of Craftsbury the following notice, duly dated, directed and signed: "There is a man in our town by the name of Jerry Doying. He claims to have a residence in Craftsbury. His wife is sick and he has called on us for aid. At the present time we have to furnish a physician, keep the family in provisions and also a woman to care for Mrs. Doying. He has lived in this town nearly three years and has never been helped by the town until within a few days. Would be glad to hear from you in regard to this matter."

The first question is as to the sufficiency of this notice.

The notice, to be given within thirty days from the time of the application to a town for assistance, and before suit is brought, is required to disclose the condition of the alleged pauper. P. S. 3668. And the condition referred to is pecuniary or financial. Barnet v. Plainfield, 82 Vt. 263, 73 Atl. 579; Mt. Holly v. Peru, 72 Vt. 68, 47 Atl. 103; Essex v. Jericho, 76 Vt. 104, 56 Atl. 493; Randolph v. Roxbury, 70 Vt. 175, 40 Atl. 49.

In this notice there is nothing that relates to the financial condition of Doying, unless it is the statement of the things the plaintiff has to do for him. It is argued in substance that the verb "have" imports obligation, and that the plaintiff could have been under no obligation to assist Doying unless he was poor and in need of assistance. But at most the notice states merely the overseer's view of the town's obligation and such statement is not enough. It is very much like a statement that a town has been called on for assistance which is immaterial and insufficient for it does not show the need of assistance but only some one's view of it.

There are no equities between towns in such matters, but by an arbitrary rule the statute throws the burden of supporting a poor person in need of assistance ultimately upon the town in which such person last resided for three full years supporting himself and family provided the required notice is given. Mere informalities in the notice do not matter. But the notice in question is lacking in substance.

The law is solicitous and imperative that poor persons in any town, in need of assistance shall be relieved by such town, and the duty of its overseer to afford relief arises and becomes ineludible whenever he receives information however conveyed that relief is required. P. S. 3665; Weston v. Wallingford, 52 [409] Vt. 630; Walden v. Cabot, 25 Vt. 522; Springfield v. Chester, 68 Vt. 294, 296, 35 Atl. 322.

But the right of such town to be reimbursed for its expenditures by some other town must necessarily be governed by arbitrary regulations. Morristown v. Hardwick, 81 Vt. 31, 69 Alt. 152; Craftsbury v. Greensboro, 66 Vt. 585, 594, 29 Atl. 1024; Worcester v. East Montpelier, 61 Vt. 139, 17 Atl. 842.

The plaintiff claims that sufficient notice was given the defendant verbally if not in writing, and that verbal notice is just as valid as notice in writing.

But "notice" within the meaning of the statute in question means written notice although the word "written" is not used in the statute. This result follows from the purposes for which the notice is required, and its official character, and accords with the uniform though tacit construction of the statute since the requirement of notice. Acts of 1892, No. 55; P. S. 3668; South Burlington v. Cambridge, 77 Vt. 289, 293, 59 Atl. 1013; Essex v. Jericho, 76 Vt. 104, 56 Atl. 493; Mt. Holly v. Peru, 72 Vt. 68, 47 Atl. 103; Randolph v. Roxbury, 70 Vt. 175, 40 Atl. 49; Barnet v. Plainfield, 82 Vt. 263, 73 Atl. 579.

There was evidence tending to show that upon receiving the notice the overseer of Craftsbury went to Waitsfield, visited the Doying family, ascertained their financial condition and conferred with the overseer of Waitsfield in respect to such condition. But his doings in that respect did not prevent the town of Craftsbury from defending on the ground of the insufficiency of the notice. His conduct amounted at most to an excess of precaution, and did not subject Craftsbury to any liability since Waitsfield lost no right thereby. Danville v. Hartford, 73 Vt. 300, 50 Atl. 1082.

There was also evidence tending to show that several months after the notice was

given the overseer of Craftsbury in refusing to pay the bills presented by Waitsfield put his refusal upon the ground that he did not consider that Doying was a pauper and not upon the ground of the insufficiency of the notice which he said he considered all right. But the statute makes the giving of the required notice a prerequisite to the bringing of an action and the overseer of the poor of the town has not authority to waive any of the town's defences to an action.

[410] The function of relieving the poor is properly governmental in its character and the overseer of the poor is not a general agent of the town but is rather a public officer. Holloway v. Barton, 53 Vt. 300.

So the ordinary principles of agency and waiver by agents do not apply. An overseer of the poor cannot by his conduct relieve one town from liability and charge it upon another. Liability must rest where the statute places it. Chelsea v. Washington, 48 Vt. 610, 614.

The defendant claims as matter of law that Doying was not a poor person in need of assistance within the meaning of the law since as the evidence showed he had a horse and a cow. But this fact was not conclusive of the question. Ripton v. Brandon, 80 Vt. 234, 67 Atl. 541.

The language of this Court in Londonderry v. Acton, 3 Vt. 122; Randolph v. Braintree, 10 Vt. 442; Ludlow v. Weathersfield, 18 Vt. 39, which today seems harsh was in fact humane, for as the law then was a person who could be deemed a pauper was liable to be warned out of the town in which he had long lived and with his family and effects be forcibly removed therefrom perhaps to a town in which he had never lived. Within the meaning of such a law the court held that a man was not a pauper, whatever the circumstances requiring his immediate relief were, if he had any property by the sacrifice of which relief could be obtained. A comprehensive review of cases upon this subject including our own cases above cited is found in a note to the Wisconsin case of Coffeen v. Preble, 142 Wis. 183, 125 N. W. 954, 27 L.R.A.(N.S.) 1079, as reported in 20 Ann. Cas. 753.

In view of all the evidence which is referred to the court below was warranted in saying as it did that the plaintiff's evidence tended to show that Doying was a poor person and in need of assistance, for the evidence tended to show that Mr. Doying was a feeble man who got his living by the work he could do with his horse and that the milk of the cow was necessary to the sustenance of the children.

The verdict for the defendant town was, however, properly directed upon the ground of the insufficiency of the notice to it given by the town furnishing the assistance.

Judgment affirmed.

NOTE.

Who Is Pauper or Poor Person within Poor Laws.

It is the purpose of this note to review the recent cases discussing who is a pauper or poor person within poor laws. The earlier cases on this point are collected in the note to Coffeen v. Preble, 20 Ann. Cas. 753.

"The term 'pauper' has a distinct and well-defined meaning in our law. It is used to designate those persons whose support imposes a burden upon the public treasury. One may be ever so destitute of estate or ability to earn a livelihood, and yet not be a pauper. He may be cared for by the voluntary action of friends or relatives. The duty to care for him may by law be cast upon relatives. He becomes a member of the pauper class only when, other means of support failing, he becomes a public charge." Weeks v. Mansfield, 84 Conn. 544, 80 Atl. 784. "The statute says (Poor Law, § 2): 'A "poor person" is one unable to maintain himself.' It is common knowledge who the ordinary 'poor persons' are. They are those without property, without habits of industry or thrift, improvident, usually physically or mentally deficient, who are unable through efforts of their own to gain a livelihood. They are constantly seeking, and generally receive at somewhat regular intervals, public charity or assistance; they have a practically constant status as 'poor persons;' they are not able to maintain themselves for any long period of time under even ordinary conditions." Tompkins County v. Ontario County, 92 Misc. 272, 156 N. Y. S. 335.

In Beaver Tp. v. Centre Tp. 23 Pa. Dist. 123, it was held that a man sixty-three years old, weak-minded, unable to work and earn a livelihood, and destitute, was a pauper.

In Amazeen v. Newcastle, 76 N. H. 250, 81 Atl. 1079, it was said that an application to a town to take the applicant's property and furnish him with support "was practically an application for aid as a poor person."

In Clark v. Walten, 137 Ga. 277, 73 S. E. 392, it was said: "One having a parent or child able to support him is not under our law . . . a 'pauper.'"

A person smitten by sudden illness or calamity and without property is a pauper. Tompkins County v. Ontario County, 156 N. Y. S. 338, wherein it was said: "It is common knowledge who the ordinary 'poor persons' are. They are those without property, without habits of industry or thrift, improvident, usually physically or mentally de-

ficient, who are unable through efforts of their own to gain a livelihood. There are yet others who from illness or misfortune, or from some unusual condition, are unable temporarily to maintain themselves. To this latter class the man Coakley apparently belonged. Under ordinary circumstances he was industrious, and, while not accumulating property, had been able to maintain himself all his lifetime until overtaken by illness in April, 1914. Without a home, and without friends who would have given him the care that a person would ordinarily receive under such circumstances, and being among strangers, he was of necessity assisted by the public authorities. In two weeks' time he was apparently again supporting himself by his own industry, and continued to do so for several months. During this time he received no aid from the poor authorities. Was he from the middle of April until the early part of November a 'poor person' within the definition of the statute? When he left Ontario county with money for Auburn, and went from there, still with money, to Groton, was he a 'poor person' straying from one county into another? I think not. It seems to me that with poor persons of this class the 'taint' does not cling to them after the acquirement of property, accumulated either by industry, or by gift or devise. It seems to me that, when one who has received public aid under circumstances out of the ordinary becomes able by his own industry for a considerable period of time to maintain himself, he ceases to be a 'poor person.' There must be some cause besides the mere lapse of time which removes an able-bodied, industrious man from the class of 'poor person.' If Coakley desired to go to a new locality to seek employment in a shop during the winter, rather than remain working on a farm or with a hay press, he had the same right to change his residence as any other industrious, self-sustaining citizen. I conclude, therefore, that when Coakley came into the town of Groton in November, 1914, having then been employed and self-sustaining for several months and arriving there with a ticket paid for by himself, and with some money, and with prospects of employment where he had theretofore been employed, he was not a 'poor person,' and that he became so only when he was again overtaken by misfortune and became ill, and that then the same duty devolved upon Tompkins county to care for him in this emergency as had devolved upon the county of Ontario on the occasion of his previous misfortune in April. He was entitled under section 42 of the Poor Law to be supported by Tompkins county, where he then was; he not having a settlement in any city or town, and not being a 'poor person' straying from one county to another."

In Maine the statute expressly provides that "persons who become needy and are assisted with necessary food, medicine, etc. while in quarantine on account of a contagious disease, shall not 'be considered a pauper.'" Lesieur v. Rumford, 113 Me. 317, 93 Atl. 838.

In Clark v. Walton, 137 Ga. 277, 73 S. E. 392, it was held that an "indigent pensioner" was not a pauper within a constitutional provision authorizing the General Assembly to delegate to the county authorities the right to levy a tax "to support paupers." The court said: "The mere fact of a Confederate soldier being rightfully on the roll of indigent pensioners would not of itself place him among the county poor entitled to support as a pauper. This is more clearly shown by a consideration of the provisions of another section of the Code relating to paupers who are chargeable to the county, under the provisions of which parent and children are bound to support each other; and if a person had a parent or a child who was able to support him, he was not chargeable to the county. . . . But it could not be contended that a Confederate soldier who, from age and poverty, or infirmity and poverty, or blindness and poverty, is unable to provide a living for himself would not be entitled to a place on the roll of indigent pensioners, although he had a parent or child able and willing to support him."

It seems that a presumption arises in favor of the decision of poor officers as to the necessity for extending aid to a person in need. Bishop v. Hermon, 111 Me. 58, 88 Atl. 86; See also Case v. Davis County, 150 Ia. 552, 129 N. W. 804; Matter of Chamberlain, 73 Misc. 256, 132 N. Y. S. 681. In the case last cited, the court in discussing the presumption attending the action of an overseer of the poor in rendering assistance said: "In giving relief to the above poor persons, the overseer of the poor of the town of Springfield evidently used his judgment and discretion. This being so, and he having rendered assistance, a presumption arises that such overseer investigated the circumstances of these poor persons and determined that they were entitled to relief as poor persons. If they were not such poor persons as defined by statute, this would make them so. . . . The question of the propriety of giving relief is confined to the discretion of the poor authorities; and, if they grant the relief asked, it is presumed that they have made such investigation as they deemed necessary and have determined the right of the party examined to such relief. While it is possible this presumption may have been overcome by evidence introduced in behalf of the town of Roseboom, no such evidence appears in the

facts as submitted; and this presumption must, therefore, stand in favor of the town of Springfield."

PEOPLE EX REL. AGNEW

v.

GRAHAM ET AL.

Illinois Supreme Court—April 22, 1915.

267 Ill. 426; 108 N. E. 699.

Elections — Election Districts in Municipality.

Cities and Villages Act, art. 4, § 3 (Hurd's Rev. St. 1913, c. 24, § 50), declares that all persons entitled to vote at any general election for state officers within any city or village, having resided therein 30 days, may vote at any election for city or village officers. Section 4 (section 51) authorizes the counsel to divide the city into wards and provides for the election of one alderman from each ward. Section 9 (section 56) requires the council to designate the place in which elections shall be held, while section 10 (section 57) provides that the manner of conducting elections and voting thereat shall be the same as in case of the election of county officers. Const. art. 7, § 1, declares that every person having resided within the state one year, in the county 90 days, and in the election district 30 days shall be entitled to vote, while General Election Law, § 65 (Hurd's Rev. St. 1913, c. 46), follows the wording of the Constitution. It is held that, as the words "precinct" and "district" are frequently used interchangeably, ward lines must be considered in forming election districts within a city, for otherwise it would be impossible to elect aldermen.

Election at Single Polling Place — Validity.

By ordinance it was provided that the ballot box for elections in a city divided into three wards should contain three compartments, one for each ward, and that the ballots of the voters of the several wards should be deposited in the proper compartment. The whole city was treated as one precinct, the only voting place being within the Third ward, but only across the street from the other two wards. It is held, that as the statutes and constitution, while contemplating the ward lines should be taken into consideration in fixing the boundaries of the election precincts, did not expressly provide that voters must cast their ballot in the ward or precinct in which they resided, they will be construed as directory instead of mandatory or essential, and hence the election is not void where it did not appear that any voters were prevented from exercising their rights.

[See note at end of this case.]

Statutes — Directory or Mandatory.

In determining whether statutes are mandatory or directory the legislative intent governs.

Elections — Acts of De Facto Judges.

Where election judges were good de facto officers, the result is not invalidated because they were not all residents of the precinct where the ballots were cast.

Error to Appellate Court, Second District.

Quo warranto proceeding. Charles Agnew, relator, and Edward Graham, et al., respondents. Judgment for respondents in Circuit Court, La Salle County: DAVIS, Judge. Judgment affirmed by Appellate Court. Relator brings error. The facts are stated in the opinion. AFFIRMED.

L. B. Olmstead, Butters & Clark and *George S. Wiley* for plaintiff in error.

Faissler, Fulton & Roberts and *Browne & Wiley* for defendants in error.

[427] CARTER, J.—This proceeding was commenced in the circuit court of LaSalle county October 4, 1912, by the State's attorney filing with leave of court, in the name of the People, on the relation of Charles Agnew, an information against Edward Graham, F. E. Blakeslee and P. J. Cruise, requiring them to show by what warrant they respectively exercised the offices of mayor of Earlville and aldermen of said city and the offices of president and secretary and member of the board of local improvements of said city, which offices, the information alleged, they had and still usurped. Respondents set up, by plea, their title to their respective offices. A demurrer thereto having been overruled, plaintiff in error elected to abide thereby and judgment was entered in favor of respondents. A writ of error was sued out from the Appellate Court for the Second District, and that court affirmed the judgment. The case has been brought to this court by petition for *certiorari*.

From the petition and plea it appears that the city of Earlville was organized under the general City and Village act on February 5, 1887, and about two months thereafter, by ordinance, it was divided into three wards, the boundaries of which it is unnecessary to state here. The same day an ordinance was passed providing that the city council should appoint three judges of election, one from each of the three wards, and one or more clerks, who should conduct all the city elections until their successors were selected; that the elections in said city should be held at a place therein to be designated by the city council in a notice published by the city clerk twenty days before the election; [428] that a ballot-box should be prepared with three apartments, lettered "First Ward,"

"Second Ward" and Third Ward," respectively, and that the ballot of each voter should be deposited in the apartment designated for the ward in which he resided, otherwise such ballot should not be counted for alderman. It further appears that the said last mentioned ordinance remained in full force from 1887 to the time of the hearing of this cause and had never been repealed or amended, and that said city of Earlville had conducted and held all elections from and after its organization in conformity with said ordinance. From the plea it further appears that in the spring of 1911 a primary, and thereafter an election, were duly called, due notice thereof given and the same duly held, and that the respondents became candidates for the respective offices and all necessary steps were taken to place their names on the primary ballot and on the official ballot in the election; and they were fully qualified in every respect to be candidates and to hold the said offices, and that they were each duly nominated and elected, Graham for mayor and Cruise and Blakeslee for aldermen of the first and second wards, respectively, and that the election was held according to law and the returns canvassed and declared, and they duly qualified and entered upon said offices, and thereby, under the law, became members of the board of local improvements and were at the time of filing said plea occupying said offices; that said primary and said election of 1911 were held at the city hall in the city of Earlville, which was the place designated by the city council and had been the place of holding elections in said city for twenty years last past; that the ballot-box contained three compartments, and that all those voting at the election were legally qualified voters in the ward designated on the compartment in which their ballots were deposited and that each judge of election possessed the qualifications required by law. The plea further alleged "that there was a large vote cast at said election and a fair expression [429] of the will of the voters of said city; that no one entitled to vote was deprived of his right to do so by reason of the polling place being situated as aforesaid, and that the said election was conducted in all respects in the same manner as has been the custom and practice in said city for more than twenty years and as provided for by the general ordinances of said city; that said city hall is centrally and conveniently located for holding such elections," etc. It further appears from the plea that the city hall was located not more than sixty feet distant from the boundary lines of both the first and second wards of said city, being located in the southeast corner of the third ward, directly north of Winthrop street, the northern boundary of the first ward, and directly west of Ottawa street, the western boundary of the second ward.

The first question necessary to be considered is whether the ward lines must be taken into consideration in fixing the boundaries of the precinct or voting district. The words "precinct" and "district" are frequently used interchangeably and with the same meaning in the various statutes of this State. (People v. Markiewicz, 225 Ill. 563, 80 N. E. 256.) Section 3 of article 4 of the Cities and Villages act provides that "all persons entitled to vote at any general election for State officers within any city or village, having resided therein thirty days next preceding thereto, may vote at any election for city or village officers." (Hurd's Stat. 1913, p. 268.) If this were the only provision of the law affecting residence and election districts there would be no question, as contended by counsel for defendants in error, that a city, even though divided into wards, could be considered as one election district. Section 4, however, of said article 4 of the Cities and Villages act, provides, among other things, that the city council may divide the city into wards, and that one alderman shall annually be elected from each ward. Section 9 provides that the city council shall designate the place or places in which the [430] election should be held and appoint the judges and clerks, and cause notices to be printed and posted as to the time and place of election twenty days before such election. Section 10 provides that the manner of conducting elections and voting at elections held under this act and contesting the same shall be "the same, as nearly as may be, as in the case of the election of county officers, under the general laws of this State." Section 1 of article 7 of the constitution of 1870 provides that "every person having resided in this State one year, in the county ninety days, and in the election district thirty days next preceding any election therein, . . . shall be entitled to vote at such election." Section 65 of the general Election law follows this wording of the constitution as to the residence of the voter in State, county and election district. (Hurd's State. 1913, p. 1055.)

This court had under consideration a somewhat similar question in Welsh v. Shumway, 232 Ill. 54, 83 N. E. 549, and held that for city elections the city council, and not the county board, should establish the boundaries of the election precincts or districts, as well as name the polling places and the judges and clerks of election, but that in such cities, for city elections, (p. 67), "the ward lines must necessarily be considered in forming election districts." As a practical matter in carrying on and conducting a city election where the city is divided into wards, we do not see how it can be reasonably argued that the ward

lines can be ignored in forming and fixing the boundaries of election districts or precincts, otherwise it would be impossible to elect the aldermen. That this must be so is conceded by counsel for defendants in error, but they argued that under the holding of this court in People v. Markiewicz, supra, the city may be considered one election precinct with a separate polling place in each ward, it being held in the case just referred to that for the purpose of town elections the entire town was considered as one voting precinct as respecting the qualifications of the [431] voters although there might be several polling places in the town. The wording of the statutes as to the conduct of town elections is, as will be seen from the two cases already cited, very different from the wording of the statutes on city elections. The reasoning of the case last referred to as to the conduct of township elections does not apply to the fixing of boundaries of election districts for city elections and the manner of conducting such elections. We see no reason to change the holding in Welsh v. Shumway, supra, that under the law in this State the ward lines must not be crossed in forming the boundary lines of an election district though such ward may be divided into several election districts or precincts, in which case the voter must have resided in the precinct thirty days before the election, in conformity with the constitution and as required by said section 65 of the general Election law.

The principal contention in the briefs is whether the voters of the first and second wards could legally cast their ballots outside of the boundaries of the respective wards in which they resided. This precise question has never been considered or decided in this State although general statements have been made in various decisions which have more or less bearing thereon. In several other jurisdictions the question has been decided, but those decisions cannot be controlling here, except in so far as the reasoning in those cases is in accord with the general principles of our constitution and statutes as construed by this court. A brief review of these principles as set out in some of the numerous decisions in this State bearing on election matters will assist in reaching a correct conclusion on the question now before us.

In People v. Kilduff, 15 Ill. 493, 60 Am. Dec. 769, the court held that the legality of an election did not depend upon the declaration of the board of elections, as required by law; that the authority, rights and powers of elected officers were derived from the election and not from the returns.

[432] In Piatt v. People, 29 Ill. 54, where the law required that the polls should be closed at five o'clock and they were kept open after that hour, it was held that the election would not be declared void on that ground unless it was made to appear that votes were cast after that hour which would change the result; that a mere irregularity in conducting an election which deprived no legal voter of his rights and did not change the result "never has been held to invalidate an election."

In People v. Hilliard, 29 Ill. 413, it appeared that the judges of election were not properly sworn. The canvassing board on that account refused to canvass the returns. This court held that it was the plain duty of the board to do so, and said (p. 425): "The question in all such cases should be, whom did a majority of the qualified voters elect? . . . A literal compliance with prescribed forms is not required in any case if the spirit of the law is not violated."

In People v. Logan County, 63 Ill. 374, it was held that the carelessness or fraud of the judges in not using the registry list as required by law could not be held to deprive the electors of the privileges reserved to them by the constitution and did not invalidate the election.

In Du Page County v. People, 65 Ill. 360, where the law stated positively that an adjournment or recess should not be taken at the noon hour by the judges and clerks of election, the court held that where such an adjournment was taken and no fraud or injury was shown on that account it was no ground for rejecting the entire poll of the township.

In People v. Waite, 70 Ill. 25, an election for school trustees was held at a place not designated in the notices. The relator, who sought to avoid the election for that reason, had participated therein by voting and running as a candidate, and it was held that sound public policy forbade him from having the election of his opponent declared void on that ground.

[433] In Cleland v. Porter, 74 Ill. 76, 24 Am. Rep. 273, the court held that if an election had in other respects been fairly and properly conducted it would not be declared invalid because the judges closed the polls an hour before the time prescribed by law, when it did not appear that any voter offered to vote after the polls were closed or was thereby prevented from voting.

In Dale v. Irwin, 78 Ill. 170, at an election held in Alton it was ordered that one of the polling places should be at Fuch's store. On the date of the election the proprietor of that store forbade the judges and clerks to use it. They therefore repaired to a barber shop on the same side of the street and not more than fifty or one hundred feet away, where the polls were opened, and the election proceeded at this latter place without hindrance, all the voters knowing where the polls

were open, as the place was readily seen from Fuch's store. This change by the judges was held not to invalidate the election.

In Chicago v. People, 80 Ill. 496, where, after notice of election was given stating the places of holding an election to incorporate under the Cities and Villages act, a change was made necessary in several of the wards because the rooms in question could not be procured, and a resolution thereafter was passed by the council changing the places and publishing notice of such changes and the location of the new places before the election, it was held that such changes would not invalidate the election, the court saying (p. 505): "The place of holding an election would seem to be one of the least important of the things pertaining to the notice, especially when the place is not to be fixed by the notice but is fixed by public authority, as in this case, by the legislative body of the city. . . . It would not seem to subserve any important end that the voter should have previous notice, for any length of time, of the place of holding the election." This was held not to invalidate the election, even though notice of the time [434] and place of election was required by law to be given thirty days before and the change was within the thirty days.

In Hodge v. Linn, 100 Ill. 397, it was held that the failure to number the ballots cast at the election, as the law then required, and to count the votes in the manner required by statute and to string the ballots on thread or wire in the order of their reading, did not invalidate the election, where nothing appeared to show an injurious effect or that the votes were not truly counted.

In Simons v. People, 119 Ill. 617, 9 N. E. 220, a certain town was divided into two voting districts by the county board, as required by law for general elections, with a voting place in each. The trustees of schools fixed only one polling place in such town for a school election. In the election notice one polling place was described as at Kuhn's Hall, while the proper authorities had established a polling place at Kuhn's real estate office on election day and the last named place was used. The buildings were not more than two hundred feet apart, in plain sight, with an open space between them. The evidence showed that no one was prevented from voting by not knowing where the voting place was or on account of the place at which the votes were taken, and the election was held legal.

In Behrensmeyer v. Kreitz, 135 Ill. 591, 26 N. E. 704, the election officers, after the close of the polls in a certain precinct, took the ballots to a room up-stairs instead of counting them, as the statute required, where the election was held. This change, as the evidence disclosed, was not from any wrongful intent and did not deprive any legal voter of his right to vote or change the result of the election.

In Ackerman v. Haenck, 147 Ill. 514, 35 N. E. 381, the judges failed to make the proclamation thirty minutes before the polls closed and after the ballots were counted they were not delivered to the township treasurer, as the law required, and there were other irregularities of a similar character. The record did not show that the election officials were [435] actuated by improper motives or that the failure to follow the law changed the result, and the election was held legal.

In People v. Brown, 189 Ill. 619, 60 N. E. 46, the court decided that an election for school trustees held at the time of the regular election for town officers at the town meeting was not void because it did not appear that the place where the election was held had been designated, as the statute required, by the electors at their annual meeting. For at least fifteen years prior to 1895 the annual town meetings and elections were held in that township at a truck-house in the village of Roseville and seem to have been properly called under the statute. The truck-house became unfit for further use and the election of 1896 was held in the opera house, located on the same lot, in plain sight and within one hundred feet of the truck-house. No action was taken by the proper authorities as to changing from the truck-house to the opera house, but the elections had been held at the latter place for several years before the question was raised as to the legality.

In Choisser v. York, 211 Ill. 56, 71 N. E. 540, the testimony showed that on the morning of the election none of the regularly appointed judges appeared and other persons took their places without having been properly selected; that the polling place was established in a room in the court house not opening, as the law required, upon a public thoroughfare; that no register of voters was used, and that some thirty or thirty-five persons prepared ballots outside of the booths, which were counted by the judges. The court held that the election in this precinct was not invalid because the judges were not properly selected or because the polling place was not located upon a public thoroughfare, but held that under the Australian Ballot law the ballots must be marked by the voters in the booths, as required by the provisions of that act.

In People v. Green, 265 Ill. 39, Ann. Cas. 1916A 707, 106 N. E. 54, in an election on the proposition to levy a tax for hard roads, it was contended [436] that the returns had not been canvassed by the proper officials.

The court held that the fact that the returns had, under a misapprehension of the law, been canvassed by officials not designated by law as the canvassing board was not fatal to the tax, as the record showed that the majority of the people voting at the hard roads election were in favor of levying such tax.

These cases severe to illustrate, as well as any decided by this court, the rulings that bear upon the question we are here passing upon. In none of them has the question now before us been squarely before the court, and those cases, therefore, cannot be controlling here. The courts, in discussing questions similar to this, have frequently considered the question as to whether statutes regulating elections were mandatory or directory. A mandatory provision in a statute is one the omission to follow which renders the proceeding to which it relates illegal and void, while a directory provision is one the observance of which is not necessary to the validity of the proceeding. Directory provisions are not intended by the legislature to be disregarded, but where the consequences of not obeying them in every particular are not prescribed the courts must judicially determine them. In doing so they must necessarily consider the importance of the punctilious observance of the provision in question to the object the legislature had in view. If it be essential it is mandatory. (2 Lewis' Sutherland on Stat. Const.—2d ed.—sec. 610.) No universal rule can be given to distinguish between directory and mandatory provisions. The controlling question in this as in all other rules of construction is, what was the intention of the legislature? Whether a statute is mandatory or directory does not depend upon its form but upon the legislative intention, to be ascertained from a consideration of the entire act, its nature, its object and the consequences which would result from construing it one way or the other. (36 Cyc. 1157, and cases cited.) In general, [437] statutes directing the mode of proceeding by public officers are deemed advisory, and strict compliance with their detailed provisions is not considered indispensable to the validity of acts done under them. (Endlich on Interpretation of Statutes, sec. 437.) The terms "mandatory" and "directory" may be convenient to distinguish one class of irregularities in election matters from the other. "But, strictly speaking, all provisions of such laws are mandatory in the sense that they impose the duty of obedience on those who come within its purview, but it does not therefore follow that every slight departure therefrom should taint the whole proceedings with a fatal blemish. Courts justly consider the chief purpose of such laws, namely, the obtaining of a fair election and an honest return, as paramount in importance to the minor requirements which prescribed the formal steps to reach that end." (Bowers v. Smith, 111 Mo. 45, 20 S. W. 101, 33 Am. St. Rep. 491, 16 L.R.A. 754, 2 Lewis' Sutherland on Stat. Const.—2d ed.—sec. 709.) The Supreme Court of one of our sister States has held that "all provisions of the Election law are mandatory if enforcement is sought before election in a direct proceeding for that purpose, but after election all should be held directly, only, in support of the result, unless of a character to affect an obstruction to the free and intelligent casting of the votes or to the ascertainment of the result, or unless the provisions affect an essential element of the election, or less it is expressly declared by the statute that the particular act is essential to the validity of an election or that its omission shall render it void." Jones v. State, 153 Ind. 440, 55 N. E. 229; Norman v. State, 51 Ind. App. 425, 99 N. E. 812.

This court has stated in some of the decisions already cited, and in other cases, that "where a statute imposes duties upon officials connected with the holding of an election and by express language provides that the omission to perform the same shall render the election void, then all courts are bound to enforce such statute and pronounce the [438] election void, regardless of all considerations touching its policy or impolicy; 'but if, as in most cases, the statute simply provides that certain acts or things shall be done within a particular time or in a particular manner and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they do, and directory if they do not, affect the actual merits of the election.'" (People v. Crossley, 261 Ill. 78, 103 N. E. 537; Parker v. Orr, 158 Ill. 609, 41 N. E. 1002, 30 L.R.A. 227; Blankinship v. Israel, 132 Ill. 514, 24 N. E. 615.) We have also said that where a statute does not declare the performance of certain duties by public officials in connection with the election to be essential to the validity of the election, it will be regarded as mandatory if such matters affect the real merits, but will be considered directory, only, and not vital to the election, unless they are such, in themselves, as to change or render doubtful the result. People v. Green, supra.

"Election statutes are to be tested like other statutes, but with a leaning to liberality in view of the great public purposes which they accomplish; and except where they specifically provide that a thing shall be done in the manner indicated, and not otherwise, their provisions designed merely for the information and guidance of the officers must be regarded as directory, only, and the election will not be defeated by a failure to comply with them, providing the irregularity has

not hindered any who were entitled from exercising the right of suffrage or rendered doubtful the evidence from which the result was to be declared." Cooley's Const. Lim. (7th ed.) sec. 928.

Neither the statute nor the constitution provides, in terms, that the votes shall be cast within the election district or precinct. The general rule is, that it is essential to the validity of an election that it be held at the time and in the place provided by law. (McCrary on Elections,—4th ed.—sec. 153; 1 Dillon on Mun. Corp.—5th ed.—sec. 370; Mechem on Public Officers, sec. 181; Cooley's Const. [439] Lim.—7th ed.—sec. 930; 2 McQuillin on Mun. Corp.—sec. 414; 10 Am. & Eng. Enc. of Law (2d ed.) 684; 15 Cyc. 343.) And this court, in discussing certain provisions as to the validity of the election, has laid down this same general rule. (Stephens v. People, 89 Ill. 337; Snowball v. People, 147 Ill. 260, 35 N. E. 538.) It is plain, however, from the decisions of this court heretofore cited, that it does not follow that the polls must be opened and the election conducted in the very building designated in the order and notice of election. A slight change in the voting place will not render an election void where it appears that no legal voter was prevented from voting and that the change was not made from any improper motive. Many of the cases, however, that discuss the question of a change in polling place had under consideration a change within the boundaries of the election precinct as fixed and not outside of those boundaries. Some of the decisions relied on most strongly by counsel for plaintiff in error are of this nature, among others Melvin's case, 68 Pa. St. 333. The polling place in that case was moved by the judges on the day of election three miles, but still in the same voting district, from the place where it had been established by the proper authority. Knowles v. Yates, 31 Cal. 82, is another case of the same character, where the polling place was moved about three miles on election day and located at another place in the same voting precinct. In both of these cases the election, on that account, was held invalid.

The question of the polling place being located outside of the boundaries of the voting district was most seriously considered by various courts when, during the progress of our civil war, statutes were enacted permitting persons absent from their States, engaged in the military service of the United States, to vote. The constitutionality of these statutes generally turned on whether it was competent for the State legislature to authorize a citizen to vote elsewhere than at the place of his residence. (McCrary on [440] Elections,—4th ed.—sec. 153.) In the case of Baldwin v. Trowbridge, 2 Bartlett's Cont. Elec. Cas. 46, the United States house of representatives held the statute constitutional so far as it related to the election of members of Congress. The Supreme Court of California, in Bourland v. Hildreth, 26 Cal. 161, held that a statute of that State enabling voters in the military service of the United States to vote outside of their legal residences was unconstitutional. The same holding was made in Chase v. Miller, 41 Pa. St. 403. In recent years the legality of votes where the polling place has been located at a place convenient for the voters, by the proper officers, only a short distance outside of the election district, has been passed upon by the courts in several of the States. The courts of last resort in the majority of these cases have held that where it was shown that no legal voter was thereby deprived of his vote and the location was not selected from any improper motive, no fraud or other harm being shown or charged, such location of a polling place would not avoid the election. (Lane v. Otis, 68 N. J. L. 656, 54 Atl. 442; People v. Carson, 155 N. Y. 491, 50 N. E. 292; Peard v. State, 34 Neb. 372, 51 N. W. 828; Murchie v. Clifford, 76 N. H. 99, 79 Atl. 901; Ex p. White, 33 Tex. Crim. 594, 28 S. W. 542; Davis v. State, 75 Tex. 420, 12 S. W. 957; Ex p. Stein, 61 Tex. Crim. 320, 135 S. W. 136; Wakefield v. Patterson, 25 Kan. 709; Steele v. Calhoun, 61 Miss. 556. See, also, where the same rule is adhered to, Delano v. Morgan, 2 Bartlett's Cont. Elec. Cas. 168; 15 Cyc. 344.) With perhaps one or two exceptions in the cases cited by counsel for plaintiff in error as holding the contrary to the decisions just cited, the precise point here involved was not decided. In State v. Fitzgerald, 37 Minn. 26, 32 N. W. 788, the court decided an act of the legislature assuming to establish a second election district in an organized town unconstitutional, and that a town election held at what would then be the proper place in the town if the law were unconstitutional was valid. In People v. Holihan, 29 Mich. 116, [441] the public authorities attempted to change the boundaries of the voting districts, and the court held the action of the authorities in this regard illegal, and that the voters in the territory so changed should have voted at their old voting precinct and not at the new one in the changed district. This was in accord with the holding of this court, under similar circumstances, in Rexroth v. Schein, 206 Ill. 80, 69 N. E. 240. The point of this holding in this and other jurisdictions where the same conclusion has been reached is, that where there is a polling place in each of two adjoining districts and where the boundary line has been attempted to be changed without legal authority, the voters in the disputed

strip cannot vote at the polling place of the district in which the public officials have attempted, without authority, to place them.

The requirement that the party offering to vote shall reside within the district which is to be affected by the exercised of his right has been adopted in most, if not all, jurisdictions to enable persons residing in the neighborhood where the voter resides to become acquainted with him and know that he is a *bona fide* resident not only of the State and county but of the district where he attempts to vote. By requiring him to vote among his neighbors who know whether he is legally entitled to vote, the opportunities for illegal or fraudulent voting will not be as great as if the voting were all to take place at a distance and among strangers. (Cooley's Const. Lim.—7th ed.—sec. 903.) Questions affecting the fairness of elections are of vital importance in this country. Popular self-government depends upon their proper solution. The late Justice Brewer, in discussing these questions in an opinion, said: "The problem is to secure, first, to the voter a free, untrammeled vote; and secondly, a correct record and return of the vote. It is mainly with reference to these two results that the rules for conducing elections are prescribed by the legislative power. But these rules are only means. The end is [442] the freedom and purity of the election. To hold these rules all mandatory and essential to a valid election is to subordinate substance to form,—the end to the means. Yet, on the other hand, to permit a total neglect of all the requirements of the statute and still sustain the proceedings is to forego the lessons of experience and invite a disregard of all those provisions which the wisdom of years has found conducive to the purity of the ballot-box. Ignorance, inadvertence, mistake, or even intentional wrong, on the part of local officials should not be permitted to disfranchise a district. Yet rules,—uniformity of procedure,—are as essential to secure truth and exactness in elections as in anything else. Irregularities invite and conceal fraud." (Gilleland v. Schuyler, 9 Kan. 569.) The fact that all the voters of a ward, by ordinance, vote at a polling place just across the street from the ward in which they live is not such an irregularity as would, merely by reason of such location, give increased opportunity for fraud in the election. Under our constitution the legislature has the authority to regulate the formation of voting districts or precincts. This is frequently, if not generally, delegated in this and other States to the local officials. These authorities draw boundary lines between the voting districts, and can change them, within certain limitations, if they desire. All that the constitution of 1870 in terms requires as to the place of voting is that the elector must vote at the polling place designated by law as the place for casting the vote of the district in which he resides. Of course, it is essential, to properly safeguard an election, that it be held at the time and place duly established as provided by law, but so far as we are advised there has been in all jurisdictions one exception to this general rule: that is, where the voting was done at the same place for years, the people supposing it to be the true place, though, in fact, it was different from the place that was provided by law or should have been fixed in accordance with law. (10 Am. & Eng. Enc. [443] of Law (2d ed.) 685, and cases cited; Ex p. White, supra; Delano v. Morgan, supra.) This, in effect, is the holding of this court in People v. Brown, supra, and although in that case the polling place was within the boundary lines of the voting district, upon principle we cannot see how the holding of the election within or without the boundaries of the voting precinct under such circumstances, and long acquiesced in by the voters, would make any difference in the legality of the votes cast at such polling place. In an unbroken line of decisions this court has held that while the legal safeguards which are thrown about the ballot must be faithfully observed by those who have been entrusted with their enforcement, yet under the pretense of enforcing them the will of the people should not be defeated by an honest mistake of election officials; that the literal compliance with prescribed forms will not be required if the spirit of the law is not violated; that forms should be subservient to substance when no legal voter has been deprived of his vote and no harm or injury of any kind has been done to anyone. People v. Hilliard, supra; Dale v. Irwin, supra; People v. Ruyle, 91 Ill. 525; People v. Nordheim, 99 Ill. 553; Hodge v. Linn, supra; Ackerman v. Haenck, supra; Parker v. Orr, supra; Schuler v. Hogan, 168 Ill. 369, 48 N. E. 135; People v. Crossley, supra; Choisser v. York, supra; People v. Green, supra.

The fixing by a public order of the polling place at a convenient point and giving public notice that such place has been located is for the purpose of giving proper information, in due time, to each voter in the district as to the place where the election will be held. All of this was accomplished by the location of the polling place here in question, as notice was duly given and everyone knew where the polling place was located. To hold that this election was invalid on account of the location of the polling place could be justified only on the ground either that the law was mandatory in requiring that the polling place be [444] located within the boundaries of the voting district, or that

to hold the election valid would be laying down a rule of law that would tend strongly to overthrow the safe conduct of elections. As heretofore stated, neither our constitution nor statute in terms states that the polling place must be within the district. Both state only that each voting district or precinct must have a polling place and ballot-box for that district. Without doubt, the spirit of our Election law is that each polling place should be within the boundaries of the district for which it is chosen. Under the circumstances shown in this record, however, to hold that this election was invalid because the polling places for two wards were out of the respective wards would be to defeat the will of the voters of those wards, fairly and honestly expressed. Where no injury has been done to anyone by the mistake and where no benefit will redound to the public by holding otherwise, we cannot see how the safety and security of the ballot are in any way endangered by holding, under the restrictions and conditions laid down in this opinion, that this election, under the circumstances as here shown, is valid.

On principle and authority the trial and Appellate Courts rightly held that the election in question was not invalid because of the location of the polling place.

The question raised by counsel for plaintiff in error that the election was invalid because all three of the judges did not reside in the precinct which the ballots were cast is without merit. The authorities hold that these men were judges *de facto* and that the election was not void by reason of their acting as such. Choisser v. York, supra; Mechem on Public Officers, sec. 184.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

Cooke, J., dissenting.

NOTE.

The reported case holds that a municipal election is not void because ward lines are ignored and the election is held at a single voting place for the entire municipality, provided no voters are thereby prevented from exercising their rights. This holding is in accord with the majority of the cases which have passed on the question, the decisions being reviewed in the note to Kerlin v. Devils Lake, Ann. Cas. 1915C 624.

HARDY
v.
WOODS ET AL.

South Dakota Supreme Court—March 21, 1914.

33 S. Dak. 416; 146 N. W. 568.

Amendments — Complaint — Change from Representative to Personal Capacity.

An amendment of the complaint, in an action to quiet title expressly brought as administrator alleging that the property belonged to the estate, by striking out the allegations showing that the suit was brought in a representative capacity and alleging that plaintiff claimed individually as surviving devisee, is not objectionable as setting up a new cause of action and changing the issues.

[See note at end of this case.]

Change of Names of Parties.

A complaint may be amended so as to change the names of the parties if the amendment does not prejudice the parties and is in furtherance of justice.

Statute Permitting Amendment — Construction.

Code Civ. Proc. § 150, providing that "the court may" in furtherance of justice "amend any pleading . . . by adding or striking out the name of any party," authorizes the court to permit amendments by the parties, and does not merely authorize the judge himself to order amendments.

Names — Variance in Chain of Title.

In an action to quiet title, in which plaintiff claimed as devisee from one who acquired title by bidding in the property at mortgage foreclosure sale under the name of "J. A. Hardy," evidence held to sustain a finding that such "J. A. Hardy" was the same person as "Jesse A. Hardy," through whom plaintiff claimed that his title was derived.

[See Ann. Cas. 1915C 97.]

Appeal from Circuit Court, Edmunds county: BOTTUM, Judge.

Action to quiet title. Charles W. Hardy, plaintiff, and George A. Woods et al., defendants. Judgment for plaintiff. Defendants appeal. The facts are stated in the opinion. AFFIRMED.

Williamson & Williamson for appellants.

C. M. Stevens for respondent.

[418] POLLEY, J.—This action was commenced by Charles W. Hardy, as administrator, with the will annexed, of the estate of Jesse A. Hardy, deceased. The said Jesse A. Hardy died testate in the county of Hills-

boro, state of New Hampshire, in the year 1898. At the time of his death, he was seised in fee of the quarter section of land that is the subject of this action. Plaintiff was appointed executor of the last will and testament of said [419] Jesse A. Hardy, in said Hillsboro county, N. H., and was also appointed administrator, with the will annexed of the said estate in Clark county, S. D. Defendant claimed title to the premises in controversy through a certain tax deed, tax judgment sale certificate, and judgments of the circuit court purporting to quiet the title in defendant's grantors prior to the commencement of this action. These evidences of title were all disposed of by this court on former appeal of this cause, and will receive no further notice. Hardy v. Woods, 28 S. D. 151, 132 N. W. 692.

On the trial, the defendant, for the purpose of defeating plaintiff's right to maintain this action, introduced in evidence certain records from the county court of Clark county, showing that the administration of the estate of the said Jesse A. Hardy had been wound up and that the said Charles W. Hardy had been finally discharged as administrator of said estate, in January, 1904. Upon the admission of this evidence, plaintiff's counsel announced that he was taken completely by surprise, that he had believed the matter of the estate of said Hardy was still pending in the county court of Clark county, and that plaintiff was still administrator and authorized to maintain this action. Counsel then asked to be given time to investigate the matter and requested the court to hold the case open to allow him time to make such investigation. This request was granted by the court, and, upon investigation, counsel found that the said administration had been finally wound up, decree of final distribution entered, and plaintiff discharged as such administrator. He further found that the plaintiff was the sole surviving legatee and devisee of the said Jesse A. Hardy, and was therefore seised in fee of the title to the land in controversy in his own right. Counsel thereupon applied to the court and was given leave to amend plaintiff's complaint so as to conform to the facts as they actually existed, and also to strike from the title of said cause the words "as administrator with the will annexed of the estate of Jesse A. Hardy, deceased." This was allowed, and, the amendment being made, plaintiff introduced in evidence the "decree of heirship" entered by the county clerk of Clark county in the said matter, which among other things, "declared that Charles W. Hardy is sole heir, devisee and legatee of the said [420] decedent and his last will and testament." The court thereupon found that plaintiff was the owner in fee and entitled to the possession of the disputed premises, and entered a decree accordingly. Motion for a new trial being denied, defendant appeals to this court.

It is first contended by appellant that the court erred, to his prejudice, in permitting this amendment and in receiving further evidence in support of the amended complaint; that he was given no opportunity to answer the same or to introduce further evidence or to be heard on the issues raised by the amended complaint. In short, that the court granted plaintiff a new trial and entered judgment for plaintiff as though by default, without giving defendant an opportunity to offer proof to controvert the allegations of the amended complaint. This contention finds no support whatever in the record. Plaintiff was originally given ten days in which to ascertain the real condition of the Hardy estate in Clark county. This time was extended by the court, but defendant was given notice of the time and place where the matter of filing the amended complaint and making further proof would be heard by the court, and he was present, by his counsel, and made his objections thereto, but did not ask leave to file an answer to the amended complaint nor offer further evidence; nor does he now suggest that he wishes to answer the said amended complaint or has further evidence to offer, nor show in what manner he was prejudiced by the rulings of the court.

But it is claimed that the change made in the complaint, under the guise of an amendment, amounted to a substitution of parties plaintiff and set up a new and different cause of action and changed the issues involved. This presents a question of more difficulty. Plaintiff brought the suit in his capacity as administrator, alleging the premises in dispute to belong to the estate of Jesse A. Hardy. By the amendment, he became the plaintiff in his individual capacity and claimed that he, individually, was the owner in fee of said premises. This, appellant strenuously contends, the court was without authority to permit, and, in support of this contention, cites the following authorities: Davis v. New York, 14 N. Y. 506, 67 Am. Dec. 186; Wood v. Metropolitan L. Ins. Co. 96 Mich. 437, 56 N. W. [421] 8; Dubbers v. Goux, 51 Cal. 154; Wilson v. Kiesel, 9 Utah 397, 35 Pac. 491; More v. Burger, 15 N. D. 345, 107 N. W. 200. Some of these cases appear to support appellants' contention, yet none of them are parallel cases, and the overwhelming weight of authority, and, as we believe, the better reasoning, supports the opposite view. The act most loudly complained of by appellant was the permitting of plaintiff to change the character in which he was endeavoring to maintain the action; yet the rule seems to be well established that this may properly be done where it is warranted

by the facts. "Where a party sues in his own right, he may, if the facts warrant it, amend his complaint so as to make the suit stand in his representative capacity; or conversely, if he sues in his representative capacity, he may be allowed to amend by declaring in his individual capacity." 1 Enc. Pl. Pr. 537, 538; 18 Cyc. 981; and 31 Cyc. 490, and cases cited. What was said in an early Iowa case is especially applicable to the facts in this case: "A party asking an amendment at so late a stage as in the present case would naturally expect to pay the whole expense caused by the issue; and what is the substantial difference between this and his taking a nonsuit and commencing again, except that by taking an amendment, rather than a nonsuit, time is spared, and an action or a cause of action is sometimes saved, which would otherwise be lost, as by a limitation, or by other cause; and this is the precise effect which we understand our present system of statute law, in relation to pleading, to aim at. It is to save the rights of persons, and not to have them sacrificed to the mere rules of pleading, if they can be placed in a correct attitude; the party himself bearing the expense of setting his case right. It is not intended to intimate that there may not be cases where the amendment could not be made on any terms, but these remarks apply to those cases which come within the reach of amendments. We think that an amendment showing the character in which the plaintiff sues, but not changing the plaintiff, is admissible." Hunt v. Collins, 4 Ia. 56.

The change made by the amendment is merely a change in the character in which plaintiff is trying to recover. He is the real party in interest and is the sole beneficiary, whether the title to the disputed premises is declared to be in plaintiff individually [422] or in the estate of the said Jesse A. Hardy. To have denied the amendment would have compelled plaintiff to commence another action, and thus require the prosecution of the two actions to accomplish what can as well be accomplished in one. With the statute of limitations running all the time, it might happen that the second action would be barred by the time the first one was determined, and thus deprive the plaintiff of a right to which he was clearly entitled at the commencement of the action. The following are some of the numerous authorities supporting the conclusions of the court: Bigelow v. Draper, 6 N. D. 152, 69 N. W. 570; Knight v. Boring, 38 Colo. 163, 87 Pac. 1078; Hume v. Kelly, 28 Ore. 398, 43 Pac. 380; Buffington v. Blackwell, 52 Ga. 129; American Bonding Co. v. Dickey, 74 Kan. 791, 88 Pac. 66; Kennedy v. Gelders, 7 Ga. App. 241, 66 S. E. 620; Goldstein v. Peter Fox Sons Co. 22 N. D. 636, 135 N. W. 180, 40 L.R.A.(N.S.) 566—where the cases on this subject are collected and reviewed at length by the court, and Wood v. Lenawee Circuit Judge, 84 Mich. 521, 47 N. W. 1103. In this latter case, the suit was commenced by the administrator, with the will annexed, of the estate of a certain woman, deceased, to recover on a certain certificate of insurance. After issue was joined, the heirs of the decedent's husband petitioned the court for an order, striking out the name of the said administrator and substituting their own in place thereof. The petition was denied by the circuit court, and the petitioners applied to the Supreme Court for a writ of mandamus to compel the circuit court to make the substitution. The writ was granted; the court saying: "This is a case where the right of action will be lost unless the amendment is permitted, and great injustice be done to the heirs." The proceeds of the certificate sued upon belonged to the heirs at law of the deceased husband. In both cases the said heirs were the real parties in interest. The only difference was in the mode of its transfer to them—"a mere technicality in the legal steps necessary to be taken to collect it."

The correct rule is that: "The right to amend as to names of parties exists where the amendment does not operate to the prejudice of the parties, and does operate in furtherance of justice." Goldstein v. Peter Fox Sons Co. supra.

[423] The amendment in this case was permitted by the court "in furtherance of justice," under the provisions of section 150, Code Civ. Proc. But it is claimed by appellant that this section does not authorize the court to permit amendments by the parties to an action—drawing a distinction between the language used in section 149 and that in section 150, and claiming that only the trial judge himself is authorized by section 150 to make amendments. In this he is clearly wrong, as it is not the intent of the law as expressed by the language used in this section (section 150) that the trial judge must himself recast the pleadings so as to make them conform to the facts or proof offered, but that he may permit the parties, or their counsel, in a proper case to do so.

Plaintiff's testator acquired his title to the disputed premises through the foreclosure of a certain mortgage thereon, which was assigned to him and bid in by him at foreclosure sale, under the name of J. A. Hardy; and it is contended by appellant that there is no evidence to identify the said J. A. Hardy as the Jesse A. Hardy through whom respondent claims to have derived his title, and that there is no evidence to show that the said Jesse A. Hardy is dead. An examination of the evidence on these two points shows that the testator was Jesse A. Hardy, of

Hollis, county of Hillsboro in the state of New Hampshire, and that Jesse A. Hardy, of Hollis, N. H., died prior to January 10, 1898. The assignment of the mortgage in question was to J. A. Hardy; but this mortgage was executed to secure the payment of a certain "mortgage coupon bond," together with ten interest coupons thereto attached. When the mortgage was assigned, said bond was indorsed by the payee therein named, as follows: "For value received, the Dakota Loan & Security Company, of Clark, Dakota, has assigned the attached bond, No. 1252, to Jesse A. Hardy, of Hollis, state of New Hampshire." And each of the said interest coupons was indorsed: "Pay to the order of Jesse A. Hardy." The sheriff's deed, through which plaintiff claims that his testator acquired his title, describes the grantee therein as J. A. Hardy, of Hillsboro county, N. H. While this is not direct evidence of identification, it is sufficient to show, prima facie at least, that Jesse A. Hardy, of Hollis, county of Hillsboro, state of New Hampshire, and J. A. [424] Hardy, of Hillsboro, N. H., was one and the same party; and, this being true, there can be no question of his having died long prior to the commencement of this action.

We have examined the other questions presented by appellant, but are unable to find that he has been, in any wise, prejudiced by any of the matters complained of, and it is not necessary to take them up in detail. Upon the whole record, we are satisfied that the trial court was correct in his conclusions, and the judgment and order appealed from are affirmed.

NOTE.

Right of Plaintiff to Amend So as to Change Capacity in which He Sues from Representative to Individual One or Vice Versa.

Majority Rule:
Statement of Rule, 401.
Application of Rule:
Individual to Representative Capacity, 402.
Representative to Individual Capacity, 403.
Minority Rule, 404.

Majority Rule.

STATEMENT OF RULE.

The rule which obtains in the majority of jurisdictions is that a plaintiff may amend his action so as to change the capacity in which he sues from that of an individual to a representative capacity or vice versa.

England.—Humphreys v. Humphreys, 3 P. Wms. 349.

United States.—Missouri, etc. R. Co. v. Wulf, 226 U. S. 570, Ann. Cas. 1914B 134, 33 S. Ct. 135, 57 U. S. (L. ed.) 355; Middlesex Banking Co. v. Smith, 83 Fed. 133, 52 U. S. App. 406, 27 C. C. A. 485; Van Doren v. Pennsylvania R. Co. 93 Fed. 260, 35 C. C. A. 282; Leahy v. Haworth, 141 Fed. 850, 73 C. C. A. 84, 4 L.R.A.(N.S.) 657; St. Louis, etc. R. Co. v. Herr, 193 Fed. 950, 113 C. C. A. 578 (*certiorari denied* 225 U. S. 705, 32 S. Ct. 837, 56 U. S. (L. ed.) 1265.

Alabama.—Crimm v. Crawford, 29 Ala. 623; Agee v. Williams, 30 Ala. 636; Ikelheimer v. Chapman, 32 Ala. 676; Longmire v. Pilkington, 37 Ala. 296; McCoy v. Watson, 51 Ala. 466; Lucas v. Pittman, 94 Ala. 616, 10 So. 603 (*overruling* Christian v. Morris, 50 Ala. 585; Taylor v. Taylor, 43 Ala. 649). See also Humphries v. Dawson, 38 Ala. 199; Mobile, etc. R. Co. v. Logan, 136 Ala. 173, 33 So. 814.

California.—Cockrill v. Clyma, 98 Cal. 123, 32 Pac. 888.

Florida.—Phifer v. Abbott, 67 So. 917.

Georgia.—Bryant v. Helton, 66 Ga. 477; Hines v. Rutherford, 67 Ga. 606; Atlanta, etc. R. Co. v. Smith, 1 Ga. App. 162, 58 S. E. 106. See also La Pierre v. Webb, 113 Ga. 820, 39 S. E. 344.

Illinois.—National Ben. Assoc. v. Jackson, 114 Ill. 533, 2 N. E. 414; Elliott v. Knight, 64 Ill. App. 87.

Indiana.—Huff v. Walker, 1 Ind. 193.

Iowa.—Hunt v. Collins, 4 Ia. 56; Myers v. Chicago, etc. R. Co. 152 Ia. 330, 131 N. W. 770.

Kansas.—Reed v. Cooper, 30 Kan. 574, 1 Pac. 822.

Kentucky.—Fuqua v. Fuqua, 16 S. W. 353, 13 Ky. L. Rep. 130; Gray v. Alderson, 123 S. W. 317.

Massachusetts.—Herlihy v. Little, 200 Mass. 284, 86 N. E. 294.

Missouri.—Vaughan v. St. Louis, etc. R. Co. 177 Mo. App. 155, 164 S. W. 144.

Nebraska.—Burlington Voluntary Relief, etc. v. More, 52 Neb. 719, 73 N. W. 15.

New Hampshire.—Stearns v. Wright, 50 N. H. 293; Mann v. Marshall, 76 N. H. 162, 80 Atl. 336.

New York.—Johnson v. Phœnix Bridge Co. 197 N. Y. 316, 90 N. E. 953 (*distinguishing* Doyle v. Carney, 190 N. Y. 386, 83 N. E. 37). See also Haddow v. Haddow, 3 Thomp. & C. 777. *Compare* Phillips v. Melville, 10 Hun 211.

Ohio.—Tucker v. Sherman, 29 Ohio Cir. Ct. Rep. 368.

Pennsylvania.—Jamieson v. Capron, 95 Pa. St. 15; Snaveley v. Prudential Ins. Co. 22

Pa. Dist. 557 (*following* Power v. Grogan, 232 Pa. 387, and *distinguishing* Wildermuth v. Long, 196 Pa. St. 541, 46 Atl. 927); Walfenden v. Pennsylvania Schuylkill Valley R. Co. 2 Pa. Co. Ct. 243; Boas v. Christ, 20 Pa. Co. Ct. 196. See also Wilmarth v. Mountford, 8 Serg. & R. 124; Com. v. Haffey, 6 Pa. St. 348; Gallagher v. Dean, 1 Leg. Rec. 183. *Compare* McPartland v. Pennsylvania R. Co. 2 Pa. Co. Ct. 244, 18 W. N. C. 79.

South Carolina.—Bradford v. Felder, 2 McCord Eq. 168; Glenn v. Gerald, 64 S. C. 236, 42 S. E. 155. See also Willis v. Tozer, 44 S. C. 1, 21 S. E. 617. *Compare* Lilly v. Charlotte, etc. R. Co. 32 S. C. 142, 10 S. E. 932.

South Dakota.—See the reported case.

Tennessee.—See also Winningham v. Crouch, 2 Swan 170; Hagerty v. Hughes, 4 Baxt. 222.

Texas.—Whitehead v. Herron, 15 Tex. 127, 65 Am. Dec. 145; Smith v. Anderson, 39 Tex. 496; Schneider-Davis Co. v. Brown, 46 S. W. 108.

Utah.—Pugmire v. Diamond Coal, etc. Co. 26 Utah 115, 72 Pac. 385.

Thus in Myers v. Chicago, etc. R. Co. 152 Ia. 330, 131 N. W. 770, the court said: "Where a party sues in his own right he may, if the facts warrant, amend his complaint, so as to make the suit stand in his representative capacity, and conversely, if he sues in his representative capacity, he may be allowed to amend by declaring as an individual; and in either instance it is not considered a substantial change of the cause of action." And in Lucas v. Pittman, 94 Ala. 616, 10 So. 603, it was said: "It may be regarded as settled, that under the statute of amendments, when a complaint is filed in the name of one suing in his individual capacity, if the facts authorize it, the complaint may be amended, so as to make the suit stand in his representative capacity, and vice versa."

Application of Rule.

Individual to Representative Capacity.

Under the rule prevailing in the majority of jurisdictions, a plaintiff may amend his action so as to change the capacity in which he sues from that of an individual to that of an executor, administrator, or personal representative. Humphreys v. Humphreys, 3 P. Wms. (Eng.) 349; Missouri, etc. R. Co. v. Wulf, 226 U. S. 570, Ann. Cas. 1914B 134, 33 S. Ct. 135, 57 U. S. (L. ed.) 355; Leahy v. Haworth, 141 Fed. 850, 73 C. C. A. 84, 4 L.R.A.(N.S.) 657; Crimm v. Crawford, 29 Ala. 623; Agee v. Williams, 30 Ala. 636; Ikelheimer v. Chapman, 32 Ala. 676; Lucas v. Pittman, 94 Ala. 616, 10 So. 603 (*overruling* Christian v. Morris, 50 Ala. 585; Taylor v. Taylor, 43 Ala. 649; Phifer v. Abbott (Fla.) 67 So. 917; Hines v. Rutherford, 67 Ga. 606; Elliott v. Knight, 64 Ill. App. 87; Reed v. Cooper, 30 Kan. 574, 1 Pac. 822; Fuqua v. Fuqua, 16 S. W. 353, 13 Ky. L. Rep. 130; Gray v. Alderson (Ky.) 123 S. W. 317; Stearns v. Wright, 50 N. H. 293; Mann v. Marshall, 76 N. H. 162, 80 Atl. 336; Tucker v. Sherman, 29 Ohio Cir. Ct. Rep. 368; Vaughan v. St. Louis, etc. R. Co. 177 Md. App. 155, 164 S. W. 144; Snaveley v. Prudential Ins. Co. 22 Pa. Dist. 557 (*distinguishing* Wildermuth v. Long, 196 Pa. St. 541, 46 Atl. 927, and *approving* Power v. Grogan, 232 Pa. St. 387, 81 Atl. 416); Glenn v. Gerald, 64 S. C. 236, 42 S. E. 155; Bradford v. Felder, 2 McCord Eq. (S. C.) 168; Smith v. Anderson, 39 Tex. 496; Pugmill v. Diamond Coal, etc. Co. 26 Utah 115, 72 Pac. 385. In Phifer v. Abbott (Fla.) 67 So. 917, the court said: "It clearly appears that Lucy B. Abbott, the complainant in the original bill, is the sole heir of the mortgagee; that she is the holder and owner of the evidence of indebtedness in question; that there is no indebtedness against her mother's estate; and that she has fully qualified to administer on the estate that belongs entirely to her. She is the same person who instituted the original suit, and the only change in her asserted capacity to sue is that she has qualified as the legal representative of an estate that is wholly her own. Such amendment as this does not make a new suit; and the form of the amended bill is such that it may, if necessary to justice in the cause, be treated as a supplemental bill. An amendment stating that a complainant sues technically in a representative capacity, and not individually, in the same cause of action, does not make a new suit or cause of action, particularly when the complainant is the sole party in interest, and the suit is brought for her sole benefit." And in Crimm v. Crawford, 29 Ala. 623, the court said: "The amendment of the complaint, by showing that the plaintiff claimed in his capacity of administrator, does not substitute a new cause of action. The cause of action is really the same. The amendment merely inserts that which is necessary to secure a recovery upon the existing cause of action, which was imperfectly set forth. In Hines v. Rutherford, 67 Me. 606, a suit brought by one as heir-at-law was held to be amendable so as to permit the plaintiff to proceed in his name as the executor of the will of the decedent. And in Missouri, etc. R. Co. v. Wulf, 226 U. S. 570, Ann. Cas. 1914B 134, 33 S. Ct. 135, 57 U. S. (L. ed.) 355, wherein the plaintiff sued as the sole beneficiary under a state statute, it was held that an amendment showing that she sued as the personal representative under the Federal Employers' Liability Act (Act of April 22, 1908, ch. 149, 35 Stat. L. 65,

Fed. St. Ann. 1909 Supp. p. 584), was not equivalent to the commencement of a new action, so as to subject it to the limitations prescribed by that act.

Under the rule supported in the majority of jurisdictions, a plaintiff may amend his action so as to change the capacity in which he sues from that of an individual to that of a trustee. Middlesex Banking Co. v. Smith, 83 Fed. 133, 52 U. S. App. 406, 27 C. C. A. 485; McCoy v. Watson, 51 Ala. 466; Boas v. Christ, 20 Pa. Co. Ct. 196. See also La Pierre v. Webb, 113 Ga. 820, 39 S. E. 344. Thus in a case where the plaintiffs sued in ejectment as individuals, they were permitted to amend so as to show that they sued in the capacity of trustees of a church. Boas v. Christ, 20 Pa. Co. Ct. 196. And in a case where the plaintiff began his action as an individual within the period of limitations, it was held that an amendment showing that the plaintiff sued in the capacity of a trustee, filed after the period of limitations had expired, did not constitute the institution of a new action so as to be barred by the statute of limitations. Middlesex Banking Co. v. Smith, 83 Fed. 133, 52 U. S. App. 406, 27 C. C. A. 485.

Under the rule obtaining in the majority of jurisdictions, it is proper to permit a plaintiff to amend his action so as to change the capacity in which he sues from that of an individual to that of an assignee for the benefit of creditors. Hunt v. Collins, 4 Ia. 56; Schneider-Davis Co. v. Brown (Tex.) 46 S. W. 108. In the case last cited the court said: "Appellants' first assignment complains that the court erred in overruling their exception directed at plaintiff's first amended original petition, to the effect that the original cause of action was abandoned, and a new cause of action set up, which was barred by the statutes of limitation. The court did not err in its ruling. The proposition is based upon the fact that the original pleading did not disclose that plaintiff held the goods as trustee for the benefit of creditors, while the amended plea fully set forth this fact as the basis of his right of possession. This was not a change in the cause of action. The capacity in which he sued was not changed by the amended pleading. The same proof was admissible under the two pleadings."

It has been held that a plaintiff may amend his action so as to change the capacity in which he sues from that of an individual to that of a guardian. Longmire v. Pilkington, 37 Ala. 296.

Representative to Individual Capacity.

Under the rule prevailing in the majority of jurisdictions, a plaintiff may amend his action so as to change the capacity in which he sues from that of an executor, administrator, or personal representative to that of an individual. Van Doren v. Pennsylvania R. Co. 93 Fed. 260, 35 C. C. A. 282; St. Louis, etc. R. Co. v. Herr, 193 Fed. 950, 113 C. C. A. 578 (*certiorari denied* 225 U. S. 705, 32 S. Ct. 837, 56 U. S. (L. ed.) 1265; Lucas v. Pittman, 94 Ala. 616, 10 So. 603 (*overruling* Christian v. Morris, 50 Ala. 585, Taylor v. Taylor, 43 Ala. 649); Atlanta, etc. R. Co. v. Smith, 1 Ga. App. 162, 58 S. E. 106; National Ben. Assoc. v. Jackson, 114 Ill. 533, 2 N. E. 414; Burlington Voluntary Relief, etc. v. More, 52 Neb. 719, 173 N. W. 15; Johnson v. Phœnix Bridge Co. 197 N. Y. 316, 90 N. E. 953 (*distinguishing* Doyle v. Carney, 190 N. Y. 386, 83 N. E. 37); Jamieson v. Capron, 95 Pa. St. 15; Walfenden v. Pennsylvania, Schuykill Valley R. Co. 2 Pa. Co. Ct. 243; Whitehead v. Herron, 15 Tex. 127, 65 Am. Dec. 145. And see the reported case. See also Cockrill v. Clyma, 98 Cal. 123, 32 Pac. 888; Herlihy v. Little, 200 Mass. 284, 86 N. E. 294. In Burlington Voluntary Relief, etc. v. Moore, 52 Neb. 719, 173 N. W. 15, which was an action brought by the plaintiff as an administratrix and which was amended to show that the plaintiff sued as an individual, the court said: "The change was not a substitution of plaintiffs, it was merely a change in the description of the capacity in which the plaintiff claimed to be suing. Nor was the cause of action changed. The object of each petition was to recover upon the same contract of insurance. The change in this respect was merely in alleging to whom the insurance was payable, the original containing no allegation on the subject. We hold, therefore, that the amendment was such as our practice permits, and in such cases the allowance of amendments being largely in the discretion of the trial court, and no abuse of discretion appearing, that the assignment of error on this subject is not well taken." And see Van Doren v. Pennsylvania R. Co. 93 Fed. 260, 35 C. C. A. 282, wherein the court said: "If a person who is both widow and administratrix sues in the wrong capacity the action may be defeated and great hardship result unless an amendment be allowed permitting her to prosecute the action in the right capacity. There is abundant authority to the effect that under a general power to allow amendments necessary for the determination of the real question in controversy between the parties, an amendment touching the capacity in which the plaintiff sues or declares should, when properly applied for, be permitted where substantial justice requires."

It has been held that an action may be amended so as to change the capacity in which the plaintiff sues from that of a guard-

ian to that of an individual. Huff v. Walker, 1 Ind. 193.

The general rule permits an action to be amended so as to change the character in which the plaintiff sues from that of next friend to that of an individual. Bryant v. Helton, 66 Ga. 477, wherein it was held that where a husband sued as the next friend of his infant wife, and pending the action the wife became of age, he might amend his action so as to sue in his own name and that of his wife.

Minority Rule.

In some jurisdictions it has been held that a plaintiff may not amend his action so as to change the capacity in which he sues from that of an individual to that of a representative capacity or vice versa. McRae v. McRae, 11 La. 571; Fleming v. Courtenay, 98 Me. 401, 57 Atl. 592, 99 Am. St. Rep. 414; Walker v. Lansing, etc. Traction Co. 144 Mich. 685, 108 N. W. 90; Lower v. Segal, 60 N. J. L. 99, 36 Atl. 777; Fitzhenry v. Consolidated Traction Co. 63 N. J. L. 142, 42 Atl. 416; Bennett v. North Carolina R. Co. 159 N. C. 345, 74 S. E. 883; Johnson v. Canadian Northern R. Co. 19 Manitoba 179. *Compare* Anderson v. Brock, 3 Greenl. (Me.) 243; Persinger v. Jubb, 52 Mich. 304, 17 N. W. 851; Wolscheid v. Thome, 76 Mich. 265, 43 N. W. 12; Smith v. Pinney, 86 Mich. 484, 49 N. W. 305; Chamberlain v. Smith, 21 U. C. Q. B. 103.

Under the minority rule a plaintiff cannot amend his action so as to change the capacity in which he sues from that of an individual to that of an executor, administrator or personal representative. Fleming v. Courtenay, 98 Me. 401, 57 Atl. 592, 99 Am. St. Rep. 414; Walker v. Lansing, etc. Traction Co. 144 Mich. 685, 108 N. W. 90; Fitzhenry v. Consolidated Traction Co. 63 N. J. L. 142, 42 Atl. 416; Bennett v. North Carolina R. Co. 159 N. C. 345, 74 S. E. 883. In Fleming v. Courtenay, supra, the court said: "There is no more identity between a person suing as executor, upon a cause of action accruing to his estate, and the same person suing in his individual capacity, upon a cause of action accruing to himself, than there is between two entirely different persons. It is true, that in Bragdon v. Harmon, 69 Me. 29, where a plaintiff was described in the writ as executor, the court held that an amendment could be allowed by striking out the words 'executor, etc.;' but the reason of this, as expressly stated in the opinion, was because the cause of action was described as one accruing to the plaintiff in his own right, and consequently the words allowed to be stricken out were simply descriptio personae. That case is no authority for the power of the court to allow an amendment whereby a new plaintiff would be substituted, or even the same person as plaintiff but in an entirely different capacity. In this very case, when it came to the law court before, upon exceptions to a ruling on a demurrer to the defendant's plea in abatement (95 Me. 128), it appeared that the plaintiff had joined in the same writ, counts in which the cause of action was alleged as accruing to the estate, and other counts in which the cause of action was alleged as accruing to her individually It further appeared that she was not executrix at that time. But, inasmuch as the counts alleging that the cause of action accrued to her individually were sufficient, with a slight amendment, she was allowed to amend her writ by striking out the counts alleging that the cause of action accrued to the estate which she represented and by making the slight amendment necessary in the counts declaring upon the cause of action in her own right, upon the authority of Bragdon v. Harmon, supra." In Walker v. Lansing, etc. Traction Co. 144 Mich. 685, 108 N. W. 90, it was said: "The second group of errors relates to the court's permitting an amendment to the declaration. The result of the amendment was to allow the plaintiff to appear in the action, not as an individual, entitled to the damages which he had sustained as the husband of decedent because of her injury and death, but as her personal representative, entitled to very different damages. The effect of the amendment was to permit Mr. Walker as an individual representing one cause of action to get out of court, and Mr. Walker as administrator representing an entirely different cause of action to get into court. This is not permissible."

Under the minority rule a plaintiff cannot amend his action so as to change the capacity in which he sues from that of an executor, administrator or personal representative to that of an individual. McRae v. McRae, 11 La. 571; Lower v. Segal, 60 N. J. L. 99, 36 Atl. 777; Johnson v. Canadian Northern R. Co. 19 Manitoba 179. *Compare* Chamberlain v. Smith, Canada 21 U. C. Q. B. 103. In Lower v. Segal, supra, it was said in a syllabus by the court: "Application being made by plaintiff to amend the proceedings, so that the action may appear to have been brought by her as widow, held: (1) That the propriety of making the amendment asked must be determined without reference to the fact that plaintiff is both widow and personal representative of the deceased; and the amendments should only be made if, in case this action had been brought by another person as such personal representative, the widow should be permitted to substitute herself as plaintiff, and amend the proceedings so as to present her claim against defendant.

(2) Such an amendment would not tend towards the determination in this suit of the real question in controversy between the parties thereto, but would operate to institute a new suit between different parties, and presenting other questions. It is not an amendment that the court is required to make. (3) The amendment asked would be unreasonably vexatious to defendant, for it appears on the face of the declaration that the action was not brought within the period limited by the laws of Pennsylvania for bringing such actions." And in Johnson v. Canadian Northern R. Co. 19 Manitoba 179, the court said: "The plaintiff applied at the trial to amend by striking out the words 'administratrix,' etc., and to bring the suit in her name as widow of deceased. The Ontario Act allows the widow to sue if no executor or administrator has been appointed. The application to amend was renewed before this court. To allow the amendment would be equivalent to the bringing of a new action. The suit was clearly brought by the Manitoba administratrix, as such. The amendment would permit a new person to sue whose right of intervention depends upon the absence of an executor or administrator of the estate of the deceased."

EX PARTE LOGAN ET AL.

Alabama Supreme Court—February 5, 1914.

185 Ala. 525; 64 So. 570.

Chattel Mortgages — Waiver — Levy of Attachment.

The levy of an attachment by a chattel mortgagee on the mortgaged property as the property of the mortgagor does not waive the title of the mortgagee, or estop him from maintaining an action of detinue to recover the mortgaged property, since, by the direct provisions of Code 1907, § 4091, a chattel mortgagor has an equity in the mortgaged property subject to levy.

[See note at end of this case.]

Res Judicata — Matters Not in Issue.

A claim suit between a chattel mortgagee and a third party resulting in favor of the third party, and instituted after the levy of an attachment by the chattel mortgagee on the mortgaged property as the property of the mortgagor is not res judicata in a detinue suit by the mortgagee against the mortgagor as to the same property.

Chattel Mortgages — Remedies of Mortgagee.

A chattel mortgagee has three several or concurrent remedies against the mortgagor: An action at law to recover the debt; an appropriate action to recover possession of the property; and a foreclosure of the mortgage, and sale of the property.

[See 96 Am. St. Rep. 690.]

Certiorari to Court of Appeals.

Petition by S. E. Logan for certiorari to Court of Appeals to review judgment and decision of that court in case of Logan, et al. v. Smith Bros. Co. 9 Ala. App. 459. The material facts are stated in the opinion. WRIT DENIED.

O. M. Alexander and *Blackmon, Merrill & Walker* for appellant.

James F. Matthews for appellee.

[526] MAYFIELD, J.—The questions presented for decision are as follows:

Does the mortgagee of a chattel estop himself from maintaining an action of detinue to recover the mortgaged property by levying an attachment or execution upon the property as the property of the mortgagor?

If not estopped, does such levy amount to a waiver of the right or title of the mortgagee?

If the mere levy does not work an estoppel or waiver, is a claim suit, instituted after the levy, between the mortgagee and a third party, which results in favor of the third party, res judicata, in a detinue suit by the mortgagee against the mortgagor, as to the same property?

The trial court and the Court of Appeals answered each of the questions in the negative, and the defendant mortgagor seeks certiorari to have reviewed the judgment and decision of the Court of Appeals as to these questions.

The exact questions are new in this court, so far as our investigation goes. They have been decided by other courts, however; but the trouble is they have been decided differently in the several courts. The questions, or some of them, have been answered in the affirmative by the Supreme Courts of Massachusetts and of Arkansas and other states, and in the negative by the Supreme Courts of Illinois, Indiana, Kansas, Iowa, North Dakota, and other states.

[527] The rule of law is thus stated by the Supreme Court of Massachusetts: "A party holding personal property by virtue of a mortgage or pledge may waive his claim under such mortgage or pledge, and attach the property in a suit to recover the debt for which the mortgage or pledge was given. Buck v. Ingersoll, 11 Metc. (Mass.) 226, 232. Such attachment is, in itself, a waiver of the claim under the mortgage. The liens respectively created by mortgage and by at-

tachment on the same property are essentially different, and cannot coexist. They affect very differently, also, the rights of third persons. A stranger may attach personal property subject to the incumbrance of a prior lien by attachment, with no responsiblity for such prior lien; if the lien is by mortgage, he must pay the amount secured by such mortgage, before his attachment is effectual. We have no need to discuss the question whether the same rule shall apply to an attachment of the equity of redemption of personal property to secure the payment of the mortgage debt as applies to the equity of redemption of real property, for, in this commonwealth, the equity of redemption of personal property is not attachable." Evans v. Warren, 122 Mass. 304.

The Arkansas court thus states the rule, citing a number of authorities: "The levy of the attachment amounted to an assertion by appellants that the property was subject to seizure and sale under the attachment. But, as this could not be true if the lien of the mortgage still existed, the levy of the attachment was the same as a denial on the part of appellants that the mortgage lien existed, and was in effect a waiver on their part of the lien created by the mortgage. In other words, having sued out an attachment, levied it upon the property in question, and prosecuted the attachment suit to judgment, they must be held to have waived [528] rights which were inconsistent with such a course of procedure. The mortgage lien, being inconsistent with such attachment, was thereby waived, and appellants have nothing upon which to base their action of replevin." Cox v. Harris, 64 Ark. 215, 41 S. W. 426, 62 Am. St. Rep. 187, 188.

The Indiana and Illinois courts criticised the rules declared by the Massachusetts and Arkansas courts as being technical and artificial, and declined to follow. See Bryam v. Stout, 127 Ind. 195, 26 N. E. 687; Barchard v. Kohn, 157 Ill. 579, 41 N. E. 902, 29 L.R.A. 803. In the latter case it is said: "The main case which holds, that an attachment of the mortgaged property by the mortgagee for the mortgage debt is a waiver of his lien under the mortgage is Evans v. Warren, 122 Mass. 303. The decision in that case was placed upon the ground substantially that the liens created by mortgage and by attachment upon the same property are essentially different, and cannot coexist, for the reason that under the Massachusetts statutes the equity of redemption of personal property is not subject to attachment, and hence, if the mortgagee causes an attachment to issue against the mortgaged property, it is a waiver of the mortgage lien. The cases which hold that the attachment operated as a waiver of the plaintiff's rights under the mortgage do so upon the general grounds that a person cannot avail himself of inconsistent remedies in relation to the same matter, and, having chosen and carried into effect one remedy, he cannot resort to a different one, involving a repudiation of the grounds upon which the first one was based; that the suit on the mortgage and the attachment suit were inconsistent, because the one proceeds upon the ground that the mortgagee is the owner of the property, and the other upon the ground that the mortgagor thereof [529] is owner; that, when the debt matured, the mortgagee had the right to take the property under the mortgage, he having the legal title, subject only to a right of redemption; and that, by bringing the attachment suit, he elects to treat the property as the property of the debtor, and cannot, by seeking to enforce his mortgage, assert an ownership and right of possession in himself antedating the attachment. The reasoning in Evans v. Warren, supra, was held to be unsatisfactory, and its doctrine was repudiated in Byram v. Stout, 127 Ind. 195, 26 N. E. 687. In the latter case the mortgagee in a chattel mortgage brought an action to foreclose it, and a junior mortgagee set up as a defense that the complainant had previously brought suit upon the evidences of debt secured by his mortgage, and had therein issued a writ of attachment, and levied it upon the mortgaged property, and had thereby released his mortgage lien; but the court held that the attachment was not a waiver of the mortgage lien, and did not estop the mortgagee from claiming under his mortgage, basing its decision mainly upon the ground that in Indiana the mortgagee in a chattel mortgage is a mere lienholder. Jones, Mortg. § 55. In support of the conclusion that the mortgagee of personal property is a mere lienholder, Indiana decisions are there referred to holding that personal property under mortgage may be levied upon and sold by execution subject to the mortgage lien."

The Massachusetts doctrine is thus criticised by an annotator of the case of Dix v. Smith, 9 Okla. 124, 60 Pac. 303, 50 L.R.A. 714: "The decision in the principal case, while the logical result of the view taken of the nature and effect of a chattel mortgage, and of the construction placed upon the statute governing attachments, rests upon strictly technical grounds. To render [530] applicable the theory of the case, that a lien of a chattel mortgage and the lien of an attachment are inconsistent, and cannot coexist, since the first imports legal title in the mortgagee, and the second legal title in the mortgagor, not only the common-law doctrine that a chattel mortgage operates to transfer the legal title to the mortgagee, but also the common-law rule that a mere equita-

ble right, such as the equity of redemption remaining in the mortgagor, is not subject to levy, must have been left undisturbed, both by statute and judicial decision. Even in a jurisdiction where the doctrine that the legal title is in the mortgagee has not been abandoned, there is no necessary inconsistency between the lien of a chattel mortgage and the lien of an attachment, though asserted by the same person, if, either by statute or judicial decision, the equity of redemption in the mortgagor is made subject to attachment. While the statute involved in the principal case affords the means of reaching by attachment property that has been mortgaged, the opinion emphasizes the fact that the statute contemplates the payment and discharge of the mortgage before the lien of the attachment can attach, so that the statute does not impair either of the doctrines of the common law referred to. The theory and decision of the principal case have the support of Evans v. Warren, 122 Mass. 303, which is substantially like it, except that there the attachment, which was subsequently dissolved, was issued for the debt secured by the mortgage. The court took the view that the liens were essentially different, and could not coexist, pointing out that the legal title was in the mortgagee, and that the equity of redemption in personal property was not attachable."

Whatever might be the correct doctrine in this state but for our statutes, our statutes certainly change the [531] law from that declared by the Supreme Courts of Massachusetts and Arkansas. Section 4091 of our Code expressly makes the equity of redemption in either land or personal property, subject to levy and sale under execution. This being true, the doctrine of estoppel or waiver cannot apply to or result from the levy of an execution, by the mortgagee, upon the mortgaged chattels.

It is true that this court, in the case of Fuller v. Eames, 108 Ala. 464, 19 So. 366, held that, where there was a conditional sale of chattels, the vendor retaining title until the purchase price was paid, and the vendor attached the property as that of the vendee, he was thereby estopped from bringing an action of detinue to recover the same property, thereby claiming that it was the vendor's, and not the vendee's. In that case this court said: "In this attachment proceeding, the plaintiff unequivocally recognized the property as defendant's, and sought to subject it in a manner wholly inconsistent with the retention of the title in himself when he sold the property to defendant. He thereby waived any title he might have had to the property, and could not afterwards institute this suit maintainable only on the theory of title in himself. Thomason v. Lewis, 103 Ala. 426, 15 So. 830; Montgomery Iron Works v. Smith, 98 Ala. 644, 13 So. 525; Lehman v. Van Winkle, 92 Ala. 443, 8 So. 870; Tanner, etc. Engine Co. v. Hall, 89 Ala. 628, 7 So. 187."

In that case, as is pointed out, the two remedies were inconsistent, and not concurrent, and, the vendor having elected to attach the property as that of the defendant, and to hold him liable for the purchase price, he would not be allowed to have the property and also to have the purchase price.

In the case at bar, as to mortgaged chattels, the statute changes the rule, if it would not otherwise be different. [532] The equity of redemption in chattels being subject to levy and sale under execution, the levy, of course, was not a claim inconsistent with that of the mortgagee's title, and, for this reason, the pleas setting up estoppel, election, or waiver, on account of this levy, were no defense to the action of detinue; hence no error intervened in the trial court or in the Court of Appeals as to the rulings on demurrer to these pleas.

The claim suit was a contest between the mortgagee and a third party. In this suit the issue was, by virtue of the statute, whether the property was that of the defendant, the mortgagor, and whether it was subject to the process. The title to the property as between the mortgagee and the mortgagor was not therefore put in issue, nor decided, so far as the pleas show, and therefore the result of that claim suit was not shown to be res judicata of the detinue suit between the mortgagee and the mortgagor.

In this state the mortgagee has three remedies against the mortgagor, either of which he is at liberty to pursue, or he may pursue any two or all concurrently: He may bring an action at law to recover the debt, an appropriate action to recover possession of the property, and may foreclose the mortgage, and sell the property. But, if he pursue one or more, each suit must be tried and determined on the principles applicable and prevailing in the forum in which the particular remedy is sought.

The questions were treated fully by the Court of Appeals in an able opinion by Walker, P. J., in which we entirely concur, and, but for the fact that the question is one of first impression in this court, it might well be disposed of by our merely adopting the opinion of the Court of Appeals.

The writ of certiorari is therefore denied.

[533] Certiorari denied.

Anderson, C. J., and Sayre, Somerville, de Graffenried, and Gardner, JJ., concur. McClellan, J., thinks the writs of certiorari prayed for should be denied for the reasons and upon the considerations set forth in the opinion of the Court of Appeals.

NOTE.

Waiver of Chattel Mortgage Lien by Attachment.

The majority of the recent cases are in accord with the rule laid down in Kansas City Live Stock Com. Co. v. Bank of Hamlin, 79 Kan. 761, 17 Ann. Cas. 956, that if the mortgagor of chattels retains a title or interest therein subject to levy and sale the mortgagee does not waive his mortgage lien by the levy of an attachment on the chattels in an action for the debt secured by the mortgage. Such a holding is in the reported case rested on a statute providing that a chattel mortgagor retains an equity subject to levy and sale. See to the same effect J. I. Case Threshing Mach. Co. v. Johnson, 152 Wis. 8, 139 N. W. 445.

In Flores v. Stone, 21 Cal. App. 105, 131 Pac. 348, *rehearing denied* 21 Cal. App. 111, 131 Pac. 351, 352, under a statute whereby a mortgagee does not obtain title to the mortgaged chattels but merely a lien on them, an attachment levied on mortgaged property the mortgage on which was subsequently assigned to the plaintiff, was held not to estop the mortgagee from prosecuting an action to foreclose the mortgaged property, the court basing its decision on the fact that the mortgagee's interest in the property was a lien and not a fee. The court said: "The contention of appellant, in brief, is that, plaintiffs having attached the property subject to the mortgage and afterwards paying to the mortgagee the amount of the mortgage debt and obtaining an assignment of said notes and mortgages, they thereby waived all right to any lien under the respective mortgages and that they are therefore estopped from foreclosing the same. This claim is based upon sections 2968 to 2970, inclusive, of the Civil Code and certain decisions of the courts, especially of other jurisdictions, hereafter to be noticed. It is not disputed that, in this state, the mortgagee does not hold the title to the property but he merely has a lien thereon as security for the payment of his debt. (Civ. Code Section 2888.) This applies to mortgages of personal as well as of real property. (Alferitz v. Borgwardt, 126 Cal. 202 [58 Pac. 460.]) While the mortgagee, therefore, can maintain only one action for the recovery of the debt secured by the mortgage, as provided in section 726 of the Code of Civil Procedure, there is nothing to preclude him from attaching the property for an unsecured debt. He would not thereby waive his mortgage as there is no inconsistency in the assertion of the two claims. If the mortgage conveyed the title the situation, of course, would be different, as he would be attaching his own property. The assignee of the mortgage would sustain the same relation to the case, and the institution of an action and the levy of an attachment on the property for an unsecured debt could not of itself be deemed a waiver of the lien of his mortgage nor should it deprive him of his right to enforce the payment of the secured debt. If practicable, only one action should be brought and a needless burden of expense should not be imposed upon the debtor, but it is not perceived how, on principle, if the attachment suit is instituted first, it destroys the lien of the mortgage. In this instance, manifestly, the attaching creditor was not in a position to foreclose at the time the attachment was issued as the assignment of the mortgage was made subsequently." So in Krebs v. Sawyer, 162 Ia. 593, 144 N. W. 345, it was held that a mortgagee who seized the mortgaged property in a replevin suit did not waive or depreciate his mortgage lien in any way. That case likewise involved a state whereby the mortgagee was not vested with the title to the mortgaged property, but was entitled merely to possession. The court said: "There is nothing in the point that Sawyer waived his mortgage lien by commencing his action of replevin in Nebraska. What he did there was in the enforcement of his lien, and not in hostility to it. In fact, he has never waived either claim, but constantly asserted, both, as he had the right to do." To the same effect see Stein v. McAuley, 147 Ia. 630, 125 N. W. 336, 140 Am. St. Rep. 332, 27 L.R.A.(N.S.) 692, wherein it was said: "The whole doctrine of waiver is based upon the theory that the respective liens are essentially different, and cannot co-exist. See Evans v. Warren, supra. When, then, a chattel mortgage conveys the legal title to the mortgagee, as in Massachusetts and some of the other states, affirming the doctrine of waiver, it is manifest that the conclusion reached in these jurisdictions is correct; for it is elementary, of course, that one may not attach his own property. But where the mortgage creates a mere lien upon the property, as in this state (see Code, section 2911), the reason for the rule does not exist and in such cases the rule itself is inapplicable. This distinction is pointed out in the cases from Illinois, Indiana, and Nebraska heretofore cited. In this state the mortgagor has an equity of redemption under a chattel mortgage, which may be levied upon and sold (see Code sections 3905, 3979); and, if this may be done, we see no reason why a mortgagee of the property may not himself levy upon this equity in the property itself without waiving his mortgage lien. In such a case he is not asserting title in himself in one proceeding and levying upon it in another. His rights, then, are simply cumu-

lative, and in no sense inconsistent. This distinction is now generally recognized by courts and text-writers." The case of Green v. Bass, 83 Ohio St. 378, Ann. Cas. 1912A 828, 94 N. E. 742, adheres to the doctrine that a mortgagee does not lose his mortgage lien by instituting an attachment proceeding. In that case it appeared that a mortgagee brought an action on the note which the mortgage secured and after recovering judgment caused an execution to be issued and levied on the property covered by the mortgage. It did not appear whether the mortgagee's interest amounted to title to the mortgaged property or whether it was merely a lien. However, the court, discussing the effect of the levy on the validity of the mortgage, said: "That the note became merged in the judgment which was a higher form of the same debt is clear enough upon both principle and authority. But it is not made to appear how it could affect the lien of the mortgage, which, according to the established view in this state, is only a security for the debt. Why should not that which was a security before the recovery of judgment be a security after it? Plaintiff did not, in any way, change his position in consequence of the recovery of that judgment, nor was he, in any way, affected by it. No reason appears why the case should not be governed by the general rule that a security continues until the discharge of the obligation. If the doctrine of merger could be said to be inapplicable to a case of this character, it would still be true that even with respect to the union of a lesser and greater estate in the same property and in the same person, the estates will not be regarded as merging if equitable considerations require them to be regarded as separate."

However, in Johnson v. Jones, 39 Okla. 323, 135 Pac. 12, 48 L.R.A.(N.S.) 547, the opposite view was announced. In that case it was held that a mortgagee by attaching the mortgaged property, released the mortgage. The court said: "The lower court did not err in giving the instruction. Instruction No. 23 reads as follows: 'You are instructed that you will not consider the question of the mortgage, which plaintiff claims he held on the mares and mules now claimed by defendant Jones, so far as it relates to said mares and mules, as the plaintiff, by attaching said property, destroyed whatever mortgage lien he may have had by reason of said alleged mortgage, and, in determining the rights of said defendant Jones to said property, said mortgage will be considered by you.' This instruction correctly states the law of the case. See Dix v. Smith, 9 Okla. 124, 60 Pac. 303, 50 L.R.A. 714; Crimson v. Barse Live Stock Commission Co. 17 Okla. 117, 87 Pac. 876; Jones on Chattel Mortgages, sec 565. The distinction urged by counsel, while ingenious, to our minds is fallacious, and will not stand." It may be pointed out that in Oklahoma a mortgagee has title to the mortgaged property and not merely a lien. To substantially the same effect, see Rooney v. McPherson, 38 Okla. 410, 133 Pac. 212. But in Sheets v. Hocker, 34 Okla. 676, 128 Pac. 725, a stranger to the mortgage who levied an execution against a house for the purpose of satisfying a money judgment but who when informed of the existence of a chattel mortgage on the same property, obtained an assignment of the same and commenced foreclosure proceedings under the mortgage after dropping the levy, was held not to lose his rights under the mortgage. The court said: "The plaintiff relied upon the proposition that the levy of the execution was a waiver of the mortgage. The evidence does not show an intention to waive the mortgage. It shows that the execution was placed in the hands of the constable before the defendant learned of the existence of the mortgage. As soon as defendant learned of the mortgage, he bought it, and from that time proceeded under it, and proceeded promptly. The constable had the execution and levied it, but according to the testimony, he was instructed not to proceed under it. This instruction was given next morning. The defendant proceeded promptly to advertise and sell, and never seemed to rely on the execution at all. The facts of this case do not bring it within the rule laid down in Dix v. Smith, 9 Okla. 124, 60 Pac. 303, 50 L.R.A. 714. In that case the creditor proceeded with an attachment. In this case he proceeded with the mortgage, and instructed the officer not to proceed under the execution. The mortgage lien was not discharged when defendant bought the note, and had it assigned to himself, and the fact that the constable also levied an execution did not discharge the lien of the mortgage."

PERDUE ET AL.

v.

STARKEY'S HEIRS.

Virginia Supreme Court of Appeals—September 9, 1915.

117 Va. 806; 86 S. E. 158.

Wills — Division Per Capita or Per Stirpes.

A bequest to persons who are living and to children of another who is dead presumptive-

ly refers to the children as individuals and not as a class, and the children take the same share per capita with those persons who are living, and the relations between the beneficiaries and the operation of the statute on those relations in case of intestacy do not overcome the presumption that a per capita distribution was intended.

[See note at end of this case.]

Same.

A husband and wife executed a will whereby they made specific legacies, and then gave to persons named and the daughters of another person their estate, "to be equally divided between them." The beneficiaries bore different degrees of relationship to each other and to the husband and wife. Held, that the estate must be divided per capita among the beneficiaries.

[See note at end of this case.]

Appeal from Circuit Court, Roanoke county.

Action between Perdue and Starkey's heirs, involving construction of will. From judgment rendered, certain parties appeal. The facts are stated in the opinion. REVERSED.

Samuel A. Anderson and *John P. Lee* for appellants.

Martin & Chitwood, Coxe & Cocke and *E. W. Saunders* for appellees.

[807] HARRISON, J.—This appeal involves the proper construction of the fifth clause of the joint will of John C. Starkey and Mary A. Starkey, his wife.

After sundry specific legacies are made, the fifth clause disposes of the residuum of the joint estate as follows: "We give and bequeath unto Sallie P. Blount, Elsie Jeter, Duck Hancock and Charles F. Poindexter and S. L. Holland's daughters by first wife the remainder of our estate, both real and personal, to be equally divided between them."

The beneficiaries under this clause bear different degrees of relationship to each other and to the testator and the testatrix. Some are nieces of the testator and others nieces of the testatrix, Duck Hancock and Charles Poindexter being niece and nephew of both, and the appellants, who are S. L. Holland's daughters by his first wife, being great-nieces of the testatrix.

The rule of construction to be applied in the interpretation of the language used in the clause under consideration has long been settled in this jurisdiction. It is that, in the absence of explanation, where a bequest is made to some who are living and to the children of another who is dead, the children of the one who is dead are presumed to be referred to as individuals and not as a class, taking the same share *per capita* with those who are living; and that the relations existing between the parties, and the operation which the statute would have upon those relations in case of intestacy are not sufficient to overcome the presumption that a *per capita* distribution was intended. Whittle v. Whittle, 108 Va. 22, 60 S. E. 748; Walker v. Webster, 95 Va. 377, 28 S. E. 570; Hoxton v. Griffith, 18 Grat. (Va.) 574.

In the last named case, Judge Joynes, speaking for this court, states the rule in the following clear and satisfactory [808] language: "When a bequest is made to several persons, in general terms, indicating that they are to take equally as tenants in common, each individual will of course take the same share; in other words, the legatees will take *per capita*. The same rule applies where a bequest is to one who is living, and to the children of another who is dead, whatever may be the relations of the parties to each other, or however the statute of distributions might operate upon those relations in case of intestacy. Thus, where property is given "to my brother A, and to the children of my brother B," A takes a share only equal to that of each of the children of B. So where the gift is to A's and B's children, or to the children of A and the children of B, the children take as individuals, *per capita*. The substance of this rule of construction is that, in the absence of explanation, the children in such a case are presumed to be referred to as individuals, and not as a class, and that the relations existing between the parties, and the operation which the statute would have upon those relations in case of intestacy, are not sufficient to control this presumption. The general rule is well established, and has been fully recognized by the decisions of this court. Brewer v. Opie, 1 Call. (Va.) 212; Crow v. Crow, 1 Leigh (Va.) 74; McMaster v. McMaster, 10 Grat. (Va.) 275." This learned judge adds: "But this rule is not inflexible, and it will yield to the cardinal rule of construction which requires that effect shall be given to the intention of the testator, to be collected from the whole will. If, therefore, an intention can be collected from the will that the children of the deceased parent are to take as a class, that intention will prevail."

The cases cited in support of the rule by Judge Joynes show from what an early day the rule as stated by him has been the established law in this State; and the subsequent [809] cases cited by us show how uniformly that rule of construction has been upheld to the present day.

The will in the case before us is brief. As already seen, after making several specific legacies, the residuary clause under construction declares that the beneficiaries mentioned therein are to take "the remainder of our estate, both real and personal, to be equally

divided between them." There is not a word in any other part of the will indicating that the makers intended by the language used any other disposition of their estate than that which follows under the rule of construction mentioned; nor is there anything in the agreed facts which suggests that they expected the estate given to be divided otherwise than *per capita* among those who were to take it.

The makers of the will selected those who were to take the remainder of their estate, describing some of them by name and others as the daughters of S. L. Holland by his first wife, and clearly and specifically directed that such residuum should be equally divided between them.

The interpretation put upon the will by the circuit court, that the beneficiaries under the fifth clause took *per stirpes* and not *per capita* is in conflict with the established rule of construction to which we have adverted. The decree complained of must, therefore, be reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

Reversed.

NOTE.

Bequest to Be Divided Equally Among Persons Standing in Different Relationships to Testator as Requiring Division Per Capita or Per Stirpes.

Generally, 411.
Gift to Unnamed Persons, 412.
Gift to Named Persons and Unnamed Members of Class:
Generally, 412.
Children and Grandchildren, 413.
Brothers or Sisters and Nephews or Nieces, 414.
Wife and Children, 415.
Gift to Named Persons of Two or More Classes, 415.

Generally.

It is a general rule of testamentary construction that, in the absence of language indicating a contrary intent, a direction that a bequest to several persons shall be divided equally among them imports a diversion per capita and not per stirpes though the beneficiaries stand in different degrees of relationship to the testator. Ballentine v. Foster, 128 Ala. 638, 30 So. 481; Purnell v. Culbertson, 12 Bush (Ky.) 369; Hertz's Estate, 22 Pa. Dist. 250; Priester's Estate, 23 Pa. Super. Ct. 336. And see the cases cited throughout this note. "The settled legal construction of the words 'equally to be divided,' when used in a will is to cause an equal division of the property per capita and not per stirpes, whether the devisees be children and grandchildren, brothers or sisters and nephews or nieces, or strangers in blood to the testator." Doe v. Roe, 2 Har. (Del.) 103, 29 Am. Dec. 336, *citing* Butler v. Stratton, 3 Bro. C. C. (Eng.) 367; Lincoln v. Pelham, 10 Ves. Jr. (Eng.) 176; Lugar v. Harman, 1 Cox Ch. (Eng.) 250; Northey v. Strange, 1 P. Wms. (Eng.) 341. So in Johnston v. Knight, 117 N. C. 122, 23 S. E. 92, it was said: "The words 'equally divided' do not absolutely control in all instances, but yield only when other language of the will or the manifest intent requires it."

The rule yields of course to testamentary language evincing a contrary intent. See the cases cited throughout this note. Thus in Risk's Appeal, 52 Pa. St. 269, 91 Am. Dec. 156, it was said: "But, like all other rules of construction, when applied to wills, this one, that entitles children of a living child to take per capita, must be controlled by the general intention of the testator. Not that the principle of the per stirpes rule is to be preferred because adopted by the statutes of distribution, for it may be the very purpose of the testator, as it is his right, to take his estate out of the principles of the statute. But it is a reasonable presumption that the mind of the testator was familiar with the statutory rule of distributions; and if we see in his will an intention to distribute according to that rule, we should give it effect all the more readily because it is provided by law for cases where there is no will. Why, then, should a testator make a will at all, if he means it should operate as the statute would operate without it? He may desire to give legacies to those who would take nothing under the statute, or increased portions to some who would take—or if content that the rules of the statute shall apply to his whole estate, he may still desire to appoint his own executors. For one or the other, or all of these reasons, he may have been moved to make a will. Whilst we are not to hesitate to allow him to alter the descents provided in the statute, we are not, on the other hand, to presume, from the fact that he made a will, that he meant its construction should be at all possible points inconsistent with the statute. In a word, a per capita construction is not to be forced upon a particular devise, because the devisees under that clause, had they taken under the statute, would have been per stirpes."

In a number of cases, wherein it appeared that a bequest was directed to be divided equally "between" several persons belonging to two distinct classes it has been urged that the use of the word "between" instead of "among" indicated an intention that the dis-

tribution should be per stirpes, but it has been held uniformly that no importance is to be attached to the use of the word in that connection. McIntire v. McIntire, 192 U. S. 116, 24 S. Ct. 196, 48 U. S. (L. ed.) 369; Almand v. Whitaker, 113 Ga. 889, 39 S. E. 395; Kling v. Schnellbecker, 107 Ia. 636, 78 N. W. 673; Farmer v. Kimball, 46 N. H. 435, 88 Am. Dec. 219; Myres v. Myres, 23 How. Pr. (N. Y.) 410; Hicks's Estate, 134 Pa. St. 507, 19 Atl. 705. In McIntire v. McIntire, supra, it was said: "And with regard to the word 'between,' the will is an illiterate will, and as the popular use of the word is not accurate no conclusion safely can be based upon that." In Kling v. Schnellbecker, 107 Ia. 636, 78 N. W. 673, the court said: "Much is made in the argument of the word 'between;' and it may be conceded that, strictly speaking, it implies a division between two parties or classes; but the reference may be to more than two parties. Haskell v. Sargent, 113 Mass. 243. When the words 'between' and 'among' follow the verb 'divide,' their general significance is very similar, and in popular use they are synonymous, though 'among' connotes a collection, and is never followed by two of any sort, while 'between' may be followed by any plural number, and seems to refer to individuals of a class, rather than to the class itself."

Gift to Unnamed Persons.

A bequest to be divided equally among several persons designated only by a statement of their relationship to the testator is ordinarily to be distributed per capita. McIntire v. McIntire, 192 U. S. 116, 24 S. Ct. 196, 48 U. S. (L. ed.) 369 (children of testator's two brothers); Kling v. Schnellbecker, 107 Ia. 636, 78 N. W. 673 (sister and wife's sisters); Farmer v. Kimball, 46 N. H. 435, 88 Am. Dec. 219 (testator's cousins and children of her mother's cousins). And see Miller v. Wilson (Ky.) 66 S. W. 755. *Compare* Crozier v. Cundall, 99 Ky. 202, 35 S. W. 546 (children and grandchildren).

By the weight of authority a bequest to be divided equally among the "heirs" of the testator is to be distributed per capita. Tuttle v. Puitt, 68 N. C. 543; Mooney v. Purpus, 70 Ohio St. 57, 70 N. E. 894; Ramsey v. Stephenson, 34 Ore. 408, 56 Pac. 520, 57 Pac. 195; Copeland v. Copeland, 64 Ill. App. 100; Walker v. Webster, 95 Va. 377, 28 S. E. 570. In Mooney v. Purpus, supra, it was said: "By the use of the phrase 'my lawful heirs' he manifestly intended that all those persons who would be his heirs under the statute of descent, in case of his intestacy, should be his beneficiaries, and should take the residuum of his estate. And by the use of the words 'equally, share and share alike,' he just as clearly evidenced the intention that they should not take such residuum in the manner prescribed by the statute, but should take it equally, share and share alike, as directed by his will. By reference to the statute we ascertain who are to take under item four, and by the plain provisions of the will itself, we are told how they are to take, that is: 'equally, share and share alike,' per capita and not per stirpes."

In a few cases, however, it has been held that despite a provision for "equal" distribution a testator in leaving his property to his "heirs" is deemed to have adopted the provisions of the statute of descents and the distribution is per stirpes. Johnson v. Bodine, 108 Ia. 594, 79 N. W. 348; Matter of Griswold, 42 Misc. 230, 86 N. Y. S. 250; Young's Appeal, 83 Pa. St. 59.

Gift to Named Persons and Unnamed Members of Class.

Generally.

It seems that by the early English decisions it was established as a rule of construction that a gift to certain named persons and the children of other persons related to the testator in the same degree as those named is to be distributed per capita. While there is much dissent in the latter cases from that broad rule, it is held by the weight of authority that a provision in such a gift that the bequest shall be "equally" divided requires a distribution per capita. Pitney v. Brown, 44 Ill. 363; Purnell v. Culbertson, 12 Bush (Ky.) 369; Justice v. Stringer, 160 Ky. 354, 169 S. W. 836; Stokes v. Tilly, 9 N. J. Eq. 130; Macknet v. Macknet, 24 N. J. Eq. 277; Thornton v. Roberts, 30 N. J. Eq. 473; Burnet v. Burnet, 30 N. J. Eq. 595; Harrell v. Davenport, 58 N. C. 4; Culp v. Lee, 109 N. C. 675, 14 S. E. 74; Johnson v. Knight, 117 N. C. 122, 23 S. E. 92; Collins v. Feather, 52 W. Va. 107, 43 S. E. 323, 94 Am. St. Rep. 912, 61 L.R.A. 660; In re Bossi, 5 British Columbia 446. And see the cases cited in the following subdivisions of this note. The cases so holding attach little importance to the fact that such a distribution varies from that provided by the statute of descents, for the reason, tersely expressed in Cuthbert v. Laing, 75 N. H. 304, 73 Atl. 641, that "a will is made to avoid, not to carry into effect, the statute." In Pitney v. Brown, 44 Ill. 363, it was said: "The point has so often been decided by the courts, both of England and of this country, that there is an established canon of interpretation in regard to these words, from whose authority we do not feel at liberty to depart. With a long line of precedents all pointing in one direc-

tion, and on a question of admitted doubt, it is our duty to follow the rule, even if questioning its soundness. The rule is thus stated by Jarman (vol. 2, p. 111): 'when a legacy is to the children of several persons, they take per capita, and not per stirpes. The same rule applies when a bequest is made to a person, described as standing in a certain relation to the testator and to the children of another person, standing in the same relation; as, to my brother A and the children of my brother B, in which case A takes only a share equal to that of one of the children of B.' See also Lugar v. Harman, 1 Cox Ch. (Eng.) 250; Northey v. Strange, 1 P. Wms. (Eng.) 343; Blackler v. Webb, 2 P. Wms. 383; Butler v. Stratton, 3 Brown C. C. (Eng.) 367; Warrington v. Warrington, 2 Hare (Eng.) 54; Paine v. Wagner, 12 Sim. (Eng.) 184; Collins v. Hoxie, 9 Paige (N. Y.) 89; Conner v. Johnson, 2 Hill Eq. (S. C.) 41."

In a few cases the general rule as heretofore stated has been questioned. Roome v. Counter, 6 N. J. L. 111, 10 Am. Dec. 390; Ferrer v. Pyne, 81 N. Y. 281; In re Scott, 163 Pa. St. 165, 29 Atl. 877. And it requires but slight evidence of such an intent on the part of the testator to lead to a distribution per stirpes. Bethel v. Major (Ky.) 68 S. W. 631; Jourdan v. Green, 16 N. C. 270; Miller's Estate, 26 Pa. Super. Ct. 453; Sipe's Estate, 30 Pa. Super. Co. 145; Conner v. Johnson, 2 Hill. Eq. (S. C.) 41; Collier v. Collier, 3 Rich. Eq. (S. C.) 555, 55 Am. Dec. 653; Perdriau v. Wells, 5 Rich. Eq. (S. C.) 20. Thus a bequest to be divided equally between A and the children of B: in case of the death of A his share to go to C's children, has been held to require a division per stirpes. Green's Estate, 140 Pa. St. 253, 21 Atl. 317.

In case of a bequest to be divided equally between a named person and the "heirs" of another, if, on a construction of the entire will, "heirs" is deemed to mean "children," the distribution will be per capita. Whitehurst v. Pritchard, 5 N. C. 383; Stowe v. Ward, 10 N. C. 604; Harris v. Philpot, 40 N. C. 324. But if "heirs" is used as meaning heirs at law a distribution per stirpes is required. Balcom v. Haynes, 14 Allen (Mass.) 204; Huntress v. Place, 137 Mass. 409; McClench v. Waldron, 204 Mass. 554, 91 N. E. 126: Grandy v. Sawyer, 62 N. C. 8; In re Ashburner, 159 Pa. St. 545, 28 Atl. 361.

CHILDREN AND GRANDCHILDREN.

A bequest to be divided equally among named children of the testator and the unnamed children or issue of a deceased child, the beneficiaries, according to the weight of authority, take per capita. Dowding v. Smith, 3 Beav. (Eng.) 541; Blackler v. Webb, 2 P. Wms. (Eng.) 383; Houghton v. Bell, 23 Can. Sup. Ct. 498; Remillard v. Chabot, 33 Can. Sup. Ct. 328; In re Duder [1884–1896] Newfoundland L. Rep. 186; Crawford v. Redus, 54 Miss. 700; Bunner v. Storm, 1 Sandf. Ch. (N. Y.) 357; Myres v. Myres, 23 How. Pr. (N. Y.) 410; Whitehurst v. Pritchard, 5 N. C. 383; Martin v. Gould, 17 N. C. 305; Harris v. Philpot, 40 N. C. 324; Waller v. Forsythe, 62 N. C. 353; Marsh v. Dellinger, 127 N. C. 360, 37 S. E. 494; In re Dible, *81 Pa. St. 279; Wessenger v. Hunt, 9 Rich. Eq. (S. C.) 459; Kimbro v. Johnston, 15 Lea (Tenn.) 78. In Cuthbert v. Laing, 75 N. H. 305, 73 Atl. 641, it was said: "The claim that the grandchildren take but one share in the estate cannot be sustained. The direction of the will is that the property be distributed in equal shares 'to my children, . . . and also to my grandchildren.' There is no satisfactory evidence that the testator intended the grandchildren to take only the statutory share of their deceased parent. In the provision relating to survivorship he treats all alike. The shares of deceased beneficiaries go to the survivors. If one of the grandchildren had died, its share would have been distributed to all the survivors equally. Had the testator had in mind the statute of distribution, and intended that the two grandchildren should take only their father's share, he would also have provided that in the event of the death of one grandchild its half of its father's share in the estate should go to the other grandchild, to the exclusion of its uncles and aunts." In Brittain v. Carson, 46 Md. 186, the court said: "The words of the will are, 'shall be equally divided between my said daughter, Amelia J. Brittain, and the children of Virginia Carson,' A long series of uniform decisions has given a settled construction to provisions in a will similar to this, all holding that the legatees, by force of the language used, take equally, and that the distribution is to be per capita."

In a few cases, however, a contrary view has been upheld. Billinslea v. Abercrombie, 2 Stew. & P. (Ala.) 24; Lyon v. Acker, 33 Conn. 222; Wood v. Robertson, 113 Ind. 323, 15 N. E. 457; Risk's Appeal, 52 Pa. St. 269, 91 Am. Dec. 156. In Eyer v. Beck, 70 Mich. 179, 38 N. W. 20, it was said: "The laws of inheritance are generally understood by intelligent people. It is understood that, when there are children and grandchildren to take, the grandchildren by one child take in aggregate only that child's portion. In our judgment this idea is clearly expressed in the will. The testator directs that the property shall be equally divided among his 'heirs.' He then goes on to name them, and in doing so gives the name of each child, but not of any grandchild. Those he describes only as 'the children of Christian Beck, J.,

deceased.' Coming as this does in the description of the heirs, we think it evidently means that those children together represent one heir. That is in harmony with the statute of distributions, and is at least quite as natural a meaning as the other, and is to be preferred for that reason, as conforming to our general policy."

If the language of the will manifests an intent that the distribution shall be per stirpes it must of course prevail. Vincent v. Newhouse, 83 N. Y. 505; Ricks v. Williams, 16 N. C. 3; Henderson v. Womack, 41 N. C. 437; Hamlett v. Hamlett, 12 Leigh (Va.) 350. In Ferrer v. Pyne, 81 N. Y. 281, it appeared that a will provided as follows: "I wish the same to be divided equally between Anita, the children of Irene, the son of Isabel, and Henry, the doctor." The court said: "In Powell on Devises (vol. 2, p. 331), it is said that where a gift is made to a person described as standing in a certain relation to the testator, and to the children of another person standing in the same relation, as to my brother A., and the children of my brother B., A. only takes a share equal to one of the children of B., and this position is abundantly sustained by the authority of English cases (Blackler v. Webb, 2 P. Wms. 383; Dowding v. Smith, 3 Beav. 541; Lenden v. Blackmore, 10 Sim. 626, among others), and to some extent by the courts of this country. Yet if the case stood upon the words of the residuary clause alone, we should find great difficulty in confirming, by the sanction of this court, a construction opposed to the apparent meaning of the language used by the testator, and at variance with the natural disposition of mankind. We find the testator calling to mind his children, their names, their relations to others by marriage, the death of some, and with these incidents before him making a distribution of his estate. The living children are named by him, while the children of the daughters who are dead spoken of not by name, but 'as the son of Isabel,' or 'the children of Irene,' evidently giving to them the place as recipients of his bounty which Isabel or Irene, if living, would have filled. He designates the children of Irene as a class, and not as individuals, remembers them not in their own persons, but as representatives of their parent, and substitutes them in her place. We are unable to discover any intent to bestow upon them any greater or more numerous marks of his affection than their parent would, if living, have received. The rule referred to has, in modern times, been applied with reluctance, by some courts, because it had become a rule of property, and by others out of deference to its supposed authority; but in many, if not in all cases, with open protest, while by others it has been wholly rejected. (Minter's Appeal 40 Pa. St. 111; Raymond v. Hillhouse [Conn.] 19 Alb. L. J. 523.) It is, however, not necessary for us to go to that extent, because wherever the rule is adopted it is also held that it is to be governed by the context, and as is said will yield 'to a very faint glimpse of a different intention.' (2 Jarman on Wills [1st Am. ed.] 111; marg. 112; Clark v. Lynch, 46 Barb. (N. Y.) 69; Collins v. Hoxie, 9 Paige (N. Y.) 81; Brett v. Horton, 5 Jur. (Eng.) 696; Roper on Legacies, 159; Lockhart v. Lockhart, 56 N. C. 205; Balcom v. Haynes, 14 Allen (Mass.) 204.) If, therefore, from any portion of the will an intention can be discovered that the children of the deceased daughter are to take as a class, and not as individuals, that intention must prevail, notwithstanding the rule of construction to which we have adverted. It may, we think, be found in the preceding clause of the will, and is fairly to be deduced from the words, 'To the children of Irene fifty thousand dollars.' This is plainly a bequest to those persons as a class, in their representative capacity, and the sum named goes to them as a body, and when we find the same language used in respect to the same persons, in the residuary clause, 'the children of Irene,' as recipients of a share of a single sum, the surplus, we conclude that the testator used the words in the last clause with the same signification, and to the same intent as in the first." In Roome v. Counter, 6 N. J. L. 111, 10 Am. Dec. 390, a distribution per stirpes was held to be required by the following provision: "Item, it is my will that all the remainder of my movable estate shall be equally divided: that is to say, Henry Counter, and the heirs of my son Peter Counter, Anna Roome, Susannah Berry, Elizabeth Dodd and Sarah Counter.'"

Brothers or Sisters and Nephews or Nieces.

A bequest to be divided equally among named brothers or sisters of the testator and the unnamed children of a deceased brother or sister is to be distributed per capita. Atkinson v. Bartrum, 28 Beav. 219, 54 Eng. Rep. (Reprint) 349; Howard v. Howard, 30 Ala. 391; Puryear v. Edmondson, 4 Heisk. (Tenn.) 43; Follansbee v. Follensbee, 7 App. Cas. (D. C.) 282; Maddox v. State, 4 Har. & J. (Md.) 539; Lee v. Lee, 39 Barb. (N. Y.) 172. *Compare* Stow v. Ward, 12 N. C. 67. In Lee v. Lee, supra, it was said: "Had the testator said, 'I give to my brother' and to the children of his brother and sister, naming each of them as a legatee, and added 'in equal proportions, share and share alike,' there would be no doubt of the right of each of the children to an equal share. The mere

grouping of the children of Ellen under that title, instead of naming them individually, does not alter the rights of each."

However, a contrary view has been expressed. Raymond v. Hillhouse, 45 Conn. 467, 29 Am. Rep. 688; Henry v. Thomas, 118 Ind. 23, 20 N. E. 519. In Lachland v. Downing, 11 B. Mon. (Ky.) 32, a division per stirpes was upheld, but that case was said in Purnell v. Culbertson, 12 Bush (Ky.) 369, to have been governed by the peculiar language of the bequest. In White v. Holland, 92 Ga. 216, 18 S. E. 17, the language of a will was held to show an intention that the distribution should be per stirpes.

WIFE AND CHILDREN.

By a bequest to be divided equally between the wife and children of the testator the beneficiaries take per capita. Lord v. Moore, 20 Conn. 122; Morgan v. Pettit, 3 Dem. (N. Y.) 61; Seabury v. Brewer, 53 Barb. (N. Y.) 662; Hick's Estate, 134 Pa. St. 507, 19 Atl. 705. In Seabury v. Brewer, 53 Barb. (N. Y.) 662, it appeared that a will contained the following provision: "I wish my person and real estate to be appropriated equally to the benefit of my wife Emily H. Brewer, and of my children, Seabury Doane Brewer and Florence Kipp Brewer." The court said: "We regard the law too well settled to admit of a reasonable doubt, in regard to the construction which this provision of said will should receive, in determining the rights of the respective parties in the division of said estate. It is very clear that the parties named take per capita and not per stirpes, and therefore each is entitled to one third of the residue of the estate after the dower interest of the widow, Emily H. Brewer, is satisfied."

Gift to Named Persons of Two or More Classes.

Where a devise is given to several persons each designated by name, to be divided equally among them, the division is to be per capita though the beneficiaries belong to two or more classes or are related to the testator in different degrees. Duffee v. Buchanan, 8 Ala. 27; Almand v. Whitaker, 113 Ga. 889, 39 S. E. 395; Wells v. Newton, 4 Bush. (Ky.) 158; Seabury v. Brewer, 53 Barb. (N. Y.) 662. And see the reported case. "Whenever property is devised to children and grandchildren, or to brothers and sisters and nephews and nieces, to be equally divided between them, and the devisees are individually named, they take per capita and not per stirpes." Doe v. Roe, 2 Har. (Del.) 103, 29 Am. Dec. 336. So in Hardy v. Roach, 190 Mass. 223, 76 N. E. 720, it was said: "The clause in question distinctly describes the legatees by their respective names, and plainly says that the property shall be equally divided between them; and we see nothing in the method of division into paragraphs, or in the other framework of the clause, to indicate that this language is to be taken in any other than its ordinary meaning. It is plain that the legatees take per capita."

Of course a plainly expressed design of the testator to divide the beneficiaries into classes and give the estate to them per stirpes will prevail even over the presumption from their designation by name. Randolph v. Bond, 12 Ga. 362; Hoxton v. Griffith, 18 Grat. (Va.) 574.

In Huston v. Crook, 38 Ohio St. 328, the court held that a bequest to several persons was to be distributed per capita in view of a previous naming of the beneficiaries. It was said: "By the 14th and 15th items of his will, the testator directs that the proceeds of his personal estate be divided, 'equally, share and share alike, between all my aforesaid heirs.' At the time these words were used and when the will took effect, he had children, and three grandchildren, the heirs of a deceased daughter. In the preceding clauses of the will, these children and grandchildren were each named, and he gave to each a specific legacy. None of these were heirs in the strict legal sense, as he was then living, but each was an heir apparent, and each would have been an heir, had he died intestate. Hence the phrase, 'all my aforesaid heirs,' was used to expressly include all such as were in fact heirs apparent. These residuary clauses of the will, did not direct a division among 'all his children,' or 'all his sons and daughters' but 'between all his aforesaid heirs.' There is nothing found elsewhere in the provisions of this will, to warrant us in limiting this comprehensive expression to part only of his heirs. To hold that this phrase includes some of the heirs and excludes others, would do violence to the well-settled rule of construction, that the intention of the testator must be discovered from the words used, in connection with the other provisions of the will. The explicit direction that this division should be made 'equally share and share alike,' entitles these grandchildren to take per capita, and not per stirpes. Had this direction as to the equality been omitted, a different result might have been reached in accordance with the judgment of the district court, and in harmony with numerous well considered cases, but the testator has left nothing for construction on this point. Each is to have an equal share."

GEORGE

v.

CONSOLIDATED LIGHTING COMPANY ET AL.

Vermont Supreme Court—January 28, 1914.

87 Vt. 411; 89 Atl. 635.

Eminent Domain — Requisites of Proceeding — Impartial Tribunal.

The questions of necessity for condemning land and due compensation must ultimately be determined by an impartial tribunal proceeding on due notice to interested parties and hearing before deciding, but not acting unreasonably or arbitrarily.

Origin and Scope of Power.

The only application of the doctrine of eminent domain at common law was the exercise by the sovereign of the prerogative right to take and enter upon lands in the defense of the realm.

Same.

The exercise of such sovereign power as the laying waste of one's own country to compel the retreat of a public enemy or the taking of land for fortifications, etc., is not an application of the power of eminent domain, but is referable rather to the war power.

Delegation to Commission — Validity.

The question of the necessity for taking property by eminent domain is a judicial question which must be determined by a court or some quasi judicial tribunal designated by statute, and Acts 1908, No. 116, § 13, providing that whenever it is necessary, to meet the reasonable requirements of service to the public, that any company, such as a lighting company, should cross another's lands with poles and wires, and it cannot agree with the owner as to the matter of necessity or of compensation, it may petition the Public Service Commission, which shall then, upon due notice to all parties in interest, determine the question of necessity and compensation, and render a judgment which shall be final except as an appeal to the Supreme Court is allowed, is not unconstitutional for authorizing the commission to determine the questions of necessity and compensation.

[See note at end of this case.]

Same.

Acts 1908, No. 116, § 13, providing that whenever it is necessary to meet the service requirements of a public service corporation, such as a lighting company, that it should cross another's land with wires, etc., and it cannot agree with the owner as to questions of necessity or compensation, it may petition the Public Service Commission, which shall, upon due notice to all parties in interest, determine such questions and render a judgment, which shall be final, except as an appeal is allowed to the Supreme Court, is not unconstitutional for empowering the commission to render "judgment" on the ground that it is an administrative body; the word being used in a comprehensive sense which will include the findings and determination of such a body.

[See note at end of this case.]

Same.

Acts 1908, No. 116, § 13, providing that if a public service corporation, such as a lighting company, cannot agree with the landowner as to the necessity of taking land for public purposes or as to compensation, it may petition the Public Service Commission, which shall, upon notice, determine the questions of the necessity and compensation and render judgment, is applicable in proceedings by a lighting company, the charter of which as amended by Acts 1902, No. 202, § 3, provided a constitutional method for the exercise of the power of eminent domain granted thereby.

[See note at end of this case.]

Judicial Power after Condemnation by Commission.

The courts will enforce and protect the rights of the landowner and of the public service corporation condemning land for placing lighting wires, etc., under Acts 1908, No. 116, § 13, after the Public Service Commission has found in favor of condemnor and awarded compensation.

Original petition for writ of prohibition. Jennie George, petitioner, and Consolidated Lighting Company et al., petitioners. The facts are stated in the opinion. PETITION DISMISSED.

Theriault & Hunt for petitioner.

Robert C. Bacon and *Senter & Senter* for *petitioncrs*.

[413] HASELTON, J.—This is a petition for a writ of prohibition to stop proceedings pending before the Public Service Commission. Such proceedings were for the taking, in the exercise of the power of eminent domain, of lands of this petitioner, Jennie George, for the purpose of the construction of a transmission line by the erection of poles and the stringing of wires. The proceedings were brought by the defendant, the Consolidated Lighting Company, before the Public Service Commission of this State under § 13 of No. 116 of the Laws of 1908. The defendants, other than the Lighting Company, make up the Public Service Commission.

Some questions discussed in the briefs were expressly waived in open Court, and on the hearing it was agreed that there were but two questions in the case.

1. Is the section 13, above referred to, constitutional?

2. If it is constitutional does it apply to the case of a Public Service Corporation with

a Charter, granted prior to the general law of which the section in question is a part, providing a constitutional method of exercising the right of eminent domain.

Section 13, of No. 116, Acts of 1908, provides that whenever it is necessary in order to meet the reasonable requirements of service to the public that any company, of a class to which this Lighting Company belongs, should cross the lands of any person with pipe lines, conduits, or lines of poles and wires, and the company cannot agree with the owner of the lands as to the matter of necessity or of compensation it may prefer a petition to the Public Service Commission, and that the Commission shall then, upon due notice to all parties in interest, determine the questions of necessity and compensation and render a judgment which shall be final, except as an appeal to the [414] Supreme Court is allowed from the order or decrees of the commission.

No claim is made in this case that the use for which the statute authorizes private property to be taken is not a public one within the meaning of the constitutional provision relating to the matter of eminent domain. But it is claimed by the petitioner that the provision for the determination of the facts of necessity and due compensation in a particular case is unconstitutional.

We go a long way with the petitioner in her argument as to constitutional requirements in those regards. Such facts must ultimately be determined by an impartial tribunal proceeding on due notice to all parties in interest, hearing before deciding, basing its conclusion upon matters properly before it, and not acting unreasonably and arbitrarily. Wheeler v. St. Johnsbury, 87 Vt. 46, 87 Atl. 349; Rutland, R. etc. Co. v. Clarendon Power Co. 86 Vt. 45, 83 Atl. 332, 44 L.R.A.(N.S.) 1204; Deerfield River Co. v. Wilmington Power, etc. Co. 83 Vt. 548, 77 Atl. 862; Burlington v. Central Vermont R. Co. 82 Vt. 5, 71 Atl. 826; Barber v. Vinton, 82 Vt. 327, 73 Atl. 881; Stearns v. Barre, 73 Vt. 281, 50 Atl. 1086, 58 L.R.A. 240, 87 Am. St. Rep. 721; Lynch v. Rutland, 66 Vt. 570, 29 Atl. 1015; LaFarrier v. Hardy, 66 Vt. 200, 28 Atl. 1030; Farnsworth v. Goodhue, 48 Vt. 209.

Our later holdings are that where the Legislature delegates to private corporations affected with a public interest the power of eminent domain by way of what has been called "a roving franchise" the necessity for its exercise in a particular case and with respect to particular property must exist or such exercise will be invalid; and the necessity and its extent must be determined by an impartial tribunal.

Since such corporations although affected with a public interest are organized for private gain, if they are to judge of the necessity of a taking in a particular case and of the extent of the necessity, they are made judges in matters in which their private and pecuniary interests are involved. If tribunals may reap profit from their decisions they might as well be paid in money as in lands. The evil which our decisions combat is not of the subtle kind which baffles detection.

To leave one to be a judge in his own case and to say that his decision of facts must stand unless it can be affirmatively shown that he acted unreasonably or in bad faith or abused the [415] power conferred is contrary to every principle of justice. All experience shows that one may act honestly and in good faith and yet, if his private interest is involved in the matter before him, may arrive at conclusions at which an impartial man would not arrive.

To say that the function in question is a legislative or political one is to make no progress.

When the Legislature acts directly in such a matter, as it sometimes though rarely does, it acts as an impartial body, and when it delegates the power to take, it is bound to provide an impartial tribunal for the ultimate determination of the questions upon which the power to take depends.

This delegation of power is, in the case of most private corporations affected with a public interest, in the nature of a valuable concession. And when the power conferred is a general power to take so far as necessity requires, the necessity and extent of the taking ought in decent observance of fundamental principles to be determined by an impartial tribunal.

The Law Quarterly Review, a periodical edited by Sir Frederick Pollock, has in its number for July, 1910, a very timely article on the subject we are now considering. The writer of the article says, and we can only quote here and there: "Assuming these powers are exercised in the best possible faith it does not require a cynical turn of mind to foresee that disputes are bound to arise. Most questions have two sides to them. . . . This decision (referring to a specific case) is particularly instructive as showing the case with which an informal tribunal, which disregards the ordinary safeguards of justice, can run off the rails, and with the best possible intention nevertheless go hopelessly wrong. . . . It used also to be thought that judicial and political duties do not harmonize in the same individual, and that a man who takes upon himself the former should lay aside the latter. But if this is obsolete it must still be true that a man shall not be judge in his own cause." Yet a government official, whose duty it is to

secure the smooth working of an act as much as to see that rights thereunder are accurately adjusted, may go straight from an acrimonious correspondence with a party to the seat of judgment."

This writer speaks of "leaving the economic question of the access to lands" to a partisan and interested tribunal as of a fact which needs only to be stated to be condemned.

[416] We are told that proceedings for a taking of property by the power of eminent domain were at common law inquisitorial and *ex parte*. But our constitution intended to provide that they should not be inquisitorial and *ex parte*. In the orderly administration of constitutional government inquisitorial and *ex parte* measures may be taken for the institution of proceedings but not for their determination. Our Constitution of 1777 was the first to contain a provision respecting the taking of private property for public use, for while in the main we copied the Pennsylvania Constitution of 1776, the provision referred to was not found therein.

By our constitutional provision the right to take for public uses was recognized, but was limited to the requirements of necessity and carried with it the right of the owner to due compensation. Though many courts put upon constitutional provisions similar to our provision, though in general less specific than it, a different construction from that which we put upon our provision, we are content to abide by the doctrine hereinbefore stated.

In the discussion of the doctrine of eminent domain rather too much is said about the common law. The phrase itself was not known to the common law nor was the doctrine itself in any other application of it than was found in the exercise by the sovereign of the prerogative right to enter upon lands for the defence of the realm. Atty.-Gen. v. Tamlane (1879) 12 Ch. D. (Eng.) 214.

To concede that at common law the doctrine was in embryo is to make an abundant concession.

While the common law was developing English Government was asserting its rights to defend its existence at all hazards. But the granting of the power of eminent domain to a private corporation organized for the purpose of gain as a valuable concession on the ground that the corporation will be of service to the public as well as to its stockholders is a modern device finding its justification in modern conditions, and to be exercised in accordance with sound principles of economy and sociology, and to be safeguarded by fundamental principles.

References are also frequently made to Grotius, Vattel, Puffendorf, and other continental publicists none of whom wrote anything fairly applicable to the concession of the power of [417] eminent domain to private corporations affected with a public interest.

Vattel recognizes the right of expropriation only so far as its exercise is required by the public safety, Vattel, Law of Nations, § 244.

Puffendorf is quoted as saying that the eminent domain is something that some are afraid of more on account of the name than the thing. But writers upon eminent domain do not often quote what he further says that the power can rightfully be exercised only in the extremities of the state, illustrating his meaning by reference to the necessities of fortifications and sieges and, in dire extremeties, "of rifling private men's coffers," and laying waste one's own country to compel the retreat of an enemy.

Puffendorf, Book VIII, Division VII, pp. 681 and 682 of the English Translation, Edition of 1710.

To the same effect writes Burlamaqui. 2 Natural and Politic Law, Nugent's Translation, 211.

Such exercises of the sovereign power of the state are not properly referable to the power of eminent domain but to the war power and allied powers of sovereignty, much as the right to destroy private property in the exigencies of flood and fire is referred to the police power rather than to the power of eminent domain. Aitken v. Wells River, 70 Vt. 308, 40 Atl. 829, 41 L.R.A. 566, 67 Am. St. Rep. 672.

The systematical writers of the seventeenth and eighteenth centuries, above referred to, were contemplating, not the beneficial purposes contemplated by the law of eminent domain as we understand it. Such purposes were foreign to their discussions. They were considering rather the application in a strict sense of the maxim "The Public Safety is the Supreme Law."

But we cannot accede to the claim made by the petitioner that under our Constitution the questions of necessity and compensation must be determined by the judicial department of the government, by a body which in the strict sense is a court.

If an impartial tribunal is provided for the determination of the questions of necessity and compensation and the provisions with respect to notice and hearing and decision upon evidence and the judicial determination of questions of law are all provided for, the constitution is satisfied, and due process of law is accorded although the determination of facts is left [418] to a body not strictly a court but to an administrative body exercising quasi-judicial functions. Such a body is our Public Service Commission. Sabre v. Rutland R. Co. 86 Vt. 347, Ann. Cas. 1915C

1269, 85 Atl. 693; Bessette v. Goddard, 87 Vt. 77, 88 Atl. 1.

In a note to Lynch v. Forbes, 42 Am. St. Rep. 402, a Massachusetts case, 161 Mass. 302, 37 N. E. 437, it is said by Freeman, or one of his associates in criticism of the principal case that "where the Legislature has only authorized the taking of such property as is necessary, the question of the necessity for taking is a judicial one which must be determined either by a court, a jury or some quasi-judicial tribunal designated in the statute." It is there said that this rule is established by an almost overwhelming preponderance of authorities. That it is so established we doubt, but that the rule is a sound one and the only one that accords with the usual constitutional requirements we confidently reaffirm.

The view here taken is not inconsistent with the holding in Stearns v. Barre, 73 Vt. 281, 50 Atl. 1086, 58 L.R.A. 240, 87 Am. St. Rep. 721. The decision there is that the necessity of the taking and the extent of the necessity cannot be left to the final determination of the interested party instituting the proceedings. The principle applied is that no man can be judge in his own cause, a principle which applies whether the "cause" is strictly a judicial one or not, that the final determination of questions between parties must be by an impartial tribunal. As the applicable law then stood there was no such tribunal provided or contemplated. The opinion sometimes speaks of the necessity of an "impartial tribunal" and sometimes of the necessity of a "judicial tribunal," but the two phrases are to be construed in the same sense. The expressions used in the opinion are to be construed with reference to the facts of the case and the state of the law as it then was, and it would be a perversion of a sound legal principle to give to expressions, then incapable of being misunderstood, a meaning which would condemn as unconstitutional subsequent legislation not, of course, foreseen or contemplated by the court, on the ground that the impartial tribunal provided by such legislation was not a judicial tribunal in the full and strict sense although clothed with quasi-judicial functions.

It is not to be understood that an impartial commission provided by the Legislature, determining facts after due notice [419] and upon legal evidence, and so exercising quasi-judicial functions, does not meet the requirements of the constitution, as much as a commission appointed by the court to determine and report facts. The report of either commission is under the control of the court to the same extent. Bacon v. Boston, etc. R. Co. 83 Vt. 421, 76 Atl. 128; Bacon v. Boston, etc. R. Co. 83 Vt. 528, 77 Atl. 858; Sabre v. Rutland R. Co. 86 Vt. 347, Ann. Cas. 1915C 1269, 85 Atl. 693.

As to the right of a party aggrieved by an order or "judgment" of the Public Service Commission to resort to the courts, we repeat in substance what was said in the Sabre case, that if a party pursues the orderly and not burdensome course pointed out by the statute he may present to this Court the questions of the rulings of the commission in receiving or excluding evidence the sufficiency of the evidence to sustain the findings under the rule that a mere scintilla of evidence will not sustain a finding and the sufficiency of the findings to warrant an order under the rule that the order must not be unreasonable or arbitrary in its character and that the powers given to this Court on appeal are supplemented by common law remedies so as to secure to every party interested in the action of the commission a vindication of his full rights against arbitrary and unreasonable action, usurpation of powers and acts in excess of authority.

The functions of the Public Service Commission, and its impartial character, considered in connection with the supervisory power of the courts, render it not only eminently fit but unobjectionable on constitutional grounds that it should be entrusted with the determination of the questions which it is authorized to determine by the legislation now under consideration.

That the railroad commissioners may be legally substituted by the Legislature for commissioners appointed by a court or by judges thereof to act in respect to the appraisal of damages for a taking in the exercise of eminent domain was decided in Stimets v. Highgate, 81 Vt. 231, 69 Atl. 878, where it is said of sec 4, of No. 125, Acts of 1906, that "the railroad commissioners take the place, certainly in respect to the appraisal of damages, of the commissioners provided by V. S. 3814 (P. S. 4398), and this completes the process of taking land under this act, when the taking is by the railroad corporation, and constitutes due process of law, for every one is given an opportunity to be heard on all questions in which they are interested."

[420] In that case it is noted that the appeal to this Court had been substituted for an appeal to the court of chancery, a matter since fully discussed and decided, Central Vermont R. Co. v. State, 82 Vt. 145, 72 Atl. 324. In the Stimets case it was held that the method of taking provided by the act did not apply to a taking by towns simply because the Legislature had not made it so applicable.

Courts that differ with us as to the character of the question of necessity are agreed that the question of compensation must ultimately be left to an impartial tribunal; but they do not hold that for that reason the matter must be determined by the judiciary department. Backus v. Fort St. Union

Depot Co. 169 U. S. 569, 570, 42 U. S. (L. ed.) 853, 18 S. Ct. 445; U. S. v. Jones, 109 U. S. 513, 519, 27 U. S. (L. ed.) 1015, 3 S. Ct. 346.

The proceeding for the ascertainment of value says the Supreme Court of the United States "may be prosecuted before commissioners or special boards or the courts, with or without the intervention of a jury, as the legislative power may designate. All that is required is that it shall be conducted in some fair and just manner with opportunity to the owners of the property to present evidence as to its value, and to be heard thereon." U. S. v. Jones, 109 U. S. 513, 519, 3 S. Ct. 346, 27 U. S. (L. ed.) 1015.

It is claimed by the petitioner that the section of the statute in question, Sec. 13, No. 116, of the Acts of 1908, is unconstitutional because it empowers the Public Service Commission to render "judgment" in the matter of necessity and compensation and that it cannot render judgment since it is an administrative body. But this objection raises no serious question. The findings, decisions, and determinations of the commission may well enough be called judgments.

The word "judgment" as here used, is to be given a comprehensive rather than a narrow and technical meaning, is to be given a meaning with comports with a constitutional purpose.

The question remaining in the case is whether the general statutory provision under consideration, enacted in 1908, is applicable in view of the fact that the charter of the defendant Lighting Company, as amended in 1902, conferred upon it the power of eminent domain and provided an entirely constitutional method for the exercise of that power. Acts of 1902, 202, § 3.

[421] But the provision of the general law affects the remedy and the mode of procedure only and is not unconstitutional and is applicable. Backus v. Fort St. Union Depot Co. 169 U. S. 558, 18 S. Ct. 445, 42 U. S. (L. ed.) 853; Ames v. Lake Superior, etc. R. Co. 21 Minn. 241; McCrea v. Port Royal R. Co. 3 S. C. 381, 16 Am. Rep. 729; Baltimore, etc. R. Co. v. Nesbit, 10 How. 395, 13 U. S. (L. ed.) 469; Chicago, etc. R. Co. v. Guthrie, 192 Ill. 579, 61 N. E. 658; Paterson, etc. Traction Co. v. DeGray, 70 N. J. L. 59, 56 Atl. 250.

The Lighting Company and any corporation with like rights is entitled to proceed before the Public Service Commission in the matter of eminent domain. Whether the general law in that regard supersedes and repeals constitutional charter provisions in force before the general law took effect, or whether the general law merely furnishes a concurrent method of procedure, it is not necessary to determine until some corporation entitled to proceed under the general law claims the right to proceed by virtue of a constitutional provision of a charter granted before the general law took effect. The importance of the question requires us to decline considering it until its consideration is necessary. The following cases illustrate the weight of the question and are referred to solely because they show the propriety of not discussing it till it is necessary to decide it. Central Vermont R. Co. v. State, 82 Vt. 146, 72 Atl. 324; Brattleboro Town School Dist. v. Brattleboro School Dist. No. 2, 72 Vt. 451, 48 Atl. 697; Brown v. U. S. 171 U. S. 631, 43 U. S. (L. ed.) 312, 19 S. Ct. 56; Rodgers v. U. S. 185 U. S. 83, 46 U. S. (L. ed.) 816, 22 S. Ct. 582; Marlor v. Philadelphia, etc. R. Co. 166 Pa. St. 524, 31 Atl. 255; Treacy v. Elizabethtown, etc. R. Co. 85 Ky. 270, 3 S. W. 168; Hunt v. Card, 94 Me. 386, 47 Atl. 921; State v. Jersey City, 54 N. J. L. 49, 22 Atl. 1052; Paterson, etc. Traction Co. v. DeGray, 70 N. J. L. 59, 56 Atl. 250; Norwich v. Johnson, 86 Conn. 151, 84 Atl. 727, 41 L.R.A.(N.S.) 1024.

The question of the right of the commission to enforce its decision or orders or judgments by process does not arise. The decision of the commission if favorable to the condemnor determines his rights upon payment of the compensation awarded, and the right of the landowner to such compensation, and as in cases of condemnation heretofore arising, it is for the courts to enforce and protect the rights of both. Bridgman v. St. Johnsbury, etc. R. Co. 58 Vt. 198, 2 Atl. 467; Adams v. St. Johnsbury, etc. R. Co. 57 Vt. 240; Kittell v. Missisquoi R. Co. 56 Vt. 96; [422] Kendall v. Missisquoi R. Co. 55 Vt. 438; Knapp v. McAuley, 39 Vt. 275; McAulay v. Western Vermont R. Co. 33 Vt. 311, 78 Am. Dec. 627.

Our conclusion is that it is the right and duty of the Public Service Commission to proceed in the matter of the petition of the Consolidated Lighting Company, and upon due notice and hearing to determine the questions of necessity and compensation which they are therein asked to determine.

Petition for writ of prohibition dismissed with costs.

NOTE.

Validity of Statute Conferring on Public Service Commission or Other Body Jurisdiction of Eminent Domain Proceedings.

The reported case holds that a statute is valid which confers on a public service commission jurisdiction to determine the questions of necessity and compensation in eminent domain proceedings, and to render a judg-

ment which shall be final except as an appeal to the supreme court of the state is allowed.

There does not seem to be any decided case exactly similar to the reported case in its facts, but the general rule laid down therein to the effect that the constitutional requirement that just compensation shall be paid for the taking of private land for public use is satisfied if an impartial tribunal is provided to which a citizen may freely resort and be heard at any time, finds support in a number of decisions. Bruggerman v. True, 25 Minn. 123; State v. Messenger, 27 Minn. 119, 6 N. W. 457; State v. Rapp, 39 Minn. 65, 38 N. W. 926; St. Paul v. Nickl, 42 Minn. 262, 44 N. W. 59; Morris v. Heppenheimer, 54 N. J. L. 268, 23 Atl. 664; People v. Adirondack R. Co. 160 N. Y. 225, 54 N. E. 689. See also U. S. v. Jones, 109 U. S. 513, 3 S. Ct. 346, 27 U. S. (L. ed.) 1015; Stimets v. Highgate, 81 Vt. 231, 69 Atl. 878. Thus it has been held that a statute which gives to county commissioners the right to hear property holders on the question of the damages sustained by them by the appropriation of their land for a highway, and which allows them the right to appeal to the district court within a specified time, is valid. State v. Messenger, supra. And where town supervisors are, in the first instance, constituted a tribunal to assess damages for the taking of land for a public road, with the right given to a property owner to appeal to county commissioners, the property holder is provided with an impartial tribunal. Bruggerman v. True, supra. So in St. Paul v. Nickl, supra, it was held that where provisions were made as to notice and an opportunity to be heard before a board of public works of a city, and the right of appeal was preserved, the constitutional rights of a property holder were secured in proceedings wherein private land was taken for public highway purposes. Likewise in Morris v. Heppenheimer, supra, wherein it appeared that the state took land for a military camp and appointed three commissioners to determine its value, it was held that the fact that the governor had appointed the commissioners did not impugn their impartiality.

In Peirce v. Banger, 105 Me. 413, 74 Atl. 1039, it was held that a statute which conferred on a board of municipal officers power to assess damages for the taking of property in eminent domain proceedings was not invalid on the ground that the officials did not constitute an impartial tribunal. The fact that an appeal was allowed from their decision to a court was said to bring the proceedings within the "just compensation" clause of the constitution.

A statute which confers power on a forest reserve board to take land by condemnation and provides that in case the board and the owner are unable to agree on the compensation the owner may appeal to the court of claims, which court shall have jurisdiction to hear and determine the question of the value of the lands, is valid and does not violate the constitutional clauses which provide for just compensation and due process of law in the taking of property for public use. People v. Adirondack R. Co. 160 N. Y. 225, 241, 54 N. E. 689. And where a statute which authorizes a city to take private property for wharf purposes leaves nothing to the final determination of the city officers and gives a right to a rehearing before an impartial tribunal on every question in which a property owner may be interested, the due process of law guaranteed him by the constitution is satisfied. Burlington v. Central Vermont R. Co. 82 Vt. 5, 71 Atl. 826. But in Stearns v. Barre, 73 Vt. 281, 50 Atl. 1086, 87 Am. St. Rep. 721, 58 L.R.A. 240, it was held that an impartial tribunal was not provided where city officials were made the final judges in the taking of private land by the municipality for a waterworks.

A statute which empowers a town council to determine the compensation to be paid to a property owner for the taking of his land for street purposes and allows an appeal from their decision to a resident judge of the county for the purpose of having a commission of five freeholders appointed finally to pass on the question of damages, is not unconstitutional as a violation of the due process of law and just compensation clauses of the federal and state constitutions. Fulton v. Dover, 8 Houst. (Del.) 78, 6 Atl. 633, 12 Atl. 394, 31 Atl. 974.

In People v. Hennessy, 206 N. Y. 750, 100 N. E. 407, it appeared that an act authorized and empowered the board of assessors of a city in its discretion to estimate and determine the damage sustained by reason of the construction of a bridge. It was held that although the action of the board, if it should reject a claim, would be final and conclusive, yet in the matter of the award of damages its action was reviewable and therefore that the act was constitutional.

It has been held that due process of law is accorded a property owner whose land has been taken for a public use where a board of supervisors assesses his damages under a statute empowering it to do so. Kimball v. Alameda County, 46 Cal. 19. See also Harper v. Richardson, 22 Cal. 251; Lincoln v. Colusa County, 28 Cal. 662. But an order of a board of supervisors which declares that a newly extended street, as extended, embracing all the land included in the boundaries described, "is hereby condemned, appropriated, acquired, set apart, and taken for public use," has been held to be an exercise of judicial power not conferred by any statute and

in a manner which no statute can authorize and therefore is in excess of the jurisdiction of the board. Wulzen v. San Francisco, 101 Cal. 15, 35 Pac. 353, 40 Am. St. Rep. 17.

In Ligat v. Com. 19 Pa. St. 456, it was held that though by the repeal of an act which allowed an appeal from the decision of canal commissioners to a board of appraisers the former were by statute constituted the final tribunal for the assessment of compensation to the owner of property taken for canal purposes, the statute was valid, since an assessment by the canal commissioners was as fully authorized by the constitution as was an assessment by any other tribunal.

It has been held that an act is not open to attack as unconstitutional on the ground that it attempts to give to county commissioners judicial powers, where it empowers the commissioners to appoint appraisers to assess the damages and benefits to lands affected by a proposed canal, as the appointment of appraisers is not exclusively a judicial act. Flat Swamp, etc. Canal Co. v. McAlister, 74 N. C. 159.

Where a statute authorized a city to take private property for street purposes and the city appointed commissioners to lay out the highways and assess damages for the taking, it was held that the statute was valid, there being a provision for an appeal within a reasonable time from the decision of the commissioners to a trial by jury. Steuart v. Baltimore, 7 Md. 500.

Where a legislative act appoints three persons commissioners to locate and establish a state road between certain points, and provides that "all damages sustained by the laying out and opening of said road shall be ascertained and determined by said commissioners, or a majority of them, and shall be paid by the county in which such damages occur," but makes no provision for notice and a hearing, on the right to appeal to the district court, the act is unconstitutional. Langford v. Ramsey County, 16 Minn. 375.

A statute has been held to be unconstitutional which attempted to transfer land to a borough for school purposes and which fixed the compensation for the transfer. Lebanon School-Dist. v. Lebanon Female Seminary, 9 Sad. (Pa.) 474, 22 W. N. C. 65, 12 Atl. 857.

In Myer v. Adam, 63 App. Div. 540, 71 N. Y. S. 707, *affirmed* 169 N. Y. 605, 62 N. E. 1098, it was held that in view of a constitutional provision to the effect that compensation for the taking of private property for public use should be ascertained by a jury or at least three commissioners appointed by a court, a board of grade crossing commissioners did not have exclusive and final jurisdiction to fix the compensation to which a property owner was entitled for the damages to his property due to the grading of a street.

In Rich v. Chicago, 59 Ill. 286, it appeared that a board of public works and the common council of a city were given the power, by its charter, to assess damages in eminent domain proceedings. In an action wherein the constitutionality of the charter provisions was attacked, the court said that if the question was a new one it would have great difficulty in reconciling the taking of priv te property for public use without ascertaining the compensation through the machinery furnished by the judicial department of the government, but as an earlier decision (Johnson v. Joliet. etc. R. Co. 23 Ill. 124) had held the provisions to be valid and they had been acted on to such an extent that its overruling would be attended by disastrous results and as a new constitution provided for a trial by jury in eminent domain cases, the court would apply the doctrine of stare decisis and not hold the provisions unconstitutional.

STATE

v.

PITT.

North Carolina Supreme Court—March 11, 1914.

166 N. Car. 268; 80 S. E. 1060.

Indictment — Validity — Prosecutor Member of Grand Jury.

That the foreman of the grand jury was the prosecutor, and swore out a complaint against accused, is not ground for quashing an indictment against him, where the foreman retired from the jury room, and did not discuss the case with the grand jury, nor vote on passing the bill.

[See note at end of this case.]

Witnesses — Competency — Children.

Whether witnesses, respectively 11 and 12 years old, were of sufficient age and capacity to testify is to be determined by the trial court, and such determination is not reviewable on appeal.

[See note at end of this case.]

Same.

A finding that a witness, 11 years old, who testified that if he swore to a lie they would put him in jail, that he intended to tell the truth, and was going to tell what he knew, and a witness, 12 years old, who testified that he had never been in court before, that when he kissed the book it meant that he would tell the truth, and that if he should tell a lie they would put him in the lockup, were competent witnesses, is conclusive as to their competency, both as to their moral

and religious sensibility and their intelligence.

[See note at end of this case.]

Larceny — Evidence — Relation of Accused and Prosecutor.

In a prosecution against an employee for larceny of his employer's corn, evidence that the employee was trusted with property of his employer is outside the issues.

Criminal Law — Instructions — Definition of Reasonable Doubt.

An instruction that a reasonable doubt in the jury box is exactly the same kind of reasonable doubt that an honest man meets up with in human life is not error.

[See generally 48 Am. St. Rep. 566.]

Appeal from Superior Court, Pitt county: WHEDBEE, Judge.

Criminal action. Willis Pitt convicted of larceny and appeals. The facts are stated in the opinion. AFFIRMED.

Julius Brown for appellant.

Attorney-General Bickett and *Assistant Attorney-General Calvert* for appellee.

[268] CLARK, C. J.—The defendant was convicted of larceny of the corn of one J. R. Bunting, standing in the field. The testimony came from eye-witnesses and was clear and explicit. The first exception is to the refusal of the court to quash the bill of indictment on the ground that said Bunting, who was foreman [269] of the grand jury that passed on the bill, was also the prosecutor and swore out the warrant before a justice of the peace. The court found as a fact that Bunting at the time that the grand jury was considering the bill retired from the grand jury room and did not discuss the case with the grand jury nor vote on passing the bill, and that he did nothing in regard to it except that as foreman of the grand jury he signed the bill at the direction of the grand jury and carried the indictment into court.

"The general rule has been laid down that interest in a particular prosecution other than a direct pecuniary interest will not disqualify a grand juror or be ground of objection to an indictment in the finding of which he participates. Accordingly, in the absence of statutory provisions to the contrary, the fact that a person has originated a complaint against the person accused of crime, or is a witness for the prosecution, does not operate as a disqualification. And the same rule has been applied to a person who has evinced a desire and purpose to enforce the law against the particular kind of crime, or has subscribed funds for the purpose of legitimately suppressing a particular violation of law." 20 Cyc. 1301, title, "Grand Jury."

In State v. McDonald, 73 N. C. 356, it was 504, where there is a full discussion of objections to the competency of a grand jury, it is held that the fact that a son of the prosecutor was a member of the grand jury did not vitiate the indictment, though he had actively participated in finding the bill.

In State v. Sharp, 110 N. C. 604, 14 S. E. held that a grand juror was a competent witness on the trial of the defendant. Revisal, 3232, provides that grand juries shall return all bills of indictment in open court through the acting foreman, except in capital felonies, and it has been often held that an indictment need not necessarily be signed by any one. State v. Mace, 86 N. C. 668.

Exceptions 2 and 3 are to the ruling of the court that two witnesses, respectively 11 and 12 years old, were of sufficient age and capacity to testify. The competency of a witness to testify [270] is determined by the trial court, and is not reviewable on appeal. State v. Finger, 131 N. C. 781, 42 S. E. 820; State v. Perry, 44 N. C. 330; 40 Cyc. 2200.

One of these witnesses, 11 years old, testified that if he swore to a lie they would put him in jail; that he intended to tell the truth, and was going to tell what he knew. The other witness, 12 years old, testified that he had never been in court before; that when he kissed the book it meant that he would tell the truth; that if he should tell a lie they would put him in the lockup. When asked, "What else?" he replied, "I don't know, sir." The finding of the judge that these witnesses were competent to testify was conclusive, and not reviewable. This is so held both as to their moral and religious sensibility and their intelligence. State v. Manual, 64 N. C. 603; State v. Edwards, 79 N. C. 648.

Shaw v. Moore, 49 N. C. 25, is a very interesting discussion as to the disqualification of a witness on account of his religious belief. The Court there held that one who believed in the existence of a Supreme Being was a competent witness, though he did not believe that punishment would be inflicted in the world to come. In that case it would seem that the witnesses were of age. If it were open to us to review the findings of fact of his Honor as to the competency of these witnesses, it would seem that they gave very intelligent replies and a sense of their responsibility and intention to tell the truth, and that punishment would be awarded them should they fail to do so. The fact that one of the witnesses said he "did not know" what punishment would happen to him beyond imprisonment in jail should not disqualify him, in view of the other evidence showing his intelligence and sense of responsibility.

However, as already stated, the finding of the judge in such case is conclusive, and

not reviewable by us. He sees the witnesses and can judge better of their intelligence and sense of responsibility than can possibly be transmitted to us on paper.

In Shaw v. Moore, supra, Pearson, J., said that "in the old cases it was held to be common law that no infidel (in which class Jews were included) could be sworn as a witness in the [271] courts of England." He then proceeds to say that the reason for this as given by my Lord Coke, "to say the least of it, is narrow-minded, illiberal, bigoted, and unsound." And adds that "Lord Hale, notwithstanding the opinion of Coke and the old cases, held that a Jew is a competent witness and may be sworn on the Old Testament, and such has ever since been taken to be the law." We know the Old Scriptures, which is the Hebrew Bible, do not teach a future life, and hence there is absent therefrom the doctrine of future rewards and punishments. Indeed, the New Testament teaches that "Life Eternal came through Jesus Christ." In the same case, Shaw v. Moore, supra, Pearson refers to Omychund v. Barker, 1 Atk. (Eng.) 21, as a great case, "for it relieved the common law from an error that was a reproach to it." In that case "a Gentoo, who did not believe in either Old or New Testament," was held to be a competent witness, though it did not appear "whether according to Gentoo religion rewards and punishments are to be in this world or the world to come. The decision was made without ascertaining how the fact was; so it must have been considered by the Court to be immaterial."

Judge Pearson further says that it was insisted on the argument that, however it was decided in Omychund v. Barker, it was otherwise under our statutory provisions prescribing the forms of oath. He says, as to this argument: "We think it manifest, by a perusal of the statute, that it was not intended to alter any rule of law, but the sole object was to prescribe forms adapted to the religious belief of the general mass of citizens, for the sake of convenience and uniformity."

The form of oath for witnesses now prescribed (Rev. 1496 (29), and 2360) simply requires the witness to swear that his evidence "shall be the truth, the whole truth, and nothing but the truth." The provision in Revisal, 2354, as to the manner of swearing is, as Judge Pearson says, merely a form "adapted to the religious belief of the general mass of citizens for the sake of convenience and uniformity." Revisal, 2363 (enacted 1899, ch. 50), validated oaths theretofore taken not in a manner prescribed by the laws of 1777, now Revisal, 2354.

[272] If such reply from one who is honestly ignorant of what will happen to him in another world shall render him incompetent to testify, not only the administration of justice will often be hindered, but unwilling witnesses can block needed investigations by professing like ignorance.

It was excepted that the defendant was not allowed to state that his employer trusted him with his property. This is not an issue in this cause. The question is not whether he was trusted by his employer, nor that he was unworthy of that confidence, but, Did he steal the corn of the prosecutor, as charged in the bill of indictment? It would not have been competent for the State to show that the defendant was not trusted, or was suspected by his employer. Nor is it competent for the defendant to testify that he was trusted.

Nor do we think it good ground of exception that the judge in his charge, in attempting to define what constitutes a reasonable doubt, said: "A reasonable doubt in the jury box is exactly the same kind of reasonable doubt that an honest man meets up with in human life." The law does not require that any particular formula shall be used in charging upon the doctrine of reasonable doubt. State v. Dobbins, 149 N. C. 465, 62 S. E. 635; State v. Brabham, 108 N. C. 793, 13 S. E. 217; State v. Matthews, 66 N. C. 106; State v. Oscar, 52 N. C. 305.

No error.

Walker, J., and Allen, J., concurring in result.

NOTE.

The reported case holds that an indictment is not vitiated by the fact that the person prosecuting the charge was foreman of the grand jury, it appearing that he retired from the room while the indictment was under discussion and took no part in finding it. The court also sustains the action of the trial judge in holding that two children, eleven and twelve years old respectively, were competent to testify. The effect on the validity of an indictment of the fact that the complainant or prosecutor was a member of the grand jury is discussed in the note to Krause v. State, Ann. Cas. 1912B 736. The competency of children as witnesses is considered at length in the notes to State v. Meyer as reported in 14 Ann. Cas 1 and 124 Am. St. Rep. 291.

MAYOR AND CITY COUNCIL OF BALTIMORE

v.

J. L. ROBINSON CONSTRUCTION COMPANY.

Maryland Court of Appeals—June 26, 1914.

123 Md. 660; 91 Atl. 682.

Public Contracts — Deposit with Bid — Effect of Withdrawing Bid.

Under Baltimore City Charter, as amended by Laws 1908, c. 163, providing that a contract for supplies or work shall be awarded to the lowest responsible bidder; that bids when filed shall be irrevocable; that each bid shall be accompanied by a certified check of $500; and that the successful bidder, failing to execute the contract and furnish a bond, shall forfeit his check as liquidated damages—one may not withdraw his bid, even before the opening of the bids, and so, being refused permission to do so, and refusing to sign the contract, on it being awarded him, he cannot recover the amount of his check.

[See note at end of this case.]

Appeal from Superior Court of Baltimore City: BOND, Judge.

Action by J. L. Robinson Construction Company, plaintiff, against Mayor and City Council of Baltimore, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. REVERSED.

Alexander Preston and *S. S. Field* for appellant.

Forrest Bramble and *W. W. Lingenfelder* for appellee.

[661] CONSTABLE, J.—This appeal involves the right of a bidder, for a municipal contract, to recover from the municipality the amount of money deposited at the time of submitting the bid, where the bidder requests the withdrawal of the proposal before the opening of the same by the municipal officers.

The facts upon which the declaration is based are uncontradicted, and from them it appears that the appellant acting through the Board of Awards advertised for proposals and bids to construct a school house in the City of Baltimore. That the appellee, among others, submitted a proposal for said construction and in compliance with the advertisement and the provisions of the City Charter filed therewith a certified check for five hundred dollars. On the day the bids were to be opened, and just before they were opened, the president of the appellee company stated to the board that he thought from the information he had gained from the other bidders present that he had made an error in his proposal, and requested to withdraw the same. He had learned that the amount of his bid was very much below that of the others, and so much lower that he felt assured a mistake had been made. The board refused to allow the bid to be withdrawn and proceeded to open all of the bids, whereupon it was found that the appellee's bid was the lowest by about fourteen thousand dollars. After the opening the board suggested to the representative of the appellee that he go over the estimate for the purpose of discovering where, if at all, the mistake was. It was found that in making up the general tabulation of the costs of the various items, including [662] the bids of the sub-contractors, that the amount for heating and ventilating had been put down at $952.13 while it should have been $11,952.13, the amount of the sub-contractor's bid, thus making the total of the bid $11,000 less than had been intended. The board, however, awarded the contract to the appellee, which refused to execute the formal contract. Whereupon the board declared the deposit forfeited and readvertised for bids. This suit was then instituted for a return of the five hundred dollars deposited.

The appellant demurred to the declaration, but the Court overruled the demurrer, and the rulings upon the prayers being in favor of the right of action, the appellant has brought this appeal from the judgment rendered against it. The rulings upon the demurrer and the prayers involve one and the same principle of law so they will be considered as a whole.

An Act of the Legislature regulates proposals for contracts with the City of Baltimore. Section 15 of the charter, as amended by Chapter 163 of the Acts of 1908, provides as follows:

"All bids made to the Mayor and City Council of Baltimore for supplies or work for any purposes whatever, unless otherwise provided in this article, shall be opened by a board, or a majority of them, consisting of the Mayor, who shall be President of the same; the Comptroller, City Register, City Solicitor, and the President of the Second Branch, which board, or majority of them, shall, after opening said bids, award the contract to the lowest responsible bidder. . . . Bids when filed shall be irrevocable. The successful bidder shall promptly execute a formal contract, to be approved, as to its form, terms and conditions by the City Solicitor, and he shall also execute and deliver to the Mayor a good and sufficient bond, to be approved by the Mayor, in the amount of the contract price. To all such bids there shall be attached a certified check of the bidder upon some clearing house bank, and the bidder who has had the contract awarded

[663] to him, and who fails to promptly and properly execute the required contract and bond, shall forfeit said check. The said check shall be taken and considered as liquidated damages and not a penalty for failure of said bidder to execute said contract and bond. Upon the execution of said contract and bond by the successful bidder the said check shall be returned to him. The amount of said check shall be five hundred dollars, unless otherwise provided by ordinance, or an order or regulation of the department for whose use the bids are made and contract entered into. The checks of the unsuccessful bidders shall be returned to them after opening the bids and awarding the contract to the successful bidders."

In the face of these provisions can a bidder, refusing to execute a contract awarded to him for municipal work, force the return of his deposit? Or once having filed his proposal, can he withdraw it before the bid is accepted and recover his deposit?

It will be noticed that, in plain terms, the section directs that the bidder shall deposit a certified check to indemnify the city in case he, as the successful bidder, fails to execute the contract and furnish a bond; that bids when filed are irrevocable; and that the contract shall be awarded to the lowest responsible bidder. It certainly must be that there was the intention that these explicit directions should have some force and meaning. We must ascribe a reasonable construction to them or we render the statute a mere nullity. These provisions involve the preliminary steps to the making of the contract for the work to be done. These are the conditions which must be subscribed to by anyone who wishes to be in a position to get a contract with the city. They do not make the proposal and the acceptance the contract, but the formal contract is to be entered into later. They make plain to the bidder just what obligation he is entering upon when he submits a bid. He knows that his bid is irrevocable, but [664] he further knows that if he, for any reason, after his bid is accepted, does not want to enter into a contract the condition of his becoming a bidder obligates him expressly to reimburse the city to the extent of five hundred dollars damages. If the contract were made by the bid and acceptance the bidder then would be compelled to carry it out or be responsible for it, without a Court of Equity, for sufficient cause, should relieve him, by rescinding the contract.

Judge Dillon in his work on Municipal Corporations at Section 810 (5th ed.) expresses the meaning and effect of such a charter provision: "After the opening of the bids, the ascertainment of the lowest or most favorable bidder, and the adoption of a resolution that the contract be awarded to him does not make a completed contract between the municipality and the bidder, when the charter requires that all contracts relating to city affairs shall be in writing, or when the advertisement so specifies or when some further step remains to be taken . . . where a bidder accompanies his bid for the performance of a public work with the deposit of a certain sum, under an agreement to forfeit the sum deposited in case of his neglect or refusal to enter into the contract for the work, and without default on the part of the board, he fails to execute the contract he cannot recover back his deposit, and the board may declare the same forfeited."

And McQuillin on Municipal Corporations at section 1221, says: "Money accompanying a bid as security that the bidder will enter into a contract if his bid is accepted, cannot be recovered if the bidder fails to enter into the contract. The rule that Courts incline against forfeitures has no application to such a case, and the rule is never carried to the extent of relieving parties against the express terms of their own contract. A bidder has no right to withdraw his bid even before the bids are opened, nor have the municipal authorities the right to permit him to withdraw it."

[665] Also in 28 Cyc. 661: "A bidder has no right at law, nor have the municipal officers power to permit him to withdraw his bid and deposit."

In Wheaton Bldg. etc. Co. v. Boston, 204 Mass. 218, 90 N. E. 598, a contractor had filed a bid with the proper authorities to build a school house, and was required to file a deposit with his bid. Afterwards he found that he had made a mistake in his estimates and sued the City for the recovery of his deposit. This case is practically identical with the one at bar. The Massachusetts Court held that he could not recover his deposit and said on pages 222 and 223: "But it is plain that the statute contemplated some obligation on the part of the bidders, even though there was none on the part of the city. Statutes of 1890, Chapter 418, Section 5, provides that every proposal shall be accompanied . . . by a check or certificate of deposit for the faithful performance of such proposal." . . . This section must be given reasonable effect. It would be a nullity if it should be held that the bidder was at liberty to withdraw, without any liability, at any time before the formal contract, which alone could bind the city, was executed. The reasonable construction is to hold that the bidder is bound to stand by his proposal at least after its acceptance, and to the extent of his bond or deposit, but no further. If the case was free

from statutory regulation, and it did not appear that a more formal contract was contemplated, the mere acceptance of the proposal would constitute a contract, and neither party could refuse to carry it out without becoming liable for all the damage sustained. The Legislature, perhaps in recognition of the hardships which might follow from requiring the bidder to be bound though the city was not, restricted the liability of the former to the extent of the deposit."

To the same effect is Robinson v. Board of Education, 98 Ill. App. 100, where the bidder asked, before the bids were opened, to withdraw his bid because a mistake had been made by him. Also the same ruling in Morgan [666] Park v. Gahan, 136 Ill. 523, 26 N. E. 1085; Turner v. Fremont, 170 Fed. 259, 95 C. C. A. 455; Davin v. Syracuse, 69 Misc. 285, 126 N. Y. S. 1002.

This may seem a hardship upon a bidder who has actually made a mistake, but if the statute is to have any effect that must be the result. The statute is an essential part of the proposal and the bidder makes all its terms and conditions an obligation upon himself by submitting a bid. While it may appear a hardship upon the bidder, the practical side, as illustrated by this record, of awarding contracts by closed bidding, shows it to be a wise provision for municipalities. After the bids were all in, and before the bids were opened, this appellee easily ascertained from his competitors the amounts of their bids. What would there then be to prevent a dishonest bidder, upon finding that his bid was extremely low, from declaring that he had made a mistake and thus put the city to the costs of delay and re-advertising?

The case of Moffett, etc. Co. v. Rochester, 178 U. S. 373, 20 S. Ct. 957, 44 U. S. (L. ed.) 1108, relied upon by the appellee, was upon a bill in equity for a reformation of the proposal and therefore is not authority for the form of action in this case. In fact, all of the cases, cited by the appellee, are cases in equity and in the most of them there was no statute involved.

Judgment reversed, without awarding a new trial, with costs to the appellant.

NOTE.

Rights of Parties with Respect to Certified Check or Other Deposit made with Bid.

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I. In General.

Where an invitation for bids requires each bid to be accompanied by a deposit, a bid may be rejected where it is not so accompanied. Compton v. Johnson, 6 Ohio Cir. Dec. 110, 9 Ohio Cir. Ct. 532; Philadelphia Metallic Co. v. Board of Public Grounds, etc. 16 Pa. Co. Ct. 431. See also Smith v. New York, 10 N. Y. 504; Walsh v. New York, 113 N. Y. 143, 20 N. E. 825; Selpho v. Brooklyn, 5 App. Div. 529, 39 N. Y. S. 520, *affirmed* in 158 N. Y. 673, 52 N. E. 1126; People v. Buffalo, 5 Misc. 36, 25 N. Y. S. 50.

But since the requirement that a deposit shall accompany the bid is intended to insure good faith on the part of the bidder and furnish protection to the party inviting the proposals in case the bidder refuses to execute a contract after a favorable award, it has been held to be no objection to the legality of a bid that it is not accompanied by a deposit, as required by law, if the contract is actually entered into. Cady v. San Bernardino, 153 Cal. 24, 94 Pac. 242; Tooele Bldg. Assoc. v. Tooele High School Dist. No. 1, 43 Utah 362, 134 Pac. 894. *Compare* Chippewa Bridge Co. v. Durand, 122 Wis. 85, 99 N. W. 603, 106 Am. St. Rep. 931.

A deposit made in substantial compliance with the terms of the requirement is sufficient. Hornung v. West New York, 82 N. J. L. 266, 81 Atl. 1116; People v. Contracting Board, 27 N. Y. 378; People v. McDonough, 173 N. Y. 181, 65 N. E. 963, *affirming* 76 App. Div. 257, 78 N. Y. S. 462. Thus the requirement that bidders on a contract for public improvement shall submit certified checks to the order of the town treasurer with their bids, has been held to be substantially fulfilled by the submission of a cashier's check on an accredited bank drawn to the order of the town and indorsed by the bidder. Hornung v. West New York, 82 N. J. L. 266, 81 Atl. 1116. And where a notice for proposals stated that every proposal must be accompanied by a certificate from some bank in good credit that four thousand dollars "in cash" had been deposited as security for the performance of the contract, the requirement was held to be met by a certificate that a deposit of four thousand dollars had been made but not specifying that it was "in cash." People v. Contracting Board, 27 N. Y. 378.

Where a bond must be deposited with a bid, and a defective bond is deposited by the successful bidder, the unsuccessful bidders cannot object that the successful bidder is allowed to perfect his bond after the opening of the bids. Detroit Free Press Co. v. State Auditors, 47 Mich. 135, 10 N. W. 171.

Where a statute requires, as a condition precedent to the reception of proposals that the bidder shall deposit a certified check with a department or some officer of the department, the requirement is not met by depositing the certified check in an "estimate box" kept by the officer, but the check should be deposited with the department or officer, and then the proposal placed in the estimate box. People v. Thompson, 11 N. Y. St. Rep. 730 note; Walsh v. New York, 55 Super. Ct. 535, 11 N. Y. St. Rep. 728.

A requirement that each bid should be accompanied by a deposit of $100,000.00 has been held not to be unreasonable where the contract called for an expenditure of $7,995,000.00. Flemming v. Jersey City (N. J.) 42 Atl. 845.

II. Forfeiture.

1. General Rule.

Where a bidder on a contract is required to deposit with his bid a certified check, cash, bond, or other security which is to be forfeited in case he refuses to enter into the contract after a favorable award, the general rule is that the deposit is forfeited by a refusal to accept the award and execute the contract. Turner v. Fremont, 170 Fed. 259, 95 C. C. A. 455, *affirming* 159 Fed. 221; Scott v. U. S. 44 Ct. Cl. 524; U. S. v. Title Guaranty, etc. Co. 36 App. Cas. (D. C.) 85; Morgan Park v. Gaham, 136 Ill. 515, 26 N. E. 1085; Robinson v. Board of Education, 98 Ill. App. 100; West Chicago Park Com'rs v. Carmody, 139 Ill. App. 635; Wheaton Bldg. etc. Co. v. Boston, 204 Mass. 218, 90 N. E. 598; Coonan v. Cape Girardeau, 149 Mo. App. 609, 129 S. W. 745; Phillips v. New York, 124 App. Div. 307, 108 N. Y. S. 1059; New York v. Seeley-Taylor Co. 149 App. Div. 98, 133 N. Y. S. 808; Davin v. Syracuse, 69 Misc. 285, 126 N. Y. S. 1002, *affirmed* in 145 App. Div. 904, 129 N. Y. S. 1119; Brown v. Levy, 29 Tex. Civ. App. 389, 69 S. W. 255. And see the reported case. See also Langley v. Harmon, 97 Mich. 347, 56 N. W. 761; Mutchler v. Easton, 148 Pa. St. 441, 23 Atl. 1109, 30 W. N. C. 94, *reversing* 9 Pa. Co. Ct. 613. *Compare* Cedar Rapids Lumber Co. v. Fisher, 129 Ia. 332, 105 N. W. 595, 4 L.R.A. (N.S.) 177; Wilson v. Baltimore, 83 Md. 203, 34 Atl. 774, 55 Am. St. Rep. 339; Mutchler v. Easton, 148 Pa. St. 441, 23 Atl. 1109, 30 W. N. C. 94. Thus where bids for a ferry franchise were required to be accompanied by a deposit to be forfeited in case, after a favorable award, the bidder refused to execute a lease, it was held that there could be no recovery of the deposit where the successful bidder refused to execute the lease. Phillips v. New York, 124 App. Div. 307, 108 N. Y. S. 1059. And where the bidder for a contract for the erection of a school house refused to perform, after a favorable award, his check of $2000.00 deposited with his bid was held to be forfeited. Wheaton Bldg. etc. Co. v. Boston, 204 Mass. 218, 90 N. E. 598.

2. Defenses to Forfeiture.

a. *In General.*

Where a deposit is conditioned on the bidder executing the contract in case of a favorable award, the deposit is discharged when the award is accepted and the contract entered into. Philadelphia v. Wood, 15 W. N. C. (Pa.) 94. See also Springfield v. Weaver, 137 Mo. 650, 37 S. W. 509, 39 S. W. 276. And when the original contract has been entered into but mutually abandoned, the deposit cannot be declared to be forfeited. Kelsey's Case, 1 Ct. Cl. 374; Tunny v. Hastings, 121 Minn. 212, 141 N. W. 168.

But it has been held that a contractor could not defeat the forfeiture of his deposit on the ground that the deposit was for a smaller amount than the law required. Tunny v. Hastings, 121 Minn. 212, 141 N. W. 168. And sickness or indisposition has been held not to excuse a failure to enter into the contract. West Chicago Park Com'rs v. Carmody, 139 Ill. App. 635.

Where a bidder placed several bids for different items of a public work in one envelope, and some of the bids were accepted and some rejected, and his deposit was forfeited for failure to perform, it was held, in an action to recover the forfeited deposit, that his contention that he had intended to bid only on the contract for the entire work, and was misled by the agents of the defendant to enter his bid in the manner he did, was not sustained by the evidence. Langley v. Harmon, 97 Mich. 347, 56 N. W. 761.

b. *Withdrawal of Bid.*

Once a bid is made, a bidder cannot prevent forfeiture of his deposit by withdrawing his bid, either before or after the bids are opened. Scott v. U. S. 44 Ct. Cl. 524; Kimball v. Hewitt, 2 N. Y. S. 697, *affirmed* in 15 Daly 124, 3 N. Y. S. 756. And see the reported case. See also Robinson v. Board of Education, 98 Ill. App. 100. And it has been held that municipal officers are without authority to permit a bidder to withdraw his bid and deposit before the bids are opened. Kimball v. Hewitt, 2 N. Y. S. 697 (*affirmed* in 15

Daly 124, 3 N. Y. S. 756), wherein the court said: "Had the defendants been acting in their own private business, there is no doubt that they could have permitted the offer made by the Electric Construction Company to be withdrawn, but, acting as public officers, they could not lawfully forgo the right that the city has acquired to insist that the company should either carry out its offer or forfeit the amount that it had deposited as security. When the bid of the Electric Company, with the certified check that accompanied it, passed into the hands of the commissioner of public works, the statute prescribed the disposition that should be made of the one and the other. The bid was to be publicly opened by the officers, who are the defendants in this action, and the contract was to be awarded to the lowest bidder. If the lowest bidder should refuse to execute, that is to say, sign the contract within five days after notice that it had been awarded to him, the amount of the certified check that he had deposited as security was to be forfeited, and retained by the city as liquidated damages, and paid into the sinking fund. No other disposition of the bid and the check was lawful."

c. *Mistake in Bid.*

The decisions are not in harmony as to whether a mistake in a bid, is a ground for its recission and the recovery of the deposit by the bidder. In some jurisdictions it has been held that where the bidder has without fault made a mistake in his estimate, and because of the mistake has refused to enter into the contract, he will be granted relief from a forfeiture of his deposit. Moffett, etc. Co. v. Rochester, 178 U. S. 373, 20 S. Ct. 957, 44 U. S. (L. ed.) 1108, *reversing* 91 Fed. 28, 62 U. S. App. 392, 33 C. C. A. 319, and *affirming* 82 Fed. 255; Bloomington v. Bromagin, 137 Ill. App. 509; School Com'rs v. Bender, 36 Ind. App. 164, 72 N. E. 154; Barlow v. Jones, (N. J.) 87 Atl. 649; New York v. Dowd Lumber Co. 140 App. Div. 358, 125 N. Y. S. 394; Balaban Co. v. New York, 87 Misc. 312, 149 N. Y. S. 954. See also Scott v. U. S. 44 Ct. Cl. 524; Crilly v. Board of Education, 54 Ill. App. 371. *Compare* Robinson v. Board of Education, 98 Ill. App. 100. Thus where it appeared that a bid was based on the wrong plans and specifications it was held that the bidder could rescind his bid and recover his deposit. Balaban Co. v. New York, 87 Misc. 312, 149 N. Y. S. 954. And it has been held that a suit could be brought to rescind a bid and enjoin the enforcement of a bond deposited with it, where there had been an unintentional clerical mistake in making the estimate. Moffett, etc. Co. v. Rochester, 178 U. S. 373, 20 S. Ct. 957, 44 U. S. (L. ed.) 1108, *reversing* 91 Fed. 28, 62 U. S. App. 392, 33 C. C. A. 319. In that case the court said: "The charter of the city provides that 'neither the principal nor sureties on any bid or bond shall have the right to withdraw or cancel the same until the board shall have let the contract for which such bid is made, and the same shall be duly executed.' A perfectly proper provision, but as was said by the learned Circuit Court: 'The complainant is not endeavoring "to withdraw or cancel a bid or bond. The bill proceeds upon the theory that the bid upon which the defendants acted was not the complainant's bid; that the complainant was no more responsible for it than if it had been the result of agraphia or the mistake of a copyist or printer. In other words, that the proposal read at the meeting of the board was one which the complainant never intended to make, and that the minds of the parties never met upon a contract based thereon. If the defendants are correct in their contention there is absolutely no redress for a bidder for public work, no matter how aggravated or palpable his blunder. The moment his proposal is opened by the executive board he is held as in a grasp of steel. There is no remedy, no escape. If, through an error of his clerk, he has agreed to do work worth a million dollars for ten dollars, he must be held to the strict letter of his contract, while equity stands by with folded hands and sees him driven to bankruptcy. The defendant's position admits of no compromise, no exception, no middle ground." These remarks are so apposite and just it is difficult to add to them. The transactions had not reached the degree of contract—a proposal and acceptance. Nor was the bid withdrawn or canceled against the provision of the charter. A clerical error was discovered in it and declared, and no question of the error was then made or of the good faith of complainant."

However, in other jurisdictions it has been held that a mistake in making the estimate is no defense to a forfeiture of the deposit for failure to accept a favorable award and perform the contract in accordance with the bid. Wheaton Bldg. etc. Co. v. Boston, 204 Mass. 218, 90 N. E. 598; Brown v. Levy, 29 Tex. Civ. App. 389, 69 S. W. 255. See also the reported case. Thus where it appeared that the plaintiff misinterpreted the language of the specifications, it was held that he could not recover his deposit on failure to enter into the contract after award. Wheaton Bldg. etc. Co. v. Boston, 204 Mass. 218, 90 N. E. 598. And a bidder has been held to the forfeiture of his deposit where he made a mistake of $10,000.00 in adding the items of his estimate. Brown v. Levy, 29

Tex. Civ. App. 389, 69 S. W. 255. However, it may be noted that in Wheaton Bldg. etc. Co. v. Boston, supra, the interpretation of the specifications was considered to be a question of law and the court based its decision on the doctrine that a mistake of law is not a ground for relief. And in the reported case the court distinguishes Moffett, etc. Co. v. Rochester, supra, on the ground that that case was a proceeding in equity.

d. *Failure to Accept Bid.*

Where the proposal of the bidder has been rejected and there is no new offer by him, there is no ground on which to base a forfeiture of his deposit. Brush Electric Light Co. v. Cincinnati, 11 Ohio Dec. (Reprint) 581, 28 Cinc. L. Bul. 29. And where there is no binding acceptance of the bid, so as to constitute a completed contract, there can be no forfeiture of the deposit. Haldane v. U. S. 69 Fed. 819, 32 U. S. App. 607, 16 C. C. A. 447; Cedar Rapids Lumber Co. v. Fisher, 129 Ia. 332, 105 N. W. 595, 4 L.R.A.(N.S.) 177; Erving v. New York, 60 Super Ct. 48, 16 N. Y. S. 612, 42 N. Y. St. Rep. 707, *affirmed* in 131 N. Y. 133, 29 N. E. 1101. Thus where a bidder was advised by wire that he was the low bidder and to "come on morning train," it was held that the acceptance did not constitute a binding agreement, and that there could be no forfeiture of the bidder's deposit on his refusal to perform according to his bid. Cedar Rapids Lumber Co. v. Fisher, 129 Ia. 332, 105 N. W. 595, 4 L.R.A.(N.S.) 177. And where the act under which proposals were invited provided that if the lowest bidder should neglect or refuse to accept the contract within five days "after written notice that the same has been awarded to him" the deposit made by him should be forfeited, it was held that the act was penal in nature and would be strictly construed, and where there had been no written notice of acceptance there could be no forfeiture of the deposit, even though the bidder was otherwise apprised that his bid had been accepted. Erving v. New York, 60 Super Ct. 48, 16 N. Y. S. 612, 42 N. Y. St. Rep. 707, *affirmed* in 131 N. Y. 133, 29 N. E. 1101. And see Haldane v. U. S. 69 Fed. 819, 32 U. S. App. 607, 16 C. C. A. 447, wherein it was held that personal notice of the acceptance of a proposal was a condition precedent to the breach of a bond to enter into the contract in case of a favorable award.

But where the statute under which school commissioners advertised for bids provided that public contracts should not be deemed to be executed until the approval of the mayor was affixed thereto, it was held that the acceptance of a bid by the school commissioners was a binding contract without the affixed approval of the mayor, and the refusal of the successful bidder to enter into the contract forfeited his deposit. Wheaton Bldg. etc. Co. v. Boston, 204 Mass. 218, 90 N. E. 598.

e. *Award to Another Bidder.*

Where the deposit of a bidder has been forfeited for his refusal to enter into the contract after an award to him, the forfeiture is not affected by awarding the contract to the next lowest bidder. Turner v. Fremont, 170 Fed. 259, 95 C. C. A. 455, *affirming* 159 Fed. 221. And the fact that the lowest bidder has refused to accept the award and enter into the contract does not alter the right to forfeit the deposit of the next lowest bidder who likewise refuses to enter into the contract. Wheaton Bldg. etc. Co. v. Boston, 204 Mass. 218, 90 N. E. 598.

f. *Illegality of Contract.*

Where the contract offered to the successful bidder is illegal, he is under no obligation to enter into it, and his deposit cannot be forfeited for his refusal to do so. N. P. Perine Contracting, etc. Co. v. Pasadena, 116 Cal. 6, 47 Pac. 777; Denver v. Hayes, 28 Colo. 110, 63 Pac. 311: Fairbanks v. North Bend, 68 Neb. 560, 94 N. W. 537; Hinkle v. Philadelphia, 214 Pa. St. 126, 63 Atl. 590. In N. P. Perine Contracting, etc. Co. v. Pasadena, supra, the court said: "Appellant contends that its demurrer should have been sustained, and its motion for a nonsuit granted, upon the ground that plaintiff, having become a successful bidder, suffered absolute and unconditional forfeiture by its refusal to enter into the contract. The street law, in terms, declares that if the bidder 'fails, neglects, or refuses to enter into the contract, . . . then the certified check accompanying his bid, and the amount therein mentioned, shall be declared to be forfeited.' (Stats. 1891; p. 199.) It is upon this language that the contention above mentioned is based. The argument is not tenable. Plaintiff averred and proved facts fully establishing the illegality and invalidity of the proceedings which led up to and were to have culminated in a contract. By entering into such a contract it would have received nothing. It could have looked neither to the city nor to the property owners for recompense for its labor. The street law contemplates a forfeiture for a failure to enter into a contract based upon legal proceedings of the municipal authorities, not for a failure to enter into a contract which, so far as the contractor is concerned, is mere waste paper, and under which he

would expend money and labor without the possibility of remuneration. In such a case, the promise of the contractor, accompanied by his certified check, is a naked offer, met and supported by no consideration. There is no estoppel. The contractor has received no benefit, the city has sustained no injury. Upon such a total failure of consideration, a promise resting upon expected benefits, which can never be received, is no longer binding, and a deposit of money, accompanying such a promise, is recoverable at law."

It has been held that a contractor may recover a forfeited deposit where the election authorizing the expenditure is illegal. Denver v. Hayes, 28 Colo. 110, 63 Pac. 311. And where a bid, accompanied by a deposit, was filed within the time fixed by the advertisement for receiving bids, but was materially changed after the term for receiving bids had closed, the bid was treated as a new bid illegally filed beyond the time fixed by the advertisement and it was held that its acceptance could not be made the basis for a forfeiture of the deposit. Fairbanks, v. North Bend. 68 Neb. 560, 94 N. W. 537. And see Hinkle v. Philadelphia, 214 Pa. St. 126, 63 Atl. 590, wherein it was held that since it was illegal for a municipality to enter into a contract for which no appropriation had been made, a deposit could not under those circumstances be forfeited for a refusal to enter into the contract after a favorable award.

It has been held that a bidder is not estopped to set up the illegality of a municipal contract in an action to recover his deposit. Fairbanks v. North Bend, 68 Neb. 560, 94 N. W. 537. See also Hinkle v. Philadelphia, 214 Pa. St. 126, 63 Atl. 590.

In the case first cited the court said: "But now the question arises whether the plaintiff is estopped to deny the legality of the proceedings under which its bid was accepted. We do not think it is. Mutuality is of the essence of an estoppel. That being true, it would follow that if the plaintiff is estopped to deny the legality of such proceedings, the defendant is also estopped to do so. If that be true, then, in the light of the cases hereinbefore cited, the defendant could have been compelled by mandamus to enter into a contract with the plaintiff, in accordance with the bid. In other words, a court would have compelled the defendant to enter into a contract in disregard of mandatory provisions of the statute. The bare statement of that proposition carries with it its obvious refutation. Neither does the maxim, Potior est conditio possidentis, apply in this case. There is no evidence that the plaintiff's bid was made or accepted with any intention to evade the statute, or to make a contract contrary to law; nor have we any reason to think it was. But, had it been made and accepted with that end in view, the most that could be said of the transaction would be that it was an agreement to enter into an illegal contract. The plaintiff refused to carry out its part of the agreement. It is the policy of the law to encourage the abanbonment of an illegal project. Consequently, it has been held that where one of the parties to an illegal contract pays money thereon to the other, he may recover it back before the contract is executed, but not afterwards. . . Hence, putting the worst possible construction on the conduct of the parties looking towards the making of an illegal contract, they stopped short of the consummation of any illegal purpose, and the plaintiff is entitled to a return of the deposit."

But where a bidder refused to enter into a contract to build a sewer, and his defense was that the sewer was to be constructed across private property, which he believed the city would be unable to acquire, it was held that the defense would not prevent a forfeiture of the deposit, since the city could acquire the right of way by eminent domain, and he should have investigated this before making his bid. Coonan v. Cape Girardeau, 149 Mo. App. 609, 129 S. W. 745. And where there was a refusal to perform it was held to be no defense to liability on a bond deposited with the bid, that the bids were asked by a departmental body known as the general supply committee and not by the board of awards as required by statute, it appearing that the action of the general supply committee was authorized and approved by the board of awards. U. S. v. Title Guaranty, etc. Co. 36 App. Cas. (D. C.) 85. See also Morgan Park v. Gahan, 136 Ill. 523, 26 N. E. 1085, wherein a bidder sought to recover his forfeited deposit on the ground that special assessments to pay for the work were irregular and he was under no obligation to perform the awarded contract, the court holding that such a defense was unavailing since the municipality had power to levy additional assessments to pay for the work and the contractor was fully protected.

g. *Tender of Contract Different from Bid.*

Where the tendered contract is different from the bid as made there can be no forfeiture of the deposit for a refusal to enter into the contract. Sewerage Com'rs v. National Surety Co. 145 Ky. 90, 140 S. W. 62; Dawson Springs v. Miller Coal. etc. Co. 155 Ky. 763, 160 S. W. 495; Smith v. Independent School Dist. No. 12, 108 Minn. 322, 122 N. W. 173; Cotter v. Casteel, (Tex.) 37 S. W. 791. Thus where the tendered contract contained specifications different from those in the invitation for proposals, it was

held that there could be no forfeiture of a deposit. Smith v. Independent School Dist. No. 12, 108 Minn. 322, 122 N. W. 173. And where a bidder for the construction of a municipal sewerage plant named his price for the entire plant, and in his proposal stated the price per unit, which price per unit totaled less than the sum for which he offered to contract for the entire plant at the prices named for each unit, it was held that the deposit of the bidder could not be forfeited for a refusal to execute the contract. Dawson Springs v. Miller Coal, etc. Co., 155 Ky. 763, 160 S. W. 495, wherein the court said: "It is also made quite plain from the evidence that the sewerage commission contemplated in the specifications and the instructions that the contractor should be paid so much for each unit of work and not a sum total for the whole work. In other words, the idea of the sewerage commission was that the bidders should specify the price at which they would do the earth excavation per cubic yard on estimates furnished by the sewage engineer and be paid this specified price for each cubic yard of excavation, whether it was more or less than the estimate, and so with the other items constituting the work. It is also quite plain from the evidence that the appellee company, while it specified in its proposal the price it would charge for each unit, understood that its bid was the total sum at which it proposed to do the work. Evidently the parties to this controversy did not understand each other when the offer was made and accepted. There was no meeting of minds. Under the circumstances we think the lower court correctly solved the difficulty by requiring the city to return the deposit of $500, thus putting the parties where they started." But see Turner v. Fremont, 170 Fed. 259, 95 C. C. A. 455, wherein a deposit was forfeited for failing to enter into a contract after an award, and in an action to recover the same on the ground that the tendered contract was different from the proposal, it was held that the statement in the contractor's bid that he proposed to use "capital" brick did not relieve him from a forfeiture on his refusal to make a contract to furnish brick according to the specifications.

3. Deposit as Liquidated Damages.

Where it is expressly agreed by the parties that the deposit shall be considered as liquidated damages, in case there is a refusal to perform after a favorable award, the decisions are uniform that the deposit will be so treated as liquidated damages and not as a penalty, whether the actual damages are more or less than the amount of the deposit. Turner v. Fremont, 170 Fed. 259, 95 C. C. A. 455, *affirming* 159 Fed. 221; Robinson v. Board of Education, 98 Ill. App. 100; Wheaton Bldg. etc. Co. v. Boston, 204 Mass. 218, 90 N. E. 598; Coonan v. Cape Girardeau, 149 Mo. App. 609, 129 S. W. 745; Davin v. Syracuse, 69 Misc. 285, 126 N. Y. S. 1002, *affirmed* in 145 App. Div. 904, 129 N. Y. S. 1119; New York v. Seely-Taylor Co. 149 App. Div. 98, 133 N. Y. S. 808.

In Coonan v. Cape Girardeau, supra, the court said: "By the very words of plaintiff's bid the amount deposited by him became stipulated damages, to be forfeited to the city if, in the event the contract was awarded him, he failed to execute the bond called for by the contract within twenty days after the award and begin actual work within thirty days. As to whether the one thousand dollars was to be penalty or liquidated damages, we have no doubt the intention was to agree on the damages; what the city would lose by plaintiff's failure to sign the bond and contract and enter on the execution of the work could not be readily measured and the amount to be forfeited was not unreasonable. Those facts justify the ruling that the amount was stipulated damages." And in Wheaton Bldg. etc. Co. v. Boston, 204 Mass. 218, 90 N. E. 598, the court said: "The final contention of the plaintiff is that the deposit was a penalty, and hence cannot be enforced. The terms of the agreement indicate an intent to treat the deposit as liquidated damages, and this appears to be the purpose of the statute. The amount of the check must be regarded as liquidated damages. It was in fact much smaller than the loss sustained by the city, for by the failure of the plaintiff to take the contract it was awarded to another bidder for a sum about twenty-four thousand dollars larger. The plaintiff refused to sign the contract except for an additional price of twenty-one thousand dollars. Therefore no reason appears why the intent of the parties as manifested by their written communication and the purpose of the statute should not be carried out."

Thus it has been held that where a deposit amounted to thirty-seven hundred dollars and the actual loss by the bidder's failure to perform was but twenty-five hundred dollars, the entire deposit was nevertheless forfeited. Turner v. Fremont, 170 Fed. 259, 95 C. C. A. 455. And where it was provided that in case the bidder failed to perform after being awarded the contract, his deposit should be forfeited as liquidated damages, it was held that there could be no recovery of actual damages in excess of the amount of the deposit. New York v. Seely-Taylor Co. 149 App. Div. 98, 133 N. Y. S. 808, where-

in the court said: "If it be assumed that the Seely-Taylor Company's bid were a valid and binding one, notwithstanding the mistake alleged, it could thereafter refuse to enter into a contract, and if it did so the only damage to which it was subjected was that provided in the section of the charter referred to. Its refusal forfeited to the city the amount of the deposit as 'liquidated damages.' Where a statute provides for liquidated damages, or where there is a stipulation in a contract as to the amount of damages that is to be paid to either party for a breach, then, in the absence of fraud or mistake, the only question which arises is as to the breach. In that case the actual damage is not involved. One cannot recover both. The recovery of one precludes the recovery of the other. . . . To permit a recovery of actual damage, where liquidated damages have been provided for, is to nullify the statute or destroy a contract with reference thereto. The sole purpose of providing for liquidated damages is to prevent, in case of a breach, any question being raised as to the amount that shall be paid or recovered therefor. The city, when it advertised for bids, informed prospective bidders that they would have to deliver, at the time bids were submitted, a check or money, as provided in section 420 of the charter. The purpose of requiring such deposit to be made was not only to insure good faith on the part of bidders, but to indemnify the city against the expense of readvertising. . . . and also to notify bidders if the contract were awarded to them and they refused to enter into it the precise amount of damage they would have to pay. If this be so, then the only damage to which the Seely-Taylor Company could be subjected for refusing to execute the contract after the same had been awarded to it was the forfeiture of its deposit."

On the other hand, where there is no express agreement that the deposit shall be treated as liquidated damages in case of forfeiture it has been held that the deposit will be treated as a penalty and the forfeiture limited to the damages sustained. Wilson v. Baltimore, 83 Md. 203, 34 Atl. 774, 55 Am. St. Rep. 339; Lindsey v. Rockwall County, 10 Tex. Civ. App. 225, 30 S. W. 380. *Compare* the reported case wherein there was an express stipulation that the deposit should be treated as liquidated damages. In Lindsey v. Rockwall County, supra, the court said: "On the trial, the court left it to the jury to determine whether or not the check for five hundred dollars was intended as a penalty or as liquidated damages in event there was a failure to enter into contract and bond on the part of plaintiffs, and the jury held, in effect, by their verdict, that plaintiffs had forfeited the whole amount. This was error. The only agreement by which plaintiffs were bound was an implied one created by the filing of their bid and check, as required by the advertisement. By the terms of that contract the plaintiffs did not absolutely forfeit the amount of the check upon failure to enter into contract and bond, but by such failure they only became liable for such actual damages as the county sustained by reason of their failure. The actual damages sustained by the county, as shown by the evidence, does not amount to near as much as the amount of the check; and the judgment, therefore, is not supported by the evidence; and the same is reversed and the cause remanded."

III. Interest on Deposit.

Where the facts justify a return of the deposit to the bidder, it has been held that interest is allowable thereon from the time of the bidder's demand for a return. Erving v. New York, 60 Super Ct. 48, 16 N. Y. S. 612, 42 N. Y. St. Rep. 707, *affirmed* in 131 N. Y. 133, 29 N. E. 1011. But the contrary was held in Denver v. Hayes 28 Colo. 110, 63 Pac. 311, wherein the successful bidders for municipal bonds, although entitled to the return of their deposit on proof of the illegality of the bond issue, were held not to be entitled to interest on their deposit.

HUTTON

v.

WATTERS ET AL.

Tennessee Supreme Court—September 29, 1915.

132 Tenn. 527; 179 S. W. 134.

Torts — Lawful Act Committed with Malicious Motive.

Plaintiff's petition alleged that she operated a boarding house near a school of which the defendant was president; that the defendant, having disagreed with one boarder at the plaintiff's house, demanded his ejection therefrom and was refused; that he, with others, than attempted to, and did, destroy the plaintiff's business, by threats against students who boarded with the plaintiff, by deterring new arrivals from going to the plaintiff's house, and by other means; that the plaintiff was of good character, and operated a reputable house; and that the defendants acted from ill-will, and not by rea-

son of business rivalry or competition. Held, that the declaration was not demurrable, the facts showing a cause of action, even though the act itself was lawful, if the defendant was actuated by malice and destroyed the plaintiff's business without reasonable advantage to himself, since every person has the right to conduct a lawful business and to have that right enforced or the wrong redressed if the right is infringed upon.

[See note at end of this case.]

Same.

In an action for wrongful injury to plaintiff's business, the question of whether the acts complained of were within the rights of the defendant as being in the due course of competition for his own advantage, or actuated solely by malice and unjustifiable, must be determined upon the facts in each case, and no rule can be laid down for its determination.

[See note at end of this case.]

Same.

A "malicious" act is one injurious to another, intentional, and without legal justification, and is unlawful and actionable, but if an act, otherwise lawful, has a reasonable tendency to promote ends advantageous to the doer, malice in the doing does not bring it within the rule.

[See note at end of this case.]

Certiorari to Court of Civil Appeals.

Action for damages. E. J. Hutton, plaintiff, and H. E. Watters et al., defendants. Judgment for defendants in trial court. Judgment reversed by Court of Civil Appeals. Defendants bring certiorari. The facts are stated in the opinion. AFFIRMED.

L. E. Holladay for defendants.

A. B. Adams and *R. E. Maiden* for plaintiff.

[529] NEIL, C. J.—The averments of the declaration are, in substance, as follows:

One of the defendants, the Hall-Moody Institute, is a chartered institution of learning at Martin, Tennessee. Defendant Watters is its president, and the ten other defendants are its "directors, trustees, teachers, and advisors." The school has a large out of town patronage, and it is essential that boarding houses be conducted to accommodate these students, as well as some of the teachers. Mrs. Hutton is a widow who makes a business of keeping boarders. In June, 1910, she opened a business of the kind in Martin. During that year one James Wilson became one of her customers. Some students did the same. Defendants offered no objection until after a personal difficulty had occurred between Wilson and defendant Watters. The latter then demanded that plaintiff dismiss Wilson. She refused. Because of this refusal Watters became her enemy, and the other defendants ranged themselves with him, and all formed a conspiracy to drive her out of business. Thereupon, from time to time, during the years 1911, 1912, and 1913, as soon as plaintiff secured student boarders, or teacher boarders, the defendants, in prosecution of this purpose, caused these, plaintiff's customers, to leave her house, by threats to deprive them of the benefits of the school, or of their places, if they should refuse. By similar threats other persons were prevented from taking board with plaintiff; the defendants even going to the length of meeting trains and watching for new arrivals and deterring these from [530] patronizing her house. The plaintiff is a person of good moral character, stands well in the community, and has always conducted a reputable establishment. The defendants, in setting on foot and prosecuting the conspiracy referred to, were not influenced by any motive of business rivalry, or competition, but acted as they did merely because of a feeling of ill will induced by plaintiff's refusal to turn James Wilson out of her house, and her refusal to permit Watters to dictate the price which she charged her customers.

The conspiracy was successful, and destroyed, or practically destroyed, plaintiff's business.

The damages are laid at $5,000

The defendants interposed a demurrer purporting numerous grounds, but all resolvable into the single objection that the declaration stated no cause of action.

The trial judge sustained the demurrer, but the court of civil appeals reversed that judgment, and the case then came to this court under the writ of *certiorari*.

We think the declaration stated a good cause of action.

Every one has the right to establish and conduct a lawful business, and is entitled to the protection of organized society, through its courts, whenever that right is unlawfully invaded. Such right existing, the commission of an actionable wrong is established against any one who is shown to have intentionally interfered with it, without justifiable cause or excuse. To establish justification, it must be made to appear, [531] not only that the act complained of was otherwise lawful and performed in a lawful manner, but likewise that it had some real tendency to effect a reasonable advantage to the doer of it. But in order to determine the reasonableness of such act it must be considered from the standpoint of both parties, with a view to ascertaining whether the defendant has acted merely in the due exercise of his own right to carry on business for himself. If this be found in his favor, while he may have done the plaintiff harm, he cannot be adjudged to have done an injury in the legal sense;

that is, a wrongful act in violation of the legal right of another. Whether the defendant was in the reasonable exercise of his own similar rights must, from the viewpoint stated, be determined by the court, or court and jury in each case as it arises, on the law and the evidence. A defendant cannot excuse himself by the mere fact that the means used were his own, his property, his servants. He cannot, with justification in law, use his property, or anything else that appertains to him, in such manner as to wantonly injure another. Still, it has been decided, by the weight of authority, that if the act complained of, being otherwise lawful in itself, had a reasonable tendency to promote ends advantageous to the defendant in the conduct of his own business, it cannot be correctly adjudged an illegal agency or operation by the fact that the doer of it was moved also by a feeling of ill will, or personal malice, towards the person against whom his act was directed (West Virginia Transp. Co. v. Standard Oil Co. 50 W. Va. 611, [532] 40 S. E. 591, 56 L.R.A. 804, 88 Am. St. Rep. 895; 62 L.R.A. 673, note; L.R.A. 1915B 1180, note); but if the act is otherwise wrongful, such personal malice may aggravate the damages. (Cooley on Torts [2d ed.], pp. 832, 836.)

In short, if an act be hurtful to another, intentional, and without legal justification, it is malicious in the true legal sense (19 Am. & Eng. Enc. of Law [2d ed.] 623, note 4), therefore unlawful, and is actionable.

Of course it is wholly impossible to formulate a description which will cover all acts which are intentionally hurtful to another, and at the same time justifiable in law. As already said, each case, as it arises, must be determined on its own facts, and in the light of the principles stated. It is left in each case for the court, or the court and jury, according to the way in which the controversy is presented, to say whether the defendant's conduct complained of was, in view of all the circumstances, a reasonable and proper exercise of his right of self-protection, or self-advancement, both as to the substance of it, and the method of it. Iuskie v. Griffin, 75 N. H. 345, 74 Atl. 595, 27 L.R.A.(N.S.) 966, 139 Am. St. Rep. 718; Dunshee v. Standard Oil Co. 152 Ia. 623, 132 N. W. 371, 36 L.R.A.(N.S.) 263; Gott v. Bearea College, 156 Ky. 376, 161 S. W. 204, 51 L.R.A.(N.S.) 17; Mogul Steamship Co. v. McGregor, 23 Q. B. D. (Eng.) 598; Mod. Am. Law, vol. 2, pp. 327–336.

[533] In the latter authority it is said, quoting 28 Law Quarterly Review, 67:

"The theory of justification consists in a proper adjustment and compromise between the two competing rights that are equally protected in law. It has been already observed that the enjoyment by a particular individual of the right of freedom, as to how he should bestow his capital and labor, is not absolute, but qualified by the existence of equal rights in the other members, to such an extent as to be made compatible with an equally free enjoyment of these rights by the rest of the community. In fact, every case of justification reduces itself to the question how far the rights of an individual can be so circumscribed in accordance with a general law of freedom as to leave an equal scope for the free enjoyment of the competing rights of his fellow men."

"But," said Lord Justice Bowen, in Mogul Steamship Co. v. McGregor, supra, "such legal justification would not exist when the act was merely done with the intention of causing temporal harm, without reference to one's own lawful gain, or the lawful enjoyment of one's own right. The good sense of the tribunal which had to decide would have to analyze the circumstances and discover on which side of the line each case fell. But if the real object was to enjoy what was one's own, or to acquire for one's self some advantage in one's property or trade, and what was done was done honestly, peaceably, and without any of the illegal acts above referred to, it could not, in my opinion, properly be said that [534] it was done without just cause or excuse." Id. 618, 619.

Although, as indicated, the defense of justification arising in such controversies is a question for decision in each case, as concreted in its own peculiar facts, yet the precedents shed much light in the way of illustrating the principles involved.

In an early English case, decided during the reign of Queen Anne (Keeble v. Hickeringill, 11 East (Eng.) 574), reported in full as a note to Carrington v. Taylor, 11 East (Eng.) 571, 574, 577, it appeared that the plaintiff had prepared a decoy pond for the purpose of taking wild fowl. The defendant knowing this, and purposing to injure the plaintiff by frightening away the wild fowl accustomed to resort to the pond, discharged guns on his own land, and the wild fowl were thus driven away. It was held that an action on the case would lie for the damages thus occasioned. Holt, Chief Justice, said that if the defendant had set up another decoy on his own ground near the plaintiff's and that had spoiled the custom of the latter, no action would lie, because he had as much liberty to make and use a decoy as the plaintiff; but, when, without benefit to himself, real or intended, he successfully committed the act intending to accomplish the injury to the plaintiff, it was actionable.

In International, etc. R. Co. v. Greenwood, 2 Tex. Civ. App. 76, 21 S. W. 559, it was held that a railway company was liable to the proprietor of a boarding house for having de-

prived him of the patronage [535] of its employees by threatening to discharge them if they patronized him. It did not appear that any interest of the railway company was served, or any benefit to it effected, by such order.

In Graham v. St. Charles St. R. Co. 47 La. Ann. 214, 16 So. 806, 27 L.R.A. 416, 49 Am. St. Rep. 366, it appeared that the foreman of the railway company, without any purpose of advancing its interests, threatened to discharge its servants if they continued to trade with plaintiff, who was conducting a grocery store near the stables and buildings of the company, in New Orleans, and by this order caused injury to the plaintiff. This conduct was held unjustifiable and therefore actionable.

In Wesley v. Native Lumber Co. 97 Miss. 814, 53 So. 346, Ann. Cas. 1912D 706, it was held that an action for damages would lie against a corporation where it had maliciously injured a retail dealer by threatening to discharge any of its employees who should deal with him. To the same effect is Globe, etc. F. Ins. Co. v. Firemen's Fund Ins. Co. 97 Miss. 148, 52 So. 454, 29 L.R.A.(N.S.) 869.

In Ertz v. Produce Exch. 79 Minn. 145, 81 N. W. 737, 48 L.R.A. 90, 79 Am. St. Rep. 433, it was held that a conspiracy by several to refuse to deal with a dealer in farm produce, having a profitable business, and to induce others to do likewise, it not appearing that such interference of the persons so conspiring was to serve any legitimate interests of their own, but that it was done merely to injure him, and that the conspiracy [536] had been carried into execution, whereby the plaintiff's business was ruined, furnished a cause of action in favor of the injured party.

On the other hand, it was held in Robinson v. Texas Pine Land Assoc. (Tex.) 40 S. W. 843, that an employer who issued store checks redeemable in merchandise was not liable to an action by another storekeeper for threatening to discharge its employees if they traded with him, and for refusing to take up any checks which had passed through the hands of plaintiff. The ground of the decision was that the plaintiff had no superior right to trade with defendant's employees; that defendant had the right to appropriate to itself all of the customers it could command, provided it did not violate a definite legal right of the plaintiff. The point of view is brought out more clearly in Lewis v. Huie-Hodge Lumber Co. 121 La. 658, 46 So. 685. The defendant was the employer of a large number of people, and in connection with its business carried on a general mercantile store for the purpose of selling goods to its employees and others. It notified its employees that if they bought goods of the plaintiff they would be discharged. The court held that defendant's act was justifiable as a means of safe-guarding its own interests.

An interesting case is Delz v. Winfree. The controversy was first presented on a petition stating, in substance, that the defendants, members of two different firms engaged in buying and slaughtering live animals fit to be slaughtered and sold as fresh butcher's meat, [537] conspired with each other, and with a butcher, not to sell to the petitioner for cash live animals or slaughtered meat for the prosecution of his business, and that in pursuance of this conspiracy they refused to sell him, although offered their own price in money, by reason of which unlawful combination and malicious interference the petitioner was compelled to close his business, and so had been damaged. This was held to state a cause of action. 80 Tex 400, 16 S. W. 111, 26 Am. St. Rep. 755. But when the case came on for trial on the issues made, it appeared that the refusal was based on the fact that the petitioner was indebted to the defendants, and they had refused to sell him because, he being insolvent, they deemed it prudent to have no further dealings with him until he had paid them what was due them. There were verdict and judgment in favor of the defendants, and on appeal the judgment of the trial court was sustained, the court holding that the reason assigned and proven justified the act complained of. 6 Tex. Civ. App. 11, 25 S. W. 50.

But in Dunshee v. Standard Oil Co. 152 Ia. 623, 132 N. W. 371, 36 L.R.A.(N.S.) 263, it was held that the principle of reasonable self-protection, or self-advancement, did not justify the action taken. There it appeared that the defendant, a wholesaler, when its customer in a particular city began to purchase a portion of his stock from a rival concern, entered into a retail business solely for the purpose of driving him out of business, and when this had been accomplished [538] ceased its said retail business. It was held that these facts made out a case for damages.

So, the case of Tuttle v. Buck, 107 Minn. 145, 119 N. W. 946, 22 L.R.A.(N.S.) 599, 131 Am. St. Rep. 446, 16 Ann. Cas. 807. Here it appeared that the plaintiff, a barber, had for several years carried on a profitable business, and that the defendant, a wealthy banker, possessed of great influence, set up an opposition shop, solely for the purpose of injuring the plaintiff, and without profit to himself, employing and paying barbers to conduct such opposition business, whereby plaintiff's business was ruined. It was held that these facts made a case for relief. The court said:

"To divert to one's self the customers of a business rival by the offer of goods at lower prices is in general a legitimate mode of serving one's own interest, and justifiable as fair

competition. But when a man starts an opposition place of business, not for the sake of profit to himself, but regardless of loss to himself, and for the sole purpose of driving his competitor out of business, and with the intention of himself retiring upon the accomplishment of his malevolent purpose, he is guilty of a wanton and an actionable tort."

To the same effect is Boggs v. Duncan-Schell Furniture Co. 163 Ia. 106, 143 N. W. 482, L.R.A. 1915B 1196, quoting and approving Tuttle v. Buck.

The illegal acts excluded by general reference in the excerpt we have made from Mogul Steamship Co. v. McGregor, supra, are thus particularized by the Lord Justice in an earlier part of his opinion:

[539] "No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden. So is the intentional procurement of a violation of individual rights, contractual or other, assuming always that there is no just cause for it. The intentional driving away of customers by show of violence (Tarleton v. M'Gawley, Peak N. P. (ed. 1795) (Eng.) 205); the obstruction of actors on the stage by preconcerted hissing (Clifford v. Brandon, 2 Campb. (Eng.) 358; Gregory v. Brunswick, 6 M. & G. 205, 46 E. C. L. 205); the disturbance of wild fowl in decoys by the firing of guns (Carrington v. Taylor, 11 East (Eng.) 571, and Keeble v. Hickeringill, 11 East (Eng.) 574, note); the impeding or threatening servants or workmen (Garret v. Taylor, Cro. Jac. (Eng.) 567); the inducing persons under personal contracts to break their contracts (Bowen v. Hall, 6 Q. B. D. (Eng.) 333; Lumley v. Gye, 2 El. & Bl. 216, 75 E. C. L. 216)—all are instances of such forbidden acts."

Applying the principles stated to the case before us, we are of the opinion that the defendants acted without legal excuse. They were not justified by plaintiff's refusal to dismiss her boarder, James Wilson, nor by her refusal to arrange her rates according to the directions of the defendant Watters. If the prices charged were pleasing to her patrons, no other person had any right to complain. No such defense appears as that set out in Gott v. Berea College, supra, based on the welfare of the students, or the right of the college to make rules for their control.

[540] We are referred to the case of Payne v. Western, etc. R. Co. 13 Lea (Tenn.) 507, 49 Am. Rep. 666, as an authority in opposition to the views herein stated. While that case was ably reasoned by the learned special judge who wrote the majority opinion, and is not without support in the authorities, we are constrained to hold that it was erroneously decided. We are better satisfied with the dissenting opinion. It is certain that the prevailing opinion in that case is out of harmony with the great weight of authority as now understood. Moreover, we have long been dissatisfied with that opinion, believing that it was fundamentally wrong. The real question was not, as assumed in that opinion, whether a master had the right to discharge his servants without liability to account to a third party for his reasons, good or bad, but it was whether the defendant had the right to injure the business of the plaintiff without any purpose to effect an advantage or benefit to itself. The plaintiff in that case could not lawfully question defendant's authority over its servants, but he could question the defendant's exercise of that authority solely for the purpose of destroying his business, the infliction of an injury on his business without legal justification, and hence an act malicious in law.

It was said in that opinion that the act was not malicious in law, because although it inflicted a wrong on the plaintiff such wrong was not a legal wrong, but only a moral wrong, therefore, not an unlawful act. That position assumed the whole matter in controversy. [541] We think the learned special judge confounded the right of a master to discharge his servants subject to legal accountability to no one save the servants themselves for breach of contract, with the supposed right to interfere with the lawful business of another by threats made against those servants. It is said, if the master had the right to discharge his servants, he necessarily had the right to threaten to discharge them. The conclusion does not logically follow. He had no right to condition his threat, or the execution of his threat, on an injury to be inflicted, under his orders, by the servants on the personal business of another. The defendant could not lawfully threaten to discharge his servants if they should fail to assault and beat the plaintiff. Why? Because to assault and beat one who is doing no harm is unlawful. So, it is unlawful to interfere with another's business without a good excuse. The means cannot justify the act, or turn a wrong into a right. The opinion referred to is based on the hypothesis that the means used can effect this metamorphosis, if that means to be the exercise of the power which the master has over his servants through their fear of losing their places, and hence their means of livelihood, and no violence be done. It cannot be that a master has power, within the law, to direct his servants where to buy for themselves, or where not to buy, when no rightful good to himself can be effected through such direction. That would be to sanction tyranny, the enslavement of servants, and the subversion of the law itself. The law wills freedom, save [542]

where a man is bound by its own behests, or has, through contract, submitted his duty to the will of another. Where one employs the power which the law gives him by contract for purposes other than those of the contract, to the end that he may enslave the will of the person who has contracted with him, he does wrong, and if injury to another occurs thereby, he does a legal wrong, and cannot shelter himself behind the contract which he has diverted from its purposes, and so prostituted.

It is said in the opinion we are criticizing that a man has the legal right to buy where he chooses and to sell to whom he will. This is true; but we think the point had no fitting part in the solution of the question then before the court. The right of a man to dispose of his own custom does not include the power, in law, to influence or control the custom of other people to the injury or destruction of the business of third parties. Such influence one can lawfully exercise only when it is used for the building up of his own business or the advancement of his own lawful interests. The true theory of the matter was fully discerned by Mr. Justice Freeman, and expressed by him in his masterly dissenting opinion filed in the cause in these words:

"The rule I have maintained is in strict accord with a maxim of the law, so well founded in reason as to need no argument or authority to support it; that is, that a man must so use his own as not to do an injury to others. That this means he shall so enjoy his legal right, as not to do wrong to the legal rights of [543] another, I freely concede. But here is a use of his legal right to discharge employees, for the direct purpose and with no other, and for no other reason except to prevent their trading with a party legitimately entitled by his location and the character of his business to such trade. Here is the use of a legal right, to deprive the other of that which is his legal right, to wit, the property he has in the good will of his business, which consists in his business character for integrity and fair dealing, his convenience of location to his customers, the character of goods he sells, and fairness of price for which they are sold, and the like. All these make up as elements of that property now well recognized in our law as the good will of a business. For a party who has the power, to use that power, to destroy or injure the value of this property, in the exercise of the right, not for any reason of advantage to himself, but solely to injure another, ought not to be permitted by an enlightened system of jurisprudence in this country.

"It is argued that a man ought to have the right to say where his employees shall trade. I do not recognize any such right. A father may well control his family in this, but an employer ought to have no such right conceded to him. In the case in hand and like cases under the rule we have maintained, the party may always show by way of defense that he has had reason for what he has done; that the trader was unworthy of patronage; that he debauched the employee, or sold, for instance, unsound food, or any other cause, [544] that affected his employee's usefulness to him, or justified the withdrawal of custom from him. This is not in any way to interfere with the legal right to discharge an employee for good cause, or without any reason assigned if the contract justifies it, but only that he shall not do this solely for the purpose of injury to another, or hold a threat over the employee *in terrorem* to fetter the freedom of the employee, and for the purpose of injuring an obnoxious party.

"Such conduct is not justifiable in morals, and ought not to be in law, and when the injury is done as averred in this case, the party should respond in damages. The principle will not interfere with any proper use of the legal rights of the employer, an improper and injurious use is all it forbids." Payne v. Western, etc. R. Co. 13 Lea (Tenn.) 541, 542, 49 Am. Rep. 666.

All of the foregoing excerpt is in accord with the views now held by the court (including as matter of justification acts for the lawful advancement of the master's own interest), and in harmony with the best judicial thought of the present time, and in our judgment should have controlled the decision of the cause.

We overrule Payne v. Western, etc. R. Co. in so far as it is in conflict with the present opinion.

The judgment of the court of civil appeals in the case before us, reversing that of the trial court, must, on the grounds herein stated, be affirmed, and the cause remanded for issue and trial.

NOTE.

Act Lawful in Itself Not Rendered Unlawful by Malicious Motive.

The earlier cases discussing the effect of a malicious intent on an act inherently lawful are collected in the note to Westley v. Native Lumber Co. Ann. Cas. 1912D 796. This note reviews the recent cases on that point.

Several recent cases have maintained the view that an act which is in itself lawful and infringes no legal right of another is not actionable though it is performed with malicious intent and results in actual damage. Thus in Vitagraph Co. of America v. Swaab, 248 Pa. St. 478, Ann. Cas. 1916B, in discuss-

ing an alleged wrongful prosecution of an action of replevin, it was said: "The general principle is that where a plaintiff has a legal right to a particular remedy it matters not what motives may induce him to assert it." So in Prospect Park, etc. R. Co. v. Morley, 155 App. Div. 347, 140 N. Y. S. 380, the court in refusing to enjoin the prosecution of certain actions said: "But appellants assert in their complaint that defendants have conspired to do injury to the plaintiffs, and that the suits brought by them are fraudulent in character, and that therefore the prosecution of such actions should be enjoined. But no action for a conspiracy lies when two or more persons conspire to do a lawful act in a lawful manner and cause damage thereby, even though they may have acted with a malicious motive." In Buck v. Latham, 110 Minn. 523, 126 N. W. 278, the Minnesota Court, which had held in an earlier case (see Tuttle v. Buck, 16 Ann. Cas. 807) that a malicious intent might render actionable an act otherwise lawful, declared that the principle of that case did not warrant recovery on proof that a person with malicious intent prosecuted to judgment a valid claim against another. The court said: "It is apparent upon the face of the counterclaim that the plaintiff had a perfect legal right to do that which he is charged with doing, which was simply this: He bought a past-due negotiable promissory note, paying full value therefor, and brought this action against the defendant to recover the amount due on the note, which the defendant might have paid at any time and avoided the suit. He admits that he had no defense to the note, and that the plaintiff was entitled to the amount claimed. The plaintiff is charged with doing no other act. It is not alleged that the plaintiff has in any manner interfered with or sacrificed the defendant's property, or impaired his financial credit. On the contrary the sole basis for the recovery from the plaintiff of damages in the sum of ten thousand dollars is that his unexecuted purpose in doing the lawful acts that he did do was malicious. The briefs of the respective parties ably discuss the question as to when, if ever, a malicious motive will convert into an actionable tort an act which otherwise would be both legal and proper. We do not discuss the question, for manifestly upon both principle and authority it must be held that the pleading here under consideration does not allege facts constituting a cause of action against the plaintiff, for it shows that he exercised a legal right in a lawful way, with no invasion of the defendant's personal or property rights."

The view that an act inherently lawful may become actionable if it is done with a malicious intent to injure another finds support in the reported case. So, in Boggs v. Duncan-Schell Furniture Co. 163 Ia. 106, 143 N. W. 482, L.R.A.1915B 1196, a recovery was sustained against a person who, having lost the selling agency for certain sewing machines, issued certain misleading advertisements of second hand machines, not for the purpose of legitimate competition in trade but to injure his successor in the agency in question. The court said: "While a person has the right to pursue his avocations and his business for his own pleasure and profit, he has no right, directly or indirectly, to wilfully and maliciously injure another in his lawful business or occupation. Men have the right to engage in lawful competition, and, though the competition may have the effect of driving another out of business, if the competition is lawful, no action arises, though injury resulted from the competition. Where there is lawful competition for gain, for supremacy in business, for the legitimate control of business, even though the purpose and effect of the competition is to drive from business competitors, yet, if the competition is lawful and carried on in a lawful way, no action will lie. There is a difference between lawful competition and simulated competition carried on with the sole purpose and intent, not of profit and gain, but of maliciously injuring others engaged in that particular business. The case before us does not present a case of lawful competition, but a case of simulated or pretended competition, designed and carried out with malice for the purpose of injury to the plaintiff in his business. . . . Every man has the legal right to advance himself before his fellows, and to build up his own business enterprises, and use all lawful means to that end, although in the path of his impetuous movements he leaves strewn the victims of his great industry, energy, skill, prowess, or foresight. But the law will not permit him to wear the garb of honor only to destroy. The law will not permit him to masquerade in the guise of honest competition solely for the purpose of injuring his neighbor. The law will not permit him to simulate that which is right for the sole purpose of protecting himself in the doing of that which is palpably wrong. It is said that a man cannot be called to answer for doing that which he has a right to do, no matter what the effect of the doing may have upon others, and no evil motive can make an act wrong, the doing of which is within the rights granted by law. But the question still stands, Is he within his legal right when he simulates honest competition, not to advance himself or his own interests, but for the sole purpose of inflicting injury upon his neighbors? It is said the law deals only with externals; but the law ought not to be blinded by the lion's skin. It may be

that expressed malice in the doing does not, of itself, make the wrong; but malice is implied in the very act of doing, and therefore the act itself is wrong." In Virtue v. Creamery Package Mfg. Co. 123 Minn. 17, 142 N. W. 930, L.R.A.1915B 1179, reargument denied, 123 Minn. 45, 142 N. W. 1136, L.R.A. 1915B 1195, it was held that while a patentee may in good faith issue notices warning against a supposed infringement, he is liable in damages if he does so with malicious intent to injure a competitor. That case seems, however, to rest on the rule as to privilege with respect to defamatory publications rather than on the doctrine discussed in this note.

MacPHERSON
v.
BUICK MOTOR COMPANY.

New York Court of Appeals—March 14, 1916.

217 N. Y. 382.

Negligence — Liability of Manufacturer to Purchaser — Defective Automobile.

The manufacturer of an automobile is liable to a purchaser thereof from a dealer for injuries caused by a defective wheel, the defects in which could have been discovered by reasonable inspection, though the wheel was purchased by the automobile manufacturer from the maker thereof.

[See note at end of this case.]

MacPherson v. *Buick Motor Co.* 160 N. Y. App. Div. 55, affirmed.

Appeal from Appellate Division of Supreme Court, Third Judicial Department.

Action for damages. Donald C. MacPherson, plaintiff, and Buick Motor Company, defendant. Judgment for plaintiff in trial court. Judgment affirmed by Appellate Division of Supreme Court. Defendant appeals by permission. The facts are stated in the opinion. AFFIRMED.

William Van Dyke for appellant.
Edgar T. Brackett for respondent.

[384] CARDOZO, J.—The defendant is a manufacturer of automobiles. It sold an automobile to a retail dealer. The retail dealer resold to the plaintiff. While the plaintiff was in the car, it suddenly collapsed. He was [385] thrown out and injured. One of the wheels was made of defective wood, and its spokes crumbled into fragments. The wheel was not made by the defendant; it was bought from another manufacturer. There is evidence, however, that its defects could have been discovered by reasonable inspection, and that inspection was omitted. There is no claim that the defendant knew of the defect and willfully conceded it. The case, in other words, is not brought within the rule rule of Kuelling v. Roderick Lean Mfg. Co. 183 N. Y. 78, 5 Ann. Cas. 124, 75 N. E. 1098, 111 Am. St. Rep. 691, 2 L.R.A.(N.S.) 303. The charge is one, not of fraud, but of negligence. The question to be determined is whether the defendant owed a duty of care and vigilance to any one but the immediate purchaser.

The foundations of this branch of the law, at least in this state, were laid in Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455. A poison was falsely labeled. The sale was made to a druggist, who in turn sold to a customer. The customer recovered damages from the seller who affixed the label. "The defendant's negligence," it was said, "put human life in imminent danger." A poison falsely labeled is likely to injure any one who gets it. Because the danger is to be foreseen, there is a duty to avoid the injury. Cases were cited by way of illustration in which manufacturers were not subject to any duty irrespective of contract. The distinction was said to be that their conduct, though negligent, was not likely to result in injury to any one except the purchaser. We are not required to say whether the chance of injury was always as remote as the distinction assumes. Some of the illustrations might be rejected to-day. The *principle* of the distinction is for present purposes the important thing.

Thomas v. Winchester became quickly a landmark of the law. In the application of its principle there may at times have been uncertainty or even error. There has never in this state been doubt or disavowal of the principle itself. The chief cases are well known, yet to recall [386] some of them will be helpful. Loop v. Litchfield, 42 N. Y. 351, 1 Am. Rep. 513, is the earliest. It was the case of a defect in a small balance wheel used on a circular saw. The manufacturer pointed out the defect to the buyer, who wished a cheap article and was ready to assume the risk. The risk can hardly have been an imminent one, for the wheel lasted five years before it broke. In the meanwhile the buyer had made a lease of the machinery. It was held that the manufacturer was not answerable to the lessee. Loop v. Litchfield was followed in Losee v. Clute, 51 N. Y. 494, 10 Am. Rep. 638, the case of the explosion of a steam boiler. That decision has been criticised (Thompson on Negligence, 233; Shear-

man & Redfield on Negligence [6th ed.] § 117); but it must be confined to its special facts. It was put upon the ground that the risk of injury was too remote. The buyer in that case had not only accepted the boiler, but had tested it. The manufacturer knew that his own test was not the final one. The finality of the test has a bearing on the measure of diligence owing to persons other than the purchaser (Beven, Negligence [3 ed.] pp. 50, 51, 54; Wharton, Negligence [2d ed.] § 134).

These early cases suggest a narrow construction of the rule. Later cases, however, evince a more liberal spirit. First in importance is Devlin v. Smith, 89 N. Y. 470, 42 Am. Rep. 311. The defendant, a contractor, built a scaffold for a painter. The painter's servants were injured. The contractor was held liable. He knew that the scaffold, if improperly constructed, was a most dangerous trap. He knew that it was to be used by the workmen. He was building it for that very purpose. Building it for their use, he owed them a duty, irrespective of his contract with their master, to build it with care.

From Devlin v. Smith we pass over intermediate cases and turn to the latest case in this court in which Thomas v. Winchester was followed. That case is Statler v. George A. Ray Mfg. Co. 195 N. Y. 478, 480, 88 N. E. 1063. The defendant [387] manufactured a large coffee urn. It was installed in a restaurant. When heated, the urn exploded and injured the plaintiff. We held that the manufacturer was liable. We said that the urn "was of such a character inherently that, when applied to the purposes for which it was designed, it was liable to become a source of great danger to many people if not carefully and properly constructed."

It may be that Devlin v. Smith and Statler v. George A. Ray Mfg. Co. have extended the rule of Thomas v. Winchester. If so, this court is committed to the extension. The defendant argues that things imminently dangerous to life are poisons, explosives, deadly weapons—things whose normal function it is to injure or destroy. But whatever the rule in Thomas v. Winchester may once have been, it has no longer that restricted meaning. A scaffold (Devlin v. Smith, supra) is not inherently a destructive instrument. It becomes destructive only if imperfectly constructed. A large coffee urn (Statler v. George A. Ray Mfg. Co. supra) may have within itself, if negligently made, the potency of danger, yet no one thinks of it as an implement whose normal function is destruction. What is true of the coffee urn is equally true of bottles of aerated water (Torgesen v. Schultz, 192 N. Y. 156, 84 N. E. 956, 127 Am. St. Rep. 894, 18 L.R.A.(N.S.) 726). We have mentioned only cases in this court. But the rule has received a like extension in our courts of intermediate appeal. In Burke v. Ireland, 26 App. Div. 487, 50 N. Y. S. 369, in an opinion by Cullen, J., it was applied to a builder who constructed a defective building; in Kahner v. Otis Elevator Co. 96 App. Div. 169, 89 N. Y. S. 185, to the manufacturer of an elevator; in Davies v. Pelham Hod Elevating Co. 65 Hun 573, 20 N. Y. S. 523, affirmed in this court without opinion, 146 N. Y. 363, 41 N. E. 88, to a contractor who furnished a defective rope with knowledge of the purpose for which the rope was to be used. We are not required at this time either to approve or to disapprove the application of the rule that was made in these cases. It is enough that they help to characterize the trend of judicial thought.

[388] Devlin v. Smith was decided in 1882. A year later a very similar case came before the Court of Appeal in England (Heaven v. Pender, 11 Q. B. D. 503). We find in the opinion of Brett, M. R., afterwards Lord Esher (p. 510), the same conception of a duty, irrespective of contract, imposed upon the manufacturer by the law itself: "Whenever one person supplies goods, or machinery, or the like, for the purpose of their being used by another person under such circumstances that every one of ordinary sense would, if he thought, recognize at once that unless he used ordinary care and skill with regard to the condition of the thing supplied or the mode of supplying it, there will be danger of injury to the person or property of him for whose use the thing is supplied, and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing." He then points out that for a neglect of such ordinary care or skill whereby injury happens, the appropriate remedy is an action for negligence. The right to enforce this liability is not to be confined to the immediate buyer. The right, he says, extends to the persons or class of persons for whose use the thing is supplied. It is enough that the goods "would in all probability be used at once . . . before a reasonable opportunity for discovering any defect which might exist," and that the thing supplied is of such a nature "that a neglect of ordinary care or skill as to its condition or the manner of supplying it would probably cause danger to the person or property of the person for whose use it was supplied, and who was about to use it." On the other hand, he would exclude a case "in which the goods are supplied under circumstances in which it would be a chance by whom they would be used or whether they would be used or not, or whether they would be used before there would probably be means of observing any defect," or where the goods are of such a nature that "a want of care or skill as to

their condition or the manner of supplying them would not probably [389] produce danger of injury to person or property." What was said by Lord Esher in that case did not command the full assent of his associates. His opinion has been criticised "as requiring every man to take affirmative precautions to protect his neighbors as well as to refrain from injuring them" (Bohlen, Affirmative Obligations in the Law of Torts, 44 Am. Law Reg. N. S. 341). It may not be an accurate exposition of the law of England. Perhaps it may need some qualification even in our own state. Like most attempts at comprehensive definition, it may involve errors of inclusion and of exclusion. But its tests and standards, at least in their underlying principles, with whatever qualification may be called for as they are applied to varying conditions, are the tests and standards of our law.

We hold, then, that the principle of Thomas v. Winchester is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. That is as far as we are required to go for the decision of this case. There must be knowledge of a danger, not merely possible, but probable. It is *possible* to use almost anything in a way that will make it dangerous if defective. That is not enough to charge the manufacturer with a duty independent of his contract. Whether a given thing is dangerous may be sometimes a question for the court and sometimes a question for the jury. There must also be knowledge that in the usual course of events the danger will be shared by others than the buyer. Such knowledge may often be [390] inferred from the nature of the transaction. But it is possible that even knowledge of the danger and of the use will not always be enough. The proximity or remoteness of the relation is a factor to be considered. We are dealing now with the liability of the manufacturer of the finished product, who puts it on the market to be used without inspection by his customers. If he is negligent, where danger is to be foreseen, a liability will follow. We are not required at this time to say that it is legitimate to go back of the manufacturer of the finished product and hold the manufacturers of the component parts. To make their negligence a cause of imminent danger, an independent cause must often intervene; the manufacturer of the finished product must also fail in *his* duty of inspection. It may be that in those circumstances the negligence of the earlier members of the series is too remote to constitute, as to the ultimate user, an actionable wrong (Beven on Negligence [3d ed.] 50, 51, 54; Wharton on Negligence [2d ed.] § 134; Leeds v. New York Telephone Co. 178 N. Y. 118, 70 N. E. 219; Sweet v. Perkins, 196 N. Y. 482, 9 N. E. 50; Hayes v. Hyde Park, 153 Mass. 514, 516, 27 N. E. 522, 12 L.R.A. 249). We leave that question open. We shall have to deal with it when it arises. The difficulty which it suggests is not present in this case. There is here no break in the chain of cause and effect. In such circumstances, the presence of a known danger, attendant upon a known use, makes vigilance a duty. We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.

From this survey of the decisions, there thus emerges a definition of the duty of a manufacturer which enables us to measure this defendant's liability. Beyond all question, the nature of an automobile gives warning of probable danger if its construction is defective. This [391] automobile was designed to go fifty miles an hour. Unless its wheels were sound and strong, injury was almost certain. It was as much a thing of danger as a defective engine for a railroad. The defendant knew the danger. It knew also that the car would be used by persons other than the buyer. This was apparent from its size; there were seats for three persons. It was apparent also from the fact that the buyer was a dealer in cars, who bought to resell. The maker of this car supplied it for the use of purchasers from the dealer just as plainly as the contractor in Devlin v. Smith supplied the scaffold for use by the servants of the owner. The dealer was indeed the one person of whom it might be said with some approach to certainty that by him the car would not be used. Yet the defendant would have us say that he was the one person whom it was under a legal duty to protect. The law does not lead us to so inconsequent a conclusion. Precedents drawn from the days of travel by stage coach do not fit the conditions of travel to-day. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.

In reaching this conclusion, we do not ignore the decisions to the contrary in other jurisdictions. It was held in Cadillac Motor

Car Co. v. Johnson, 221 Fed. 801, 137 C. C. A. 279, L.R.A.1915E 287, that an automobile is not within the rule of Thomas v. Winchester. There was, however, a vigorous dissent. Opposed to that decision is one of the Court of Appeals of Kentucky (Olds Motor Works v. Shaffer, 145 Ky. 616, Ann. Cas. 1913B 689, 140 S. W. 1047, 37 L.R.A.(N.S.) 560). The earlier cases are summarized by Judge Sanborn in Huset v. J. I. Case Threshing Mach. Co. 120 Fed. 865, 57 C. C. A. 237, 61 L.R.A. 303. Some of them, at first sight inconsistent with our conclusion, may be reconciled upon the ground that the negligence was too remote, and that another cause had intervened. But even when they cannot be reconciled, the difference is rather in the application [392] of the principle than in the principle itself. Judge Sanborn says, for example, that the contractor who builds a bridge, or the manufacturer who builds a car, cannot ordinarily forsee injury to other persons than the owner as the probable result (120 Fed. 865, 867). We take a different view. We think that injury to others is to be foreseen not merely as a possible, but as an almost inevitable result. (See the trenchant criticism in Bohlen, supra, 351.) Indeed, Judge Sanborn concedes that his view is not to be reconciled with our decision in Devlin v. Smith (supra). The doctrine of that decision has now become the settled law of this state, and we have no desire to depart from it.

In England the limits of the rule are still unsettled. Winterbottom v. Wright, 10 M. & W. 109 is often cited. The defendant undertook to provide a mail coach to carry the mail bags. The coach broke down from latent defects in its construction. The defendant, however, was not the manufacturer. The court held that he was not liable for injuries to a passenger. The case was decided on a demurrer to the declaration. Lord Esher points out in Heaven v. Pender (supra, at p. 513) that the form of the declaration was subject to criticism. It did not fairly suggest the existence of a duty aside from the special contract which was the plaintiff's main reliance. (See the criticism of Winterbottom v. Wright, in Bohlen, supra, at pp. 281, 283.) At all events, in Heaven v. Pender (supra), the defendant, a dock owner, who put up a staging outside a ship, was held liable to the servants of the shipowner. In Elliott v. Hall, 15 Q. B. D. 315, the defendant sent out a defective truck laden with goods which he had sold. The buyer's servants unloaded it, and were injured because of the defects. It was held that the defendant was under a duty "not to be guilty of negligence with regard to the state and condition of the truck." There seems to have been a [393] return to the doctrine of Winterbottom v. Wright in Earl v. Lubbock [1905] 1 K. B. 253, 1 Ann. Cas. 753. In that case, however, as in the earlier one, the defendant was not the manufacturer. He had merely made a contract to keep the van in repair. A later case (White v. Steadman [1913] 3 K. B. 340, 348) emphasizes that element. A livery stable keeper who sent out a vicious horse was held liable not merely to his customer but also to another occupant of the carriage, and Thomas v .Winchester was cited and followed (White v. Steadman, supra, at pp. 348, 349). It was again cited and followed in Dominion Natural Gas Co. v. Collins [1909] A. C. 640, 646. From these cases a consistent principle is with difficulty extracted. The English courts, however, agree with ours in holding that one who invites another to make use of an appliance is bound to the exercise of reasonable care (Caledonian R. Co. v. Mulholland [1898] A. C. 216, 227; Indermaur v. Dames, L. R. 1 C. P. 274). That at bottom is the underlying principle of Devlin v. Smith. The contractor who builds the scaffold invites the owner's workmen to use it. The manufacturer who sells the automobile to the retail dealer invites the dealer's customers to use it. The invitation is addressed in the one case to determinate persons and in the other to an indeterminate class, but in each case it is equally plain, and in each its consequences must be the same.

There is nothing anomalous in a rule which imposes upon A, who has contracted with B, a duty to C and D and others according as he knows or does not know that the subject-matter of the contract is intended for their use. We may find an analogy in the law which measures the liability of landlords. If A leases to B a tumbledown house he is not liable, in the absence of fraud, to B's guests who enter it and are injured. This is because B is then under the duty to repair it, the lessor has the right to suppose that he will fulfill that duty, and, if he [394] omits to do so, his guests must look to him (Bohlen, supra, at p. 276). But if A leases a building to be used by the lessee at once as a place of public entertainment, the rule is different. There injury to persons other than the lessee is to be foreseen, and foresight of the consequences involves the creation of a duty (Junkermann v. Tilyou Realty Co. 213 N. Y. 404, 108 N. E. 190, L.R.A.1915F 700, and cases there cited).

In this view of the defendant's liability there is nothing inconsistent with the theory of liability on which the case was tried. It is true that the court told the jury that "an automobile is not an inherently dangerous vehicle." The meaning, however, is made plain by the context. The meaning is that danger is not to be expected when the vehicle is well constructed. The court left it to the jury to say whether the defendant ought to have foreseen that the car, if negligently constructed, would become "imminently dan-

gerous." Subtle distinctions are drawn by the defendant between things inherently dangerous and things imminently dangerous, but the case does not turn upon these verbal niceties. If danger was to be expected as reasonably certain, there was a duty of vigilance, and this whether you call the danger inherent or imminent. In varying forms that thought was put before the jury. We do not say that the court would not have been justified in ruling as a matter of law that the car was a dangerous thing. If there was any error, it was none of which the defendant can complain.

We think the defendant was not absolved from a duty of inspection because it bought the wheels from a reputable manufacturer. It was not merely a dealer in automobiles. It was a manufacturer of automobiles. It was responsible for the finished product. It was not at liberty to put the finished product on the market without subjecting the components parts to ordinary and simple tests (Richmond, etc. R. Co. v. Elliott, 149 U. S. 266, 272, 13 S. Ct. 837, 37 U. S. (L. ed.) 728). Under the charge of the trial judge nothing more was [395] required of it. The obligation to inspect must vary with the nature of the thing to be inspected. The more probable the danger, the greater the need of caution. There is little analogy between this case and Carlson v. Phœnix Bridge Co. 132 N. Y. 273, 30 N. E. 750, where the defendant bought a tool for a servant's use. The making of tools was not the business in which the master was engaged. Reliance on the skill of the manufacturer was proper and almost inevitable. But that is not the defendant's situation. Both by its relation to the work and by the nature of its business, it is charged with a stricter duty.

Other rulings complained of have been considered, but no error has been found in them.

The judgment should be affirmed with costs.

WILLARD BARTLETT, Ch. J. (*dissenting*).—The plaintiff was injured in consequence of the collapse of a wheel of an automobile manufactured by the defendant corporation which sold it to a firm of automobile dealers in Schenectady, who in turn sold the car to the plaintiff. The wheel was purchased by the Buick Motor Company, ready made, from the Imperial Wheel Company of Flint, Michigan, a reputable manufacturer of automobile wheels which had furnished the defendant with eighty thousand wheels, none of which had proved to be made of defective wood prior to the accident in the present case. The defendant relied upon the wheel manufacturer to make all necessary tests as to the strength of the material therein and made no such tests itself. The present suit is an action for negligence brought by the subvendee of the motor car against the manufacturer as the original vendor. The evidence warranted a finding by the jury that the wheel which collapsed was defective when it left the hands of the defendant. The automobile was being prudently operated at the time of the accident and was moving at a speed of only eight miles an hour. There was [396] no allegation or proof of any actual knowledge of the defect on the part of the defendant or any suggestion that any element of fraud or deceit or misrepresentation entered into the sale.

The theory upon which the case was submitted to the jury by the learned judge who presided at the trial was that, although an automobile is not an inherently dangerous vehicle, it may become such if equipped with a weak wheel; and that if the motor car in question, when it was put upon the market was in itself inherently dangerous by reason of its being equipped with a weak wheel, the defendant was chargeable with a knowledge of the defect so far as it might be discovered by a reasonable inspection and the application of reasonable tests. This liability, it was further held, was not limited to the original vendee, but extended to a subvendee like the plaintiff, who was not a party to the original contract of sale.

I think that these rulings, which have been approved by the Appellate Division, extend the liability of the vendor of a manufactured article further than any case which has yet received the sanction of this court. It has heretofore been held in this state that the liability of the vendor of a manufactured article for negligence arising out of the existence of defects therein does not extend to strangers injured in consequence of such defects but is confined to the immediate vendee. The exceptions to this general rule which have thus far been recognized in New York are cases in which the article sold was of such a character that danger to life or limb was involved in the ordinary use thereof: in other words, where the article sold was inherently dangerous. As has already been pointed out, the learned trial judge instructed the jury that an automobile is not an inherently dangerous vehicle.

The late Chief Justice Cooley of Michigan, one of the most learned and accurate of American law writers, [397] states the general rule thus: "The general rule is that a contractor, manufacturer, vendor or furnisher of an article is not liable to third parties who have no contractual relations with him for negligence in the construction, manufacture or sale of such article." (2 Cooley on Torts [3d ed.] 1486.)

The leading English authority in support of this rule, to which all the later cases on

the same subject refer, is Winterbottom v. Wright, 10 M. & W. 109, which was an action by the driver of a stage coach against a contractor who had agreed with the postmaster-general to provide and keep the vehicle in repair for the purpose of conveying the royal mail over a prescribed route. The coach broke down and upset, injuring the driver, who sought to recover against the contractor on account of its defective construction. The Court of Exchequer denied him any right of recovery on the ground that there was no privity of contract between the parties, the agreement having been made with the postmaster-general alone. "If the plaintiff can sue," said Lord Abinger, the Chief Baron, "every passenger or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts as this to the parties who enter into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue."

The doctrine of that decision was recognized as the law of this state by the leading New York case of Thomas v. Winchester, 6 N. Y. 397, 408, 57 Am. Dec. 455, which, however, involved an exception to the general rule. There the defendant, who was a dealer in medicines, sold to a druggist a quantity of belladonna, which is a deadly poison, negligently labeled as extract of dandelion. The druggist in good faith used the poison in filling a prescription calling for the harmless dandelion extract and the plaintiff for whom the prescription was put up was poisoned by the [398] belladonna. This court held that the original vendor was liable for the injuries suffered by the patient. Chief Judge Ruggles, who delivered the opinion of the court, distinguished between an act of negligence imminently dangerous to the lives of others and one that is not so, saying: "If A. build a wagon and sells it to B., who sells it to C. and C. hires it to D., who in consequence of the gross negligence of A. in building the wagon is overturned and injured, D. cannot recover damages against A., the builder. A.'s obligation to build the wagon faithfully, arises solely out of his contract with B. The public have nothing to do with it. . . . So, for the same reason, if a horse be defectively shod by a smith, and a person hiring the horse from the owner is thrown and injured in consequence of the smith's negligence in shoeing; the smith is not liable for the injury."

In Torgesen v. Schultz, 192 N. Y. 156, 159, 84 N. E. 956, 127 Am. St. Rep. 894, 18 L.R.A. (N. S.) 726, the defendant was the vendor of bottles of aerated water which were charged under high pressure and likely to explode unless used with precaution when exposed to sudden changes of temperature. The plaintiff, who was a servant of the purchaser, was injured by the explosion of one of these bottles. There was evidence tending to show that it had not been properly tested in order to insure users against such accidents. We held that the defendant corporation was liable notwithstanding the absence of any contract relation between it and the plaintiff "under the doctrine of Thomas v. Winchester (supra), and similar cases based upon the duty of the vendor of an article dangerous in its nature, or likely to become so in the course of the ordinary usage to be contemplated by the vendor, either to exercise due care to warn users of the danger or to take reasonable care to prevent the article sold from proving dangerous when subjected only to customary usage." The character of the exception to the general rule limiting liability for negligence to the original parties to the contract of sale, was still more clearly stated by Judge [399] Hiscock, writing for the court in Statler v. George A. Ray Mfg. Co. 195 N. Y. 478, 482, 88 N. E. 1063, where he said that "in the case of an article of an inherently dangerous nature, a manufacturer may become liable for a negligent construction which, when added to the inherent character of the appliance, makes it imminently dangerous, and causes or contributes to a resulting injury not necessarily incident to the use of such an article if properly constructed, but naturally following from a defective construction." In that case the injuries were inflicted by the explosion of a battery of steam-driven coffee urns, constituting an appliance liable to become dangerous in the course of ordinary usage.

The case of Devlin v. Smith, 89 N. Y. 470, 42 Am. Rep. 311, is cited as an authority in conflict with the view that the liability of the manufacturer and vendor extends to third parties only when the article manufactured and sold is inherently dangerous. In that case the builder of a scaffold ninety feet high which was erected for the purpose of enabling painters to stand upon it, was held to be liable to the administratrix of a painter who fell therefrom and was killed, being at the time in the employ of the person for whom the scaffold was built. It is said that the scaffold if properly constructed was not inherently dangerous; and hence that this decision affirms the existence of liability in the case of an article not dangerous in itself but made so only in consequence of negligent construction. Whatever logical force there may be in this view it seems to me clear from the language of Judge Rapallo, who wrote the opinion of the court, that the scaffold was deemed to be an inherently dangerous structure; and that the case was decided as it was because the court entertained that view.

Otherwise he would hardly have said, as he did, that the circumstances seemed to bring the case fairly within the principle of Thomas v. Winchester.

I do not see how we can uphold the judgment in the [400] present case without overruling what has been so often said by this court and other courts of like authority in reference to the absence of any liability for negligence on the part of the original vendor of an ordinary carriage to any one except his immediate vendee. The absence of such liability was the very point actually decided in the English case of Winterbottom v. Wright (supra), and the illustration quoted from the opinion of Chief Judge Ruggles in Thomas v. Winchester (supra) assumes that the law on the subject was so plain that the statement would be accepted almost as a matter of course. In the case at bar the defective wheel on an automobile moving only eight miles an hour was not any more dangerous to the occupants of the car than a similarly defective wheel would be to the occupants of a carriage drawn by a horse at the same speed; and yet unless the courts have been all wrong on this question up to the present time there would be no liability to strangers to the original sale in the case of the horse-drawn carriage.

The rule upon which, in my judgment, the determination of this case depends, and the recognized exceptions thereto, were discussed by Circuit Judge Sanborn of the United States Circuit Court of Appeals in the Eighth Circuit, in Huset v. J. I. Case Threshing Mach. Co. 120 Fed. 865, 57 C. C. A. 237, 61 L.R.A. 303, in an opinion which reviews all the leading American and English decisions on the subject up to the time when it was rendered (1903). I have already discussed the leading New York cases, but as to the rest I feel that I can add nothing to the learning of that opinion or the cogency of its reasoning. I have examined the cases to which Judge Sanborn refers, but if I were to discuss them at length I should be forced merely to paraphrase his language, as a study of the authorities he cites has led me to the same conclusion; and the repetition of what has already been so well said would contribute nothing to the advantage of the bench, the bar or the individual litigants whose case is before us.

[401] A few cases decided since his opinion was written, however, may be noticed. In Earl v. Lubbock [1905] 1 K. B. (Eng.) 253, 1 Ann. Cas. 753, the Court of Appeal in 1904 considered and approved the propositions of law laid down by the Court of Exchequer in Winterbottom v. Wright (supra), declaring that the decision in that case, since the year 1842, had stood the test of repeated discussion. The master of the rolls approved the principles laid down by Lord Abinger as based upon sound reasoning; and all the members of the court agreed that his decision was a controlling authority which must be followed. That the Federal courts still adhere to the general rule, as I have stated it, appears by the decision of the Circuit Court of Appeals in the Second Circuit, in March, 1915, in the case of Cadillac Motor Car Co. v. Johnson, 221 Fed. 801, 137 C. C. A. 279, L.R.A.1915E 287. That case, like this, was an action by a subvendee against a manufacturer of automobiles for negligence in failing to discover that one of its wheels was defective, the court holding that such an action could not be maintained. It is true there was a dissenting opinion in that case, but it was based chiefly upon the proposition that rules applicable to stage coaches are archaic when applied to automobiles and that if the law did not afford a remedy to strangers to the contract the law should be changed. If this be true, the change should be effected by the legislature and not by the courts. A perusal of the opinion in that case and in the Huset case will disclose how uniformly the courts throughout this country have adhered to the rule and how consistently they have refused to broaden the scope of the exceptions. I think we should adhere to it in the case at bar and, therefore, I vote for a reversal of this judgment.

Hiscock, Chase and Cuddeback, JJ., concur with Cardozo, J., and Hogan, J., concurs in result; Willard Bartlett, Ch. J., reads dissenting opinion; Pound, J., not voting.

Judgment affirmed.

NOTE.

The reported case discusses at length the rule that the manufacturer of an article which, by reason of a defect therein discoverable by inspection, is a source of peril to a user thereof, is liable to an ultimate purchaser for an injury resulting from the existence of that defect. The rule, the court holds, is applicable to an automobile having a defective wheel, and it is held that the manufacturer is not exonerated by the fact that he purchases the defective wheel from a reputable manufacturer. The liability of the maker of an automobile to a third person for the defective construction thereof is discussed in the note to Olds Motor Works v. Shaffer, Ann. Cas. 1913B 689.

BATES

v.

GERMAN COMMERCIAL ACCIDENT COMPANY.

Vermont Supreme Court—October 13, 1913.

87 Vt. 128; 88 Atl. 532.

Accident Insurance — Limitation of Time to Sue — Validity.

A provision in an accident policy requiring suit to be brought, if at all, within one year from the date of the accident on which the suit is predicated is valid.

Waiver of Limitation.

A provision in an accident policy requiring suit to be brought within a year, if at all, is matter for the benefit of the company and may be waived.

[See note at end of this case.]

Same.

An accident policy was issued October 19, 1908, and two days thereafter plaintiff suffered accidental injuries which were the basis of the suit. He seasonably filed proofs of injury which were rejected, and nothing further was done until October 26, 1911, when defendant, at the suggestion of the State Insurance Commissioner, requested full information concerning the nature of the accident, stating that on receipt of the same the company would open the case. This request was complied with, and plaintiff continued from time to time to furnish other papers and proofs until on November 9, 1911, when defendant sent plaintiff a check for $25 in full settlement, which he promptly returned and brought suit. Held, that defendant's acts constituted a waiver of the policy provision requiring suit to be brought, if at all, within a year after the date of the accident on which the suit was predicated.

[See note at end of this case.]

Reduction of Benefits — Construction of Policy.

An accident policy provided that, in the event of disability due wholly or in part to or resulting directly or indirectly from hernia commencing or appearing after the policy had been in force for 60 days preceding, the limit of the company's liability should be one-third of the amount that would otherwise be payable under the policy. Held, that such clause, construed most strongly against the insurance company, provided no limitation in case hernia resulted within the 60-day period, in which case the company was liable for full indemnity.

Exceptions from Franklin County Court: FISH, Judge.

Action on accident insurance policy. Burnice B. Bates, plaintiff, and German Commercial Accident Company, defendant. Judgment for defendant. Plaintiff alleges exceptions. The facts are stated in the opinion. REVERSED.

A. B. Rowley for plaintiff.

W. B. Locklin for defendant.

[129] POWERS, J.—The accident policy which the plaintiff held in the defendant company contained a provision which, read in connection with P. S. 4823, limited the period within which a suit thereon could be brought to one year from the date of the accident on which it was predicated. This policy was issued October 19, 1908, and on the twenty-first the plaintiff suffered the accidental injuries which form the basis of this suit. He seasonably filed with the defendant proofs of his injury and his [130] claim was promptly rejected. Nothing further was said or done by either party until October 26, 1911, when, as stated in the defendant's brief, at the suggestion of the State Insurance Commissioners, the defendant began a correspondence with the plaintiff regarding the matter. On that date, the defendant's treasurer wrote the plaintiff a letter in which, after referring to the company's desire to meet all requirements of the commissioner's committee, he said: "Will you be kind enough to give us full information regarding the nature of the accident which occurred to you on October 21, 1908. Kindly be specific in your dates giving us the length of time you were disabled from this injury, and stating the nature of the accident and how it occurred. On receipt of same, this Company will reopen your case." This request was complied with, and on October 31, 1911, the treasurer again wrote the plaintiff, saying: "We are enclosing herewith final claim papers which you and the attending physician will kindly fill in with the information relative to your accident of Oct. 21, 1908. Also kindly give the name of the hospital at Burlington, Vt., in which you were operated on. In forwarding you these blanks, we must request that you kindly answer each and every question asked as it will facilitate matters greatly and we are very anxious to have your claim finally disposed of." These requests were also complied with by the plaintiff. On November 6, 1911, the treasurer again wrote the plaintiff acknowledging receipt of his claim papers, and calling for still further information by way of an attested statement of a notary public that the plaintiff was physically sound and without any hernia prior to the accident. This, too, was furnished. Finally, on November 9, the treasurer sent the plaintiff a check for $25 expressed to be in full settlement, and called attention to certain provisions of the policy to show that this was the amount recoverable. The plaintiff returned the check and brought this suit. The

validity of the limitation clause is not and could not be questioned. Wilson v. Ætna Ins. Co. 27 Vt. 99; Morrill v. New England F. Ins. Co. 71 Vt. 281, 44 Atl. 358. It was, however, inserted in the policy for the benefit of the company, and may be waived. Thompson v. Phenix Ins. Co. 136 U. S. 287, 10 S. Ct. 1019, 34 U. S. (L. ed.) 408. It stands just like any other such provision in the policy,—no better and no worse. The waiver may be oral or written, express or implied, before or after forfeiture; it requires no new consideration and need not amount to an estoppel [131] to be effective. Webster v. State Mut. F. Ins. Co. 81 Vt. 75, 69 Atl. 319. The facts here relied upon to constitute a waiver were subsequent to the forfeiture, and while one or two isolated cases can be found holding that the waiver must occur within the period of limitation, by the better reason the true rule is that if, in any negotiations with the assured, after knowledge of the forfeiture, the company recognizes the continued validity of the policy, does acts based thereon, or requires the insured by virtue thereof to incur trouble or expense, the forfeiture is, as matter of law, waived, and cannot thereafter be asserted by the company. And so are the authorities. Titus v. Glens Falls Ins. Co. 81 N. Y. 410; Roby v. American Cent. Ins. Co. 120 N. Y. 510, 24 N. E. 808; Covenant Mut. L. Assoc. v. Baughman, 73 Ill. App. 544; DeFarconnent v. Western Ins. Co. 110 Fed. 405, *affirmed* 122 Fed. 448, 58 C. C. A. 612; Coursin v. Pennsylvania Ins. Co. 46 Pa. St. 323; New England Mut. L. Ins. Co. v. Springate, 129 Ky. 627, 112 S. W. 681, 113 S. W. 824, 19 L.R.A.(N.S.) 227; Rundell v. Anchor F. Ins. Co. 128 Ia. 575, 105 N. W. 112, 25 L.R.A.(N.S.) 20; Oshkosh Gas-Light Co. v. Germania F. Ins. Co. 71 Wis. 454, 37 N. W. 819, 5 Am. St. Rep. 233; Brown v. State Ins. Co. 74 Ia. 428, 38 N. W. 135, 7 Am. St. Rep. 495; Queen Ins. Co. v. Young, 86 Ala. 424, 5 So. 116, 11 Am. St. Rep. 51; Bonnert v. Pennsylvania Ins. Co. 129 Pa. St. 558, 18 Atl. 552, 15 Am. St. Rep. 739; Murray v. Home Ben. L. Assoc. 90 Cal. 402, 27 Pac. 309, 25 Am. St. Rep. 133; Knickerbocker L. Ins. Co. v. Norton, 96 U. S. 234, 24 U. S. (L. ed.) 689; Webster v. State Mut. F. Ins. Co. 81 Vt. 75, 69 Atl. 319.

This record presents a typical case of waiver under this rule. It shows in unmistakable terms that the company, with full knowledge, treated the policy as valid; that it acted upon it; and that it required the plaintiff to go to trouble and expense under it, on the assurance that the company would thereupon re-open his case.

But the defendant says that our own cases stand in the way of this result, and calls attention to Williams v. Vermont Mut. F. Ins. Co. 20 Vt. 222; Wilson v. Ætna Ins. Co. 27 Vt. 102; Higgins v. Windsor County Mut. F. Ins. Co. 54 Vt. 271, and Morrill v. New England F. Ins. Co. 71 Vt. 281, 44 Atl. 358. Of these, only the first-named requires special consideration, for the others are manifestly no authority for the defendant's position The Williams case was decided in 1848, and it was held that the cause of action upon the fire policy there involved having become barred by a limitation in the charter of the company could not be revived by an acknowledgment or new promise. It is apparent [132] that this decision is predicated upon a theory of insurance contracts which has long been abandoned. But it is not necessary to criticise the case, for it is clearly distinguishable from the case in hand. The limitation there involved was in the charter of the company; here it is in the policy. There the forfeiture was statutory; here it is contractual. There the court regarded the provision as a limitation of the liability; here it must be regarded as a limitation of the remedy. This distinction is pointed out in the case and it was said that it was unnecessary to consider what effect the conduct of the directors would have had in the ordinary case of debt,—thus leaving undecided the very question here involved.

The policy contains a provision which, so far as need be recited, is as follows: "In the event of . . . disability . . . due wholly or in part to, or resulting directly or indirectly from . . . hernia . . . cancer or any chronic disease commencing or appearing after this policy has been maintained in continuous force for sixty days preceding, . . . then . . . the limit of the company's liability shall be one-third of the amount that would otherwise be payable under this policy."

As we have seen, the plaintiff's injury was received on the second day after the policy was issued; one of its immediate results was a hernia. The parties disagree as to the effect of the foregoing provision on the amount recoverable. Construing the language of this paragraph against the company, as we are bound to do, Brink v. Merchants', etc. Ins. Co. 49 Vt. 442, Mosley v. Vermont Mut. F. Ins. Co. 55 Vt. 142, the clause regarding the sixty days relates to and modifies the word "hernia." Indeed, counsel for the defendant so construes it in his brief; and he says that the injury to the plaintiff comes within the excepting clause, "which," he says, "when fairly construed, is this: For disability on account of hernia occurring within sixty days from the date of the policy, no liability on the company; hence no right of action." And if the hernia occurs after the sixty days, one-third indemnity.

But this cannot be so. The clause only mentions hernias which occur after the sixty

days; those that occur within the sixty days are not alluded to at all; and so they stand like other injuries. The result is, that for hernia which results within the sixty days, the policy provides full indemnity.

[133] The judgment must be reversed, but it will not be necessary to remand the case, as the record discloses sufficient facts to enable us to render the proper judgment. Ellis v. Durkee, 79 Vt. 341, 65 Atl. 94.

The findings show that the plaintiff was totally disabled for four months and seven days, and partially disabled for five months. His total disability calls for $105.83, and his partial disability for $62.50,—or $168.33 in all. To this should be added interest from October 24, 1908, the date on which the company rejected the claim.

Judgment reversed and judgment rendered for the plaintiff to recover $168.33 with interest thereon from October 24, 1908.

NOTE.

Waiver of Provision in Accident Insurance Policy Limiting Time to Bring Suit Thereon.

Generally, 449.
Waiver of Final Limitation of Time to Sue:
In General, 449.
Effect of Waiver, 450.
What Does Not Amount to Waiver, 451.
Waiver of Exemption Period before Suit, 452.

Generally.

It is well settled that a provision in an accident insurance policy limiting the time within which the insured or his beneficiary can bring suit to enforce payment of the policy is for the benefit of the insurance company and therefore can be waived by the company. North American Acc. Ins. Co. v. Williamson, 118 Ill. App. 670; Hansell-Elcock Co. v. Frankfort Marine Acc. etc. Ins. Co. 177 Ill. App. 500; Continental Casualty Co. v. Hunt, 53 Ind. App. 657, 101 N. E. 519; Turner v. Fidelity, etc. Co. 112 Mich. 425, 70 N. W. 898, 4 Detroit Leg. N. 85, 67 Am. St. Rep. 428, 38 L.R.A. 529; Wondra v. National L. Ins. Co. 126 Minn. 136, 147 N. W. 961; Association v. Beidelman, 1 Mona (Pa.) 481; American Acc. Ins. Co. v. Norment, 91 Tenn. 1, 18 S. W. 395. See also the reported case. And see generally the cases cited throughout this note. In Turner v. Fidelity, etc. Co. supra, the court said: "Such clauses in policies of insurance, while held valid as contracts, may be waived by the company. The law does not favor clauses of limitation in policies of insurance, and they are strictly construed, and it does not require the positive act of the company inducing postponement; but, where the evidence is conflicting, the question of waiver is one for the jury."

The waiver may be by agreement, supported by a sufficient consideration; or it may be independent of any agreement. Thus, in Creem v. Fidelity, etc. Co. 141 App. Div. 493, 126 N. Y. S. 555, wherein it appeared that the defendant had contracted to insure the plaintiff against loss on account of accident to certain third persons, both classes of waiver were discussed as follows: "The promise, . . . necessarily involved an agreement to waive the limitation clause, and it was supported by sufficient consideration because it was made to obtain the co-operation of these plaintiffs in the defense which counsel desired to make and to induce them not to employ other counsel who might have insisted upon a different defense. However, we do not need to rest the decision on the ground of an agreement to waive the limitation clause, supported by a sufficient consideration, because a case of technical waiver, as well as estoppel, is established, not by reason of the promise alone, because no forfeiture had then occurred, but by reason of the promise together with the subsequent conduct. . . . While the defendant had the right under the policy to insist upon non-interference by the plaintiffs and was obliged to defend in their behalf, it could not exercise that right or discharge that duty so as to prolong the litigation until the plaintiffs' rights were forfeited. By giving the plaintiffs notice of the suits and by then procuring them not to interfere the defendant assumed the defense on their behalf pursuant to the provisions of the policy and the promise to protect them, which was but a renewal of its obligations under the policy, and it could not continue in that relation a moment beyond the three-year period without recognizing its continued obligation under the policy. When it ceased to represent the plaintiffs it was bound to turn the defense over to them, and its failure to do that amounted to a technical waiver of the limitation clause."

Waiver of Final Limitation of Time to Sue.

In General.

It is generally held that where the insurance company causes the insured, or the beneficiary, to delay suit beyond the time limited in the contract the company thereby waives the limitation. Metropolitan Acc. Assoc. v. Froiland, 161 Ill. 30, 43 N. E. 766, 52 Am. St. Rep. 359; Continental Casualty Co. v. Hunt, 53 Ind. App. 657, 101 N. E. 519; Creem v. Fidelity, etc. Co. 141 App.

Div. 493, 126 N. Y. S. 555. A waiver frequently results from a delay beyond the period of limitation caused by the company's holding out to the insured a hope of an adjustment. Lynchburg Cotton Mill Co. v. Travelers' Ins. Co. 149 Fed. 954, 79 C. C. A. 464, 9 L.R.A.(N.S.) 654, *reversing* 140 Fed. 718; North American Acc. Ins. Co. v. Williamson, 118 Ill. App. 670; Clark v. Pacific Mut. L. Ins. Co. 185 Ill. App. 580; Turner v. Fidelity, etc. Co. 112 Mich. 425, 70 N. W. 898, 4 Detroit Leg. N. 85, 67 Am. St. Rep. 428, 38 L.R.A. 529; Dolsen v. Phœnix Preferred Acc. Ins. Co. 151 Mich. 228, 115 N. W. 60, 14 Detroit Leg. N. 894; Mastenbrook v. U. S. Accident Assoc. 154 Mich. 16, 117 N. W. 543, 15 Detroit Leg. N. 697; Harold v. People's Mut. Acc. Ins. Co. 2 Pa. Dist. 503, 12 Pa. Co. Ct. 454. See also Norwood v. Preferred Acc. Ins. Co. 56 Misc. 529, 107 N. Y. S. 104. Thus in Dolsen v. Phœnix Preferred Acc. Ins. Co. supra, the court said: "On November 5, 1906, defendant's general counsel wrote the following letter: 'Yours of Oct. 30th duly received. In reply will say that files and your letter were handed to me some time in September, and by me referred back to the secretary of the Insurance Co. for further investigation as to some of the facts and has not been returned to me. I will get the files at my earliest convenience, and thereupon give the matter my prompt attention. Owing to my absence from the city, your letter of the 30th was not received by me or called to my attention until this afternoon, and unfortunately I will leave the city today, and will therefore be unable to give the Dolsen matter any attention until the latter part of the week. Asking you to patiently bear with me, I beg to remain,' etc. . . . [The] letter of November 5th authorized the delay of plaintiff's counsel, in the absence of further communication, and waived the contract limitation as to the time of bringing suit."

In Continental Casualty Co. v. Hunt, 53 Ind. App. 657, 101 N. E. 519, it was held that a request not to bring suit waived the limitation. In Metropolitan Acc. Assoc. v. Froiland, 161 Ill. 30, 43 N. E. 766, 52 Am. St. Rep. 359, it appeared that the by-laws of the insurance association were expressly made a part of the contract of insurance. Soon after the death of the insured, the beneficiary of the policy went to the office of the association and asked for a copy of the by-laws. This request was refused. The beneficiary then inquired how much time she had within which to bring suit and was informed that she had three months. She brought suit within three months but after the expiration of the period limited in the by-law. The court held that the association had waived the by-law.

It has been said that slight evidence is sufficient to establish a waiver of the contractual limitation. North American Acc. Ins. Co. v. Williamson, 118 Ill. App. 670. See also Creem v. Fidelity, etc. Co. 141 App. Div. 493, 126 N. Y. S. 555.

The holding of the reported case to the effect that the acts of the company constituting a waiver may occur after the expiration of the period of limitation finds support in the following cases. Norwood v. Preferred Acc. Ins. Co. 56 Misc. 529, 107 N. Y. S. 104; Harold v. People's Mut. Acc. Ins. Co. 2 Pa. Dist. 503, 12 Pa. Co. Ct. 454. In Norwood v. Preferred Acc. Ins. Co. supra, the court said: "The defendant could have insisted that, as no suit had been brought prior to August 20, 1902, the insured had forfeited or lost all right of recovery by reason of the short Statute of Limitations fixed by the policy. But, instead of that, it continued to treat the policy as valid and induced the plaintiff's attorney not to sue until further investigation could be made; and, after such further investigation, the letter of October 7, 1902, was sent, from which it appears that the defendant had concluded to renew an offer to settle, fixing a limit of time within which the offer must be accepted, and if not accepted the insured would then be at liberty to take such course as he deemed for his best interest; implying that, if he rejected the offer, he could then sue. In Titus v. Glen Falls Ins. Co. 81 N. Y. 410, 419, Judge Earl said: 'It may be asserted broadly that if, in any negotiations or transactions with the insured, after knowledge of the forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured by virtue thereof to do some act or incur some trouble or expense, the forfeiture is as matter of law waived; and it is now settled in this court, after some difference of opinion, that such a waiver need not be based on any new agreement or an estoppel.'"

It seems that a waiver results from a failure to plead the contractual limitation, for such a limitation when not pleaded has been held to be unavailable. Keeffe v. National Acc. Soc. 4 App. Div. 392, 38 N. Y. S. 854. See also Harold v. People's Mut. Acc. Ins. Co. 2 Pa. Dist. 503, 12 Pa. Co. Ct. 454.

Effect of Waiver.

Where the final limitation of the time within which suit can be brought is waived, the effect is to nullify, and not merely to postpone, the contractual limitation; and the claim remains subject only to the general statutory limitation. Lynchburg Cotton Mill Co. v. Travelers' Ins. Co. 140 Fed. 954, 79 C. C. A. 464, 9 L.R.A.(N.S.) 654, *reversing*

140 Fed. 718, wherein the court said: "The reason for this is apparent, and this case is a striking illustration of what would be the ill effect of a contrary doctrine. No one would ever know when, as to such contracts the statute of limitations began or ceased to run. It would not be determinable from an examination of the contract, nor from the state statute, but would depend upon an uncertain and indefinite state of facts, as to which persons might think differently, and bring about a chaotic condition, which would be exceedingly undesirable. The requirement to sue within thirty days is a stringent clause at best in contravention of the general law on the subject, and only enforcible because of the special agreement of the parties; and it is one that cannot and should not be revived by implication, if once lost; and, besides, the equities of the case would be unfavorable to the adoption of such a policy. The insurer knowing his rights under the general law could afford to waive the clause in question, in order to effect an adjustment, and the assured likewise to make or entertain such a proposition, realizing that by so doing he would forfeit nothing, and upon failure proceed by suit within the statutory period to enforce his claim. The contrary view would result in making practically impossible any effort at compromise between the parties, certainly so far as the assured is concerned. If it be suggested that the benefit of the clause, so far as securing speedy adjustment, would be lost, the answer is that at least a specific contract for revivor of the special limitation contemplated after the failure of the settlement should be had, if it is proposed to avoid the statutory limitation."

In Creem v. Fidelity, etc. Co. 141 App. Div. 493, 126 N. Y. S. 555, the court said: "Waiver, once established, cannot be recalled."

What Does Not Amount to Waiver.

It is generally held that acts of the insurance company in the ordinary course of business and in good faith toward the insured, showing no intention to waive the limitation, do not amount to a waiver. Harvey v. Fidelity, etc. Co. 200 Fed. 925, 119 C. C. A. 221 (insurer denied sufficiency of proofs of death); Fitzpatrick v. North American Acc. Ins. Co. 18 Cal. App. 264, 123 Pac. 209 (insurer exacted strict compliance with requirements as to proof of death, proof being made before expirations of time limited); Metropolitan Acc. Assoc. v. Clifton, 63 Ill. App. 152 (after expiration of period of limitation, company wrote letter and telegram requesting interview, without promising to recognize claim); Hansell-Elcock Co. v. Frankfort Marine Acc. etc. Ins. Co. 177 Ill. App. 500 (agent of company listened to proposition for settlement and promised to communicate with company and advise insured to reply); Paul v. Fidelity, etc. Co. 186 Mass. 413, 71 N. E. 801, 104 Am. St. Rep. 594 (insurer failed to call attention to limitation while other parties conducted suit to restrain collection by beneficiary; and after expiration of limitation, insurer refused to pay, coupling its refusal with objection that party demanding was not proper party to compel payment); Law v. New England Mut. Acc. Assoc. 94 Mich. 266, 53 N. W. 1104 (insurer negotiated for settlement, denying liability five months before end of time limited); Harris v. Phœnix Acc. etc. Ben. Assoc. 149 Mich. 285, 112 N. W. 935 (insurer negotiated for settlement); Maynard v. U. S. Health, etc. Ins. Co. 76 N. H. 275, 81 Atl. 1077 (company admitted partial liability and negotiated for adjustment); White v. Maryland Casualty Co. 139 App. Div. 179, 123 N. Y. S. 840 (company that had insured firm against loss by accident to certain third persons denied liability and refused to defend action brought against insured).

In Harvey v. Fidelity, etc. Co. 200 Fed. 925, 119 C. C. A. 221, it appeared that the insurer on the receipt of proofs of death answered as follows: "The statements are all to the effect that Mr. Harvey must have been drowned, because he disappeared from the boat, and there was no way of saving him. That, however, is not sufficient proof that the death of Mr. Harvey was from causes covered by the accident policy; that is to say, the beneficiary must prove that death resulted directly and independently of all other causes from bodily injuries sustained through external, violent and accidental means (suicide, sane or insane, not included). The fact that he disappeared from the ship is not sufficient ground upon which to base a claim under the accident policy." In regard to this letter the court said: "Plaintiff contends that defendant's letter . . . above quoted, constituted a waiver of its right to rely upon the limitation provisions of the policy. The letter itself is a refutation of this contention. In it the defendant impliedly admitted the death of Mr. Harvey, and denied liability solely upon the ground that the proofs did not show that his death was caused by accident within the terms of the policy. There was no request for delay, or for further proofs of death, and no intimation that the defendant intended to waive any of its rights under its contract."

A waiver of the provision as to the time for filing proof of disability does not effect a waiver of the provision limiting the time for suit. Maynard v. U. S. Health, etc. Ins. Co. 76 N. H. 275, 81 Atl. 1077. *Compare* Cole v. Preferred Acc. Ins. Co. 40 Misc. 266,

81 N. Y. S. 901, *affirmed* 92 App. Div. 612, 86 N. Y. S. 1132; Travelers' Ins. Co. v. Harvey, 82 Va. 949, 5 S. E. 553 (wherein it appeared that filing of proof was waived altogether).

Waiver of Exemption Period before Suit.

The authorities are agreed that a denial by the insurer of all liability on a policy waives a provision in the policy fixing a period after the accident within which suit cannot be brought. Depue v. Travelers' Ins. Co. 166 Fed. 183; U. S. Casualty Co. v. Hanson, 20 Colo. App. 393, 79 Pac. 176; American Home Circle v. Eggers, 137 Ill. App. 595; Binder v. National Masonic Acc. Assoc. 127 Ia. 25, 102 N. W. 190; Continental Casualty Co. v. Mathis, 150 Ky. 477, 150 S. W. 507; Dulaney v. Fidelity, etc. Co. 106 Md. 17, 66 Atl. 614; Phillips v. U. S. Benevolent Soc. 120 Mich. 142, 79 N. W. 1, 6 Detroit Leg. N. 91, *affirmed on rehearing* 125 Mich. 186, 84 N. W. 57, 7 Detroit Leg. N. 466; Zeitler v. National Casualty Co. 124 Minn. 478, 145 N. W. 395; Wondra v. National L. Ins. Co. 126 Minn. 136, 147 N. W. 961; Modern Brotherhood of America v. Cummings, 68 Neb. 256, 94 N. W. 144; Darling v. Protective Assur. Soc. 71 Misc. 113, 127 N. Y. S. 486; Travelers' Ins. Co. v. Harvey, 82 Va. 949, 5 S. E. 553; French v. Fidelity, etc. Co. 135 Wis. 259, 115 N. W. 869, 17 L.R.A.(N. S.) 1011. *Compare* Texas Short Line R. Co. v. Waymire (Tex.) 89 S. W. 452, wherein it appeared that by the contract the insurer could not become liable until the insured had sustained loss by reason of satisfying a judgment in favor of the injured third party. Thus in French v. Fidelity, etc. Co. supra, the court said: "Stipulations in policies of insurance that the loss should be paid within a specified time after proofs of loss are furnished and postponing action in the meantime are for the purpose of enabling the insurer before paying the loss to make a full investigation with a view of determining his liability and its extent and to discharge the obligation, if any, without the costs of suit. If the insurer repudiates any obligation under the policy there can be no reason for further delay, and it cannot be prejudiced by an immediate action. Hence it is held both on reason and authority that a denial of any liability on a policy is a waiver of the right of the company to have the stipulated time before suit is begun, and that the action may be commenced at once." In regard to a waiver by a denial of liability, the court in Hansell-Elcock Co. v. Frankfort Marine Acc. etc. Ins. Co. 177 Ill. App. 500, said: "From all the authorities we deduce the rule that where, and only where, a limitation by contract is an existing and available defense, at the time the company denies liability on other grounds and ignores such limitation, it is waived and cannot afterwards be relied upon as a defense."

Consonant with the foregoing line of decisions, it has been held that a refusal on the part of the insurer to treat with the insured as to liability except on prejudicial and illegal conditions amounts to a waiver of the period of exemption provided for in the contract. American Acc. Ins. Co. v. Norment, 91 Tenn. 1, 18 S. W. 395.

Likewise it has been held that waiver results from a demand for stronger proof than the insured is required to furnish in order to render the company liable. Preferred Acc. Ins. Co. v. Fielding, 35 Colo. 19, 9 Ann. Cas. 916, 83 Pac. 1013, wherein the court said: "The stipulation in the policy that the company should have a certain period within which to pay the claim after the proof of death was received was for its benefit. . . . When, however, . . . it refuses the preliminary proofs tendered, and demands proofs which the plaintiff was not required to furnish, it waived the right to insist on the expiration of the period provided in the policy after preliminary proofs of death were furnished before an action can be maintained on the policy by those who have the legal right to enforce it."

LAYMASTER

v.

GOODIN.

Missouri Supreme Court—July 2, 1914.

260 Mo. 613; 168 S. W. 754.

Injunction — Criminal Act — Private Nuisance.

The keeping of a bawdyhouse being a crime, and being a private rather than a public nuisance it cannot be enjoined in a suit by the state.

[See note at end of this case.]

Original habeas corpus proceeding. May Laymaster, petitioner, and B. F. Goodin, sheriff, defendant. The facts are stated in the opinion. PETITIONER DISCHARGED.

Irwin & Peters for petitioner.

James H. Lay and *A. M. Hough* for respondent.

[616] WOODSON, J.—This is an original proceeding—*habeas corpus*—filed in this

court by the petitioner, asking to be discharged from a sentence of ten days imprisonment in the county jail, imposed by the circuit court of Cole county, for the violation of a temporary injunction issued by it against her on the —— day of ——, 1913, "for setting up and keeping a common bawdyhouse" in Jefferson City, Missouri.

The facts are substantially as follows:

On July 19, 1913, the prosecuting attorney of Cole county filed in the office of the clerk of the circuit court thereof, an information charging the petitioner "with setting up and keeping a common bawdyhouse."

This information was filed in vacation of the court, and the cause was tried at the July term, 1913, of the court, which resulted in a mistrial. At the November term thereof she was again tried and acquitted by a jury.

During the interim of the mistrial and the acquittal the prosecuting attorney filed in said court a petition asking that the petitioner herein be enjoined from conducting a common bawdyhouse in said city.

Without notice to petitioner the circuit court granted a temporary injunction, as prayed, without bond, and set the case down for trial at the November term, some four months subsequent, but she had in the meantime been notified of the issuance of the temporary order.

At that term of court the petitioner filed a demurrer to the petition asking for the injunction, which was by the court overruled at the March term, 1914.

Thereupon the petitioner filed answer; but subsequently filed a motion for a change of venue of the cause from Cole county, on account of the prejudice [617] of the judge thereof. This motion was overruled, as I gather it, because of some informality in the application.

Thereupon, a second motion in proper form for a change of venue was filed, which was also overruled.

In the meantime the prosecuting attorney had duly filed in court an application requesting that the petitioner herein be cited for contempt of court, for the alleged violation of the temporary injunction previously issued in the injunction case.

On March 21, 1914, the court took up the citation for contempt and after hearing much evidence pro and con regarding the said violation of the temporary injunction, took the case under advisement until the 30th, and then found her guilty, and sentenced her to imprisonment in the county jail for ten days, and ordered the issuance of a committment, etc., which the sheriff proceeded to execute, when the petition for the writ in this case was applied for and issued, under which the marshal of this court released her from custody on bond, etc.

I. Counsel for respondent raise a question as to whether or not the bill of exceptions was properly and timely filed.

Without going into that question I will state that in my individual opinion it was neither properly nor timely filed to preserve the questions attempted to be here presented thereby.

II. But the record proper is correctly before this court; and it appears from the petition filed that the petitioner was charged in the petition for the injunction with "setting up and keeping a common bawdyhouse in Jefferson City, Missouri," and the judgment of the court finding her guilty of contempt, etc.

[618] This charge, finding and judgment simply convicts the petitioner of the ordinary crime of setting up and keeping a bawdyhouse. [State v. Canty, 207 Mo. 439, 13 Ann. Cas. 787, 105 S. W. 1078, 123 Am. St. Rep 393, 15 L.R.A.(N.S.) 747 and cases cited.]

Counsel for respondent rely not only upon the case just cited, but also upon the case of State v. Lamb, 237 Mo. 437, 141 S. W. 865, as authorities supporting their position in this case. They are not in point.

By an examination of both of those cases it will be seen that it was alleged and proven according to the majority opinion of the court, that not only a crime was being committed, as here, but also that the business complained of was so vile, open, notorious and vicious, that bad and dangerous men, in large numbers, were attracted thereto; even criminals were constantly congregated there, to the great detriment of the peace and safety of the community. In other words, these cases hold that a public nuisance, even though a crime, may be enjoined by a court of equity, though having no criminal jurisdiction, not because of the crime, but because of its inherent and constitutional authority to abate such nuisances.

There is no doubt but what a court of equity has this power, and it should be exercised freely whenever the exigency of the case demands, yet it should not invade the province of the criminal courts of the country, which must try criminals with the assistance of a jury, according to the Constitution and laws of this State, and country generally.

The differentiation of this case from those is, that while all crimes are nuisances, yet they are not necessarily public nuisances. A court of equity may abate the latter, but the courts of law can properly punish the former. Some of the States have enacted statutes conferring jurisdiction upon courts of equity in both classes of cases, but this is not one of them. It still preserves the right of one charged with this class [619] of crime, as in

most all others, to be tried by a jury of his peers.

Great pains were taken in the case of State v. Canty, supra, to point out and distinguish the difference between these two classes of cases, and after further consideration I am unable to make that demarcation any plainer by anything I might here add.

No lawyer or judge differs as to the law governing these two classes of cases, but the trouble the courts have had, and I presume always will have, is to determine from the facts of each particular case to which class it belongs. The line of demarcation between the two is often so narrow that it becomes exceedingly difficult to follow it in many complicated and intricate cases; but fortunately for the court, this is not of that character. The petitioner was charged and found guilty of setting up and keeping a common bawdyhouse, which according to all of the authorities, in the absence of statute, is an ordinary crime, but not a public nuisance in any sense of the term.

A court of equity having no jurisdiction over the subject-matter of this cause, it necessarily follows, under the laws of this State, that the circuit court of Cole county had no authority to try and imprison the petitioner for the crime stated in the petition for the injunction. [State v. Williams, 221 Mo. 227, 120 S. W. 740.]

If we are correct in this view of the law of the case, then the circuit court of Cole county sitting in equity, had no jurisdiction to enjoin the petitioner from committing the crime of keeping a common bawdyhouse. That crime, if the petitioner is guilty of it, can be promptly and adequately punished under the criminal laws of the State, which were enacted expressly for that purpose, and there is, therefore, no necessity to resort to the extraordinary powers of a court of equity to suppress such a well-known and common crime.

[620] So believing, I am of the opinion that the petitioner should be discharged; and it is so ordered.

Walker and Faris, JJ., concur; Graves and Brown, JJ., concur in separate opinions; Lamm, C. J., and Bond, J., dissent.

BROWN, J.—I concur in the conclusions reached by my learned brother Woodson, for the reason that in its suit against the petitioner the State is seeking to substitute the equity practice for the criminal law—a thing which the Constitution does not permit. A party whose property is being injured or destroyed by the criminal acts of another may enjoin such criminal acts; notwithstanding to do so amounts to enjoining the commission of a crime. [State v. Schweickardt, 109 Mo. 496, 19 S. W. 47; State v. Feitz, 174 Mo. App. 456, 160 S. W. 585.] Nevertheless it is not the theory of our organic law that the liberty of even the humblest citizen may be taken away without a compliance with section 12, article 2, Constitution of Missouri, which ordains that all prosecutions for felonies and misdemeanors shall be by indictment or information; in which the accused shall be entitled to a trial by jury. [Sec. 28, art. 2, Constitution of Missouri.] In such trial the accused has the right to meet the witnesses against him "face to face." [Section 22, art. 2, Constitution of Missouri.] This last clause of our organic law means that witnesses having personal knowledge tending to prove defendant's guilt must confront him in court, and a conviction cannot stand upon the evidence of witnesses who have only heard rumors of defendant's guilt. A mere rumor has no *face*, and cannot be "confronted" by anybody within the purview of our Constitution. [State v. Wellman, 253 Mo. 302, 315, 161 S. W. 795.]

[621] Before the constitutional safeguards above noted can be cast into the scrap-heap the people must amend their organic law.

GRAVES, J.—I concur in the result reached by our brother Woodson in this case, but am not certain that I follow all of his reasoning. That my position may not be misunderstood I prefer to state it in my own way. The bill in equity involved in this case is one which simply charged the defendant therein, the petitioner herein, with "setting up and keeping a common bawdyhouse in Jefferson City, Missouri." Upon this petition the temporary injunction was granted, and for the violation of which petitioner was deprived of her liberty. To my mind the trouble with this petition is that it states no cause of equitable cognizance, but as I see it, not for the reasons stated by my brother.

I adhere strictly to the rule announced in State v. Canty, 207 Mo. 439, 13 Ann. Cas. 787, 105 S. W. 1078, 123 Am. St. Rep. 393, 15 L.R.A.(N.S.) 747, and State v. Lamb, 237 Mo. 437, 141 S. W. 665. I do not understand those cases to say that a court of equity will enjoin a crime, but they do announce the doctrine that when a given state of facts shows a public nuisance, then a court of equity will enjoin the doing of the acts which make up and constitute the public nuisance, although such acts or some of them may within themselves be crimes.

Now at common law the mere maintenance of a bawdyhouse was a public nuisance. Thus in 14 Cyc. 484, it is said: "A bawdyhouse was a public nuisance at common law, because it drew together lewd and debauched persons, thus tending to disturb the peace

and to increase immorality among the people."

By statute it has been made a crime, but the making of it a crime has not destroyed its character as a public nuisance, and therefore the jurisdiction of equity over it as a public nuisance. At the instance of the [622] state, through its law officers, public nuisances may be abated, as can private nuisances at the instance of the individual.

But all this does not help the state in this case. The petition for equitable relief should have averred in direct terms that the defendant was maintaining a public nuisance, but the term "public nuisance" is not found therein. On the other hand the criminal name for the act is used throughout. It may appear to be a refinement to say, that in law the keeping of a bawdyhouse is a public nuisance, and yet say that a petition in equity which says the defendant is keeping a bawdyhouse does not charge her with maintaining a public nuisance. But when we consider the fact that equity can only take hold of the subject upon the theory of there being a public nuisance, it is clear that the charge in the bill should specifically aver a public nuisance. This of course should be followed by specifications. The bill in this case, upon which the temporary injunction was granted, does not so charge, and therefore stated no cause in equity.

Rehearing denied July 14, 1914.

NOTE.

Right of State to Enjoin Private Nuisance Which Is also Crime.

An examination of the authorities reveals no decision other than the reported case wherein the right of a court of equity to enjoin at the suit of the state a private nuisance which is also a crime, has been adjudicated. The expression of the courts in the various cases involving the restraint of public nuisances which are also crimes, would seem to indicate that no right exists to such a remedy on the part of the state, under the broad general rule that a court of equity has no power to enjoin the commission of a crime. Thus in Ex p. Allison, 48 Tex. Crim. 634, 13 Ann. Cas. 684, 90 S. W. 492, 13 L.R.A. (N.S.) 622, the court said, in commenting on the rule laid down in State v. Patterson, 14 Tex. Civ. App. 465, 37 S. W. 478, that a state has the right, through its proper officers, to enjoin a public nuisance which is also a crime: "But . . . the state must show in such case that the nuisance is an injury to the property or civil rights of the public at large. It was there held that the state did not show such injury to property or civil rights of the public, and that consequently it presented a criminal case, pure and simple, and an injunction would not lie." And in Hudson v. Thorne, 7 Paige (N. Y.) 261, the court said: "It is no part of the business of this court to enforce the penal laws of the state, or the by-laws of a corporation, by injunction, unless the act sought to be restrained is a nuisance. And it nowhere alleged in this bill, that the manufacture of pressed hay within the compact parts of the city of Hudson, in a building more than thirty feet square, is in itself a public nuisance." In State v. O'Leary, 155 Ind. 526, 58 N. E. 703, 52 L.R.A. 299, the question was whether an injunction might be had on the application of the state to suppress a gambling house, where no injury to property was shown, where no person had been annoyed or disturbed, where gambling in all of its forms was made a criminal offense by statute, and the ordinary criminal process for its punishment and suppression was in full force and available to the state." The court said, in denying an injunction: "We do not undertake to lay down any general rule, or to decide that a place where gambling is carried on, and where lawless and disreputable persons congregate for the purpose of gaming, may not, under special circumstances, constitute a public nuisance, and be a proper subject for the exercise of the powers of a court of equity. But, owing to the total failure of proof in the important particulars pointed out in this opinion, we are constrained to hold that the appellant failed to make such a case as warranted the interposition of the court by its extraordinary writ of injunction."

In the reported case, the implication would seem to be that a private nuisance which is also a crime, cannot be enjoined by the state. The court holds that where the keeping of a bawdyhouse is a crime but not a public nuisance, an injunction against the keeping of such a house should not be granted, on the ground that while a court of equity may abate a public nuisance, a court of law only can punish a crime, and also that such an injunction would deprive the accused of his constitutional right to be tried by a jury of his peers.

In Pike County Dispensary v. Brundidge, 130 Ala. 193, 30 So. 451, the court said: "The illegal carrying on the business of a retailer of spirituous, vinous and malt liquors, that is the carrying on of such business without a license when a license is required, or in violation of a local prohibition statute is not a nuisance unless declared so to be by the statute. There is no statute in Alabama declaring such illegal business a nuisance; and it is therefore, not a nuisance in this state. . . . If it is to be conceded that the Pike County Dispensary has no right to engage in

the liquor business without paying the county license tax and may not legally engage in such business in Brundidge under any circumstances because of the local prohibition statute referred to, the present bill is yet without equity, since chancery courts have no jurisdiction to enjoin the commission of offenses against the criminal laws of the state; and the proposed acts of the respondent, however illegal they may be, would not constitute a nuisance. True the bill in terms alleges that to carry on the proposed business in Brundidge would be a public nuisance; but this is a mere mistaken conclusion of law on the part of the pleader from the facts stated which do not warrant it. Taking all the facts appearing on the bill, whether well or illy pleaded, to be true, no case is made of equity cognizance." And in State v. Ehrlick, 65 W. Va. 700, 64 S. E. 935, 23 L.R.A.(N.S.) 691, the court said: "Jurisdiction in equity to abate nuisances is undoubted and of universal recognition. It is equally well settled that the state may institute suits for that purpose in proper cases. But it is nowhere asserted that either the state or private individual may maintain such a suit in any and all cases of nuisance. In other words, relief in equity by abatement is not the necessary sequence of the establishment of the charge of nuisance. Some nuisances are criminal while others are not. Criminal nuisances are abatable by criminal process, and, where this process is adequate, jurisdiction in equity fails; either because adequate legal remedy precludes jurisdiction in equity, or the subject matter is beyond the scope of equity jurisdiction. If a nuisance, purely criminal, injures or affects a private plaintiff in certain respects, he may resort to equity for relief, but the existence of neither a civil nor criminal public nuisance necessarily calls for interposition by a court of equity. A private person cannot abate it, unless it is specially injurious or prejudicial to him, and the state cannot proceed against it in equity, if it be merely a criminal nuisance, unattended by injury to a personal or property right of some sort, creating necessity for prevention of irreparable injury." But in People v. St. Louis, 5 Gilman (Ill.) 351, 48 Am. Dec. 339, an action to enjoin the obstruction of a channel of the Mississippi River, thus creating a public nuisance, the court said: "The court of chancery may grant preventive as well as remedial relief, and this may be done where the act threatened would be punishable under the criminal laws as a nuisance. It was admitted that the court may prevent or remove a private nuisance, and it is equally clear that it may do so when the nuisance affects the public generally; although it is not always bound to interfere in either case. No better case could be desired to illustrate the necessity of this jurisdiction than the one before us. If the acts here threatened would amount to a nuisance, the remedy offered by a criminal prosecution, would be entirely inadequate to the protection of the public franchise, for the works once erected, it is admitted on all hands that no human power could ever remove them, and such are the interests involved on the one hand, that the prospects of a prosecution which could only be followed by a light punishment, present no sufficient terrors to restrain the parties."

A discussion of the cases wherein it has been held that a state may enjoin, through its proper officers, an act which is both a public nuisance and a crime will be found in the notes to State v. Canty, 13 Ann. Cas. 787; State v. Marshall, Ann. Cas. 1914A 434, and Crighton v. Dahmer, 35 Am. St. Rep. 666. And the validity of statutes authorizing the issuance of an injunction against the commission of a crime is treated in the note to Ex p. Allison, 13 Ann. Cas. 684.

STATE

v.

SALISBURY ICE AND FUEL COMPANY.

North Carolina Supreme Court—May 6, 1914.

166 N. Car. 366; 81 S. E. 737.

False Pretenses — Intent.

Under Revisal 1905, § 3432, providing that, in an indictment for obtaining property by false pretenses, it shall be sufficient to allege that the party did the act with the intent to defraud, without alleging an intent to defraud any particular person, and that it shall not be necessary to prove an intent to defraud any particular person, an allegation, in an indictment as to the persons intended to be defrauded, is surplusage, and a claim of variance cannot be predicated thereon.

Corporations — Criminal Liability.

Under Revisal 1905, § 2831, subd. 6, defining "person" as extending to bodies corporate, unless the context clearly shows the contrary, and section 3432 providing that, if any person shall by any false pretense obtain any money or other thing of value with intent to defraud, such person shall be guilty of a felony and imprisoned or fined, a corporation may be convicted of obtaining money by false pretenses, as a corporation may be convicted of a crime requiring an intent, and the fact that it cannot be imprisoned does not exempt it from criminal liability.

[See note at end of this case.]

False Pretenses — Reliance on Representation.

While, to constitute the offense of obtaining property by false pretenses, defendant's conduct must deceive and be intended and calculated to deceive, the sale of 1,750 pounds of coke as a ton constitutes the offense, though the buyer strongly suspected that defendant was selling by short weight, where he did not and could not know this until he weighed the coke after delivery, as he was induced to part with the price in reliance upon defendant's representation that it was a ton.

[See 7 Ann. Cas. 32; 25 Am. St. Rep. 379.]

Appeal from Superior Court, Rowan county: LONG, Judge.

Criminal action. Salisbury Ice and Fuel Company convicted of obtaining money by false pretenses and appeals. The facts are stated in the opinion. AFFIRMED.

Linn & Linn for appellant.

Attorney General Bickett, Assistant Attorney General Calvert and *A. H. Price* for appellee.

[366] CLARK, C. J.—The defendant was indicted for obtaining money by false pretenses, under Revisal, 3432, by selling to J. N. Smith and C. M. Henderlite a certain amount of coke represented to be one ton in weight, whereas it weighed 1,750 pounds, the defendant well knowing the pretense to be false. Said Henderlite was a competitor in trade of the defendant company, and he suspected that it was selling short weight. On 8 January, 1913, he called up the office of the defendant over the phone and asked the price of coke. The reply was $5. He ordered a ton sent to J. N. Smith at a certain corner, and the defendant delivered the order as one ton and received payment. Henderlite then hauled the coke to the scales and found that it weighed only 1,750 pounds.

There are practically but two questions presented that require consideration:

[367] 1. The defendant moved in arrest of judgment on the ground of fatal variance in that the indictment charged false pretense "with intent to deceive C. M. Henderlite and J. N. Smith," whereas it appears from the evidence that J. N. Smith was a fictitious person and C. M. Henderlite was not known in the transaction either directly or indirectly, and was not deceived. Revisal, 3432, provides: "It shall be sufficient in any indictment for obtaining or attempting to obtain any such property by false pretenses to allege that the party did the act with intent to defraud, without alleging an intent to defraud any particular person and without alleging any ownership of the chattels, money, or valuable securities; and, on the trial of any such indictment, it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud." The charge as to the persons intended to be cheated was therefore surplusage and immaterial. State v. Ridge, 125 N. C. 658, 34 S. E. 440.

2. The other exception is that a corporation cannot be convicted of a crime which requires an intent.

In State v. Rowland Lumber Co. 153 N. C. 612, 69 S. E. 58, it is said: "The first ground, that corporations cannot be convicted of an offense where the intent is an ingredient, is no longer tenable. They are as fullly liable in such cases as individuals. They are liable for libel, assaults and battery, etc. Corporate existence can be shown, though not charged in the bill. State v. Shaw, 92 N. C. 768."

This is fully sustained by all the late authorities. In U. S. v. MacAndrews, etc. Co. 149 Fed. 823, it is held that a corporation can be held criminally liable for conspiracy or any other crime requiring the proof of an intent. The Court says, on page 835: "It was long contended that even civil liability arising from evil intent could not be visited upon an artificial being. This fiction has vanished, and corporate liability on the criminal side permanently established, even for assault. Lake Shore, etc. R. Co. v. Prentice, 147 U. S. 101, 13 S. Ct. 261, 37 U. S. (L. ed.) 97, for conspiracy (citing many cases). It was even longer denied that a corporation could be indicted at all. Reg. v. Great North of England R. Co. 9 Q. B. 315, 58 E. C. L. 315. In People v. Clark, 8 N. Y. Crim. 169, 179, 14 N. Y. S. 642, [368] the Court declared that the legal reason upholding this contention was the strange argument that a corporation could not plead in person, and therefore could not be called on to answer criminally. It certainly is now admitted law that not only may corporations (the art of pleading by attorney having been discovered) be indicted for nonfeasance, but for such deeds of misfeasance as are complete by the mere doing a thing prohibited, e. g.: violation of the 8-hour law, U. S. v. John Kelso Co. 86 Fed. 304; receiving usurious interest, State v. First Nat. Bank, 2 S. D. 568, 51 N. W. 587; not stopping gaming at a fair, Com. v. Pulaski County Agricultural, etc. Assoc. 92 Ky. 197. . . . These defendant corporations claim that since in conspiracy evil intent is of the essence of the crime, accusation is futile. This is but the remnant of a theory always fanciful and now in process of abandonment. In Telegram Newspaper Co. v. Com. 172 Mass. 294, 44 L.R.A. 159, 70 Am. St. Rep. 280, it was held: 'We think that a corporation may be liable criminally for

certain offenses of which a specific intent may be a necessary element. There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil.' To same effect State v. Baltimore, etc. R. Co. 15 W. Va. 362, 36 Am. Rep. 803."

In People v. Star Co. 135 App. Div. 517, 120 N. Y. S. 498, it is held that a corporation can be convicted of a malicious libel, the Court adopting the following statement by Bishop in his New Crim. Law, sec. 417: "Within the sphere of its corporate capacity and to an undefined extent beyond, whenever it assumes to act as a corporation it has the same capabilities of criminal intent and of act—in other words, of crime—as an individual man sustaining the like relations. . . . Some have stumbled on the seeming impossibility of the artificial and soulless being, called a corporation, having an evil mind, or criminal intent. . . . But the author explained in another work that, since a corporation acts by its officers and agents, their purposes, motives, and intent are just as much those of the corporation as are things done."

It was recently said by the Supreme Court of the United States: "It is true that there are some crimes which in their nature cannot be committed by corporations. But there is a large class of offenses wherein the crime consists in purposely [369] doing things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purpose of their agents, acting within the authority conferred upon them." 212 U. S. 481, 29 S. Ct. 304, 53 U. S. (L. ed.) 613.

In Grant v. U. S. 114 Pac. 955, it is held: "A corporation can form a criminal intent and have the knowledge essential, provided the officers representing it have such knowledge or intent." To the same effect, U. S. v. Union Supply Co. 215 U. S. 50, 30 S. Ct. 15, 54 U. S. (L. ed.) 87, and Standard Oil Co. v. State, 117 Tenn. 664, 100 S. W. 705, 10 L.R.A. (N.S.) 1015, in which last the Court cited many cases holding "the criminal intent of the agent is imputed to the corporation."

Indeed, Revisal, 2831 (6), provides: "The word 'person' shall extend, and be applied, to bodies politic and corporate as well as to individuals, unless the context clearly shows to the contrary." The word "person" in Revisal, 3432, therefore, embraces corporations. This is fully discussed and sustained upon a similar statute in State v. Belle Springs Creamery Co. 83 Kan. 389, 111 Pac. 474, L.R.A.1915D 515.

Indeed, so many businesses of every kind are now carried on by corporations that it would render nugatory many criminal statutes for the protection of the public if they did not apply to the misconduct of corporations when the statute would apply to the same conduct by an individual. In this present case the business of selling coal and ice is carried on by a corporation, and it violated the statute by the false pretense of selling a ton of coke when it delivered in fact only 1,750 pounds, intending to cheat, as fully as an individual could have done. It is true that when the statute imposes a penalty of a fine or imprisonment, that only the fine can be placed upon a corporation. But this is no reason why that should not be imposed. The corporation should not be wholly exempted from punishment because it cannot be imprisoned. The remedy is that the officer or agent may be indicted jointly with the corporation as a coprincipal or accessory, as the case may be, as has been done in the enforcement of the statutes against illegal trusts.

The defendant contends that he is not guilty, because the prosecutor was not deceived. Of course, to constitute the offense the conduct of the defendant must be "intended and calculated to [370] deceive, and did deceive." The evidence was sufficient to establish these facts, and was properly submitted to the jury, and it was so found by their verdict. It is true, the prosecutor had a strong suspicion that the defendant was selling by short weight, but he could not have testified to it as a fact. His testimony is: "I have to buy from you to find out whether you were (selling by short weight) or not." In another place he says that to the best of his judgment the defendant was selling in this mode, but he did not know this and could not know it till he had tested the matter, as he did.

The defendant offered a ton of coke for $5, the offer was accepted and it was paid for as a ton. The prosecutor acted in good faith, because he paid the purchase price for a ton, and on weighing it, the only possible method, he found that there was not a ton. He was therefore induced to part with his $5 in reliance upon the assertion of the defendant that a ton of coke had been sent him. He could not possibly know beforehand whether this would be done or not, nor indeed after he saw the coke until he had actually weighed it. However much he might have mistrusted the defendant's representation, he relied on it by paying the $5 charged.

A very similar case is State v. Smith, 152 N. C. 798, 67 S. E. 508, 30 L.R.A.(N.S.) 946, for selling whiskey contrary to the statute, in which case a police officer, suspecting the defendant, employed one to buy whiskey from the defendant and furnished the money. The defendant, like all victims caught in a trap, viciously assailed the trap. He said he ought not to be punished, because the prosecutor had "connived" at his offense. This Court

said: "It is not the motive of the buyer, but the conduct of the seller, which is to be considered," and held that the defendant was properly convicted. This was approved in State v. Hopkins, 154 N. C. 622, 70 S. E. 394, where Brown, J., says: "However much the defendant, when caught, may criticise the methods used to catch him, it has been held that the transaction is, so far as the defendant is concerned, a violation of law, if the evidence is deemed by the jury sufficient proof of the facts."

No error.

NOTE.

Criminal Liability of Corporation for Act of Misfeasance Other than Homicide.

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I. Introductory.

In the development of the law relating to the criminal liability of corporations, liability for a failure to perform a duty is more readily deemed to be within the scope of corporate power than liability for a positive act. (See State v. Ohio, etc. R. Co. 23 Ind. 362, and State v. Great Works Mill, etc. Co. 20 Me. 41, 37 Am. Dec. 38.) The cases concerning the liability of a corporation to indictment for nonfeasance are collated in the note to Southern R. Co. v. State, 5 Ann. Cas. 411. The purpose of the present note is to consider cases concerning the criminal liability of a corporation, as affected by its corporate character, for acts of misfeasance other than homicide. The liability of a corporation to indictment for homicide is fully treated in the notes to People v. Rochester R. etc. Co. 16 Ann. Cas. 837, and Com. v. Illinois Cent. R. Co. Ann. Cas. 1915B 617.

II. Liability in General.

1. Rule Stated.

The rule is now firmly established that a corporation can by act of misfeasance render itself criminally liable.

England.—Reg. v. Great North of England R. Co. 9 Q. B. 315, 58 E. C. L. 315, 2 Cox C. C. 70, 10 Jur. 755, 16 L. J. M. C. 16; Pearks v. Ward [1902] 2 K. B. 1. See also Pharmaceutical Soc. v. London, etc. Supply Assoc. L. R. 5 App. Cas. 857, 49 L. J. Q. B. 736, 28 W. R. 957, 43 L. T. N. S. 389.

Canada.—D'Ivry v. World Newspaper Co. 17 Ont. Pr. 387.

United States.—New York Cent. etc. R. Co. v. U. S. 212 U. S. 481, 29 S. Ct. 304, 53 U. S. (L. ed.) 613; U. S. v. John Kelso Co. 86 Fed. 304; U. S. v. MacAndrews, etc. Co. 149 Fed. 823; U. S. v. New York Herald Co. 159 Fed. 296; U. S. v. Young, etc. Co. 170 Fed. 110; U. S. v. Pacific Live Stock Co. 192 Fed. 443; Kaufman v. U. S. reported in full, post, this volume, at page 466; Joplin v. Mercantile Co. v. U. S. reported in full, post, this volume, at page 470.

Alaska.—U. S. v. Alaska Packers' Assoc. 1 Alaska 217.

Arizona.—Grant Bros. Const. Co. v. U. S. 13 Ariz. 388, 114 Pac. 955.

Arkansas.—St. Louis, etc. R. Co. v. State, 52 Ark. 51, 11 S. W. 1035.

Colorado.—Overland Cotton Mill Co. v. People, 32 Colo. 268, 75 Pac. 924, 105 Am. St. Rep. 74.

Florida.—See Palatka, etc. R. Co. v. State, 23 Fla. 546, 3 So. 158, 11 Am. St. Rep. 395.

Georgia.—Southern Express Co. v. State, 1 Ga. App. 700, 58 S. E. 67; R. M. Rose Co. v. State, 4 Ga. App. 588, 62 S. E. 117.

Illinois.—Chicago, etc. Coal Co. v. People, 214 Ill. 421, 73 N. E. 770. See also People v. Chicago, 256 Ill. 558, Ann. Cas. 1913E 305, 100 N. E. 194, 43 L.R.A.(N.S.) 954.

Indiana.—State v. Louisville, etc. R. Co. 86 Ind. 114; State v. Baltimore, etc. R. Co. 120 Ind. 298, 22 N. E. 307; State v. Sullivan County Agricultural Soc. 14 Ind. App. 369, 42 N. E. 963; Paragon Paper Co. v. State, 19 Ind. App. 314, 49 N. E. 600; Acme Fertilizer Co. v. State, 34 Ind. App. 346, 72 N. E. 1037, 107 Am. St. Rep. 190. *Compare* State v. Ohio, etc. R. Co. 23 Ind. 362.

Iowa.—See State v. Chicago, etc. R. Co. 77 Ia. 442, 42 N. W. 365, 4 L.R.A. 298.

Kansas.—State v. Belle Springs Creamery Co. 83 Kan. 389, 111 Pac. 474, L.R.A.1915D 515.

Kentucky.—Cincinnati R. Co. v. Com. 80 Ky. 137; Com. v. Paducah, 6 Ky. L. Rep.

292, abstracts; Small v. Com. 134 Ky. 272, 120 S. W. 361. See also Com. v. Pulaski County Agricultural, etc. Assoc. 92 Ky. 197, 17 S. W. 442.

Maine.—See State v. Portland, 74 Me. 268, 43 Am. Rep. 586, *overruling* State v. Great Works Mill, etc. Co. 20 Me. 41, 37 Am. Dec. 38.

Massachusetts.—Com. v. Nashva, etc. R. Corp. 2 Gray 54; Com. v. New Bedford Bridge, 2 Gray 339; Com. v. Vermont, etc. R. Corp. 4 Gray 22; Telegram Newspaper Co. v. Com. 172 Mass. 294, 52 N. E. 445, 70 Am. St. Rep. 280, 44 L.R.A. 159; Com. v. New York Cent. etc. R. Co. 206 Mass. 417, 19 Ann. Cas. 529, 92 N. E. 766; Com. v. Graustein, 208 Mass. 38, 95 N. E. 97.

Michigan.—People v. Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735, 9 L.R.A. 722.

Missouri.—See State v. White, 96 Mo. App. 34, 69 S. W. 684.

New Jersey.—State v. Morris, etc. R. Co. 23 N. J. L. 360; State v. Warren R. Co. 29 N. J. L. 353; State v. Passaic County Agricultural Soc. 54 N. J. L. 260, 23 Atl. 680.

New York.—People v. John H. Woodbury Dermatological Institute, 192 N. Y. 454, 85 N. E. 697, *affirming* 124 App. Div. 877, 109 N. Y. S. 578; People v. Star Co. 135 App. Div. 517, 120 N. Y. S. 498; People v. Dunbar Contracting Co. 165 App. Div. 59, 151 N. Y. S. 164, *affirmed* 215 N. Y. 416, 109 N. E. 554. See also People v. Clark, 8 N. Y. Crim. 169, 179, 14 N. Y. S. 642.

North Carolina.—State v. Western North Carolina R. Co. 95 N. C. 602; State v. Southern R. Co. 119 N. C. 814, 25 S. E. 862, 56 Am. St. Rep. 689; State v. Southern R. Co. 122 N. C. 1052, 30 S. E. 133, 41 L.R.A. 246; State v. Rowland Lumber Co. 153 N. C. 610, 69 S. E. 58. See also State v. Southern R. Co. 145 N. C. 495, 59 S. E. 570, 13 L.R.A. (N.S.) 966. And see the reported case.

Pennsylvania.—Northern Cent. R. Co. v. Com. 90 Pa. St. 300; Com. v. Lehigh Valley R. Co. 165 Pa. St. 162, 30 Atl. 836, 27 L.R.A. 231.

South Dakota.—State v. Security Bank, 2 S. D. 538, 51 N. W. 337; State v. First Nat. Bank, 2 S. D. 568, 51 N. W. 587.

Tennessee.—Louisville, etc. R. Co. v. State, 3 Head (Tenn.) 523, 75 Am. Dec. 778; State v. Atchison, 3 Lea (Tenn.) 729, 31 Am. Rep. 663; State v. Louisville, etc. R. Co. 91 Tenn. 445, 19 S. W. 229; Nashville, etc. Ridge Turnpike Co. v. State, 96 Tenn. 249, 34 S. W. 4; Standard Oil Co. v. State, 117 Tenn. 618, 100 S. W. 705, 10 L.R.A.(N.S.) 1015.

Rhode Island.—State v. Eastern Coal Co. 29 R. I. 254, 17 Ann. Cas. 96, 70 Atl. 1, 132 Am. St. Rep. 817.

Vermont.—State v. Vermont Cent. R. Co. 27 Vt. 103.

Washington.—State v. Paggett, 8 Wash. 579, 36 Pac. 487.

West Virginia.—State v. Baltimore, etc. R. Co. 15 W. Va. 362, 36 Am. Rep. 803.

There have been decisions contrary to this rule. Anonymous, 12 Mod. (Eng.) 559, State v. Ohio, etc. R. Co. 23 Ind. 362 (changed by statute—see Indiana citations under general rule, supra); State v. Great Works Mill, etc. Co. 20 Me. 41, 37 Am. Dec. 38 (*overruled* in State v. Portland, 74 Me. 268, 43 Am. Rep. 586); Com. v. Swift Run Gap Turnpike Co. 2 Va. Cas. 362 (decided in 1823). In an Anonymous case, 12 Mod. (Eng.) 559, the following was reported: "Per Holt, Chief Justice. A corporation is not indictable, but the particular members of it are." Concerning this report, the court in State v. Morris, etc. R. Co. 23 N. J. L. 360, said: "It may well be doubted whether this is not one of those cases which extorted from Lord Holt the bitter complaint of his reporters, 'that the stuff which they published would make posterity think ill of his understanding, and that of his brethren on the bench.' Aside from the apochryphal character of the report, it is hardly credible that so learned and accurate a judge as Lord Holt should have laid down the broad proposition imputed to him by his reporter. It is certain that while he was chief justice of the King's Bench, there were cases before that court of indictments against quasi corporations for neglect to repair roads and bridges."

In two jurisdictions it has been held that corporations are indictable only in those cases in which the legislature has specifically provided therefor. State v. Ohio, etc. R. Co. 23 Ind. 362; State v. Sullivan County Agricultural Soc. 14 Ind. App. 369, 42 N. E. 963; Paragon Paper Co. v. State, 19 Ind. App. 314, 49 N. E. 600; State v. Cincinnati Fertilizer Co. 24 Ohio St. 611; Leo Ebert Brewing Co. v. State, 25 Ohio Cir. Ct. Rep. 601. See also State v. West Baden Springs Co. 42 Ind. App. 282, 85 N. E. 724.

2. Reason of Rule.

The basis of the general rule heretofore stated was set forth in Com. v. New Bedford Bridge, 2 Gray (Mass.) 339, wherein the court said: "The indictment in the present case is for a nuisance. The defendants contend that it cannot be maintained against them, on the ground, that a corporation, although liable to indictment for nonfeasance, or an omission to perform a legal duty or obligation, are not amenable in this form of prosecution for a misfeasance, or the doing of any act unlawful in itself and injurious to the rights of others. There are dicta in some of the early cases which sanction this broad doctrine, and it has been thence copied

into text writers, and adopted to its full extent in a few modern decisions. But if it ever had any foundation, it had its origin at a time when corporations were few in number, and limited in their powers, and in the purposes for which they were created. Experience has shown the necessity of essentially modifying it; and the tendency of the more recent cases in courts of the highest authority has been to extend the application of all legal remedies to corporations, and assimilate them, as far as possible, in their legal duties and responsibilities, to individuals." The rule contended for "would, in many cases, preclude all adequate remedy, and render reparation for an injury, committed by a corporation, impossible; because it would leave the only means of redress to be sought against irresponsible servants, instead of against those who truly committed the wrongful act by commanding it to be done. There is no principle of law which would thus furnish immunity to a corporation. If they commit a trespass on private property, or obstruct a way to the special injury and damage of an individual, no one can doubt their liability therefor. In like manner, and for the same reason, if they do similar acts to the inconvenience and annoyance of the public, they are responsible in the form and mode appropriate to the prosecution and punishment of such offenses. . . . It may be added, that the distinction between a nonfeasance and a misfeasance is often one more of form than of substance. There are cases where it would be difficult to say whether the offense consisted in the doing of an unlawful act, or in the doing of a lawful act in an improper manner. In the case at bar, it would be no great refinement to say, that the defendants are indicted for not constructing their draws in a suitable manner, and thereby obstructing navigation, which would be a nonfeasance, and not for unlawfully placing obstructions in the river, which would be a misfeasance. The difficulty in distinguishing the character of these offenses strongly illustrates the absurdity of the doctrine that a corporation are indictable for a nonfeasance, but not for a misfeasance."

And the soundness of the rule was demonstrated by the court in State v. Morris, etc. R. Co. 23 N. J. L. 360, as follows: "It being conceded that an indictment will lie against a corporation aggregate for a nonfeasance, or for any cause whatever, all preliminary and formal objections arising out of the invisibility and intangibility of the body aggregate, the impossibility of arresting it, its inability to appear, its incapacity for punishment, and the injustice of punishing innocent stockholders for the acts of others, are at once disposed of. These objections apply, it is obvious, with equal force to indictments for acts of nonfeasance. If they are invalid as to the one, they are equally so as to the other. But it is said, that although a corporation may omit to perform acts made obligatory upon it by law, and thus be liable for nonfeasance, yet from its very nature it cannot use force, and therefore cannot commit any act involving force, and which must be charged to have been committed vi et armis. This argument rests entirely upon the disability of the corporation to commit any act of trespass or positive wrong, and applies to its capacity to commit civil as well as criminal injuries. It is the very argument by which it was sought to be established that no action for a trespass or tort would lie against a corporation. But it has been well said, that if a corporation has itself no hands with which to strike, it may employ the hands of others." In Grant Bros. Constr. Co. v. U. S. 13 Ariz. 388, 114 Pac. 955, the court said: "A corporation, as well as an individual, is capable of forming a guilty intent and capable of having the knowledge necessary, provided the officers of the corporation capable of volcing the will of the corporation have such knowledge or intent."

The statement of the rule by Bishop, quoted in the reported case, that "within the sphere of its corporate capacity and to an undefined extent beyond, whenever it assumes to act as a corporation it [a corporation] has the same capabilities of criminal intent and of act—in other words, of crime—as an individual man sustaining the like relations," has also been regarded as authoritative in the following cases: Joplin Mercantile Co. v. U. S. 213 Fed. 926, 131 C. C. A. 160; U. S. v. Alaska Packers' Assoc. 1 Alaska 217; People v. Star Co. 135 App. Div. 517, 120 N. Y. S. 498.

III. Crime Requiring Specific Intent.

The weight of authority supports the holding of the reported case that a corporation can be convicted of a crime requiring a specific intent. U. S. v. MacAndrews, etc. Co. 149 Fed. 823; Joplin Mercantile Co. v. U. S. reported in full, post, this volume, at page 470; Telegram Newspaper Co. v. Com. 172 Mass. 294, 52 N. E. 445, 70 Am. St. Rep. 280, 44 L.R.A. 159; People v. Star Co. 135 App. Div. 517, 120 N. Y. S. 498; People v. Dunbar Contracting Co. 165 App. Div. 59, 151 N. Y. S. 164, *affirmed* 215 N. Y. 416, 109 N. E. 554; State v. Rowland Lumber Co. 153 N. C. 610, 69 S. E. 58; State v. Eastern Coal Co. 29 R. I. 254, 17 Ann. Cas. 96, 70 Atl. 1, 132 Am. St. Rep. 817. See also Kaufman v. U. S. 212 Fed. 613, 129 C. C. A. 149; Chicago, etc. Coal Co. v. People, 214 Ill. 421, 73 N. E. 770; State v. Passaic County Agricultural

Soc. 54 N. J. L. 260, 23 Atl. 680; State v. Atchison, 3 Lea (Tenn.) 729, 31 Am. Rep. 663; Standard Oil Co. v. State, 117 Tenn. 618, 100 S. W. 705, 10 L.R.A.(N.S.) 1015; State v. Baltimore, etc. R. Co. 15 W. Va. 362, 36 Am. Rep. 803; D'Ivry v. World Newspaper Co. 17 Ont. Pr. 387. Thus in Telegram Newspaper Co. v. Com. supra, the court, in affirming a conviction of criminal contempt, said: "We think that a corporation may be liable criminally for certain offenses of which a specific intent may be a necessary element. There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil. A corporation cannot be arrested and imprisoned in either civil or criminal proceedings, but its property may be taken either as compensation for a private wrong or as punishment for a public wrong. In most of the states of this country corporations may be formed under general laws for the purpose of doing almost any kind of business as easily as partnerships, and many of the newspapers are published by corporations. Although natural persons who publish or assist in publishing a libel in a newspaper owned by a corporation may be punished criminally by fine or imprisonment, or both, yet if the corporation cannot be punished by a fine it will escape all criminal liability. The authors of libels are often irresponsible persons, and the remedy by private action against corporations for the publishing of libellous statements is often inadequate."

In a case in which the facts were somewhat similar to those appearing in the reported case, a corporation was convicted of grand larceny. People v. Hudson Valley Constr. Co. 165 App. Div. 626, 151 N. Y. S. 314.

But in Androscoggin Water Power Co. v. Bethel Steam Mill Co. 64 Me. 441, the court in construing a statute said: "It is obvious that the defendant corporation could not be indicted under this last section. The intent, with which the act prohibited is done, is individual, not corporate intent. Larceny cannot, by any existing law, be predicated of any corporate action of a corporation, nor is there any provision for its punishment for the crime, if it were one which it is capable of committing." And in Cumberland, etc. Canal Corp. v. Portland, 56 Me. 77, the court said: "The question presented, is whether a suit for the penalty given by this section can be maintained against a corporation, by whose servants the acts prohibited have been done. The language of the section manifestly refers only to individuals—persons—offenders, those who could 'wilfully, maliciously, or contrary to law,' do the several acts forbidden. But malice and wilfulness cannot be predicated of a corporation, though they may well be of its members."

In a number of cases there are dicta to the effect that a corporation cannot be convicted of a crime requiring specific intent. Pearks v. Ward (1902) 2 K. B. (Eng.) 1, 20 Cox C. C. 279; Com. v. New Bedford Bridge, 2 Gray (Mass.) 339; State v. Delmar Jolkey Club, 200 Mo. 34, 92 S. W. 185, 98 S. W. 539; State v. Morris, etc. R. Co. 23 N. J. L. 360; People v. Dunlep, 32 Misc. 390, 66 N. Y. S. 161.

See especially in connection with this subject the cases relating to the liability of a corporation to indictment for homicide which are collated in the notes to People v. Rochester R. etc. R. Co. 16 Ann. Cas. 867, and Com. v. Illinois Cent. R. Co. Ann. Cas. 1915B 817.

IV. Corporation as "Person" within Penal Statute.

The term "person" used in a statute imposing criminal liability is regarded as including corporations where that construction is warranted by the spirit and purpose of the statute. See the notes to Willmotts v. London Road Car Co. 20 Ann. Cas. 733 and State v. Rutland, etc. R. Co. Ann. Cas. 1914A 1305.

V. Particular Crime.

1. Conspiracy.

A corporation can be indicted for conspiracy. Joplin Mercantile Co. v. U. S. reported in full, post, this volume at page 470; U. S. v. MacAndrews, etc. Co. 149 Fed. 823; People v. Dunbar Contracting Co. 165 App. Div. 59, 151 N. Y. S. 164, *affirmed* 215 N. Y. 416, 109 N. E. 554; State v. Eastern Coal Co. 29 R. I. 254, 17 Ann. Cas. 96, 70 Atl. 1, 132 Am. St. Rep. 817. See also Chicago, etc. Coal Co. v. People, 214 Ill. 421, 73 N. E. 770; Standard Oil Co. v. State, 117 Tenn. 618, 100 S. W. 705, 10 L.R.A.(N.S.) 1015. In People v. Dunbar Contracting Co. supra, the court said: "The defendants demurred to the indictment upon various grounds, the defendant company basing its demurrer in part upon the contention that the crime of conspiracy requires a specific criminal intent and that a corporation is incapable of committing any crime requiring criminal intention, because of which the indictment against it would not lie. The demurrers were severally overruled at Special Term, and it is now contended that this was error. This contention is without merit. Upon both principle and authority, a corporation may be indicted and convicted for conspiracy and similar crimes of which specific intent is the necessary and controlling element."

Where, however, it appeared that the indictment charged the defendant in one count with a conspiracy to commit two distinct offenses, the indictment was held to be bad for duplicity. John Gund Brewing Co. v. U. S. 204 Fed. 17, 122 C. C. A. 331.

2. CONTEMPT.

It has been held that a corporation can be guilty of criminal contempt of court. Telegram Newspaper Co. v. Com. 172 Mass. 294, 52 N. E. 445, 70 Am. St. Rep. 280, 44 L.R.A. 159, wherein a newspaper company was adjudged guilty of criminal contempt for publishing in a paper circulated in the place where a trial was pending an article concerning the cause on trial and calculated to influence the jury.

3. LARCENY.

In People v. Hudson Valley Constr. Co. 165 App. Div. 626, 151 N. Y. S. 314, the defendant corporation was convicted of grand larceny in the second degree, no question being raised as to its power to commit the crime. *Compare* the dictum in Androscoggin Water Power Co. v. Bethel Steam Mill Co. 64 Me. 441.

4. LIBEL.

A corporation can be indicted for criminal libel. People v. Star Co. 135 App. Div. 517, 120 N. Y. S. 498; State v. Atchison, 3 Lea (Tenn.) 729, 31 Am. Rep. 663; D'Ivry v. World Newspaper Co. of Toronto, 17 Ont. Pr. R. 387. In People v. Star Co. supra, the court after reviewing the authorities said: "We find no difficulty, therefore, in holding that a corporation may be indicted for and convicted of the crime of criminal libel, the evil intent of its agents who write and print the libel being attributable to it."

5. NUISANCE GENERALLY.

A corporation is liable to indictment for committing a nuisance. State v. Louisville, etc. R. Co. 86 Ind. 114 (by statute); Paragon Paper Co. v. State, 19 Ind. App. 314, 49 N. E. 600 (by statute); Acme Fertilizer Co. v. State, 34 Ind. App. 346, 72 N. E. 1037, 107 Am. St. Rep. 190 (by statute); State v. Portland, 74 Me. 268, 43 Am. Rep. 586, *overruling* State v. Great Works Mill, etc. Co. 20 Me. 41, 37 Am. Dec. 38; People v. Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735, 9 L.R.A. 722; State v. Paggett, 8 Wash. 579, 36 Pac. 487. See also Morris, etc. R. Co. v. Prudden, 20 N. J. Eq. 530. Accordingly it has been held that a corporation can be indicted for keeping a disorderly house. State v. Passaic County Agricultural Soc. 54 N. J. L. 260, 23 Atl. 680. And a municipal corporation has been held to be liable to indictment for the negligent construction of a public sewer which caused a nuisance. State v. Portland, 74 Me. 268, 43 Am. Rep. 586. Where it appeared that a paper company in the conduct of its business caused the pollution of a river, to the injury of persons living near the river, it was held that the company could be prosecuted under a statute providing for the indictment of a corporation for maintaining a public nuisance. Paragon Paper Co. v. State, 19 Ind. App. 314, 49 N. E. 600. But under a statute providing that corporations can be prosecuted for maintaining a public nuisance, it has been held that a corporation could not be indicted for keeping a tenement for gaming, where it did not appear that gaming was carried on to such an extent as to become a nuisance. State v. Sullivan County Agricultural Soc. 14 Ind. App. 369, 42 N. E. 963.

6. OBSTRUCTION OF PUBLIC ROAD OR WATERWAY.

A particular form of nuisance for which corporations have in a number of cases been prosecuted is the unlawful obstruction of a public road or waterway. Reg. v. Great North of England R. Co. 9 Q. B. (Eng.) 315, 58 E. C. L. 315, 2 Cox C. C. 70, 10 Jur. 755, 16 L. J. M. C. 16; Reg. v. Longton Gas Co. 2 El. & Bl. 651, 105 E. C. L. 651; Reg. v. United Kingdom Electric Tel. Co. 2 B. & S. 647, 110 E. C. L. 647 note; St. Louis, etc. R. Co. v. State, 52 Ark. 51, 11 S. W. 1035; Palatka, etc. R. Co. v. State, 23 Fla. 546, 3 So. 158, 11 Am. St. Rep. 395; State v. Baltimore, etc. R. Co. 120 Ind. 298, 22 N. E. 307 (by statute); State v. Chicago, etc. R. Co. 77 Ia. 442, 42 N. W. 365, 4 L.R.A. 298; Cincinnati R. Co. v. Com. 80 Ky. 137; State v. Freeport, 43 Me. 198; Com. v. Nashua, etc. R. Corp. 2 Gray (Mass.) 54; Com. v. New Bedford Bridge, 2 Gray (Mass.) 339; Com. v. Vermont, etc. R. Corp. 4 Gray (Mass.) 22; Com. v. New York Cent. etc. R. Co. 206 Mass. 417, 19 Ann. Cas. 529, 92 N. E. 766; State v. Morris, etc. R. Co. 23 N. J. L. 360; State v. Warren R. Co. 29 N. J. L. 353; State v. Western North Carolina R. Co. 95 N. C. 602; Northern Cent. R. Co. v. Com. 90 Pa. St. 300; Com. v. Lehigh Valley R. Co. 165 Pa. St. 162, 30 Atl. 836, 27 L.R.A. 231; Louisville, etc. R. Co. v. State, 3 Head (Tenn.) 523, 75 Am. Dec. 778; State v. Louisville, etc. R. Co. 91 Tenn. 445, 19 S. W. 229; State v. Vermont Cent. R. Co. 27 Vt. 103. See also State v. White, 96 Mo. App. 34, 69 S. W. 684; State v. Central R. Co. 32 N. J. L. 220. *Contra*, Com. v. Swift Run Gap Turnpike Co. 2 Va. Cas. 362 (decided in 1823). Thus in State v. Louisville, etc. R. Co. supra, the court said: "That railway corporations are liable to indictment for obstructing a public highway has been long settled. . . . Being a corporation, it necessarily acts only through its agents. If the obstruction is the act of its agent, it is the act of the corpora-

tion; provided the agent did the act in the course and scope of his duty as an agent. It is immaterial that the agent was, by the rules of the company, instructed not to permit such obstruction to continue for a time deemed by the corporation to be unreasonable. If such agent disobeys the reasonable requirement of the corporation, it becomes liable for the nuisance, because the agent was within the scope of his duty in operating the train and in stopping it across a public road. This principle is necessary to be enforced in regard to acts of misfeasance by corporations of this character. Otherwise, the public would be required to look alone to subordinates, in general unknown and irresponsible."

The necessity under certain circumstances for bringing the indictment against the corporation, instead of against individuals only, was pointed out in State v. Morris, etc. R. Co. 23 N. J. L. 360, as follows: "If the rights of the corporation are to be concluded by the judgment, as in the present case, a valuable building, erected by the company at great cost for their own convenience, is to be ordered to be torn down as an encroachment upon the highway, there is peculiar propriety in making the corporation itself a party, and giving it an opportunity of being heard in defense. To condemn the property of the corporation to destruction upon an indictment against an irresponsible individual who was employed in the construction of the work, but who has no interest in the company, and who perhaps is hostile to its interests, savors strongly of the injustice of condemning them unheard. And it is not clear how the sentence is to be executed against the corporation, who are in possession, and in no sense parties to the proceeding."

Accordingly, a corporation has been indicted and convicted for leaving a hand car at the intersection of its track with a public road. Cincinnati R. Co. v. Com. 80 Ky. 137. But where it appeared that a railroad company had the right to erect a bridge "so constructed as not to prevent" navigation, it was held that the company could not be indicted for building a bridge so as to obstruct and impede navigation. State v. Portland, etc. R. Co. 57 Me. 402.

7. Unjust Discrimination.

Corporations are liable to indictment under statutes forbidding unjust discrimination in transportation. New York Cent. R. Co. v. U. S. 212 U. S. 481, 29 S. Ct. 304, 53 U. S. (L. ed.) 613. See also State v. Southern R. Co. 122 N. C. 1052, 30 S. E. 133, 41 L.R.A. 246; State v. Southern R. Co. 125 N. C. 666, 34 S. E. 527. In New York Cent. R. Co. v. U. S. supra, the court said: "There is a large class of offenses, of which rebating under the federal statutes is one, wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them. 2 Morawetz on Corporations, sec. 733; Green's Brice on Ultra Vires, 366. If it were not so, many offenses might go unpunished and acts be committed in violation of law, where, as in the present case, the statute requires all persons, corporate or private, to refrain from certain practices forbidden in the interest of public policy. It is a part of the public history of the times that statutes against rebates could not be effectually enforced so long as individuals only were subject to punishment for violation of the law, when the giving of rebates or concessions inured to the benefit of the corporations of which the individuals were but the instruments. This situation, developed in more than one report of the Interstate Commerce Commission, was no doubt influential in bringing about the enactment of the Elkins Law, making corporations criminally liable. . . . We see no valid objection in law, and every reason in public policy, why the corporation which profits by the transaction, and can only act through its agents and officers, shall be held punishable by fine because of the knowledge and intent of its agents to whom it has intrusted authority to act in the subject matter of making and fixing rates of transportation, and whose knowledge and purposes may well be attributed to the corporation for which the agents act. While the law should have regard to the rights of all, and to those of corporations no less than to those of individuals, it cannot shut its eyes to the fact that the great majority of business transactions in modern times are conducted through these bodies, and particularly that interstate commerce is almost entirely in their hands, and to give them immunity from all punishment because of the old and exploded doctrine that a corporation cannot commit a crime would virtually take away the only means of effectually controlling the subject matter and correcting the abuses aimed at."

8. Violation of Bankruptcy Law.

It has been held that a bankrupt corporation is capable of committing the criminal offense of knowingly or fraudulently concealing its property from its trustee. Kaufman v. U. S. reported in full, post, this volume at page 466. U. S. v. Young, etc. Co. 170 Fed. 110; Cohen v. U. S. 157 Fed. 651, 85 C. C. A. 113. But of course it could not be punished

for that offense under a statute providing for imprisonment only. Cohen v. U. S. supra.

9. Violation of Labor Law.

A corporation has been held to be criminally liable under a statute providing that the employment of children under age shall constitute a misdemeanor. Overland Cotton Mill Co. v. People, 32 Colo. 263, 75 Pac. 924, 105 Am. St. Rep. 74.

Likewise it has been held that a corporation can be convicted under a statute regulating the hours of labor. U. S. v. John Kelso Co. 86 Fed. 304. See also People v. Chicago, 256 Ill. 558, Ann. Cas. 1913E 305, 100 N. E. 194, 43 L.R.A.(N.S.) 954.

10. Violation of Liquor Law.

A corporation can be indicted under a statute forbidding the solicitation or taking of orders for intoxicating liquors in certain localities. R. M. Rose Co. v. State, 4 Ga. App. 588, 62 S. E. 117. Likewise a corporation may be guilty of a conspiracy to carry liquor into prohibited territory. Joplin Mercantile Co. v. U. S. reported in full, post, this volume, at page 470. And a corporation may be guilty of furnishing liquor to a minor. Southern Express Co. v. State, 1 Ga. App. 700, 58 S. E. 67. A contrary result has been reached in a case wherein it was held that the statute making the act unlawful applied only to natural persons. Leo Ebert Brewing Co. v. State, 25 Ohio Cir. Ct. Rep. 601.

11. Miscellaneous.

Corporations have been held liable to prosecution under statutes making criminal the following acts:

Advertising to practice medicine by a person not a registered physician: People v. John H. Woodbury Dermatological Institute, 192 N. Y. 454, 85 N. E. 697, *affirming* 124 App. Div. 877, 109 N. Y. S. 578.

Collecting excessive toll: Nashville, etc. Ridge Turnpike Co. v. State, 96 Tenn. 249, 34 S. W. 4.

Fishing: U. S. v. Alaska Packers' Assoc. 1 Alaska 217.

Inclosing public domain: U. S. v. Pacific Live Stock Co. 192 Fed. 443.

Knowingly assisting in bringing certain laborers into the United States: Grant Bros. Constr. Co. v. U. S. 13 Ariz. 388, 114 Pac. 955.

Mailing obscene matter: U. S. v. New York Herald Co. 159 Fed. 296.

Obtaining money by false pretenses: See the reported case.

Receiving illegal interest: State v. First Nat. Bank, 2 S. D. 568, 51 N. W. 587. See also State v. Clark Security Bank, 2 S. D. 538, 51 N. W. 337.

Sabbath breaking: State v. Southern R. Co. 119 N. C. 814, 25 S. E. 862, 56 Am. St. Rep. 689.

Selling adulterated milk: Com. v. Graustein, 208 Mass. 38, 95 N. E. 97.

Selling food which was not of the nature, substance and quality of the article demanded: Pearks v. Ward [1902] 2 K. B. (Eng.) 1. See also Small v. Com. 134 Ky. 272, 120 S. W. 361.

Use of false weights and measures: State v. Belle Springs Creamery Co. 83 Kan. 389, 111 Pac. 474, L.R.A.1915D 515.

Wilful destruction of premises by tenant: State v. Rowland Lumber Co. 153 N. C. 610, 69 S. E. 58.

VI. Punishment.

A corporation is punished for its criminal acts by fine. New York Cent. R. Co. v. U. S. 212 U. S. 481, 29 S. Ct. 304, 53 U. S. (L. ed.) 613; John Gund Brewing Co. v. U. S. 204 Fed. 17, 124 C. C. A. 268; U. S. v. Alaska Packers' Assoc. 1 Alaska 217; Overland Cotton Mill Co. v. People, 32 Colo. 263, 75 Pac. 924, 105 Am. St. Rep. 74; State v. Belle Springs Creamery Co. 83 Kan. 389, 111 Pac. 474, L.R.A.1915D 515; People v. Detroit White Lead Works, 82 Mich. 471, 46 N. W. 735, 9 L.R.A. 722; American Fork City v. Charlier, 43 Utah 231, 134 Pac. 739. And see the reported case.

Of course a corporation cannot be imprisoned. Cohen v. U. S. 157 Fed. 651, 85 C. C. A. 113.

The fact that a corporation can be fined but not imprisoned does not render penal statutes, prescribing fine or imprisonment, and applying alike to individuals and corporations, open to the objection of unequal operation. State v. Belle Springs Creamery Co. 83 Kan. 389, 111 Pac. 474, L.R.A.1915D 515; Small v. Com. 134 Ky. 272, 120 S. W. 361, wherein the court said: "That an individual guilty of an offense may be both fined and imprisoned, and a corporation likewise guilty only fined, does not affect the validity of the statute. The apparent discrimination grows out of conditions that cannot be avoided, and the corporation that is favored by the discrimination cannot complain."

KAUFMAN

v.

UNITED STATES.

United States Circuit Court of Appeals, Second Circuit—March 17, 1914.

212 Fed. 613.

Bankruptcy — Concealing Assets — Felony.

Bankr. Act July 1, 1898, c. 541, § 29b, 30 Stat. 554 (Fed. St. Ann. 1912 Supp. p. 646), provides that a person shall be punished by imprisonment for not to exceed two years on conviction of having knowingly and fraudulently concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy. Cr. Code section 332 (Act March 4, 1909, c. 321, 35 Stat. 1152 [Fed. St. Ann. 1909 Supp. p. 495]), declares that whoever commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, demands, induces, or procures its commission, is a principal, and section 335 provides that all offenses which may be punished by death or imprisonment for a term exceeding one year shall be deemed felonies. It is held that an indictment charging the president and manager of a bankrupt corporation with knowingly and fraudulently aiding and abetting the concealment of its assets charged a felony.

Criminal Law — Principal in Second Degree — Prosecution.

Under Cr. Code (Act March 4, 1909, c. 321, 35 Stat. 1152 [Fed. St. Ann. 1909 Supp. p. 495]) § 332, providing that all aiders or abettors of any crime are principals, where defendant was charged with knowingly and fraudulently aiding and abetting a bankrupt corporation, of which he was president and general manager, to conceal its assets from its trustee, it is not necessary that the corporation should be first convicted before the conviction of accused.

Corporations — Criminal Liability.

A bankrupt corporation is capable of committing the offense of knowingly and fraudulently concealing its property from its trustee in violation of Bankr. Act July 1, 1898, c. 541, § 29b, 30 Stat. 554 (Fed. St. Ann. 1912 Supp. p. 646).

[See note at end of this case.]

Bankruptcy — Concealment of Assets.

Bankr. Act. July 1, 1898, c. 541, § 29b, 30 Stat. 554 (Fed. St. Ann. 1912 Supp. p. 646), providing that a person shall be punished, etc., on conviction of the offense of having knowingly and fraudulently concealed, while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy, applies only to one who has been adjudicated a bankrupt, and not to one guilty of aiding and abetting the bankrupt in knowingly and fraudulently concealing its assets.

Same.

Where an alleged concealment of assets of a bankrupt corporation begins before the appointment of a trustee and continues after such appointment, it constitutes a concealment from him, within Bankr. Act July 1, 1898, c. 541, § 29b, 30 Stat. 554 (Fed. St. Ann. 1912 Supp. p. 646), making such concealment a felony.

Witnesses — Privileged Communications — Attorney and Client.

Where accused is charged with aiding and abetting a bankrupt corporation, of which he was president and manager, to conceal its assets from its trustee, evidence of defendant's attorney that he was retained by defendant as attorney for the corporation, and also to represent defendant individually, is not objectionable as privileged.

Instructions — Matters Covered by General Charge.

Where the court's charge is explicit and fair, and covered all the aspects of the case requiring that all the facts must be proved against defendant beyond a reasonable doubt, and defines reasonable doubt in the language of defendant's counsel, it is not error to refuse a charge that if on the whole case the jury should find that the evidence was evenly balanced, or they were unable to determine where the truth lay, that created a reasonable doubt, and defendant would be entitled to an acquittal.

Bankruptcy — Abetting Concealment of Assets.

In a prosecution of the president and manager of a bankrupt corporation for aiding and abetting the concealment of its assets from its trustee, the fact that there is no evidence that defendant was holding the moneys under an agreement with the bankrupt to do with them what it requested does not impair the government's case.

Same.

In a prosecution of the president and manager of a bankrupt corporation for aiding and abetting the concealment of its assets from its trustee, evidence held to sustain a conviction.

Error to United States District Court, Southern District of New York.

Criminal action. Henry Kaufman convicted of aiding and abetting Daisy Shirt Company, bankrupt corporation, to conceal its assets from its trustee, and brings error. AFFIRMED.

[615] Henry Kaufman was convicted of aiding and abetting the Daisy Shirt Company, a bankrupt corporation, to conceal its assets from its trustee, and he brings error. Affirmed.

The plaintiff in error, Henry Kaufman, hereinafter referred to as the "defendant," was president of the Daisy Shirt Company, a corporation organized under the laws of the

state of New York, and was in charge of the company. This company was engaged in the manufacture and sale of shirts and had its principal place of business in the city of New York. On November 5, 1910, an involuntary petition in bankruptcy was filed against the company and it was duly adjudicated a bankrupt. The evidence discloses that between October 24 and November 2, 1910, Kaufman assigned a large portion of the outstanding accounts of the company to the Federal Finance Company for $2,718.15. He assigned other accounts to one Silverstone for $900. He sold to other parties a large quantity of merchandise belonging to the company receiving altogether $12,653.72. A large part of this was paid to him in cash and some of it in checks which he cashed. On or about November 3d, a few days before the company was thrown into bankruptcy, Kaufman left New York for California, stopping at Montreal on his way where he remained a month. He was arrested in California and brought from there to New York to answer an indictment charging him with aiding and abetting a bankrupt corporation to conceal its assets. He never turned over any of the money he had received as hereinbefore set forth. The defendant undertook to account for the money which he had received before leaving for California by claiming that he had paid certain specified amounts to his wife, his sister, his brother, his father, his mother-in-law, and to certain other persons including $495 to his attorney.

The defendant's testimony was that he had invested $16,000 in the business, which was inadequate for the demands made upon it; that it became necessary to borrow money, and the defendant secured a loan of $5,000 from the Madison Trust Company, which he put into the treasury of the corporation; that he raised $1,200 on his mother-in-law's jewels, which sum was deposited in the bank account of the corporation, as well as $875 on life insurance belonging to her, likewise paid to the corporation; that his sister loaned the company $2,400 in various amounts; that his father paid $2,500 to avoid foreclosure of mortgage assigned to the Franklin Trust Company as security for its loan to the corporation; that he pledged his wife's jewels with the Provident Loan Association for $1,600, which went into the treasury of the [616] corporation; that he borrowed $400 from one Gutkin. He testified that things were going very badly with the corporation and that great pressure was brought to bear on him to pay the debts thus incurred; that he yielded to these demands and paid from the moneys received upon the assignment of the outstanding accounts and sale of merchandise sums aggregating $11,438, part of which went to merchandise creditors also. The other witnesses for the defense corroborated his statements to some extent.

Aaron William Levy for plaintiff in error.
H. Snowden Marshall and *Roger B. Wood* for defendant in error.

Sitting: Lacombe, Ward, and Rogers, Circuit Judges.

ROGERS, J.—(*after stating the facts*).—The plaintiff in error who was the defendant below has been convicted of the crime of having aided and abetted the Daisy Shirt Company in concealing its assets in violation of section 29b of the Bankruptcy Act. He was not charged with having concealed the assets of the company from the trustee in bankruptcy. The indictment charged the Daisy Shirt Company with having concealed its assets from its duly qualified trustee in bankruptcy to an amount exceeding $5,000, and further charged that the defendant "under the circumstances aforesaid did knowingly and fraudulently cause, procure, aid and abet, the Daisy Shirt Company while the said Daisy Shirt Company was a bankrupt as aforesaid, knowingly and fraudulently to conceal in the manner and form aforesaid, from William P. Myhan, the duly qualified trustee in bankruptcy of the said Daisy Shirt Company, the aforesaid sums of money and the aforesaid property belonging to the estate in bankruptcy of the said Daisy Shirt Company."

The provision of section 29b of the Bankruptcy Act reads as follows:

"A person shall be punished, by imprisonment for a period not to exceed two years, upon conviction of the offense of having knowingly and fraudulently concealed while a bankrupt, or after his discharge, from his trustee any of the property belonging to his estate in bankruptcy." (Fed. St. Ann. 1912 Supp. p. 646).

The Criminal Code in section 332 provides that:

"Whoever directly commits any act constituting an offense defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal." (Fed. St. Ann. 1909 Supp. p. 495.)

The federal courts have such criminal jurisdiction only as is given by act of Congress. Jones v. U. S. 137 U. S. 202–211, 11 S. Ct. 80, 34 U. S. (L. ed.) 691. The defendant was indicted as a principal under section 332 of the Criminal Code, and the case was tried on that theory.

The offense of concealing the assets from the trustee in bankruptcy is a felony as one committing the offense may be punished by imprisonment for more than one year. Section 335 of the Penal Laws, Act March 4, 1909 (Fed. St. Ann. 1909 Supp. p. 495). In

the case of felonies the common law recognized the distinction of principals and accessories, a distinction it refused to apply to persons participating in treason and in misdemeanors. In the case of treason and misdemeanors all persons [617] who were guilty at all were punishable as principals and indictable as such. In the case of felonies one who aided and abetted the principal, but was absent when the crime was committed, or who after the crime was committed assisted the perpetrator, was simply an accessory. And according to the common law an accessory could not be tried before the conviction of the principal. But under section 332 of the Criminal Code of the United States all abettors of any crime are made principals. It is not necessary, therefore, that a bankrupt corporation should first be convicted before bringing to trial one charged with aiding and abetting in the concealment of its assets from a trustee in bankruptcy.

It is undoubtedly the case that decisions and dicta can be found denying that a corporation can be indicted. Lord Holt is reported as having said that "a corporation is not indictable, but the particular members of it are." Anonymous, 12 Mod. (Eng.) 559. But it is a well-established principle of modern jurisprudence that an indictment will lie against a corporation, although there are some crimes, as treason, or felony, or breach of the peace, in respect of which it is agreed that an indictment could not be maintained against it, and it has been held that where a statute prescribes fine and imprisonment it is not applicable to a corporation because a corporation cannot be imprisoned. U. S. v. Braun, 158 Fed. 456. But in Cohen v. U. S. 157 Fed. 651, 85 C. C. A. 113 (1907), this court decided that a bankrupt corporation was capable of committing the criminal offense of knowingly or fraudulently concealing its property from its trustee defined and made punishable by the Bankruptcy Act, and that persons who conspire to cause a corporation to commit such an offense are indictable for the conspiracy, and that it is immaterial that the corporation is not or cannot be indicted as one of the conspirators. We know of no reason why we should not adhere to the opinion we then expressed. We are compelled therefore to disregard the defendant's contention that, if the corporation could not be convicted of the offense described in section 29b of the Bankruptcy Act, he could not be convicted of aiding and abetting in the commission of such an offense. There is no distinction in principle between the Cohen Case, supra, and the case at bar. The fact that in the Cohen Case the indictment was for conspiracy under section 5440 of the Revised Statutes (2 Fed. St. Ann. 247) while in this case the indictment is based on a concealment of assets, is a distinction without a difference so far as the principle involved is concerned.

It may be conceded that defendant could not be convicted under section 29b of the Bankruptcy Act. That section applies only to one who has "knowingly or fraudulently concealed while a bankrupt or after his discharge." As the defendant is not alleged ever to have been a bankrupt the section is without application to him. It was held in Field v. U. S. 137 Fed. 6, 69 C. C. A. 568, that the present or past bankruptcy of the person accused was an indispensable element of the offense created by that section. The defendant, however, is mistaken in supposing that the principle announced in the Field Case is so far applicable to his case as to require this court to [618] set aside his conviction. He loses sight of the fact that his own conviction is not under section 29b of the Bankruptcy Act which was under discussion in the Field Case, but is under section 332 of the Criminal Code.

The offense with which the defendant is charged is that he aided and abetted the Daisy Shirt Company while the said company was a bankrupt knowingly and fraudulently to conceal from the duly qualified trustee property belonging to the estate in bankruptcy. The concealment must be a concealment from the trustee. In re Adams, 171 Fed. 599. In the case at bar the funds were taken and the concealment began before the appointment of the trustee. But if the concealment which began before the appointment of the trustee continued after the appointment was made, and there was evidence in this case showing that it did, it constituted concealment from him. This we decided in the Cohen Case, supra.

The defendant took the stand and testified in his own behalf. It is urged upon us that error was committed at the trial in the admission of certain evidence. The defendant's attorney was permitted to say:

"I was retained by Mr. Kaufman (the defendant) as attorney for the Daisy Shirt Company, and also to represent him individually."

It was objected that this evidence was calculated to bias or prejudice the defendant in the eyes of the jury. We see no valid objection to the admission of the testimony. If the attorney was retained by the defendant to represent him personally in the bankruptcy proceedings, the fact cannot be regarded as privileged. It was necessary for the witness to give this testimony before he could claim his privilege as to communications which passed between him and the attorney about which he was asked and which were excluded upon the theory that they were privileged. Whether any error was committed in refusing

to allow the communications which may have passed between the defendant and his counsel in respect to the commission of a crime or a fraud, the legal adviser being ignorant of the purpose for which the advice was wanted, is not before us. But it may be remarked in passing that it has been held in England that communication made in furtherance of any criminal or fraudulent purpose is not privileged. Reg. v. Cox, L. R. 14 Q. B. 153. And the English rule appears to have been regarded with favor in the Supreme Court of the United States in Alexander v. U. S. 138 U. S. 353, 11 S. Ct. 350, 34 U. S. (L. ed.) 954, the rule being limited to cases where the party is tried for the crime in furtherance of which the communication was made, although the attorney declared in the case at bar that he had been retained by the defendant, the defendant while on the stand positively denied that he had been so retained. In view of his testimony on that point, we fail to see what right he has to raise the question of privilege at all. He cannot blow hot and cold at the same time. But irrespective of his right to raise the question, there is nothing in the point which he seeks to make.

The defendant predicates error upon a refusal to charge "that if upon the whole case the jury should find that the evidence is evenly [619] balanced, or that they are unable to determine where the truth lies, then that would create a reasonable doubt, and the defendant is entitled to an acquittal." The charge was a full, clear, explicit, and fair one, covering all the aspects of the case. The instructions upon the law were sufficiently distinct and precise. On the subject of reasonable doubt the jury was charged as follows:

"Now, in this, as in all other criminal cases, all of the facts must be proved against the defendant beyond a reasonable doubt, which is, as Mr. McIntyre (the defendant's counsel) told you. That does not mean that you should look around to see what remote or unreasonable theory you can imagine that might throw it out. If every suggestion which is not obviously fictitious is excluded from your mind, so that your minds are settled that the man is guilty, then you bring a verdict against him. It is only in case you shall have some doubt, for which you can give a sensible reason, that you are to bring in a verdict of guilty."

What Mr. McIntyre had told the jury about "reasonable doubt" does not appear in the record. If he thought that what he said to the jury on the subject, which the court adopted and supplemented, was not adequate, he should have had what he said on that subject incorporated into the record for our information. The accused was entitled to have the jury instructed that the prosecution must prove the charge against him beyond a reasonable doubt. Some courts have declared that it is not necessary for the trial judge to define or explain the words "reasonable doubt." State v. Davis, 48 Kan. 1, 28 Pac. 1092; State v. Reed, 62 Me. 129; State v. Robinson, 117 Mo. 649, 23 S. W. 1066. The Supreme Court of the United States, in Miles v. U. S. 103 U. S. 304, 312, 26 U. S. (L. ed.) 481), said "Attempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury." And the same court, speaking through Mr. Justice Brewer, in Dunbar v. U. S. 156 U. S. 185, 199, 15 S. Ct. 325, 39 U. S. (L. ed.) 390 (1894), referred approvingly to what was said in the Miles Case. We are not now expressing any opinion upon whether the trial judge is or is not bound to define a reasonable doubt. But we fail to discover after what had already been said upon the subject any reason why the court should have enlarged upon it by complying with the request of counsel to charge in the words requested. The subject had already been adequately covered.

There was no evidence that Kaufman was holding the moneys under an agreement with the bankrupt to do with them what it asked. Of course, if there had been such evidence, it would have been important in establishing the guilt of the defendant. But the absence of such evidence does not impair the government's case, for it is not at all important whether the defendant in taking and concealing the assets was concealing them on behalf of the bankrupt or for himself. The offense consists in concealing from the trustee any of the property belonging to the bankrupt. What may be the purpose of the concealment and who is to benefit by it does not enter into the matter. The wrong that is being punished is the withholding from the trustee, and therefore from the creditors, property to which they are entitled.

There is no error of law and the evidence abundantly supports [620] the verdict of the jury. The jury has found under instructions of the court that the assets were secreted under a general scheme and that the defendant aided and abetted the bankrupt corporation in the concealment of its assets from its trustee in bankruptcy. The defendant admitted he had taken the moneys and that he had never turned over a dollar to the trustee. His claim that he paid $400 to one Kuntz on a debt due to the latter from the corporation was denied by Kuntz. Neither his wife, nor his mother-in-law nor his brother were called to corroborate him in the story he told as to payments made to them in payment of debts due to them likewise from the corporation. His sister took the stand to corroborate him as to payments made to her

by him, but her testimony was properly characterized by the trial judge as extraordinary and was evidently not believed by the jury. As soon as he obtained the money of the bankrupt, he left the United States without informing any one where he was going. He did not even wait to surrender the lease to his apartment or to look after the storage of his furniture. He never communicated with the trustee, nor did he in any way assist in straightening out the affairs of the bankrupt corporation of which he was president and general manager. The case is a particularly flagrant one, and the majority of the court discover no reason for reversing the judgment.

Judgment affirmed.

NOTE.

The reported case supports the rule that an indictment will lie against a corporation and distinctly holds that a bankrupt corporation is capable of committing the criminal offense of knowingly or fraudulently concealing its property from its trustee, although the corporation cannot be punished by imprisonment. For an exhaustive discussion of the criminal liability of a corporation for acts of misfeasance, see the note to State v. Salisbury Ice, etc. Co. reported ante, this volume, at page 456.

JOPLIN MERCANTILE COMPANY ET AL.

v.

UNITED STATES.

United States Circuit Court of Appeals, Eighth Circuit—April 3, 1914.

218 Fed. 926.

Indians — Shipments of Liquor into Indian Territory.

Act March 1, 1895, c. 145, § 8, 28 Stat. 697 (3 Fed. St. Ann. 424), which inter alia prohibits the carrying of intoxicating liquors into Indian Territory, was enacted as a part of the recognized guardianship by the United States of the Indians as a separate but independent people, and in the exercise of the constitutional power of Congress to regulate commerce with the Indian tribes, and was not repealed by the Enabling Act of Oklahoma, and the admission of the state thereunder, as to importations from parts of the state not within the former Indian Territory, and an indictment for conspiracy to violate said act by carrying liquor into such territory need not allege that it was to be imported from without the state of Oklahoma.

Same.

In none of the legislation of Congress prohibiting the introduction of liquor into the Indian country have state lines been recognized, but the acts prohibited have always been held unlawful whether the liquor was introduced from points within the same state or from without.

Corporations — Criminal Liability.

A corporation may be indicted and convicted under section 37 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Fed. St. Ann. 1909 Supp. p. 415]), for conspiracy to commit an offense against the United States by carrying liquors into Indian Territory or introducing liquors into the Indian country, although under section 335 of the Criminal Code (Fed. St. Ann. 1909 Supp. p. 495) the offense is a felony.

[See note at end of this case.]

Error to United States District Court, Western District of Missouri.

Criminal action. Joplin Mercantile Company et al., convicted of conspiracy and brings error. The facts are stated in the opinion. AFFIRMED.

Paul A. Ewert for plaintiffs in error.

Leslie J. Lyons and *Thad B. Leavdon* for defendant in error.

Sitting: Hook and Smith, Circuit Judges, and Amidon, District Judge.

[927] SMITH, J.—An indictment was returned for conspiracy under section 37 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1096, Fed. St. Ann. 1909 Supp. p. 415), charging that the Joplin Mercantile Company, a corporation existing under and by virtue of the laws of the state of Missouri, and one Joseph Filler, and one Ben Due, and one Martin F. Witte, and other persons to the grand jury unknown, hereinafter called the defendants, then and there being, did then and there unlawfully, willfully, knowingly, and feloniously conspire together to commit an offense against the United States of America, to wit, to unlawfully, knowingly, and feloniously introduce and attempt to introduce malt, spirituous, vinous, and other intoxicating liquors into the Indian country which was formerly the Indian Territory and now is included in a portion of the state of Oklahoma, and into the city of Tulso, Tulsa county, Okla., which was formerly within and is now a part of what is known as the Indian country and into other parts and portions of that part of Oklahoma which lies within the Indian country. Certain overt acts were then alleged all of which charged

that the defendants shipped liquors from Joplin, Mo., to Tulsa, Okl.

Ben Due pleaded guilty. The case against the Joplin Mercantile Company, Joseph Filler, and Martin F. Witte was tried to a jury who found the Mercantile Company and Filler guilty and acquitted Martin [928] F. Witte, and the Joplin Mercantile Company was fined, and Filler sentenced to the Leavenworth penitentiary, and they sued out a writ of error.

The only errors assigned which can be considered by us are:

(1) The court erred in overruling the demurrer of the defendants and each of them to the said indictment herein.

(2) The court erred in overruling the motion to quash said indictment herein made by the defendants and each of them.

(3) The court erred in overruling the motion in arrest of judgment herein made by the defendants and each of them.

Neither the evidence nor the charge of the court are before us.

The other questions covered by the assignments are with reference to the motion for a new trial which cannot be considered here and the admission of certain evidence which does not appear in the transcript.

The questions, therefore, before this court can be resolved into one: Did the indictment charge an offense?

There are two separate systems of laws on the subject of liquors imported into the territory here in question. The Fifty-Second Congress, on July 23, 1892 (chapter 234, 27 Stat. 260), enacted the following as a substitute for section 2139 of the Revised Statutes:

"Sec. 2139. No ardent spirits, ale, beer, wine, or intoxicating liquor or liquors of whatever kind shall be introduced, under any pretense, into the Indian country. Every person who sells, exchanges, gives, barters, or disposes of any ardent spirits, ale, beer, wine, or intoxicating liquors of any kind to any Indian under charge of any Indian superintendent or agent or introduces or attempts to introduce any ardent spirits, ale, wine, or beer, or intoxicating liquor of any kind into the Indian country shall be punished by imprisonment for not more than two years, and by a fine of not more than three hundred dollars for each offense. But it shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or intoxicating liquors into the Indian country that the acts charged were done under authority in writing from the War Department, or any officer duly authorized thereunto by the War Department. All complaints for the arrest of any person or persons made for violation of any of the provisions of this act shall be made in the county where the offense shall have been committed, or if committed upon or within any reservation not included in any county, then in any county adjoining such reservation, and, if in the Indian Territory, before the United States court commissioner, or commissioner of the circuit court of the United States residing nearest the place where the offense was committed, who is not for any reason disqualified; but in all cases such arrests shall be made before any United States court commissioner residing in such adjoining county, or before any magistrate or judicial officer authorized by the laws of the state in which such reservation is located to issue warrants for the arrest and examination of offenders by section ten hundred and fourteen of the Revised Statutes of the United States. And all persons so arrested shall, unless discharged upon examination, be held to answer and stand trial before the court of the United States having jurisdiction of the offense." (3 Fed. St. Ann. 382.)

January 30, 1897, it being doubtful whether land allotted to Indians remained Indian country under the existing laws, the Fifty-Fourth Congress enacted Act Jan. 30, 1897, c. 109, 29 Stats. 506, in part as follows:

"Any person who shall introduce or attempt to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, which [929] term shall include any Indian allotment while the title to the same shall be held in trust by the government or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter." (3 Fed. St. Ann. 384.)

But almost midway between the enactment of these two statutes the Fifty-Third Congress on March 1, 1895, enacted, chapter 145, 28 Stats. 693, 697:

"Sec. 8. That any person, whether an Indian or otherwise, who shall, in said [Indian] territory, manufacture, sell, give away, or in any manner, or by any means furnish to any one, either for himself or another any vinous, malt, or fermented liquors, or any other intoxicating drinks of any kind whatsoever, whether medicated or not, or who shall carry, or in any manner have carried, into said territory any such liquors or drinks, or who shall be interested in such manufacture, sale, giving away, furnishing to anyone, or carrying into said territory any of such liquors or drinks shall, upon conviction thereof, be punished by fine not exceeding five hundred dollars and by imprisonment for not less than

one month nor more than five years." (3 Fed. St. Ann. 424.)

It will be observed that the first two statutes prohibited introducing liquor into the Indian country, but the last prohibited their introduction, not into the Indian country, but into the Indian Territory which had boundaries fixed by law.

The term "Indian country" has a constantly changing application, but the Indian Territory referred to is a well-defined and perpetually existing region.

In U. S. Express Co. v. Friedman, 191 Fed. 673, 112 C. C. A. 219, this court held that the two first statutes above quoted were still applicable to a considerable portion of the old Indian Territory.

In Ex p. Webb, 225 U. S. 663, 32 S. Ct. 769, 56 U. S. (L. ed.) 1248, the Supreme Court held that the last-mentioned act, that of 1895, was still in force as applied to shipments from without Oklahoma.

In this situation this case was brought here in the belief that the decision in Ex p. Webb practically nullified our decision in U. S. Express Co. v. Friedman, but in U. S. v. Wright, 229 U. S. 226, 33 S. Ct. 630, 57 U. S. (L. ed.) 1160, the Supreme Court also held, as held by this court in U. S. Express Co. v. Friedman, that the acts of 1892 and 1897 remained in force where applicable in Indian Territory, and the effect of this holding was that the acts of 1892, 1897, and 1895 all remained in force concurrently in Indian Territory.

If an indictment was returned which charged a defendant with introducing liquor into the Indian country upon the trial a question of fact would at once arise as to whether the place to which they were imported remained Indian country under the acts of 1892 and 1897; but, if the charge was under the act of 1895, the sole question would be whether the liquor had been carried into a geographical location fixed and determined.

It must be borne in mind that this was not an indictment for either of these offenses, but was an indictment for a conspiracy to violate both of these laws—introducing liquors into the Indian country which was formerly the Indian Territory. That one conspiracy could be [930] formed to violate any number of laws of the United States seems beyond question. Here the conspiracy was the crime charged and not the introduction of liquors into the Indian country or the carrying of them into the Indian Territory.

It is contended that this conviction could not stand upon the act of 1895 because the indictment failed to charge that the conspiracy was to introduce liquors from without Oklahoma and that the overt acts alleged could not be utilized as the equivalent of such an allegation in the indictment, and reliance is placed upon Ex p. Webb, 225 U. S. 663, 32 S. Ct. 769, 56 U. S. (L. ed.) 1248. In that case it was claimed the liquors were shipped from Joplin, Mo., and manifestly it could not involve the question as to whether the act of 1895 was repealed as to importations from parts of Oklahoma not in Indian Territory. It is true that in the Webb Case the Supreme Court said:

"We may thus proceed at once to the question of the effect upon the act of 1895 of the Oklahoma Enabling Act of June 16, 1906 (34 Stat. 267, c. 3335), and the admission of the state of Oklahoma into the Union pursuant thereto. Since the government concedes that the act of 1895 has been thereby repealed saving so far as it prohibited the carrying of intoxicating liquors, etc., from another state into the territory, the matter to be discussed is still further narrowed."

Again the court said:

"No doubt the Enabling Act, followed by the adoption of the Constitution therein prescribed and the admission of the new state, had the effect of remitting to the state government the enforcement of the prohibition respecting the manufacture, sale, barter, etc., of intoxicating liquors within the state, and respecting commerce in such liquors conducted wholly within the state; and, to the extent that the scheme of prohibition established by the Enabling Act covered the same field that had been covered by the act of 1895, the latter act must be considered as impliedly repealed."

If this latter clause stood alone, we would be much inclined to think the act of 1895 had been repealed as to carrying liquors from other parts of Oklahoma into Indian Territory, but the question was again before the Supreme Court in U. S. v. Wright, 229 U. S. 226, 33 S. Ct. 630, 57 U. S. (L. ed.) 1160. In that case the Supreme Court said:

"In the Webb Case, as appears from the opinion [225 U. S. 676, 32 S. Ct. 769, 56 U. S. (L. ed.) 1248], the government conceded that the act of 1895 had been repealed by the Enabling Act and the admission of the state thereunder, saying so far as it prohibited the carrying of intoxicating liquors, etc., from another state into the territory. The statement to the like effect in the opinion [225 U. S. 681, 32 S. Ct. 769, 56 U. S. (L. ed.) 1248] was made in view of this concession; but we see no reason for recalling it."

The latter case, like the former, was a case of importation into the Indian country, but it was a case of importation into the Indian country from Oklahoma. The indictment was not under the act of 1895, but under the acts of 1892 and 1897.

Schaap v. U. S. 210 Fed. 853, 127 C. C. A. 415, involved an indictment for introducing

liquor into the Indian country and did not involve the carrying of liquor into Indian Territory. In that case it appears that the liquor was deposited at Ft. Smith, Ark., for transportation [931] into the part of Oklahoma that was formerly Indian Territory. It was an attempt at an interstate shipment. We are therefore of the opinion that it did not involve a decision upon the application of the act of 1895 to transactions wholly within the state of Oklahoma. In other words, that manifestly it did not involve the question whether the importation of liquors from other points in Oklahoma was illegal. In the opinion in that case the court said:

"General expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. Cohen v. Virginia, 6 Wheat. 264, 393, 5 U. S. (L. ed.) 257; King v. Pomeroy, 121 Fed. 287, 294, 58 C. C. A. 209, 216; Traer v. Fowler, 144 Fed. 810, 817, 75 C. C. A. 540, 547; Mason City, etc. R. Co. v. Wolf, 148 Fed. 961, 968, 78 C. C. A. 589, 596."

These are all the cases that touch upon the question as to whether the act of 1895 was repealed as to the balance of Oklahoma. This question is now first presented to this court. We feel that, by so specifically pointing out in the Wright Case that all that was said upon the subject in the Webb Case was based upon the admission of the Government, it was distinctly foreshadowed that it would not be binding upon the court in the future, even though it was then said, "We see no reason for recalling it."

It seems time that some one discuss the question, as the government has heretofore conceded it without discussing it.

The effect of holding that the Enabling Act for the admission of the state of Oklahoma repealed the law of 1895 as to importations from parts of Oklahoma not in Indian Territory would in effect hold that importations remained prohibited from the north, south, and east of Indian Territory, but from the west they were turned over to the state.

The provisions of the Enabling Act requiring the prohibition provisions in the Constitution of Oklahoma is of no validity if Oklahoma sees fit to repeal it. She is on an equality with all of the states and can repudiate that and other provisions of the Enabling Act whenever she sees proper. The states are equal in power, and a new state when admitted is clothed with all the power of the original states and she can repudiate all the restrictions placed upon her that do not amount to a contract. Coyle v. Oklahoma, 221 U. S. 559, 31 S. Ct. 688, 55 U. S. (L. ed.) 853. Why then would the admission of the state repeal the west boundary limit of this law?

In the exercise of its powers to regulate commerce with the Indian tribes, Congress has never recognized the boundaries of states as existent. As pointed out in the Friedman Case, the power to legislate in general with reference to liquor and the Indians is derived from: First, the treaty-making power; second, the power to regulate interstate commerce; third, the power to regulate commerce with the Indian tribes; fourth, the ownership, as sovereign, of lands to which the Indian title has not been extinguished; and, fifth, the plenary authority arising out of the guardianship of the Indians as an alien but dependent people.

[932] Prior to the admission of the last of the territories here at home, Congress was also vested with the power to legislate on this subject by the provisions of the Constitution that:

"The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

If the act of 1895 was enacted in the exercise of the second of the powers enumerated in the Friedman Case, viz., the power to regulate interstate commerce, then it might well have been that the admission of Oklahoma repealed the statute so far as it applied to the introduction of intoxicating liquors from points of the state of Oklahoma not in Indian Territory. If it was enacted solely in the exercise of the power to enact legislation for the territories, then the admission of the state repealed the act in toto but did not repeal it upon the western side and leave it standing upon the north, south, and east sides.

Quite a different rule would prevail if it was enacted in the exercise of the third, fourth, or fifth powers enumerated in the Friedman Case, namely, the power to regulate commerce with the Indian tribes, the power to pass laws by virtue of its ownership as sovereign of land to which the Indian title had not been extinguished, and the authority of Congress arising out of its guardianship of the Indians as an alien but dependent people.

The law could not be assigned to the power to enact laws for the government of the territories because there is not an instance in the whole history of the federal government's dealing with the territories of a federal statute regulating the liquor business. That subject has been uniformly left to the territorial authorities, and the business has been carried on under such licenses or regulation as those authorized saw fit to impose.

Many considerations indicate that the act

was passed as a part of the guardianship of the Indians and as a part of the power of Congress to regulate commerce with the Indians.

1. The federal government was under the most solemn pledges, contained in repeated treaties from the time the Indians were first removed to this district, to protect the Indians in their person and property against the evils of intercourse with people of the white race. History clearly shows that the greatest of those evils was the sale of intoxicating liquors.

2. Indian Territory contains the largest body of Indian population in the United States. It is not to be presumed that Congress intended to turn these Indians over to the protection of local authorities. This would be contrary to the uniform practice of the federal government in dealing with other Indian tribes in the various states.

3. Section 1 of the Enabling Act expressly reserves full authority to the national government for the protection of the Indians and their property, and thus shows clearly that it was not the intent of Congress in admitting Oklahoma, to remit the Indians to the control of the state. Protection of them against the liquor traffic has always been their greatest need, and it would be contrary to reason to suppose that the [933] reservation in the first section of the Enabling Act was not intended to cover that subject.

4. The numerous statutes passed by Congress at about the time Oklahoma was admitted, to protect these Indians against the evils of intoxicating liquor, show plainly that Congress intended to exercise this protection itself, and not to remit it to the state. It would be strange, indeed, if out of its abundant caution such a conflict has arisen as to wholly defeat this clear purpose of the federal government.

It is true that subdivision 2 of section 3 of the Enabling Act, containing provisions to be inserted in the constitution of the new state, provided that the Legislature might provide for one agency under the supervision of said state in each incorporated town of not less than 2,000 population and for one to a county in which there was no town of 2,000 inhabitants, for the sale of liquors for medicinal purposes and for the sale of denatured alcohol for industrial and scientific purposes.

This provision probably contemplated the repeal of so much of the act of 1895 as was necessary to enable the proprietors of such dispensaries to obtain intoxicating liquors, but there was no contemplation that if the state authorized such agencies they must obtain their liquors from within the state of Oklahoma. In other words this would be a repeal pro tanto of the act of 1895 upon all sides and not upon the western side. But such proviso or repeal in part of the act of 1895 need not be negatived even in an indictment for carrying liquors into Indian Territory. U. S. v. Cook, 17 Wall. 168, 21 U. S. (L. ed.) 538; Ledbetter v. U. S. 170 U. S. 606, 18 S. Ct. 774, 42 U. S. (L. ed.) 1162. Still less would it be necessary to negative the proviso in an indictment for conspiracy to carry liquors into Indian Territory.

The same section of the Enabling Act required the state to prohibit for twenty-one years the sale of intoxicating liquors in Indian Territory. This was to secure the cooperation of the state authorities and was not intended to remit to the state the whole subject of the guardianship of the Indians on approach from the west.

[2] The courts have always held that state lines had nothing whatever to do with this subject. This has been in effect held in every case where a conviction has been had for introducing liquors into the Indian country from within the same state, but it has been squarely so held in U. S. v. Holliday, 3 Wall. 407, 18 U. S. (L. ed.) 182; U. S. v. 43 Gallons Whisky, 93 U. S. 188, 23 U. S. (L. ed.) 846; U. S. v. 43 Gallons Whisky, 108 U. S. 491, 2 S. Ct. 906, 27 U. S. (L. ed.) 803; Dick v. U. S. 208 U. S. 340, 28 S. Ct. 399, 52 U. S. (L. ed.) 520; U. S. v. Sutton, 215 U. S. 291, 30 S. Ct. 116, 54 U. S. (L. ed.) 200; Hallowell v. U. S. 221 U. S. 317, 31 S. Ct. 587, 55 U. S. (L. ed.) 750; U. S. v. Wright, 229 U. S. 226, 33 S. Ct. 630, 57 U. S. (L. ed.) 1160; U. S. v. Sandoval, 231 U. S. 28, 34 S. Ct. 1, 58 U. S. (L. ed.) 107; Perrin v. U. S. 232 U. S. 478, 34 S. Ct. 387, 58 U. S. (L. ed.) 691; Pronovost v. U. S. 232 U. S. 487, 34 S. Ct. 391, 58 U. S. (L. ed.) 696; U. S. v. Barnhart, 22 Fed. 285.

It thus appears that there was absolutely nothing even after the admission of the state to prevent Congress from prohibiting the importation of liquors into the Indian Territory peopled as it was so largely [394] by Indians, and there is therefore no reason to believe that the admission of the state was intended to repeal this law on the western boundary of the Indian Territory.

If the United States had power to prohibit the introduction of liquors illegally from Oklahoma and from other states into Indian Territory, upon what basis could it be held that the admission of the state repealed the western boundary of prohibition but left standing the prohibition upon the north, south, and east?

Why were these two systems of laws originally enacted? The general allotment law had been in force some years when the act of 1895 was passed. It was manifest that much of what had heretofore been Indian country would soon cease to be such, but

Congress wanted to protect the Indians against intoxicating liquors and did not want them admitted to the territory and therefore prohibited their importation absolutely. Nothing could better illustrate the danger than what has happened. It is now lawful under the acts of 1892 and 1897 to ship liquors across Indian country if the point of destination is not Indian country and Indian Territory may be flooded with liquors under the acts of 1892 and 1897. On the other hand, if the act of 1895 was alone in force prohibiting the carrying of liquor within the Indian Territory, why would it be unlawful to transport liquor from a point within the Indian Territory to an allotment therein? It was therefore necessary to maintain the provisions of 1892 and 1897 prohibiting the introduction of liquor into the Indian country.

It is claimed that in some way the western boundary of 1895 was taken down and the government turned over to the state of Oklahoma the guardianship of its wards.

So long as Congress had the right to prohibit the introduction of liquor from Oklahoma into Indian Territory, there should be some clearly defined statute to indicate that Congress abandoned its guardianship and turned it over to the state, and neither the government nor the defendants have ever attempted to point out how was thus abdicated the exercise of congressional powers.

It was not necessary, therefore, for the indictment to allege the conspiracy was to import liquors into the Indian Territory from without Oklahoma.

The conviction may also be sustained upon another ground. The indictment charged a conspiracy to violate the laws of 1892 and 1897 to introduce or attempt to introduce liquors into the Indian country and into the city of Tulsa, which is now a part of what is known as the Indian country, and to other parts and portions of Oklahoma which lie in the Indian country.

That the laws of 1892 and 1897 are in force in the territory named is beyond question since the decision in U. S. v. Wright, 229 U. S. 226, 33 S. Ct. 630, 57 U. S. (L. ed.) 1160.

An inspection of the opinion in Schaap v. U. S. of America will show that this court held that, if the place which was charged to be within the Indian country was not so situated, that was a matter for proof upon the trial, and we have before us none of the evidence, and no objection to the indictment could be made upon that ground.

[935] If we should even take judicial notice of the fact that Tulsa was not in the Indian country, the indictment charged that the conspiracy was to introduce liquors into other parts or portions of Oklahoma which lie within the Indian country, and, until we should take judicial notice that no portion of Oklahoma was within the Indian country, the objection to the indictment could not be sustained.

The plaintiffs in error suggest the question: "Can a corporation be lawfully indicted and convicted for a conspiracy which by statute is declared a felony?"

This question was not especially called to the attention of the District Court by any of the subdivisions of the demurrer, motion to quash, or motion in arrest of judgment; but, as the counsel for the plaintiffs in error says that this was presented to the court below upon the argument, we will briefly consider it, although we are not prepared to say that it is pending for consideration here.

"All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors." Penal Code, § 335 (Fed. St. Ann. 1909 Supp., p. 495).

It follows as the offense of conspiracy may be punished by imprisonment for not more than two years, Penal Code, § 37 (Fed. St. Ann. 1909 Supp. p. 415) the offense here charged was a felony. The statute provides, however, that each of the parties to the conspiracy shall be fined not more than $10,000 or imprisoned not more than two years or both. The mercantile company in this case was fined.

Owing to the changes from time to time by statute in the meaning of the term "felony," it is perhaps more apt to become misleading than otherwise. The meaning of the term "felony" is a growth. Originally it meant an offense which occasioned a forfeiture of the lands or goods of the offender as distinguished from a mere money fine. The actual offense here charged was subject to the same punishment before the enactment of the Criminal Code. Rev. St. § 5440; Act May 17, 1879, c. 8, 21 Stat. 4 (2 Fed. St. Ann. 247). Yet it was not a felony. Bannon v. U. S. 156 U. S. 464, 15 S. Ct. 467, 39 U. S. (L. ed.) 494.

In that case, as if anticipating the action of Congress by nearly 15 years, the court said:

"And even if it were made a felony by statute, the indictment would not necessarily be defective for failing to aver that the act was feloniously done."

It is manifest that whether a corporation can be convicted of a criminal offense depends, not upon technical name, treason, felony, or misdemeanor, attached to the crime, but is one of whether the crime is such that the corporation is capable of committing it.

In Bishop's New Criminal Law, par. 417, upon the sole authority of the author, it is said:

"2. Criminal Capabilities Defined.—A corporation cannot in its corporate capacity commit a crime by an act in the fullest sense ultra vires and contrary to its nature. But within the sphere of its corporate capacity, and to an undefined extent beyond, whenever it assumes to act as a corporation it has the same capabilities of criminal intent and of act—in other words, of crime—as an individual man sustaining to the thing the like relations."

[986] As the evidence is not here, it cannot be told what was the scope of the authority of this particular corporation, but it was doubtless its business to sell liquors.

In Cook on Corporations (6th ed.) vol. 1, p. 94, it is said:

"Even where it is necessary to prove a fraudulent and malicious intent it is held by the great weight of modern authority that the fraud and malice of the authorized agents of a corporation may be imputed to the corporation itself."

See, also, on the imputability of crime to corporations, Wharton's Criminal Law (11th ed.) par. 119.

It has been repeatedly held in civil cases that a corporation may be a party to a conspiracy. Aberthaw Constr. Co. v. Cameron, 194 Mass. 208, 80 N. E. 478, 120 Am. St. Rep. 542; White v. Apsley Rubber Co. 194 Mass. 97, 80 N. E. 500, 8 L.R.A.(N.S.) 484; Buffalo Lubricating Oil Co. v. Acme Oil Co. 106 N. Y. 669, 12 N. E. 825.

In Thompson on Corporations (2d ed.) 5440, it is said:

"A corporation is liable for conspiracy to the same extent as are individuals under like circumstances."

And see Id., par. 5632.

And in Chicago, etc. Coal Co. v. People, 214 Ill. 421, 73 N. E. 770, it was expressly held that a corporation could be indicted and convicted of a conspiracy at common law.

The plaintiffs in error cite State v. Delmar Jockey Club, 200 Mo. 34, 92 S. W. 185, 98 S. W. 539.

That was a civil case, and its statement therefore in accordance, however, with the ancient holdings that a corporation could not be guilty of a felony, while somewhat persuasive, is not controlling with us because the question was not involved in that case.

They also cite Com. v. New Bedford Bridge, 2 Gray (Mass.) 339. That also was a civil case, but held the company liable for nuisance.

These are the only cases cited on the subject by the plaintiffs in error.

Upon the other hand, see U. S. v. Union Supply Co. 215 U. S. 50, 30 S. Ct. 15, 54 U. S. (L. ed.) 87; Cohen v. U. S. 157 Fed. 651, 85 C. C. A. 113, and U. S. v. MacAndrews, etc. Co. 149 Fed. 823.

The whole growth of the modern law tends to subject corporations, as nearly as may be, to the same pains and penalties imposed upon individuals. Of course, if the law imposed a death penalty or personal imprisonment, a corporation could not be subjected thereto.

Suffice it to say that we think that a corporation could be guilty of a conspiracy to carry liquor into Indian Territory and to introduce it into the Indian country.

The judgment of the District Court is affirmed.

NOTE.

The criminal liability of a corporation is considered in the reported case, which holds that a corporation can be guilty of a conspiracy to violate a liquor law. The cases discussing the criminal liability of a corporation for conspiracy and for other acts of misfeasance are collected in the note to State v. Salisbury Ice, etc. Co. reported ante, this volume, at page 456.

NIEBERG

v.

COHEN ET AL.

Vermont Supreme Court—November 10, 1914.

88 Vt. 281; 92 Atl. 214.

Husband and Wife — Alienation of Affections — Right of Recovery.

A wife at common law had no remedy for alienation of her husband's affections and consequent loss of his society and aid; such right being conferred on her by modern statutes empowering her to sue alone and to hold separate property.

[See Ann. Cas. 1912C 1179.]

Same.

The ordinary right of action of a wife for the alienation of affections and loss of society of her husband through criminal conversation is against the husband's paramour alone.

Same.

A single act of sexual intercourse by a man accustomed to marital infidelities, with a prostitute, on a chance occasion, does not constitute the "enticement" and "alienation" essential to a recovery by the wife in a suit for alienation of affections.

Torts — Incidental Injury to Third Person.

Where one is injured by the wrongful act of another, and a third person suffers an indirect loss because of some contract obligation to the injured party, such loss is not actionable; but where one is injured by the wrongful act of another, and a third person is indirectly and consequently injured in his business relations, the injury to the latter is actionable, though not directly committed on him, if it was maliciously and fraudulently done.

Husband and Wife — Imprisonment of Husband — Right of Wife to Recover.

Defendant C., believing that plaintiff's husband was immorally intimate with C.'s wife, with certain others carried out a scheme to take the husband in flagrante delicto with another woman, that he might be imprisoned for adultery. Held that, defendants' wrongful act being leveled at the husband only, and not at plaintiff, she could not recover damages from defendants because of the loss of her husband's affections, society, support, etc., due to his incarceration for such offense.

[See note at end of this case.]

Exceptions from Chittenden County Court: STANTON, Judge.

Action for damages. Lena M. Nieberg, plaintiff, and Victor Cohen et al., defendants. Judgment for plaintiff. Defendants allege exceptions. REVERSED.

[282] The statement referred to in the opinion is as follows:

The Niebergs and Cohen were located at St. Albans, where the latter kept a store with his wife in attendance; Agel was an acquaintance of Cohen residing in Boston, who made occasional trips to Burlington and St. Albans; and Hattie Cushing was apparently a resident of Burlington or Winooski. There was evidence that Nieberg had a bad reputation for chastity, and that Mrs. Nieberg had once made a specific complaint to the State's attorney touching his conduct in that respect; that Cohen was suspicious of Nieberg's relations with his wife, and had forbidden his coming to the store, and on subsequently finding him there had beaten him severely.

An officer in St. Albans testified that shortly before the affair in question he went to Cohen's store at his request, and found Cohen and Agel there; that Cohen told him Nieberg was then in a certain house and that he wanted to catch him and asked the witness to go and arrest him; that witness told him he could not do this without papers, but that if he would get a warrant he would make the arrest; that Cohen offered him twenty-five dollars to do the job, and that witness suggested getting some one whom Nieberg would not mistrust; and that Agel then said that he could do the business—that he was going to Burlington, and that Nieberg was often there on business and he could catch him there.

A Burlington attorney testified that Cohen and Agel came to his office together on a Saturday, and talked together about getting Nieberg to come to Burlington, having some laughter between them in connection with it; and that after this Agel had a telephone talk with Nieberg at St. Albans, in which it was agreed that they should meet at Essex Junction at noon the following day about some matter of business. Agel and Nieberg met at Essex Junction as agreed, and came to Burlington together later in the day. Agel testified that the meeting at the Junction was agreed upon for the purpose of going to Montpelier to transact [283] some business, but that he learned Sunday morning that the appointment there was cancelled. Nieberg testified that Agel so informed him, and said, "Come to Burlington."

Defendant Cohen testified in substance that he saw Nieberg take the noon train from St. Albans going south; that he himself took the evening train and arrived in Burlington about eight o'clock, and went to the junction of Bright Street with Winooski Avenue, and remained in that vicinity until about 10:30; that he knew from Agel that Nieberg would be in Burlington that day, and that he expected to see him going to Winooski, and was there watching for him; that when the hackman came along he fell in behind the sleigh, and ran after it, about 25 or 30 rods behind, until it got to the Allen House; that there were only three people in the sleigh; that he saw Nieberg go in with the woman, told the hackman to wait, went to where he could look through the window, saw Nieberg register, then went to the police and communicated with the State's attorney, and after some going about, in which he made use of the hackman, obtained a warrant, which was served between two and three o'clock; that he followed Nieberg to watch him and catch him and have him convicted of adultery; that he did not hire the hackman for that occasion, but paid him two dollars for what he did for him. There was also evidence that Cohen had said that he wanted his revenge and he had got it, and that he paid the hackman thirty dollars for the job. The hackman was out of the State at the time of the trial, and had been for some months.

Agel and Nieberg took an electric car from Essex Junction, and stopped at Braxton's, a disreputable resort near Fort Ethan Allen, and stayed there five or six hours. Agel testified that he had no previous knowledge of the place; that Nieberg wanted to go in and get a drink, and that both drank; that

the women there called Nieberg by name, and that he called them by name, and that he told witness about his previous experiences with them; that Nieberg took nothing but a glass of beer, and paid for it himself. Nieberg testified that Agel wanted to stop at Braxton's and get a drink; that he (Nieberg) did not know the women there; that he drank beer, whiskey and brandy, and that Agel paid the bills; that he wanted to take a car back to Essex Junction to get the seven o'clock train, the earliest train by which he could return, but that Agel urged him to go to Burlington. They reached Burlington about seven or eight o'clock, [284] and went to the house of Rabbi Sacks, who was Agel's father-in-law, for some supper. Agel testified that they did not get any because the Rabbi's family were away. Nieberg testified that Mrs. Sacks and the children were there, that both he and Agel had supper, and that he drank two glasses of brandy. Rabbi Sacks testified that he and his wife were about leaving the house when Nieberg came; that he called Nieberg to supper, and that he went to the table; that it was a feast day, and there might have been brandy on the table. Agel and Nieberg went next to Klinkerstein's, where they stayed awhile, but without drinking. For some purpose, as to which they are entirely disagreed, they went from Klinkerstein's to Dorn's saloon on Main Street, and remained in that vicinity until about ten o'clock, but had no drink.

Agel testified that while they were in front of Dorn's Nieberg motioned to the hackman, who was on the other side of the street, to drive over, and that they both got into the sleigh, Nieberg asking him to do so; that they went up Winooski Avenue until they came to a woman who was walking along the sidewalk alone going north, when Nieberg stopped the team and spoke to the woman, and she got in; that he remained in the sleigh until it got as far as Klinkerstein's, when he jumped out and went to his father-in-law's; that he did not know the woman, but that Nieberg called her by name and she called him by name.

Nieberg testified that while he and Agel were talking the hackman came along and Agel said to witness, "come along," and they drove up Winooski Avenue; that the hackman saw the woman and turned the team around and took her in, and that when they got as far as Klinkerstein's Agel jumped out and told the hackman to drive along on Winooski Avenue to the Allen House, and said, "I will be there soon;" that he went there and waited for Agel; that in the warm room the liquor went to his head, and he got very sick and didn't know much; that he did not engage the hack, nor motion it to come across the street; that he did not know the woman, and did not ask the hackman to stop nor ask her to get in. Nieberg registered as "J. M. Thompson and wife, Montpelier, Vt." Agel testified that Nieberg was not drunk when he left him. The officer who arrested him testified that he had been drinking, but was not drunk. There was no evidence of the administering of drugs.

[285] *Theodore E. Hopkins* and *Sherman R. Moulton* for defendants.

E. A. Ashland and *H. S. Peck* for plaintiff.

MUNSON, J.—Louis M. Nieberg was found guilty of committing adultery with Hattie Cushing, and was sentenced to the State prison and served a part of his term. His wife brings this suit against Victor Cohen, Max Agel, and Hattie Cushing to recover damages for the loss she sustained in being thus deprived of his affection, society and support; charging that the defendants conspired together to procure, and did procure, the commission of the offense by means of persuasions and the administering of intoxicating liquor and drugs. Hattie Cushing has not been personally served, nor been within the State since the writ issued, and the trial proceeded against Cohen and Agel alone.

The only exception argued is that taken to the refusal of the court to direct a verdict for the defendants. It was claimed below, and is now argued, that there was no evidence tending to establish the alleged conspiracy, and none tending to show that the defendants did anything to influence Nieberg to commit the crime; that in doing all that the evidence tended to establish, the defendants did nothing but what they had a legal right to do, and that the motive with which one does a legal act is not material.

A somewhat particular presentation of the evidence will be found in the statement of the case.

There was certainly evidence tending to show that Cohen and Agel were acting in concurrence in the execution of a plan previously agreed upon. The claim made by the defendants raises [286] the question whether the undertaking which the evidence tends to establish was merely to keep Nieberg under observation to get evidence of a crime likely to be committed and secure his punishment, or whether it covered a purpose and attempt to bring about the commission of a crime through agencies of their own. The use of the word "persuasions" in the declaration did not confine the plaintiff to influences by word of mouth. The influence may have been exerted through surrounding conditions for which the defendants were responsible. We think the evidence tends to show that Cohen and Agel conspired to bring about the commission of an offence at a time oppor-

tune for discovery and proof, by creating conditions calculated to secure the desired result; and that they were actuated therein solely by a desire to injure Nieberg. But it cannot be said that the evidence fairly and reasonably tends to show that Nieberg was so intoxicated as not to be master of himself. We know of no other case like this, and before carrying our conclusions further we give some preliminary consideration to the relation between husband and wife as bearing upon the latter's rights of action.

The wife had no remedy at common law for the alienation of her husband's affection and the consequent loss of his society and aid. This was partly because of her inability to sue independently of her husband, and partly because she was not considered to have any property interest in her husband's services. Knapp v. Wing, 72 Vt. 334, 47 Atl. 1075. But in nearly all jurisdictions where the wife is now empowered to sue alone and to hold separate property, she is held entitled to recover damages of the person causing the alienation, and this without the aid of any special statute. Note, 46 Am. St. Rep. 472.

In other instances of a wrongful deprivation of the husband's support the right of recovery is given by statute. The right to recover for the pecuniary injury resulting to a widow from the loss of her husband's support through his death from a wrongful act did not exist at common law and depends wholly upon the statute. Legg v. Britton, 64 Vt. 652, 659, 24 Atl. 1016. A wife who has lost the support of her husband through the disabling effects of intoxicating liquor unlawfully furnished recovers solely by force of the statute. Enactments of this nature, known as the Civil Damage Acts, give a cause of action where none existed at common law. Campbell v. Harmon, 96 [287] Me. 87, 51 Atl. 801; Volans v. Owen, 74 N. Y. 526, 30 Am. Rep. 337. The recognition of the right of the wife to recover for the loss of support resulting from an alienation of her husband's affection, as a right in existence when her common law disabilities are removed, is doubtless due to the nature of the marriage relation and the mutuality of its peculiar obligations. See Bennett v. Bennett, 116 N. Y. 584, 590, 23 N. E. 17, 6 L.R.A. 553.

It may aid us somewhat in giving this case its proper status if we contrast it with the familiar cases of our reports. The case is not the ordinary suit for alienation of affection and loss of society through an adulterous intercourse. Hattie Cushing, and she alone, would have been the respondent to such a charge. The husband's failure to give his wife the further benefit of his society was not from any lack of willingness on his part, but because he was prevented from living with her by his incarceration. Nor is the case one against relatives or friends who have sought from motives good or bad to separate husband and wife. The defendants have not tried to get the plaintiff's husband to abandon her, nor proceeded from any malicious feeling against her, nor in fact caused her any pecuniary loss except that incident to the husband's punishment for crime.

If this had been the usual suit against the woman whose act is the basis of the plaintiff's claim, there could have been no recovery. A single instance of adultery, had by a man accustomed to marital infidelities with a common prostitute who serves his purpose on a chance occasion, does not constitute the enticement and alienation essential to a recovery. This action is not an alienation suit, but is like it in respect to the damage claimed. The suit seeks a recovery for the same loss of society and support that is sustained in an alienation case, but with the loss due to an imprisonment for the crime of adultery instead of to an alienation of affection. The immediate cause of the damage sued for was the imprisonment. The more remote cause was the action of the defendants.

It may be said generally that when one is injured by the wrongful act of another, and a third person suffers an indirect and consequential loss because of some contract obligation to the injured party, the loss suffered by such third person does not constitute a cause of action. Connecticut Mut. L. Ins. Co. v. New York, etc. R. Co. 25 Conn. 265, 65 Am. Dec. 571; Rockingham Mut. F. Ins. Co. v. Bosher, 39 Me. 253, 63 Am. Dec. 618; Ashley v. Dixon, [288] 48 N. Y. 430, 8 Am. Rep. 559; Anthony v. Slaid, 11 Metc. (Mass.) 290. It has been held, however, that where one is injured by the wrongful act of another, and a third party is indirectly and consequentially injured, the injury of the latter is actionable, although not directly committed upon him, if it was maliciously and fraudulently intended to affect, and did injuriously affect, him in his contract or business relations. Gregory v. Brooks, 35 Conn. 487, 95 Am. Dec. 278; McNary v. Chamberlain, 34 Conn. 384, 91 Am. Dec. 732.

The above cases deal with injuries indirectly affecting a third person through his contract obligations to the party immediately injured. There are other cases where the consequential injury is suffered by reason of a natural relation to such injured party. The father, being entitled to the services of his children during their minority, may recover for any injury wrongfully inflicted upon his child which causes a loss of service. A husband has a right to recover for any injury wrongfully inflicted upon his wife, physical or otherwise, which deprives him of her services. The wife has no corresponding gen-

eral right. But husband and wife each have the same right to recover for an alienation of the other's affection and the consequent loss of society and support. The right of the wife seems not to have been extended beyond this otherwise than by special enactment.

The position of the wife will appear more fully from a reference to some cases where the loss of the husband's society and support was due to other causes than alienation of affection. In Clark v. Hill, 69 Mo. App. 541, the husband, a strong and healthy man, was made incurably insane by the defendant's repeated threats of violence; and the wife brought suit for the loss of her husband's support, comfort and society, and recovered. The ground stated was that under the statutes then existing a married woman could maintain an action in her own name for this loss. It appears from a case cited in the opinion that the statute referred to specifically included in the rights of action which were a part of the property rights conferred, those growing out of any violation of her personal rights. So the decision may be viewed as a construction of the Missouri statute. No such clause is contained in our statute, and it is not necessary to inquire as to the effect of such a provision upon the common law rule.

[289] Where the wife has been deprived of the support of her husband by reason of his injury through the negligent act of another, she is held to have no separate remedy. In Feneff v. New York Cent. etc. R. Co. 203 Mass. 278, 89 N. E. 436, 133 Am. St. Rep. 291, 24 L.R.A.(N.S.) 1024, decided in 1909, it was said that no case had been referred to or found in which an action for a loss of consortium had been maintained because of a personal injury to the other spouse for which that spouse was entitled to recover full compensation; that persons whose relations to the injured party are purely domestic should not be permitted to share in, nor receive a sum in addition to, the compensation to which the injured person is entitled; that their damages are too remote to be made the subject of an action. It is said in Lush's Husband and Wife, ed. 1910, p. 13, that there is no reported case of an action by a wife, or by husband and wife, for consequential damage to the wife through the negligent act of a defendant causing personal injuries or other damage directly to the husband.

The only cases we know of where the loss of support resulted from the husband's imprisonment for crime were cases which arose under the Civil Damage Acts. Most of these statutes provide that the wife may recover for a loss of the means of support as well as for injuries to person and property. This provision regarding the means of support is held to apply to both the direct and indirect results of the intoxication; and in actions brought under the statutes containing it the wife is allowed to recover for the loss of support which she suffers because of her husband's imprisonment. Beers v. Walhizer, 43 Hun 254, 4 N. Y. St. Rep. 377; Homire v. Halfman, 156 Ind. 470, 60 N. E. 154. In other cases, where the statutory remedy is confined to injuries to person and property, a recovery for the loss of support resulting from the husband's imprisonment is denied. Bradford v. Boley, 167 Pa. St. 506, 31 Atl. 751; See Dennison v. Van Wormer, 107 Mich. 461, 65 N. W. 274.

It is evident that the plaintiff cannot recover the damages claimed in the absence of a statutory authorization, unless upon some special ground. It is true that the loss she suffered resulted from an intentional and malicious act. But the malicious purpose and act of the defendants were directed against the husband and not against the wife. Whatever Nieberg's right against the defendants might have been if their acts had deprived him of [290] his will, he certainly could not have recovered upon the case as presented. The reasoning in the Feneff case, based upon the husband's right of recovery, is not to be taken as implying that the wife may recover where the husband cannot. It is not the deprivation of the husband's support, but the cause of the deprivation, which determines the question of remedy. If the deprivation is due to an alienation of the husband's affection, the wife has a right of action corresponding to that of the husband. If the deprivation is due to causes for which the husband may recover, his recovery is deemed to be partly for the wife's benefit, and the remedy is clearly to the husband and not to the wife. If the conduct of the husband was such that he cannot recover, there can be no recovery by the wife, unless upon grounds directly personal to her. In such a case the damage would be considered immediate and not consequential. It is said in the work above cited that no action will lie at the suit of the wife for loss of consortium, or indeed for any other consequential damages which she may have suffered from an act of trespass to her husband, except possibly when the trespass is committed upon the husband with intent to injure the wife. As this case shows no intent to injure the wife, it is not necessary to pursue the argument further.

As the case stands, the situation is the same as in any case where the head of a dependent family is convicted of crime and sentenced to imprisonment. The rights of all persons entitled to the support of a relative are subject to the right of the State to exact the penalty for his breach of the law. The wife is in a class by herself, but

she is not the only one entitled to support. The obligations of support are both natural and statutory. The family may consist of a wife, or a dependent child, or other relative entitled to support,—as a dependent parent or grandparent, brother or sister, or grandchild,—or of all these together. It would be difficult to place a recovery in this case upon grounds which would not be equally available to other relatives entitled to support.

Our conclusions upon the points considered are such that it is not necessary to characterize the nature of the defendants' acts more fully than was done in opening the discussion; nor to consider the proper application of the rule regarding the motive with which a lawful act is done; nor to inquire as to the [291] rights of private persons with reference to the detection and punishment of crime.

Judgment reversed and judgment for defendants.

NOTE.

Right of Wife to Recover Damages for Imprisonment of Husband.

The reported case, dealing with what appears to be a novel situation, holds that a wife has no cause of action against persons who entice her husband into the commission of a crime, by reason of which he is legally imprisoned and she loses his support and society. While the decisions are not in accord, it appears that by the weight of authority a wife may, even in the absence of a statute, recover for a tortious act resulting in loss of consortium. See the note to Flandermeyer v. Cooper, Ann. Cas. 1913A 983. Though that doctrine has been invoked most frequently in actions for enticement or alienation of affections it has in several cases cited in the note referred to, been applied to wrongs to the husband resulting in a loss of consortium. Thus in Flandermeyer v. Cooper, supra, a recovery by a wife was sustained against a person who by furnishing morphine to the husband eventually produced a condition requiring his confinement in an asylum, the court in that case forcibly combating the position assumed in the reported case that malice against the wife or intent to injure her was necessary. So in Clark v. Hill, 69 Mo. App. 541, it was held that an action could be maintained by a wife for loss of consortium due to her husband's becoming insane by reason of threats of violence.

SNYDER
v.
KULESH ET AL.

Iowa Supreme Court—December 13, 1913.

163 Ia. 748; 144 N. W. 306.

Landlord and Tenant — Rights of Tenant — Use of Wall for Advertising.

Where a lease is of "the lower floor and shed" of a brick building, the lessee has the right to use reasonably the columns or walls of the building for advertising his business, as by painting a sign thereon, etc., unless such use is unusual, unreasonable, or harmful as against the objection by the landlord that he wishes himself to use the columns for advertising his own business in the same building.

[See note at end of this case.]

Appeal from District Court, Pottawattamie county: ARTHUR, Judge.

Action for injunction. Sam Snyder, plaintiff, and H. N. Kulesh et al., defendants. Judgment for plaintiff. Defendants appeal. The facts are stated in the opinion. REVERSED.

A. W. Askwith for appellants.
Saunders & Stuart for appellee.

[749] DEEMER, J.—Plaintiff is the owner of a two-story, brick and stone building on one of the main streets of Council Bluffs, and in the year 1911 leased the defendants the first floor and basement of the building for the term of two years, with an option on their part to extend the term three years after the expiration of the one created by the lease. The premises were rented for a pawnshop, a jewelry, and firearms business. The building fronts on what is known as Broadway street, in Council Bluffs, and the entrance to the front room is near the middle of the building. On either side of the entrance there are plate glass windows, and on the outer side of each of the windows are stone columns, each from fourteen to eighteen inches wide, made to support the upper story and to hold the front in place. On the west side of the west column is a stairway leading to the upper story, and this stairway is a common one used not only for entrance to the second story of plaintiff's building, but also to the second story of an adjoining one; and one-half of this stairway is on plaintiff's property, the column on that side of the building being wholly on plaintiff's lot. Just before the commencement of this action, defendants were about to paint a sign, adver-

tising their business, upon the west column, above described, and had employed a sign painter to paint one, some sixteen or eighteen inches square, when plaintiff commenced this action to [750] enjoin them from so doing. He claimed that defendants had no right to use the outside of his building, and secured a temporary injunction restraining them from painting any sign on the front of the building. The case was not presented to the lower court on the theory that the painting of the sign upon the column would greatly disfigure and damage the same, although in a reply plaintiff alleged that the use of black paint upon the stone column would mar the same, and further pleaded that defendants were proposing to erect or paint their sign for the purpose of injuring him, he being a competitor of theirs in business; and that he wished to use the column as a place for painting a sign of his own.

We are not advised as to the reason why the trial court entered the decree it did; for it certainly could not have been upon the theory that the painting of the sign, which defendants were proposing to put upon the column, would in any way injure, mar, or deface it. The record shows that this paint could easily have been removed from the stone at any time, without leaving any stains thereon. So that there is nothing upon which to base the claim of defacement. Plaintiff, before commencing the suit, said to several people that he rented the inside and not the outside of the building to the defendants, and that they had no right to put a sign upon any of the walls or columns. This may have been the basis of the decree, but it has no support either in fact or in law. The lease covered "the lower floor and shed of the brick building and also the basement," and it was without any reservations or covenants which either expressly or impliedly prohibited the use of the walls or columns of the building in any manner not harmful to them or injurious to the building as a whole. Defendants had the right to reasonably use these columns or the walls of the building, if they were exposed, for the purpose of advertising their business, and should not be restrained from such use, unless it was unusual, unreasonable, or harmful. Lowell v. Strahan, 145 Mass. 1, 12 N. E. 401, 1 Am. St. Rep. 422; Forbes v. Gorham, 159 Mich. 291, [751] 123 N. W. 1089, 25 L.R.A.(N.S.) 318, 134 Am. St. Rep. 718. Indeed, this proposition seems to be so fundamental that no authority need be cited in support thereof.

The lease of the lower floor, which, in the absence of reservation, covers the walls and supporting columns, gave the tenant the right to a reasonable use thereof for the purpose of advertising his business, so long as he did not permanently mar or deface the building; and, conceding arguendo that the landlord might use part of the space for the purpose of notifying his customers as to where he might be found, it does not follow that in so doing he might deprive his tenant of the reasonable use of the exposed walls or columns to advertise his own business. The sign which defendants proposed to have painted would not interfere with the landlord's use of it for any legitimate and proper purpose, and if it did we are not prepared to say on this record that plaintiff had a prior and superior right to the use of this column for the purpose of advertising his business. There was a sign over the entrance to the building notifying the public that plaintiff was in business in that building and the character thereof, and, while there is some testimony that defendants were not particular in directing customers to him, this did not deprive them of their right to a reasonable use of the building under their lease.

Plaintiff was not, under the showing made, entitled to a permanent injunction. On the contrary, his petition should have been dismissed.

The decree will therefore be and it is reversed, and the cause remanded.

Reversed and remanded.

Weaver, C. J., and Gaynor and Withrow, JJ., concur.

NOTE.

Right of Tenant of Building to Use of Front Wall for Advertising Purposes.

The earlier cases which discuss the right of a tenant to use the front wall of the leased building for advertising purposes are collected in the note to Broads v. Mead, Ann. Cas 1912C 1125. It is intended in the present note to review the more recent decisions on the subject.

The rule laid down in the earlier cases that a tenant, irrespective of any provision to that effect in his lease, has a right to make reasonable use of the front wall or walls of the leased building for advertising purposes, finds support in a few late cases. Joseph v. London, County Council, 111 L. T. N. S. (Eng.) 276, [1914] W. N. 204, 30 Times L. Rep. 508, 58 Sol. J. 579; Di Marco v. Isaac, 74 Misc. 459, 132 N. Y. S. 363. And see the reported case. Thus in Joseph v. London County Council, supra, it appeared that a lease contained the following covenant: "The lessee will not during the said term without the previous written license of the lessors, their successors or assigns, cut or maim any of the principal walls or timbers of the buildings for the time being on the ground hereby demised, commit or permit any waste or damage to

the said buildings or to the floors or timbers thereof, or make or permit to be made any alteration in the elevation of the buildings or in the architectural decoration thereof, or permit any steam engine or furnace or any additional building, chimney, or flue to be erected on the said demised premises, or use, exercise, carry on, or permit to be used, exercised, or carried on in any part of the said demised premises any dangerous, noxious, noisome, or offensive trade or business whatsoever, or any trade or business whereby the insurance against fire may be vitiated or lessened in value." It was held that the words of the covenant referred to an alteration in the fabric of the premises, and therefore the lease was not broken by the erection by the tenant of an electric light advertisement which was supported by an iron frame work hung by steel bands affixed to the ornamental stonework in the front of the premises, all of which could be removed at any time and would leave the building the same as before.

In Goldfoot v. Walch [1914] 1 Ch. (Eng.) 213, 83 L. J. Ch. 360, 109 L. T. N. S. 820 [1913] W. N. 357, a tenant of the first and second floors of a business building, who under his lease had a right to exhibit on the premises certain advertisements, was granted a mandatory injunction to compel his landlord to remove from the wall of the second story of the building two large advertising boards.

In Alfre Peats Co. v. Bradley, 149 N. Y. S. 613, wherein a tenant sought to enjoin his landlord from erecting an electric advertising sign on that part of the common roof of a row of stores below which was the shop that had been leased to the plaintiff, it was said by the court that there was no reason or principle for treating the roof of such a building as the one in question differently than the outer walls, and that a tenant had a right to use the walls and roof for advertising purposes provided that in so doing he did not commit waste or violate the law, and he was therefore entitled to the relief asked for.

In Just v. Stewart, 23 Manitoba 517, 12 Dominion L. Rep. 65, 24 West L. Rep. 433, it appeared that a tenant had occupied premises subsequently leased to him and had, during such occupation, erected a sign on the wall of the building. The lease which he later signed prohibited the erection of signs of this kind. The landlord contended that the lease had been broken and a forfeiture incurred but the court held that as the sign was on the structure at the time the lease was signed and as the landlord knew it was there and had not objected to it there was not such a violation of the lease as would result in a forfeiture.

The principle underlying the foregoing decisions also finds support in Hope v. Cowan [1913] 2 Ch. (Eng.) 312, 82 L. J. Ch. 439, 108 L. T. N. S. 945, 57 Sol. J. 559, 29 Times L. Rep. 520, which was an action by a landlord to restrain a tenant of an office room on the first floor of a building from placing on his office window sills flower boxes which rested on brackets screwed into the lower part of the window frames. The court dismissed the action, and said: "Now, after the arguments I have heard, it appears to me that speaking generally in the case of a demise of one floor of a building, or of a room on any floor which is bounded or enclosed on one or more sides by an outside wall, unless the outside wall be excepted or reserved or there be some context which leads to a contrary conclusion, prima facie the premises demised comprise the whole; that is to say, both sides of the outside wall. This is so prima facie, and as far as I am aware the contrary has never been suggested in reference to a ground floor nor in reference to a top floor; but it has been suggested—certainly it was argued—in this case with reference to a room on the middle floor. I do not see what difference the particular floor makes. The demise of a room must necessarily include, unless it be excepted, some part of the wall which bounds it."

However, the right of the tenant cannot be so exercised as to cause material injury to the building. Hayman v. Rownd, 82 Neb. 598, 118 N. W. 328, 45 L.R.A.(N.S.) 623. In that case it appeared that a tenant for years was about to drive wooden plugs into a brick wall of the leased premises to which a sign was to be attached, and that this would do considerable damage to a wall of the kind in question. The landlord brought an action to restrain the tenant from carrying out his plans and the court ordered a restraining order to be issued as prayed for.

COST ET AL.

v.

SHINAULT ET AL.

Arkansas Supreme Court—April 27, 1914.

113 Ark. 19; 166 S. W. 740.

Appeal — Review of Facts.

A finding not contrary to the preponderance of the evidence will not be disturbed on appeal.

Schools — Use of School Building — Lodge Meetings.

Kirby's Dig. § 7643, authorizing school directors to permit a private school to be taught in the schoolhouse while not occupied by a public school, unless otherwise directed by the voters of the district, does not exclude other uses of school buildings, where the same do not interfere with the schools nor injure the buildings, and does not render invalid a contract authorizing a local lodge of a secret society to use a school building for a lodgeroom; the use not interfering with the school nor injuring the building.

[See note at end of this case.]

Same.

Kirby's Dig. § 7614, conferring on school directors the power to control the school affairs with the custody of the schoolhouses and grounds, and preserve the same, vests in the directors discretion in arrangements for the interest of the district and they may, with the approval of the voters of the district, permit a secret society to use the school building as a lodgeroom, where such use does not interfere with the school nor injure the building, but is advantageous to the district in view of its financial condition.

[See note at end of this case.]

Appeal from Chancery Court, Lawrence county: HUMPHREIS, Chancellor.

Action for injunction. A. B. Cost et al., plaintiffs, and J. F. Shinault et al., defendants. Judgment for defendants. Plaintiffs appeal. The facts are stated in the opinion. AFFIRMED.

W. A. Cunningham for appellants.
W. E. Beloate for appellees.

[20] SMITH, J.—Appellants were plaintiffs below, and alleged the following facts in their complaint: That they were citizens and taxpayers of School District No. 64 of Lawrence County, Arkansas, and interested in the educational interests of that district, and that appellees, who were defendants below, were school directors of said district, and as such had control of the schoolhouse and grounds, and that school was being taught in the school building, all of which was needed for the accommodation of the children attending school. That the said directors, notwithstanding that fact, are about to lease a part of said building to the Independent Order of Odd Fellows, as a lodge hall, and are about to cause said building to be remodeled without right or authority from the voters of said district, by causing the stairway to be moved and other changes to be made, and that if such changes are made it will entirely unfit the building for the use for which it was originally designed, and will make the same totally unfit for use as a school building.

That the use of said building as a lodge room is entirely inconsistent with its use as a school, and will interfere with the use and enjoyment of the other rooms of the building as schoolrooms, and will cause great and irreparable injury to the public and interfere with the educational interests of said district.

Plaintiffs prayed that said directors and all other persons be forever enjoined from changing or altering [21] said building in any way, without first submitting the plans thereof to the voters of said district, and that said directors be enjoined from leasing any part of the building to any person, for any purpose whatever, except for the conduct of schools.

The answer denied that the directors were about to make any change in the building, which was detrimental to it, or any contract or lease with reference to the use of the building, which would in any way interfere with the school being taught therein.

There was offered in evidence a contract dated December 27, 1911, made between representatives of the local Odd Fellows Lodge and the directors of the district, under the terms of which for the consideration of $50, to be paid on or before October 1, 1912, the directors rented to said lodge the upper part, or second story, of the school building for the use of said lodge, for a term of one year from January 1, 1912, with an option to renew said lease for a period of five years. The school district, however, reserved the right to use the building for school exhibitions and entertainments of its own.

At the annual school election in May, 1912, the directors caused the question of the ratification of this lease to be submitted to the electors voting at that election, and it was ratified by a vote of nineteen for, and one against.

It appears that the revenues of the district had been insufficient to provide the necessary funds for school purposes, and subscription lists had been circulated upon which private contributions were asked for school purposes. The evidence was conflicting as to the interference with the school on account of this lease, and of the damage to the building in adapting it to the uses of the Odd Fellows. But the court found the fact to be that no damage was occasioned to the said school building by reason of the changes made in the building by the Odd Fellows Lodge, and that no interference had resulted, or would result, to the school being taught, or that would thereafter be taught in said building, by reason of the upper story thereof being used as a lodgeroom, and that the [22] plaintiffs' complaint should be dismissed for want of equity.

We think this finding was not contrary to the preponderance of the evidence.

Appellants cite us to section 7643, of Kirby's Digest, which provides that directors may permit a private school to be taught in the district schoolhouse during such time as the said house is not occupied by a public school, unless they be otherwise directed by a majority of the legal voters of the district, and contend that the express granting of power for this purpose is in effect a denial of power to let it for any other purpose. But we do not agree with that contention. Section 7614, of Kirby's Digest, provides that the directors shall have charge of the school affairs and the school educational interests of their district, and shall have the care and custody of the schoolhouses and grounds and property of the district, and shall carefully preserve same, and gives to them authority to purchase or lease a schoolhouse site and to rent, purchase or build a schoolhouse with the funds of the district. And this section vests them with the duty and discretion of making the most advantageous arrangements possible, within the powers conferred, for the interest of the district. In the case of Boyd v. Mitchell, 69 Ark. 202, 62 S. W. 61, this section was construed to give school directors the right to prohibit the use of a school building for religious worship, where it was shown the building and contents were being injured, notwithstanding the land on which the school building was situated was conveyed to trustees for the purpose of religious worship, and was by them conveyed to the school directors for the same purpose, and the building was erected in part by subscriptions, with the understanding that it was to be so used under the charge of the directors. The court pretermitted any discussion of the power of the directors to make any arrangement to build a house to be used as a schoolhouse, and also as a church or as a place for religious [23] worship, as it found, under the facts in that case, that the schoolhouse was, when built, to be under the control of the directors of the school district and the property of said district, and after so finding the facts to be, it was there said: "If it was to be under their control, in contemplation of law it was within their province, and was, perhaps, in strictness, their duty, not to allow it used for purposes other than school purposes. It seems that this is apparent. They have no power beyond those expressly granted or arising by necessary implication." The court found in that case that the schoolhouse was being damaged by the use which was being made of the building, and that the directors in the exercise of their power of control, and their duty to preserve the property of the district, had the right to prohibit the use of the schoolhouse for religious purposes, and that this was true notwithstanding the individual contributions which had been made, and which were used in erecting the schoolhouse, upon the understanding that the house was to be used as a schoolhouse and for religious worship.

So here, we should not hesitate to hold that the contract was void, if its performance interfered with the school. But the chancellor has expressly found that such was not the case. The electors of that district, who were the patrons of that school, voted for the ratification of the contract, and in their depositions made it appear, by a preponderance of the evidence, that the schools were not being interfered with nor the building damaged. Upon the contrary, the revenues of the district were being supplemented by the annual rental in the sum of $50, and under the circumstances we think the contract was not an unlawful one, nor void as being against public policy. Of course, the district could not divert its funds for the purpose of building or providing lodge rooms for any association or society, however benevolent its purposes might be, neither would the directors have the right to make any contract which authorized the use of the school property in a manner which interfered with the schools. But as has been stated, that was not done in this case.

[24] It is a matter of common knowledge that many *quasi*-public uses are made of the rural school buildings of the State. We do not believe it was the purpose of the Legislature in granting express authority for private schools to be taught in the public school building, to exclude other uses where such uses do not interfere with the schools nor injure the buildings.

We think the decree of the chancellor is correct, and it is affirmed.

NOTE.

Power of School Authorities to Permit Use of School Building for Other than Religious or Public School Purposes.

It is of course obvious that a school building built and maintained by public funds cannot be put to a use inconsistent with the welfare of the school (Sugar v. Monroe, 108 La. 677, 32 So. 961, 59 L.R.A. 723, theater) unless the use of the building for school purposes has been discontinued. Gottlieb Knabe Co. v. Macklin, 109 Md. 429, 16 Ann. Cas. 1092, 71 Atl. 949, 31 L.R.A.(N.S.) 580. But aside from the question of the use of a school building for religious purposes (see the note to Reichwald v. Catholic Bishop, Ann. Cas. 1914B 301) it is held in several jurisdictions that school authorities may permit the use

of a school building for an occasional or incidental purpose not inconsistent with the welfare of the school. Lagow v. Hill, 238 Ill. 428, 87 N. E. 369, *affirming* 143 Ill. App. 523 (lodge); Royse Independent School Dist. v. Reinhardt (Tex.) 159 S. W. 1010 (campus leased for baseball ground during school vacation). And see the reported case. See also State v. Kessler, 136 Mo. App. 236, 117 S. W. 85 (wherein it was held that an order prohibiting the use of a school building for certain entertainments was illegal because made at a meeting held outside the district); Rhodes v. Maret, 102 Tex. 519, 119 S. W. 1139 (building constructed by public subscription for joint use as lodgeroom and public school). In Sugar v. Monroe, 108 La. 677, 32 So. 961, 59 L.R.A. 723, the court said: "We do not wish to be understood as going to the extreme of holding that the city authorities may not make such casual and incidental use of the building in question, not inconsistent with, or prejudicial to, the main purpose for which it was erected, as they may deem advisable, nor as holding that changed conditions in the future may not justify them in devoting it to some other purpose. The question here presented is, whether they have the legal right, at this time, to make use of it, or any part of it, for the purpose of maintaining a theater therein, or of giving theatrical performances, as a business, and this question we decide in the negative." In Greenbanks v. Boutwell, 43 Vt. 207, it was said: "In the present case, if the hall was designed to accomodate the schools and the inhabitants of the district for the purpose of examinations and exhibitions and other such things as are proper and customary in connection with district schools, and it was adopted in that view, the purpose was legitimate and within the province of the district to carry out by making the hall. On the other hand, if the view and purpose were not such, but the design was, to use the occasion of building a schoolhouse as a pretext for making a public hall for town meetings, religious meetings, lectures, concerts, dances, picnics, and the other uses to which such halls are ordinarily put, then the district was doing what it had no lawful authority to do. If again, the hall was designed and adapted to serve the interests of the district in respect to its schools, the making of the hall would not be rendered illegal if, when not wanted for school purposes the district should permit it to be used for other purposes, having no relation to the schools. While it would not be lawful for the district to make lofts, or rooms, for the mere purpose of realizing profit by renting for pay, it would not be unlawful for the district to receive pay and profit for the use of rooms legitimately made for school purposes, when not in use for those purposes, and when they may be used for other purposes without detriment to the district in respect to its schools. We can readily conceive that the prospect of being able to derive income from such outside use of a hall, like the one in question, which may be really needed for the occasional accommodation of the schools, may properly operate as an influence upon the district in forming the determination to build one. While, but for such prospect, the district might feel too poor to make the outlay, still, with such prospect, it may regard it judicious to do so, and thus provide a desirable appendage to the school house for the service of the interests of the schools, which otherwise the district would feel compelled to forego." In Sheldon v. Centre School Dist. 25 Conn. 224, it was held that the fact that the vote for the construction of a school building authorized its use for lectures and other incidental purposes did not invalidate the vote or warrant an injunction against the collection of the tax thereby levied.

The permitting of the use of a school building for a private school or private instruction has been sustained in several cases. Barnes's Appeal, 6 R. I. 591; Chaplin v. Hill, 24 Vt. 528; Russell v. Dodds, 37 Vt. 497. And see Townsend v. Hagan, 35 Ia. 194. Thus in Barnes's Appeal, supra, holding that the school authorities could permit the use of a school building for private instruction in music the court said: "Instruction in this art, is quite commonly furnished in our public schools, to enable the children to join in an exercise always agreeable to them, and to fit them to participate in one of the ordinary acts of public devotion. The use of the school house, when not needed for the regular course, that the like instruction may be imparted to the scholars and others of the district, so that the knowledge and taste of all in this excellent accomplishment may be promoted, is quite in accordance with the uses to which such property is appropriated by law; and the last objection which a friend of public education should make to such a use is, that the people of the district are so desirous of such instruction, that they are willing to pay for it themselves." However, in Weir v. Day, 35 Ohio St. 143, it was held that the use of a school building for private instruction cannot be permitted if it is inconsistent with the public use.

It has been held in *Indiana* that the use of a school building for township meetings may be permitted. Harmony Tp. v. Osborne, 9 Ind. 458. However, a subsequent statute in that jurisdiction provides that a vote of the electors of the school district is essential to authorize a use for other than school purposes. Hurd v. Walters, 48 Ind. 148.

In a few jurisdictions it is held that, even under a statute authorizing the school authorities to permit the use of a school building for such purposes as they deem proper, they cannot permit its use for any private purpose. Spencer v. Joint School Dist. 15 Kan. 259, 22 Am. Rep. 268; Bender v. Streabich, 182 Pa. St. 251, 37 Atl. 853; Lewis v. Bateman, 26 Utah 434, 73 Pac. 509; School Dist. v. Arnold, 21 Wis. 657; Tyre v. Krug, 159 Wis. 39, 149 N. W. 718, L.R.A.1915C 624. In Spencer v. Joint School Dist. supra, it was said: "The question as it comes before us may fairly be thus stated: May the majority of the tax-payers and electors in a school district, for other than school purposes, use or permit the use of the schoolhouse built with funds raised by taxation? The question is one which in view of the times, and the attacks made in so many places, and from so many directions, upon our public school system, justifies, as it has received at our hands, most serious consideration. We are fully aware of the fact that all over the state the schoolhouse is, by general consent, or at least without active opposition, used for a variety of purposes other than the holding of public schools. Sabbath schools of separate religious denominations, church assemblies, sometimes political meetings, social gatherings, etc., are held there. Now, none of these can be strictly considered among the purposes for which a public building can be erected, or taxation employed. But it often happens, particularly in our newer settlements, that there is no other public building than the schoolhouse—no place so convenient as that. The use for these purposes works little damage. It is used by the inhabitants of the district whose money has built it, and used for their profit or pleasure. Shall it be said that this is illegal? Doubtless, if all in the district are content, no question will ever be raised; and, on the other hand, if a majority object, the use for such purposes will cease. It is only when the majority favor, and a minority object, that the courts are appealed to. That minority may be but a single individual,—may be influenced by spite or revenge, or any other unworthy motive; but, whatever the motives which prompt the litigation, the decision must be in harmony with the absolute right of all. It seems to us that upon well-settled principles the question must be answered in the negative. The public schoolhouse cannot be used for any private purposes. The argument is a short one. Taxation is invoked to raise funds to erect the building; but taxation is illegitimate to provide for any private purpose. Taxation will not lie to raise funds to build a place for a religious society, a political society, or a social club. What cannot be done directly cannot be done indirectly. As you may not levy taxes to build a church, no more may you levy taxes to build a schoolhouse and then lease it for a church. Nor is it an answer to say that its use for school purposes is not interfered with, and that the use for the other purposes works little, perhaps no immediately perceptible, injury to the building, and results in the receipt of immediate pecuniary benefit. The extent of the injury or benefit is something into which courts will not inquire. The character of the use is the only legitimate question. A municipal bond of five cents in aid of a purely private purpose is as void as one of a thousand dollars; and that, too, though the actual benefit to the municipality far exceeds the amount of the bond. The use of a public schoolhouse for a single religious or political gathering is legally as unauthorized as its constant use therefor. True, a court of equity would not interfere by injunction after a single use, and where there was no likelihood of a repetition of the wrong, for it is only apprehended wrongs that equity will enjoin. Here the unauthorized use is charged as a frequent fact, and one likely to occur hereafter." So in Bender v. Streabich, 182 Pa. St. 251, 37 Atl. 853, it was said: "The use of school buildings by the community at large for public meetings for the discussion of subjects of general interest may be said to be in the line of their use for educational purposes, but it is not the use intended by law. The public school system is for the instruction of pupils who may attend the schools, and not for the instruction or entertainment of other persons. The school directors are trustees of the school property for that use, and they may not against objection authorize or permit its use for other purposes. If the school buildings may be used for meetings for the convenience, pleasure or instruction of the general public, all other school property may with equal propriety be so used, and it would be but a step further to apply a part of the school funds to the same use. This view of the law does not forbid the use of the buildings for any purpose directly related to the instruction of the pupils of the schools, and it does not exclude their use for lectures or debates which are made a part of the course of instruction."

THOMAS CUSACK COMPANY
v.
CITY OF CHICAGO ET AL.

Illinois Supreme Court—December 16, 1914.

267 Ill. 344; 108 N. E. 340.

Municipal Corporations — Regulation of Bill Boards.

A city has power to enact an ordinance requiring the consent of a majority of the residence owners to the erection of a billboard in a residence block, under Hurd's Civ. St. 1913, c. 24, § 696, giving cities power to regulate the location of billboards, etc., upon vacant property and upon buildings.

[See note at end of this case.]

Same.

On a question of the reasonableness of a city ordinance requiring the consent of the majority of the residence owners in accordance with frontage, evidence tending to show that the erection of billboards is productive of fire, and that residence districts are not so well protected as the business district, is admissible.

[See note at end of this case.].

Same.

On the question of the reasonableness of a city ordinance requiring the consent of residence owners as a condition to the erection of a billboard in a residence block, evidence that such boards offered a protection to disorderly and lawbreaking persons, and that residence districts were not so well policed as other districts, is admissible.

[See note at end of this case.]

Same.

An ordinance requiring the consent of residence owners to the erection of a billboard in a residence block is not discriminatory in that there is no difference between fences, buildings, and billboards.

[See note at end of this case.]

Same.

An ordinance requiring the consent of the majority of residence owners according to frontage to the erection of a billboard in a residence block is not unreasonable in view of the liability of fire, the liability of a use by disorderly persons for unlawful and immoral purposes, and the difference between fire and police protection in residence districts and other districts.

[See note at end of this case.]

Same.

An ordinance requiring the consent of the majority of residence owners according to frontage to the erection of a billboard in a residence block is not unreasonable because it requires the consent of a majority of the owners of property on both sides of the street where the billboard is to be erected.

[See note at end of this case.]

Appeal from Superior Court, Cook county: FOELL, Judge.

Action for injunction. Thomas Cusack Company, plaintiff, and City of Chicago, et al., defendants. Judgment for plaintiff. Defendants appeal. The facts are stated in the opinion. REVERSED.

John W. Beckwith, William H. Sexton and *Loring R. Hoover* for appellants.

John S. Hummer for appellee.

[345] VICKERS, J.—The Thomas Cusack Company, a corporation, filed a bill in equity in the superior court of Cook county against the city of Chicago, the mayor of the city, and other officials, to restrain the enforcement of an ordinance regulating the erection and maintenance of bill-boards in residence blocks in said city. The bill alleges that the complainant is engaged in the business of outdoor advertising in Chicago and elsewhere, and that it maintains bill-boards on private property in residence blocks without having complied with an ordinance of the city of Chicago passed and in force December 5, 1910. The section of the ordinance the validity of which is involved is as follows:

"707. *Frontage consents required.*—It shall be unlawful for any person, firm or corporation to erect or construct any bill-board or sign-board in any block on any public street in which one-half of the buildings on both sides of the street are used exclusively for residence purposes, without first obtaining the consent, in writing, of the owners or duly authorized agents of said owners owning a majority of the frontage of the property, on both sides of the street, in the block in which such bill-board or sign-board is to be erected, constructed or located. Such written [346] consents shall be filed with the commissioner of buildings before a permit shall be issued for the erection, construction or location of such bill-board or sign-board."

The bill alleges that a large number of bill-boards have been erected since the passage of said ordinance without complying with its provisions in regard to obtaining the consent of the majority of the property owners fronting on both sides of the street in the blocks in which such bill-boards have been erected and maintained; that the occupation of lots with these bill-boards is under leases made with the owners of the lots, and that the complainant has made contracts with its customers for the maintenance of said boards and the display of advertisements thereon. The bill alleges that the section of the ordinance above set out is invalid for the reason that it is discriminatory and unconstitutional, in that it deprives property owners of their property without due process of law, in violation of the constitutions of the United States and of the State of Illinois. The bill also alleges that the bill-boards erected in violation

of said ordinance do not in any way interfere with the public health, safety, welfare or comfort, and alleges that the city of Chicago has no power to pass said ordinance, and that if said city has power to pass any ordinance on the subject of bill-boards, the one in question is void for unreasonableness. The prayer is for a perpetual injunction against the city and its officials enjoining them from the enforcement of said ordinance.

The defendants below answered the bill, in which the alleged invalidity is denied. The answer alleges that the ordinance was regularly passed by the city council pursuant to expressed legislative authority, and that it is a proper exercise of the police power of the city of Chicago and the State of Illinois. The answer sets up that bill-boards are dangerous to the public health, safety, morals, welfare and comfort in that they afford protection to disorderly persons, who conceal themselves behind them; that the space behind [347] bill-boards is used in such manner as to create nuisances by reason of the shelter and protection afforded by said bill-boards; that the maintenance of such bill-boards causes the accumulation of inflammable material, thereby increasing the danger of fires. The answer denies that the ordinance is invalid for any reason, and particularly that it is not invalid because discriminatory, oppressive or unreasonable.

The cause was heard upon evidence produced in open court, and a decree was entered in accordance with the prayer of the bill, perpetually enjoining the enforcement of the ordinance. The defendants below have prosecuted an appeal to this court.

The sole question involved for our consideration is the validity of section 707 of the municipal code of Chicago, which is quoted above. The contentions in support of the decree are, first, that the municipality had no power to pass the ordinance in question; and second, conceding that the city has the power to pass proper regulatory ordinances in regard to the erection and maintenance of bill-boards, the ordinance here involved is void because it is not a proper exercise of such power, in that it is oppressive and unreasonable.

This court held in Chicago v. Gunning System, 214 Ill. 628, 2 Ann. Cas. 892, 73 N. E. 1035, 70 L.R.A. 230, that under paragraph 66 of section 1 of article 5 of the Cities and Villages act, relating to the police power, and under paragraph 75 of said section, relating to nuisances, a city has power to enact and enforce reasonable regulations respecting bill-boards within the corporate limits, whether upon public streets or private property. On page 639 this court summed up its view upon this question, as follows: "We think it clear that either under paragraph 66 or 75, supra, full power and authority are conferred upon cities, towns and villages to regulate the construction and use of bill-boards within their corporate limits, provided the regulation is not unreasonable. Moreover, paragraph 78 of section 1, article 5, confers upon cities and villages [348] the right 'to do all acts, make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease.' No argument need be advanced that the structures described in the bill before us may become a menace to the safety of the public, and hence the subject of control and regulation. They may be erected in such a manner as to be dangerous to the public by falling or being blown down, or constructed of such materials and dimensions as to be dangerous, or placed upon buildings or other structures in such a manner as to endanger the life and limb of the citizen, or erected within the fire limits in such proximity to buildings as to increase the danger of loss by fire, or so as to obstruct the view of railroad crossings and thus endanger life by accident, or have printed or displayed upon them obscene characters tending to demoralize and injure the public morals. If boards are erected in violation of any of these public rights or interests, and of others which might be mentioned, there is ample power within the statute to regulate them, provided such regulations are reasonably necessary for the protection of the public health, morals or safety. Nor will the mere fact that such structures are placed upon private property, and not on the public streets, protect those owning or using them against such reasonable regulations."

While the particular ordinance that was involved in the Gunning System case was held invalid, the decision did not rest on the want of power in the municipality to pass reasonable ordinances upon that subject. To remove any doubt as to the existence of the power, the legislature in 1912 passed an act providing "that the city council in cities and the president and board of trustees in villages and incorporated towns shall have the power to license street advertising by means of bill-boards, sign-boards and signs, and to regulate the character and control the location of such bill-boards, sign-boards and signs upon vacant property and upon buildings." (Hurd's Stat. 1913, chap. 24, par. 696.) [349] Whether this statute enlarges the powers which existed, as declared by this court in the Gunning System case, or not, it is not necessary to inquire. It is at least a clear legislative declaration which unmistakably manifests an intention that the subject of bill-boards and bill-board advertising shall be subject to municipal regulation.

The existence of the power to legislate upon the subject of bill-boards being estab-

lished, the next inquiry is whether the ordinance in question is a reasonable exercise of such power. Upon the question of the reasonableness of the ordinance such evidence was introduced by the appellants showing the detrimental results that have followed the erection and maintenance of bill-boards in the residence districts. It was shown by the testimony that fires had been started from the accumulation of combustible material that had lodged against the base of bill-boards. As bearing upon this question and as affording a justification for requiring frontage consents in residence districts, evidence was offered to show that the residence territory of the city is not so well protected with fire extinguishing apparatus as is the business district. This evidence was objected to and the court sustained the objection. In this the court erred. When the reasonableness of an ordinance is under investigation as a question of fact, any pertinent matter which may reasonably be supposed to have influenced the enactment of the ordinance would seem to be proper evidence. If, as a matter of fact, the erection of bill-boards would increase the hazards of fire in residence districts, that fact, together with any other attending circumstance which would show that fires in residential districts would be more disastrous to life and property and that their extinguishment would be attended with greater difficulties than in other districts, would have a direct bearing upon the reasonableness of the requirement for frontage consent. Welch v. Swasey, 214 U. S. 91, 29 S. Ct. 567, 53 U. S. (L. ed.) 923.

[350] Appellants also offered to show that bill-boards offered a protection to disorderly and law-breaking persons and the residence districts are not afforded as full police protection as other districts in the city of Chicago, and the court refused to hear this evidence, and in this the court also erred. It did, however, appear from the testimony that women and children are on the streets, unaccompanied, in larger numbers and more frequently in residence districts than in other places, and that the crimes against women and children the most frequent are indecent exposure and offenses against the person. It is shown by the testimony that the two elements contributing to crime in cities are, in the order of their importance, first, absence of police; and second, darkness. It was shown by appellee that in some instances lights were maintained upon the front surface of its bill-boards, but in answer to this it was shown that the space behind the boards remained dark, and that the rear was even darker than it would have been if there were no lights at all. It was shown that nuisances were permitted to exist in the rear of surface bill-boards, and physicians testified that deposits found behind bill-boards breed disease germs, which may be carried and scattered in the dust by the wind and by flies and other insects. It was shown that dissolute and immoral practices were carried on under the cover and shield furnished by these bill-boards. The answer made to all this is, that any other structure or building which would afford a like screen from view would produce similar results, and herein is found the basis for the contention that the ordinance is discriminatory; but we are of the opinion that the surface bill-board is unlike, in several particulars, structures that are erected for other purposes, such as fences, barns and other out-buildings that may be used in connection with a residence. This argument was made in the case of St. Louis Gunning Advertising Co. v. St. Louis, 235 Mo. 99, 137 S. W. 929, and we quote the answer of that court to this argument, as follows: "While that is [351] possible yet it is not probable. Nor does the erection and maintenance of a building or a fence along the lines of private property bordering upon public streets have the natural tendency to create any such nuisance as those mentioned. Buildings and fences are erected for the purpose of enclosing grounds and excluding therefrom strangers and trespassers, and common experience teaches us that they are effectual for that purpose, which is inconsistent with the idea that they promote and harbor nuisances, as bill-boards do, which rarely, if ever, enclose the grounds upon which they stand. That is not the purpose of their erection. Generally they are built along only one end or side of a lot or plot of ground, but occasionally upon two sides, and in rare instances upon three, but I have never seen or heard of a lot being enclosed upon all four sides by bill-boards. The end of the lot fronting upon an alley is almost invariably left open, for the simple reason that the alley is not conspicuous in the public eye, and for that reason it would be useless to display advertisements at such places where they could not be seen."

Under the state of facts shown by the evidence here, we cannot agree with the court below that the ordinance in question is void for unreasonableness. Before the court will be justified in declaring the ordinance invalid the unreasonableness should be made to clearly appear. It should be manifest that the discretion reposed in municipal authorities has been abused in the exercise of the power conferred. (Chicago, etc. R. Co. v. Carlinville, 200 Ill. 314, 93 Am. St. Rep. 190, 60 L.R.A. 391, and cases there cited.) The case of Chicago v. Gunning System, supra, is clearly distinguishable from the case at bar. The ordinance there held unreasonable and void was general in its terms and prescribed restrictive conditions in regard to

the erection and maintenance of bill-boards, and made no exception whether the bill-boards were in a thickly settled part of the city or in an open block or field. Mr. Justice Wilkin said [352] on this point in the Gunning System case: "It must be apparent to all reasonable minds that provisions which are necessary in one of such cases would be wholly unnecessary and unreasonable in others, and that a provision might be a reasonable police regulation in the one case and in one locality which would be wholly unreasonable under other circumstances in another locality. This ordinance is, however, without qualification or limitation applicable to signs and bill-boards alike in all portions of the great city of Chicago, applicable alike to every portion of its extended territory. We do not hold that this ordinance is so unreasonable as to be void if it were limited to particular districts of the city." In Haller Sign Works v. Physical Culture Training School, 249 Ill. 436, 94 N. E. 920, 34 L.R.A. (N.S.) 998, we held a statute which prohibited the erection of any character of signs for advertising purposes within five hundred feet of any public park or boulevard, illegal and void, for the reason that it did not tend to promote the safety, health, comfort or general welfare of the public but was manifestly passed solely from æsthetic considerations. The ordinance here under consideration is not open to the objections that were apparent upon the fact of the statute in the Haller Sign Works case, and the evidence in the record clearly distinguishes this case from the Gunning System case.

The ordinance is not unreasonable or oppressive because it requires the consent of a majority of the owners of property, within certain limits, on both sides of the street where such bill-boards are to be erected. In respect to occupations or structures the location and maintenance of which are subject to regulation under the police power of the municipality, a requirement of frontage consents of property owners, within reasonable limits, is a proper mode of exercising the power of regulation vested in the municipality. Ordinances of this general character have been upheld in regard to livery stables in Chicago v. Stratton, 162 Ill. 494, 44 N. E. 853, 53 Am. St. Rep. 325, 35 L.R.A. 84; in regard to dram-shops in Swift v. People, 162 [353] Ill. 534, 44 N. E. 528, 33 L.R.A. 470, and in respect to garages in the late case of People v. Ericsson, 263 Ill. 368, Ann. Cas. 1915C 183, 105 N. E. 315, L.R.A.1915D 607.

It follows from the views herein expressed that the court erred in entering a final decree perpetually enjoining the enforcement of section 707 of the municipal code of Chicago.

The decree of the superior court is reversed and the cause remanded to that court, with directions to dismiss the bill for want of equity.

Reversed and remanded, with directions.

Dunn and Cooke, JJ., dissenting.

Rehearing denied April 9, 1915.

NOTE.

Municipal Regulation of Billboards and Signs.

Introductory, 491.
Moral Welfare and Public Safety, 491.
Aesthetic Considerations, 493.

Introductory.

This note reviews the recent cases discussing the municipal regulation of billboards and signs. The earlier cases on this subject are collated in the notes to Chicago v. Gunning System, 2 Ann. Cas. 892; State v. Whitlock, 16 Ann. Cas. 765; Ex p. Savage, Ann. Cas. 1913D 951; and Varney v. Williams, 132 Am. St. Rep. 88.

For a discussion of the subject of false, fraudulent, immoral, or other objectionable advertising, see the note to People v. Kennedy, Ann. Cas. 1916A 895.

Moral Welfare and Public Safety.

The recent cases support the rule that a municipality may by virtue of its police power enact and enforce reasonable regulations with reference to billboards and signs, in order to preserve the health, safety, and good morals of its inhabitants. Haskell v. Howard, 269 Ill. 550, 109 N. E. 992; Southern Leasing Co. v. Ludwig, 168 App. Div. 233, 153 N. Y. S. 545, *reversed* on other grounds 217 N. Y. 100, 111 N. E. 470; People v. Ludwig, 158 N. Y. S. 208; Horton v. Old Colony Bill Posting Co. 36 R. I. 507, Ann. Cas. 1916A 911, 90 Atl. 822; Cream City Bill Posting Co. v. Milwaukee, 158 Wis. 86, 147 N. W. 25. And see the reported case. Thus, under a delegation of the police power by a general welfare clause it has been held that a city council can place billboards in a class by themselves and legislate in reference thereto. Cream City Bill Posting Co. v. Milwaukee, supra. And in People v. Ludwig, 158 N. Y. S. 208, an ordinance regulating roof signs was held to be valid, even though its effect was to revoke a permit previously issued.

In considering an ordinance regulating billboards, the court, in Cream City Bill Posting Co. v. Milwaukee, 158 Wis. 86, 147 N. W. 25, said: "The only question before the court is whether the council went too far in prescribing the means by which these objects should be accomplished. It must be admitted that in some respects the ordinance ap-

proaches closely to the point of unreasonableness. Between the point where an ordinance is obviously reasonable and the one where it is obviously unreasonable there is a wide range, a broad field for the exercise of legislative discretion. The action of the municipal authorities within that range is conclusive. Reasonable minds may well differ concerning the extent of it, and, this being so, legislative action should not be declared to be without justification unless it is clear beyond reasonable controversy that it is so. . . . In order to support legislation of this kind, a public need therefore must exist, and the act must at least have a tendency to support such need. In discovering the need and the purpose, the legislative branch of the government may exercise its discretion within the realm of reason, and if a public purpose can reasonably be conceived which might rationally justify the act, the court cannot further weigh the adequacy of the need or the wisdom of the method. . . . Considerable evidence was offered in this case tending to show that the public welfare would or might be conserved by the various provisions of the ordinance which were made the subject of attack. In reference to the provision requiring a clear space of three feet between these boards and any adjacent structure, it was said that it was a proper regulation, because otherwise the boards might be an obstruction to the fire department in the event of a fire in a nearby building and also to the police department in the pursuit of criminals. The trial court met this claim by saying that the requirement that there should be a space of not less than two feet between the bottom of the board and the ground was sufficient for the needs of the fire and police departments. It may well be, however, that those needs would be much better subserved by having both provisions instead of only one. The reasonableness of the regulation requiring a clear space at the ends of roof and coping signs for the convenience of the fire department is more apparent, because the ordinance does not require any space to be left between the bottom of the boards and the roof or coping on which they rest. So it is apparent that these signs might prove to be a serious obstruction. Roofs, particularly where they are not flat, are at best often difficult places from which to fight fire. The regulation in regard to the distance which these boards must be placed from a sidewalk is justified on the ground that it will tend to prevent pedestrians from being injured in case any boards should fall down, and also on the ground that when they are placed near to the sidewalk they afford a convenient hiding place for thieves and thugs who contemplate robbing or assaulting passers by, and on the additional ground that, when placed a reasonable distance from the lot line, those committing crimes or nuisances behind the boards can be more readily discovered." Furthermore, the ordinance that was upheld in that case was retroactive.

An instance of regulation that has recently been held to be unreasonable is found in Haskell v. Howard, 269 Ill. 550, 109 N. E. 992, wherein the court said: "The ordinance purports to prohibit the posting or displaying of any advertisement of intoxicating liquor. . . . The argument of appellees that the power to pass such an ordinance exists or is implied as incidental to the power to regulate or prohibit the sale of intoxicating liquors, or that it arises out of the statute which forbids taking orders for the sale and delivery of intoxicating liquors in anti-saloon territory, is untenable. The ordinance is not limited to advertisements for the sale of liquor in Villa Grove nor to advertisements for taking orders for the sale and delivery of intoxicating liquors in that city. The prohibition of such advertisements is unnecessary to and has no reasonable connection with the power to prohibit the sale of liquor in said city. If the power to prohibit such advertisements is to be implied, it must be because their display affects the public health, safety, morals or welfare. By no stretch of the imagination could it be made to appear that such advertisements threaten or injuriously affect the public health or safety. If the ordinance can be sustained at all it must be because they injuriously affect the morals or welfare of the public. It is a matter of common observation that a great many manufacturers extensively advertise their products by display signs in cities and along the lines of railroads and public highways. So far as we are aware it has never been held that the advertisement of its beer by a brewery was so injurious to the public morals as to make it a nuisance per se and authorize it being prohibited. The use of intoxicating liquors is objectionable to a great many people; but so, also, is the use of tobacco, coca cola and chewing gum, but they are the products of lawful manufacture, and so long as that is so we do not see how their advertisement can be prohibited. It would seem inconsistent to say that a product may be lawfully manufactured for the consumption of all who desire it but the advertisement of it may be prohibited as an offense against public morals. The exercise of the police power is limited to enactments tending to promote the public health, safety, morals or general welfare. It is for the legislature to determine when an exigency exists for the exercise of the police power, but what is the subject of such exercise is a judicial question. Under the guise of police regulation

the personal rights or liberties of citizens cannot be arbitrarily invaded."

Aesthetic Considerations.

The rule established by the earlier decisions, that aesthetic or artistic considerations alone will not justify a radical restriction by the police power on the rights of a property owner, is referred to in the reported case. But the objection that an ordinance is passed for aesthetic considerations cannot be raised where the city council has the power to pass the ordinance regardless of motive. New Orleans v. Kaufman (La.) 70 So. 874. In that case it appeared that the defendant was charged with violating an ordinance prohibiting "the erection of signs, sheds, or other obstructions, on or over any part of" certain streets. The defendant demurred to the charge on the ground of the unconstitutionality of the ordinance in that it "was not adopted to safeguard public health, safety, morals, comfort, or for the general welfare, but that it embraces aesthetic considerations only." With respect to the demurrer the court said: "The public right to the use of streets goes to the full width of the street and extends indefinitely upward and downward. . . . It follows that the defendant had no legal right whatever to construct his shed above and over the sidewalk next to his property line, and that it was within the discretion of the commission council to prohibit and to penalize the erection of such an obstruction. Having the power to enact the ordinance, the motives of the council in so doing cannot be inquired into." Obviously, however, the power of the council in that case was on a basis different from that of the general regulation of billboards and signs.

MASTIN

v.

MAY ET AL.

Minnesota Supreme Court—October 2, 1914.

127 Minn. 93; 148 N. W. 893.

Forcible Entry and Detainer — Possession under Claim of Right — Peaceful Entry.

Proceedings under the forcible entry and detainer statute to recover the possession of land alleged to be unlawfully and forcibly detained, cannot be maintained against a person who peaceably and under claim of right entered into possession of the property, and does not forcibly detain the same. Davis v. Woodward, 19 Minn. 137 (174), followed and applied.

[See note at end of this case.]

Same.

The unlawful detention, unaccompanied with force, where the original possession was taken peaceably and under claim of right, is not sufficient to authorize proceedings under section 7657, G. S. 1913. Ejectment is the remedy in such cases.

[See note at end of this case.]

(Syllabus by court.)

Appeal from District Court, Dakota county: HODGSON, Judge.

Action of forcible entry and detainer. C. D. Mastin, plaintiff, and A. W. May et al., defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. AFFIRMED.

S. R. Child and *Albert Schaller* for appellant.

Charles R. Pye and *C. S. Lowell* for respondents.

[94] BROWN, C. J.—The short facts in this case are as follows: Plaintiff as the owner of certain real property entered into negotiations to sell the same to defendants. Pending the negotiations defendants went into possession of the premises, whether with the knowledge and consent of plaintiff does not appear but, as found by the trial court, peaceably and under claim of right under the oral arrangements of the parties as to the sale. They so entered into possession on October 16, 1912, and have since retained the same. The negotiations for the sale were not completed and were abandoned, and on November 1, 1912, some two weeks after defendants entered into possession of the property, plaintiff demanded that they vacate the same, which defendants refused to do, claiming to have certain rights under the attempted sale, by way of compensation for improvements made upon the premises during the time of their possession. Thereafter, in December, 1912, plaintiff brought this proceeding under the forcible entry and detainer statute to regain possession. There was a judgment for plaintiff before the justice and defendants appealed to the district court. The cause was tried in that court without a jury and the court made findings of fact, substantially as above stated, and, further, "that the entry upon said lands by the defendants was made in a peaceable manner; that the detention of said premises after the first day of November, 1912, by the defendants was unlawful but not forcible or held with strong hands." As conclusion of law the court found that plaintiff

was not entitled to maintain the proceeding and that it should be dismissed. Judgment of dismissal was subsequently entered, and plaintiff appealed.

The only question presented is whether the facts stated present a [95] case for proceedings under the forcible entry and detainer statute, or whether plaintiff's remedy was in ejectment.

Our statutes, like those of many of the other states, limit the right to resort to forcible entry proceedings to recover the possession of land, other than the instances specially provided for by section 7658, G. S. 1913, (1) to cases where there has been an unlawful or forcible entry thereon, and (2) where there has been a peaceable entry, and a subsequent unlawful and forcible detention of the premises. If the possession be taken unlawfully or forcibly, the proceeding will lie without regard to the question whether the subsequent possession is maintained by force or violence. If the entry into possession be under claim of right or peaceably, then the proceeding cannot be maintained, unless the possession thus taken be "unlawfully and forcibly" detained. The *unlawful* detention is not, standing alone, sufficient, where the proceeding is founded upon section 7657, G. S. 1913. Davis v. Woodward, 19 Minn. 174. The statute, with some modifications, is but declaratory of the common law upon the subject, and was designed to provide a speedy remedy to recover the possession of land unlawfully taken or forcibly and unlawfully detained from the person entitled thereto. It was not intended as a substitute for ejectment (O'Neill v. Jones, 72 Minn. 446, 75 N. W. 701), and is only applicable to the cases specially provided for by the statute. In the case at bar the record does not present facts showing either an unlawful or forcible entry of the land in question, the findings negative either theory, and plaintiff cannot recover upon that ground. The case presented is one showing a peaceable entry, pending negotiations for the purchase of the land, and a wrongful or unlawful withholding possession after abandonment of the negotiations, unaccompanied by force or violence. There is no showing of a forcible detention of the land, and therefore plaintiff cannot prevail on that theory of the statute. This was expressly so held in the case of Davis v. Woodward, 19 Minn. 174, supra. The ruling there made is in harmony with the authorities generally. Fults v. Munro, 202 N. Y. 34, 95 N. E. 23, 37 L.R.A.(N.S.) 600, Ann. Cas. 1912D 871, and note 875; 19 Cyc. 1135. The proceeding cannot be resorted to for the purpose of removing a mere trespasser, who [96] entered into possession peaceably under claim of right and asserts no right of possession by force or violence. Castro v. Tewksbury, 69 Cal. 562, 11 Pac. 339; Wood v. Phillips, 43 N. Y. 152; Smith v. Reeder, 21 Ore. 541, 28 Pac. 890, 15 L.R.A. 172; Foster v. Kelsey, 36 Vt. 199, 84 Am. Dec. 676. The findings of the court to the effect that the entry of defendants was peaceable and under claim of right and not retained by force or a strong hand, dispose of the case and render the forcible entry statute inapplicable. The remedy of plaintiffs was in ejectment.

Judgment affirmed.

NOTE.

The reported case holds that an action for forcible entry and detainer will not lie against a person who enters on land peaceably and holds it without violence and under a claim of right. The earlier cases, recognizing this rule and adding by way of qualification that a holding of possession by threat of violence will warrant an action of forcible detainer despite a peaceable entry and a claim of right, are collated in the note to Fults v. Munro, Ann. Cas. 1912D 870.

MATTER OF FARLEY.

New York Court of Appeals—November 10, 1914.

213 N. Y. 15; 106 N. E. 756.

Infants — Contracts.

Attempted contracts by an infant are incomplete and imperfect, and do not become binding except by the act, or failure to act, of the infant after he reaches majority.

[See 18 Am. St. Rep. 573.]

Consent to Issuance of Liquor License.

Under Liquor Tax Law (Consol. Laws, c. 34, § 15, subd. 8), as amended by Laws 1911, c. 643, § 2, requiring the consent of owners of dwelling houses situated within 300 feet of a saloon to the issuance of a license therefor, infant owners may not give a valid consent, in view of the policy of the liquor law as to infants, nor can an infant, through an agent, make a valid consent.

[See note at end of this case.]

Matter of Farley, 161 N. Y. App. Div. 63. reversed.

Appeal from Appellate Division of Supreme Court, Fourth Judicial Department.

Petition by William W. Farley to revoke liquor tax certificate. Catherine Cronin, respondent. Judgment for petition at special term of Supreme Court. Judgment reversed

by Appellate Division of Supreme Court. Petitioner appeals. The facts are stated in the opinion. REVERSED.

Louis M. King and *A. M. Sperry* for appellant.

Walter Welch for respondent.

[16] HISCOCK, J.—Application was made to the deputy commissioner of excise of the county of Onondaga for the transfer to respondent and to new premises of a liquor tax certificate theretofore issued to another person. The transfer was made by the commissioner and later this proceeding was instituted to have such certificate canceled, on the ground that respondent's application for the issue of the certificate to her falsely stated that she had secured the requisite number of consents to the prosecution of said business in the new location.

The Liquor Tax Law (Consol. Laws, ch. 34, section 15, subd. 8, as amended, L. 1911, ch. 643, section 2) provides that "When the nearest entrance to the premises described in said statement as those in which traffic in liquors is to be carried on is within three hundred feet, measured in a straight line, of the nearest entrance to a building or buildings occupied exclusively for a dwelling, there shall also be filed simultaneously with said statement (on the application for a certificate) a consent in writing that such traffic in liquors be so carried on in said premises during a term therein stated, executed by the owner or owners, or by a duly authorized agent or agents of such owner or owners of at least two-thirds of [17] the total number of such buildings within three hundred feet so occupied as dwellings."

The question whether respondent's statement that she had secured the requisite number of consents of owners of buildings occupied as dwellings within the prescribed limit is true, depends on the further query whether infant owners of such dwellings may give a legal consent. There were one or more dwellings within three hundred feet of the premises where respondent proposed to conduct her liquor business of which infants were owners and consents in the form required by law were obtained from them and filed. If they are valid the respondent had a sufficient number of consents; without them she did not have, and is not entitled to have her certificate and carry on her business.

We do not think that infant owners of property may give a valid consent to the issue of a liquor tax certificate.

At the outset we find in the Liquor Tax Law various provisions which indicate a policy on the part of the state to prevent any relationship between infants and the sale of liquor, which we think are entitled to some consideration in interpreting the particular provision relating to consents.

Section 29 provides in substance that it shall be unlawful to sell, deliver or give away liquor to any minor under the age of eighteen years or to such minor for any other person.

Section 30 provides that it shall not be lawful to permit any minor under such age to sell or serve any liquors or to enter or remain in any barroom where liquors are sold.

Section 21 of said law provides that no person under the age of twenty-one years shall traffic in liquor.

As we read these provisions it would seem to be a fair inference that a legislative policy which prohibited an infant from using, serving or trafficking in liquors did not contemplate that he should be authorized to give a consent [18] that some other person might carry on the business. And in entertaining this view sight is not lost of the argument made by the learned Appellate Division that because the legislature expressly prohibited certain acts such as those mentioned, it may be assumed that it did not intend to prohibit certain other acts which were not mentioned such as the right of an infant to give a consent to traffic in liquors by another person. That argument, however, does not in this case seem to be very persuasive. The legislature might very well prohibit the specific acts which have been mentioned and which without express provision were not unlawful, and rely on general principles for the proper decision of the question whether an infant might perform some other act, such as executing one of the consents required by the statute, and we, therefore, pass to the consideration on such general principles of the question whether an infant ought to be allowed to give such a consent.

The rule is well understood that attempted contracts by an infant are incomplete and imperfect, and do not become valid and binding except by the act or failure to act of the infant after he reaches the age of maturity. He is regarded as not having sufficient capacity to understand and pass upon questions involving contractual rights, and, therefore, a person dealing with him does so at his peril, and subject to the right of the infant to avoid his contract when he becomes of age.

It seems to us that an attempted consent by an infant to the issue of a liquor tax certificate and the prosecution of that business involves considerations which are in the nature of a property right, and is subject to the infirmities of infancy which would attach to an ordinary contract executed by a minor. It appears to have been assumed by the legislature that neighboring property used for dwellings might be affected by opening a

saloon, as we very well know might be the case, and, hence, the requirement for consents thereto which are to be given, [19] not by persons dwelling within a certain radius, but by the persons who own property within that radius. If considerations of property rights are involved in giving such a consent it would seem that the act of an infant should be safeguarded in the same way as would be an attempt on his part to sell, lease or mortgage his real estate.

But reverting to the principles governing an ordinary contract by an infant, it is urged that since his contracts are not void but voidable at his election, the same rule should be applied to a consent to the issue of a liquor tax certificate, and that such consent should be held valid until the infant, under proper conditions, disaffirms said act.

There are two answers to this proposition. In the first place, the principle which allows the executed contract of an infant to stand as valid unless the infant shall disaffirm the same after becoming of age is not practically adapted to such an instrument as a consent to the issue of a liquor tax certificate. In many cases at least the office of the certificate would have been completed and any injury flowing from the issue thereof consummated long before the infant would arrive at those years of maturity where the law would regard him as reaching for the first time sound discretion in such a matter.

But the more important objection to this theory rests on the distinction between an act of an infant which only affects himself and his property and an act like that involved in the present proceeding which is also of public consequence. If an infant makes a lease or sale of his real estate it legally touches no one but himself, and if when he becomes of age he chooses to affirm the contract no one should object. But that is not the present case. The People of the state acting within well-defined and established powers have deemed it wise to regulate the traffic in liquor. The Liquor Tax Law with its many provisions is sufficient evidence of the extent to which the legislature has attempted to do this. Amongst other [20] things it has been deemed wise and very just that the prosecution of this traffic should not be permitted in certain localities occupied by dwelling houses unless a large proportion of the owners of such property are in favor of such traffic. As has already been said, a property owner in consenting to the prosecution of this business performs an act which might be regarded as affecting the value of his own property and in that aspect no one has any interest in the question except himself. But in addition to this, each owner of property within the prescribed limit has an interest in the execution of such a consent by every other property owner. His effective opposition or consent to the prosecution of the business depends on the action of other property owners and he is interested in having such other property owners pass on the question intelligently and wisely. It is a matter of importance to every property owner in the neighborhood and to the people of the community that consents should not be given by persons whom the law regards as deficient in judgment and capacity to act. Every property owner is entitled to have every other property owner within the prescribed radius pass intelligently on the question whether it is best to have a saloon within the proposed area, and of course such intelligent action cannot be secured either presumptively or actually if infants may give such consents. In the present case the infants at the time in question were of the ages respectively of fourteen and ten years. Nobody would claim that they could pass with mature judgment on the question whether a saloon should be located at the proposed spot. Moreover if these particular infants can execute valid consents there is no reason why still younger children might not perform similar acts until the process of securing consents from property owners where there happened to be infant owners would be made absurd and ridiculous and any benefits anticipated from these provisions in securing a limited form of local option be lost.

[21] While this question of the power of an infant to execute such a consent has not been heretofore decided by this court, authorities found in other states and entitled to great respect adopt the conclusion which we now reach that such power is lacking (Thompson v. Egan, 70 Neb. 169, 97 N. W. 247; People v. Griesbach, 211 Ill. 35, 71 N. E. 874.)

The consent in question was not only signed by the infants personally but also by "Martin J. McArdle, agent for" said infants, and it is further urged by the respondent that this later signature rendered the consent effective under that provision of the statute which authorizes a consent to be executed not only by the owner of premises but also "by his duly authorized agent."

We do not intend to hold that a consent to the issue of a certificate may not be executed on behalf of an infant by a guardian or by some other person authorized in some unusual manner to execute such consent. We simply do not pass on that question as we do not regard it as here presented. It certainly is clear that an infant who cannot himself execute a consent cannot by himself and in any ordinary manner create an agent who will have greater powers than he himself possesses. The evidence makes it fairly apparent that whatever agency for the infants

McArdle enjoyed sprang from the fact that he collected rents and managed the property. If there was any other agency or power of representation I think that evidence thereof should have been produced by the respondent, and such agency did not clothe the alleged agent with greater powers in respect of this consent than the infants themselves possessed.

The order of the Appellate Division should be reversed and that of the Special Term affirmed, with costs in both courts.

Werner, Chase, Collin, Hogan, Miller and Cardozo, JJ., concur.

Order reversed, etc.

NOTE.

Power of Infant to Consent to Issuance of Liquor License.

The general rule is that an infant owner of property cannot give a valid consent to the issuance of a liquor license. Wray v. Harrison, 116 Ga. 93, 42 S. E. 351; People v. Griesbach, 211 Ill. 35, 71 N. E. 874; Thompson v. Egan, 70 Neb. 169, 97 N. W. 247. And see the reported case. In Thompson v. Egan, supra, the court said: "It is further contended, in the brief, that certain minor children who were heirs to estates in the precinct should have been counted among the legal resident freeholders of the precinct who had not signed the petition. We think that there is little merit in this contention. The statute never contemplated infant children, although residents and heirs to estate of inheritance in the precinct, as proper persons to sign a petition for a license to sell intoxicating liquors. This right was intended to be reserved for the full grown resident freeholders of the precinct." In People v. Griesbach, supra, it was said: "We do not think a minor can be regarded as a qualified petitioner on the application of the appellee for the license to keep a dram shop. . . . The persons authorized by the ordinances of the village of Hyde Park to sign the application of appellee for a license to keep a dramshop in that matter stand for and represent the public, whose interests, rights and welfare, moral and material, are concerned in the granting or refusal of the application. They occupy a position of trust toward the public, and the proper discharge of their duty to the public demands the consideration of the interests of all who are to be affected and the exercise of matured judgment and discretion. A person wanting in mental power to meet the requirements of the duty to the public could not be regarded as a competent applicant. A person who is so affected with insanity as to be irresponsible for his action in the ordinary affairs of life would not be competent to sign an application, although he be the owner of property abutting on the streets in the block whereon the dramshop was to be located. The said Charles Nottbohm, at the time he signed the application, had not reached the age which, in law, is deemed essential to the maturity of the mental faculties. The law did not regard him as possessed of the requisite maturity of mind and soundness of judgment to act in his individual capacity with reference to public and private affairs. He was regarded by our law-makers as particularly incompetent to comprehend the evils likely to result from the use to himself of intoxicating liquors. The statutes adopted by the General Assembly hold him not competent to determine for himself whether and when he shall indulge in intoxicating liquors, and require that persons licensed to sell such liquors at retail shall not sell or give the same to him unless his parents, guardian or family physician shall first determine that he should be permitted to receive it. . . .. Being incompetent, by the express provisions of the law, to decide whether he may drink intoxicating liquors or not, because of the immaturity of his mind and judgment, it must be held he is in a far greater degree incompetent to decide for himself, and as a representative of the public, whether or not a dramshop should be permitted to be established and operated by the appellee. He has the qualification of a property owner, but is under the disqualification of nonage and consequent immaturity of his mental powers, in legal contemplation." In Wray v. Harrison, 116 Ga. 93, 42 S. E. 351, it appeared that under the charter of a town the mayor and council were authorized to issue licenses for the sale of spirituous and malt liquors at retail, but no license could be issued unless the applicant for the same presented with his application "a petition signed by two-thirds of the citizens of said town, asking for such license." It was held that the term "citizens" embraced only the qualified voters of the town, and did not include infants. In the reported case it is held that an infant cannot by himself and in any ordinary manner create an agent who may give a valid consent to the issuance of a liquor license.

Whether an infant may give a valid consent through a guardian or through some other person authorized in some unusual manner is an undecided question. See the reported case. But where a guardian for an infant, who was also a doweress in the property owned by the infant, signed an application for a liquor license, without a showing that she signed as guardian for the infant, it was held that her signature would be regarded as placed on the application in her individual capacity, and not as guardian for

the infant owner of the property affected. People v. Griesbach, 211 Ill. 35, 71 N. E. 874.

However, in State v. Howard County Ct. 90 Mo. 593, 2 S. W. 788, it appeared that a statute provided that it should not be lawful to issue a license to keep a dramshop in certain towns and cities, until a majority of the taxpaying citizens in the block or square in which the dramshop was to be kept should sign a petition asking for the license. It was held that minor residents, who had guardians and owned property, and were regularly assessed, were to be counted in determining whether a petition presented for a dramshop was signed by a majority of the assessed taxpaying citizens. The court said: "If the design of the legislature in requiring a petition, signed by a majority of the assessed taxpaying citizens, to be presented as a condition precedent to the exercise by the county court of the power to grant a license to keep a dramshop in a block of a city containing twenty-five hundred or more inhabitants, was to afford protection to that extent to the property in the block, no reason is perceived why the word citizen should be restricted in its meaning only to those who are voters, inasmuch as the property of women and minors would be affected as well as that of the citizen clothed with the privilege of voting. If the location of the dramshop in such a block would affect injuriously the property, as to rental value, or otherwise, belonging to a citizen voter, it would also affect in the same way that owned by women and minors, both of which classes would be denied the protection the statute was designed to afford, if we put the construction upon the word citizen the relator's counsel contend for. We think it cannot be reasonably urged that when one citizen entitled to vote owns but one lot in a block, and all the rest of the block is owned by women, either married or single, or minors to the number of twenty, and all of whom are assessed thereon, that a petition signed by the one citizen would be a majority, in the sense of the statute, of the assessed taxpaying citizens, and that the county court would be bound to act upon, and close their eyes on the assessment list, disclosing the fact that these twenty other assessed taxpaying citizens owned property in the block. And yet such would be the result under the construction contended for by the relator."

DES MOINES SAVINGS BANK

v.

ARTHUR ET AL.

Iowa Supreme Court—October 25, 1913.

163 Iowa 205; 143 N. W. 556.

Appeal — Entitling Papers — Effect of Error.

Code, § 4108, providing that on appeal the cause shall be docketed as in the court below, being remedial, is simply directory, and the fact that the abstract designated all parties except plaintiff as defendants or appellees, whereas some were defendants in cross-petitions and not in the main action, is not ground for dismissal, where the relation of the parties to the case was disclosed.

Time for Appeal — Computation.

The time allowed for appeal is computed from the entry of the decree, and, though service of the notice of appeal was not acknowledged until more than six months after the judge had filed an opinion, the appeal will not be dismissed where less than six months had elapsed after the entry of the decree.

[See 2 R. C. L. tit. *Appeal and Error*, p. 104.]

Foreclosure of Mortgages — Defenses — Payment.

Foreclosure of a mortgage cannot be defeated by the defense of payment of the note thereby secured, where such defense is not available against the note because it as well as the mortgage is held by an innocent purchaser for value.

Bills and Notes — Note Secured by Mortgage — Construction Together.

In construing a note, a mortgage executed at the same time and as a part of the same transaction is to be considered along with the note, but that does not mean that the provisions of the mortgage become part of the note.

[See generally 21 Ann. Cas. 1162.]

Negotiability — Uncertainty as to Amount.

Provisions of a mortgage given as security for a note executed at the same time and as a part of the same transaction, making the mortgage security for the payment of taxes and insurance by the mortgagor, but not containing any promise to pay the same, do not render the note nonnegotiable for uncertainty in the amount payable, as such provisions in no way affect the obligation of the note.

[See note at end of this case.]

Note Secured by Mortgage — Separate Actions on Note and Mortgage.

Under the express terms of Code, § 3428, an action may be brought on a note alone without regard to the mortgage given as security, and so an action may be brought on the mortgage alone, unless either is prevented by stipulation in the note or mortgage; but under the express terms of section 4288, when separate actions are brought on the note and

mortgage in the same county, the plaintiff must elect between them, and the other will be discontinued.

Negotiability — Uncertainty as to Amount.

A provision in a mortgage that the mortgagor would pay the taxes on the mortgage on a certain contingency did not render the note secured nonnegotiable for uncertainty in the amount payable, since it did not entitle the mortgagee to recover such taxes as a part of the indebtedness, but only made the mortgage a lien therefor.

[See note at end of this case.]

Same.

A stipulation in a note that the payee may recover any taxes on the premises mortgaged as security therefor which the payee shall pay renders it nonnegotiable for uncertainty as to the amount payable, since no one can tell what future tax levies will be.

[See note at end of this case.]

Uncertainty as to Date of Maturity.

Under the Negotiable Instruments Act (Code Supp. 1907, § 3060a1), providing that an instrument to be negotiable "must be payable on demand or at a fixed or determinable future time," a clause in the mortgage given as security that the mortgagee might declare the debt due for default of the mortgagor did not render the note nonnegotiable for uncertainty as to the time of payment.

[See note at end of this case.]

Same.

A mortgage, giving the mortgagee the right to declare the debt due without regard to whether the mortgagor is in default, renders the note for which it is security nonnegotiable for uncertainty as to the time of payment.

[See note at end of this case.]

Corporations — Want of Notice — Proof Sufficient.

Where the president of a bank to which a note was given as security testified that the transaction was with him and he had no notice of any defense thereto, the evidence was sufficient to justify a finding of want of notice to the bank, though the other officers did not testify, and though the burden of proof was on the bank under Code Supp. 1907, §§ 3060a55, 3060a59, because the payee negotiated the note in bad faith.

Appeal from District Court, Madison county: FAHEY, Judge.

Action by Des Moines Savings Bank, plaintiff, against E. O. Arthur et al., defendants. Judgment for defendants. Plaintiff appeals. REVERSED.

[206] On the 6th day of October, 1900, Thomas and Montana Duff executed to A. B. Shriver their promissory note for $1,800 payable on the 6th day of October, 1910, with interest at the rate of 5½ per cent. per annum payable annually, but, if any part of the principal or interest should not be paid when due, it would bear 8 per cent. per annum. This note was secured by a mortgage executed by the payors on 101 acres of land. On February 10, 1906, the Duffs conveyed the land to Edwin Trester and the latter negotiated a loan with A. B. Shriver in order to take up that mentioned and pay to the Duffs $1,200 on the purchase price. A note for $3,000 was executed to Shriver by Trester and [207] wife payable five years after date and secured by a mortgage on the land. The $1,200 was received from Shriver and paid over to the Duffs, and Shriver explained that he owned the $1,800 note and mortgage, but that the note was in Des Moines, up as security, and that he would get it in a few days and cancel it. The $3,000 note and mortgage of Trester and wife were assigned to A. B. Anderson, September 22, 1906, and they subsequently conveyed the land to E. E. Gallup and wife, who later conveyed it to E. O. Arthur. The deed of the Duffs to Trester warranted title except as to the $1,800 mortgage. On June 11, 1901, Shriver assigned the mortgage securing the note for $1,800 to the Security Loan & Trust Company, and this assignment was recorded, and there was nothing of record indicating a reassignment thereof to Shriver or any one else. In the fall of 1909, Shriver negotiated a loan of $1,600 with the Des Moines Savings Bank and executed his note for that amount payable ninety days after date with interest at the rate of 7 per cent. per annum, and as collateral security for its payment hypothecated the note for $1,800 and assigned to said bank the mortgage securing the same. This action was begun by said bank January 6, 1911, praying for judgment on said note of $1,800 against Montana Duff and demanding foreclosure of said mortgage against the land and that it be established as a lien prior to the $3,000 mortgage held by Anderson. Arthur, the owner of the land, was made a party defendant, and he pleaded that the note of $1,800 and mortgage securing it were executed as one instrument, that the terms of the mortgage rendered the note nonnegotiable, that the note had been paid by the transactions mentioned, and that the plaintiff was not an innocent holder. He also filed a cross-petition praying judgment against Turrill, Elliott, Gallup, and Trester on the warranty deeds for whatever amount might be recovered against him on the $1,800 note and mortgage. Montana Duff filed answer alleging that Trester had assumed and agreed to pay [208] the note of $1,800 and pleaded the same defense as Arthur. A. B. Anderson prayed judgment on the note of $3,000 against the Tresters, Shriver, Elliott, Turrill, and Arthur, and that the mortgage securing said note be foreclosed. Trester answered the cross-petition of Arthur and joined in praying the relief demanded. Shriver filed a dis-

claimer. Some other matters were in issue not necessary to be mentioned. On hearing, the plaintiff's petition was dismissed and judgment entered on the cross-petition of A. B. Anderson as prayed and decree foreclosing the same. The plaintiff appeals.

John A. Guiher for appellant.

Church & McCully, J. F. Gallup and *W. S. Cooper* for appellees.

LAND, J.—This is an action to recover judgment against Montana Duff, on a promissory note of $1,800 given October 6, 1900, and payable ten years thereafter, given by herself and husband to A. B. Shriver, and to foreclose a mortgage on one hundred and one acres of land executed by them to secure its payment. E. O. Arthur, who had acquired the land, was made defendant, as also was A. B. Anderson, who held a note of $3,000 given by Edwin Trester to Shriver February 10, 1906, payable five years after date and secured by a mortgage on the same land. Plaintiff prayed that the lien of this mortgage be decreed inferior to that sued on. Other parties were brought in as defendants to cross-petitions, and S. H. Arthur by amendment to the petition.

I. In printing the abstract, all parties other than plaintiff were designated appellees without indicating their relation to the case other than as defendants or appellees, and this is one of the grounds of the motion of dismissal. It will be noted that the parties defendant were correctly named, but others who were defendants in cross-petitions were included as [209] though parties to the main action. The statute exacts that the cause be docketed as in the court below (section 4108, Code), and this should have been done. But the section, being remedial, is directory, and, inasmuch as the identity of the action has been preserved and the relation of defendants to the case disclosed in the abstract, there could have been no prejudice and there should not be a dismissal on this ground.

The judge presiding filed an opinion with the clerk November 23, 1911, and service of notice of appeal was not acknowledged until August 7, 1912. As more than six months had intervened, dismissal on this ground is demanded. As time for the purposes of appeal is computed from the entry of decree which occurred February 24, 1912, instead of the announcement of the decision, service of the notice of appeal was in time. Martin v. Martin, 125 Ia. 73, 99 N. W. 719; Sievertsen v. Paxton-Eckman Chemical Co. 160 Ia. 662, 133 N. W. 744, 142 N. W. 424. The record does not bear out the suggestion that there was delay in the final entry because of the trials of issues raised on the petitions of intervention, and, as the record does not disclose that the same attorney represented plaintiff and Anderson, the issuance of execution on the decree of the latter cannot be construed as a waiver of the right of appeal, even were appellee's theory to be adopted. The motion to dismiss the appeal is overruled.

II. The note of $1,800 executed by Montana Duff and husband to A. B. Shriver October 6, 1910, and payable ten years thereafter, was deposited by him with the Des Moines Savings Bank in the fall of 1909 as collateral security of his note of $1,600 payable in 90 days and the mortgage executed by the Duffs to secure payment of their note duly assigned to said bank. It advanced the face of the note less $28, interest for the period until maturity, and the president of the bank, who negotiated the loan, testified that before making it he ascertained that the mortgage was a first lien on land constituting [210] ample security for its payment and that he was without knowledge that the note and mortgage had been paid.

The note and mortgage had been paid by the execution of a note of $3,000 to Shriver by Trester and wife, the former of whom having acquired the land, and a mortgage on the land securing the same. Though the $1,800 note and mortgage were not then in Shriver's possession, he procured the same subsequently; but, instead of canceling the one and releasing the other, he negotiated the loan with the bank as stated. As it acquired these for value and without notice, the defense of payment must fail unless the note is found not to be negotiable, for under the decisions of this state foreclosure of the mortgage may not be defeated by a defense not available against the note. Preston v. Case, 42 Ia. 549.

The theory of defendants is that the mortgage and note are to be construed together and treated as one instrument, and the following clause contained in the mortgage renders the note nonnegotiable:

Said first party shall pay all taxes and assessments upon said property to whomsoever laid, or assessed, and including personal taxes, and should any reduction be made in the assessment of taxes on said land by reason of this mortgage, and payment thereof required of the mortgagee or assigns, then said mortgagor shall pay the taxes on this mortgage and the debt hereby secured before delinquent; and said first party shall not suffer waste; shall keep all buildings thereon insured to the satisfaction of said second party in a sum not less than two hundred dollars, delivering all policies and renewal receipts to said second party, and shall pay, in case of suit, a reasonable attorney's fee and expenses of continuation of abstract, and all expenses and attorney's fees incurred by

said second party or assigns by reason of litigation with third parties to protect the lien of this mortgage. A failure to comply with any one of the agreements hereof (including warranty of title) causes the whole debt to at once become due and collectible, if said second party or assigns so elect, and no [211] demand for fulfillment of broken conditions nor notice of election to consider the debt due, shall be necessary previous to commencement of suit to collect the debt hereby secured, or any part thereof, or to foreclose this mortgage. . . . All money paid by said second party or assigns for insurance or taxes shall bear interest at the rate of eight per cent. per annum, payable semiannually, and be a lien on said land under this mortgage.

It is settled, in this state at least, that the note and mortgage, having been executed at the same time and as a part of the same transaction, are to be construed together. Iowa Nat. Bank v. Carter, 144 Ia. 715, 123 N. W. 237; Swearingen v. Lahner, 93 Ia. 147, 61 N. W. 431, 57 Am. St. Rep. 261, 26 L.R.A. 765. And such appears to be the general rule. Brooke v. Struthers, 110 Mich. 562 (68 N. W. 272, 35 L.R.A. 536 and note); 1 Jones on Mtgs. section 71. This is but the application of the familiar doctrine concerning the construction of agreements contemporaneously executed.

But how far under this rule are the collateral agreements contained in the mortgage to be imparted into the note? On the margin of the note were these words: "This note is secured by first mortgage on one hundred and one acres in Madison Twp., Madison county, Iowa." This may have advised the transferee of the security, but did not purport to load the note with any of its particular provisions. The note was complete in itself and, as usual, was given as evidence of the debt and to fix the time and terms of payment. The purpose of the mortgage was to afford security for the payment of the note, and all the conditions in the part quoted, except one, relate to the protection and preservation of the security. These have no bearing on the engagements contained in the note. While the note and mortgage are to be construed together whenever the nature of the transaction becomes material, this does not mean that the provisions of the mortgage are thereby incorporated into and become part of the note. [212] As said in Thorp v. Mindeman, 123 Wis. 149, 101 N. W. 417, 68 L.R.A. 146, 107 Am. St. Rep. 1003.

Construing together simply means that if there be any provisions in one instrument limiting, explaining, or otherwise affecting the provisions of another, they will be given effect as between the parties themselves and all persons charged with notice, so that the intent of the parties may be carried out, and that the whole agreement actually made may be effectuated. . . . The promise to pay is one distinct agreement, and, if couched in proper terms, is negotiable. The pledge of real estate to secure that promise is another distinct agreement, which ordinarily is not intended to affect in the least the promise to pay, but only to give a remedy for failure to carry out the promise to pay. The holder of the note may discard the mortgage entirely and sue and recover on his note; and the fact that a mortgage had been given with the note, containing all manner of agreements relating simply to the preservation of the security, would cut no figure. A pleading alleging such facts would be stricken out as frivolous or irrelevant.

In Garnett v. Meyers, 65 Neb. 280, 91 N. W. 400, 94 N. W. 803, Sedgwick, J., in speaking for the court concisely states the rule:

If the terms and conditions of the mortgage are limited to the proper province of the mortgage—that is, to provide security for the indebtedness—its provisions relating solely to the security will not affect the negotiability of the note. If the holder of the note is compelled to pay the taxes or insurance on the mortgaged property to protect the security, and is afterwards allowed to recover the amount so paid in addition to the principal indebtedness, this does not affect the amount of the indebtedness itself. The mortgagee has no interest in the mortgaged property except a collateral and contingent one. The liability for these expenses is upon the mortgagor. If he shirks this responsibility, and compels the mortgagee to assume it, equity allows the mortgagee to add the payment so made to his mortgage. This right has long been established as an essential element of the mortgage itself. It cannot be held [213] to destroy the negotiability of the note, unless the fact that the execution of the note is accompanied by the execution of a mortgage securing it is to have that effect. This principle applies to all agreements of the mortgagor to preserve the collateral security. It does not affect the rule that the two instruments, when executed at the same time, must be construed together. The provisions contained in the mortgage to protect the securities, which would be implied and enforced upon settled principles of equity, whether expressed in the mortgage or not, cannot be held to render the note nonnegotiable.

See also Kendall v. Selby, 66 Neb. 60, 92 N. W. 178, 103 Am. St. Rep. 697; Frost v. Fisher, 13 Colo. App. 322, 58 Pac. 872; Hunter v. Clarke, 184 Ill. 158, 56 N. E. 297, 75 Am. St. Rep. 160.

It will be observed that the mortgage contains no promise on the part of the mortgagor

to repay mortgagee taxes or premiums for insurance which may have been advanced by him. These are to be a lien on the land and, of course, may be recovered upon foreclosure of the mortgage. The maker of the note does not thereby become liable for payment thereof save as he may be required to pay to redeem his land from the proceedings in foreclosure of the mortgage. The obligation of his note was in no manner enhanced or otherwise affected either as to time or amount of payment. As observed in Hunter v. Clarke, supra, "the provisions of the mortgage for the allowance of costs, taxes, assessments, insurance, and attorney's fees apply only in case of foreclosure and do not add to the amount of the note."

A separate action could have been maintained on the note (section 3428, Code) or on the mortgage, unless this is prevented by some stipulation in one or the other, as that execution shall not issue against property other than that mortgaged (Kennion v. Kelsey, 10 Ia. 443); but actions on each cannot be prosecuted in the same county at the same time, for, if undertaken, the plaintiff will be required to elect which he will [214] maintain (section 4288, Code). And as the maker of the note did not agree to pay the items of taxes, insurance, and the like in his note, the amount payable thereon has not been rendered uncertain by the terms of the mortgage.

As intimated, one clause in the mortgage was not inserted to protect the security but to place a burden on the mortgagor: "Should any reduction be made in the assessment of taxes on said land by reason of this mortgage and payment thereof required of the mortgagee or assigns, then said mortgagor shall pay the taxes on this mortgage and the debt thereby secured before delinquent." This merely exacted payment by the mortgagor of taxes assessed on the credits owing the mortgagee which, but for this, the latter must have paid. But as pointed out, if not paid by the mortgagor and discharged by the mortgagee, there is no condition entitling him to recover the same as a part of the indebtedness evidenced by the note or otherwise save by enforcing the lien specifically stipulated against the land mortgaged.

In this respect, the mortgage differs from that considered in Garnett v. Meyers, 65 Neb. 287, 91 N. W. 400, 94 N. W. 803; Consterdine v. Moore, 65 Neb. 291, 91 N. W. 399, 96 N. W. 1021, 101 Am. St. Rep. 620, where it was provided that "the said party of the second part, or the legal holder or holders of said note, . . . may elect to pay such taxes, assessments, . . . and the amount so paid shall be secured by the mortgage and may be collected in the same manner as the principal debt hereby secured, with interest at the rate of ten per cent. per annum." In holding that this provision rendered the note nonnegotiable, the court seems to have held that, under this clause, taxes so paid by the mortgagee might be recovered in an action on the note, and therefore the amount payable was uncertain. No one can anticipate precisely what the tax levies of the future will be, and for this reason such a stipulation when contained in a note, renders it nonnegotiable. Farquar [215] v. Fidelity Ins. etc. Co. 13 Phila. 473, 35 Leg. Int. 404, 8 Fed. Cas. No. 4,676; Howell v. Todd, 12 Fed. Cas. No. 6,783; Walker v. Thompson, 108 Mich. 686, 66 N. W. 584; Carmody v. Crane, 110 Mich. 508, 68 N. W. 268. See also Brooke v. Struthers, 110 Mich. 562, 68 N. W. 272, 35 L.R.A. 536.

As the provisions of the mortgage in the case at bar did not render the amount payable on the note uncertain, the note cannot be denounced as nonnegotiable on this ground. Nor did the clause giving the mortgagee on breach of certain conditions the election to declare the entire indebtedness due. Under the Negotiable Instruments Act, an instrument to be negotiable "must be payable on demand, or at a fixed or determinable future time." Section 3060–1a, Code Supp. This note was payable "on the 6th day of October, 1910." It was certain that the time would arrive when the note would be payable, and the circumstances that it might become payable before that time upon the default of the maker in certain respects at the option of the payee or holder did not affect its negotiability. Charlton v. Reed, 61 Ia. 166, 16 N. W. 64; Chicago R. Equipment Co. v. Merchants' Bank, 136 U. S. 268, 10 S. Ct. 999, 34 U. S. (L. ed.) 252; Hunter v. Clarke, 184 Ill. 158, 56 N. E. 297, 75 Am. St. Rep. 160; Mackintosh v. Gibbs, 81 N. J. L. 577, 80 Atl. 554, Ann. Cas. 1912D 163; Merrill v. Hurley, 6 S. D. 592, 62 N. W. 958, 55 Am. St. Rep. 859; Taylor v. American Nat. Bank, 63 Fla. 631, Ann. Cas. 1914A 309, 57 So. 678; Barker v. Sartori, 66 Wash. 260, 119 Pac. 611. See valuable note to Holliday State Bank v. Hoffman, Ann. Cas. 1912D 1.

Decisions to the contrary may be found on both of the foregoing propositions, but our conclusion has the support of the great weight of authority. Appellant relies on Iowa Nat. Bank v. Carter, 144 Ia. 715, 123 N. W. 237, but the chattel mortgage securing the note there held nonnegotiable provided that the note should become due and payable at the election of the payee or holder. This, being independent of any default of the maker, left him without protection, and such a clause is generally [216] held to render the note when construed in connection with the mortgage nonnegotiable, as was decided in the above case. See also Smith v. Marland, 59 Ia. 645, 13 N. W. 852; New Windsor First Nat. Bank v. Bynum, 84 N. C. 24, 37 Am.

Rep. 604; Syracuse Third Nat. Bank v. Armstrong, 25 Minn. 531; Carroll County Sav. Bank v. Strother, 28 S. C. 504, 6 S. E. 313. Note in which cases are collected, to Kimpton v. Studebaker Bros. Co. 14 Idaho 552, 94 Pac. 1039, 125 Am. St. Rep. 185, 14 Ann. Cas. 1126. The point was not raised in Heard v. Dubuque County Bank, 8 Neb. 10, 30 Am. Rep. 811. Such a condition divests the note of the quality of certainty in time of payment, for this may be hastened at the option of the maker alone. We are of opinion that the note was negotiable, and, as plaintiff acquired it without notice and for value, that it was not subject to the defense of payment.

III. Only the president of the bank testified to the absence of notice that the note had been paid, and it is argued that, as the other officers might have been aware of this, purchase without notice was not proven. But, according to the witness, the transaction was with him, and, though his evidence may not have established the absence of notice conclusively, it was sufficient to justify the finding that the bank was without notice in acquiring the paper. Arnd v. Aylesworth, 145 Ia. 185, 123 N. W. 1000, 29 L.R.A.(N.S.) 638; Bennett State Bank v. Schloesser, 101 Ia. 571, 70 N. W. 705. Conceding then that Shriver negotiated the papers in breach of faith (see section 3060–a55, Code Supp.), and therefore that burden of proof to show want of notice was on plaintiff (section 3060–a59, Code), such burden was met, and plaintiff rightly held a holder of the note in due course. The cause is remanded for the entry of a decree in harmony herewith.

Reversed.

Weaver, C. J., and Evans, Deemer, Gaynor, Preston, and Withrow, JJ., concur.

NOTE.

The reported case, applying the elementary rule that uncertainty as to the amount of a note or as to the date when it is payable destroys its negotiability, holds that a note secured by a mortgage is not rendered non-negotiable by a clause in the mortgage giving the mortgagee the right to pay taxes and hold the mortgagor therefor. It is further held that a clause in a mortgage allowing the mortgagee to declare the entire debt due on a breach of certain conditions in the mortgage does not destroy the negotiability of the note. The question what is a negotiable note is fully discussed in the note to Holliday State Bank v. Hoffman, Ann. Cas. 1912D 1.

WEIGEL
v.
McCLOSKEY.

Arkansas Supreme Court—April 27, 1914.

113 Ark. 1; 166 S. W. 944.

Actions — Joinder of Causes.

The refusal to compel an election between causes of action for false imprisonment and for damages for unlawfully shackling a convict laborer is not prejudicial, in view of Acts 1905, p. 798, providing that the court may consolidate causes of like nature when it appears reasonable to do so.

Damages — Instructions — Requiring Verdict to Be Based on Evidence.

An instruction on the measure of damages, which does not tell the jury that their finding must be based on the evidence, is erroneous.

Same.

An instruction on the measure of damages, erroneous because not telling the jury that their finding must be based on evidence, is not prejudicial error, as the oath of the juror is sufficient to compel him to conform his finding to the evidence.

Pardon — When Effective.

A pardon is effective upon delivery and acceptance.

False Imprisonment — Detention of Convict after Pardon.

Where a warden, appointed by a contractor for convict labor and confirmed by the court under the statute, refuses, on the ground of lack of authority, to release a convict laborer of whom he had charge, on delivery of a pardon to him, he is liable for false imprisonment.

Same.

Where a contractor of convict labor delegates his custody of the convicts to a warden appointed by him and confirmed by the court under the statute, it is the duty of the warden, on delivery of a pardon to him, to himself examine the books to see if the pardon covers all the offenses for which the convict was committed if he would escape liability for false imprisonment in holding the convict.

Damages — Excessiveness.

Where a warden, having charge of convict labor hired out to a contractor, refused to release a convict on the delivery of a pardon to him on the mistaken assumption that only the contractor had such authority, and the convict was detained 4 or 5 hours and was compelled to work 2½ hours after receipt of the pardon, but no indignities were offered him, a verdict of $1,000 for the false imprisonment is excessive, and a verdict for $25 would be affirmed.

[See note at end of this case.]

Appeal from Circuit Court, Pulaski county: HENDRICKS, Judge.

Action for false imprisonment. C. E. McCloskey, plaintiff, and E. N. Weigel, defendant. Judgment for plaintiff. Defendant appeals. MODIFIED.

[2] C. E. McCloskey instituted this action against E. N. Weigel to recover damages for false impirsonment. His complaint also alleges that during the time of his imprisonment he was unlawfully and wrongfully forced to wear upon his leg an iron shackle, commonly known as a "spur," which was very painful, and caused a sore on his leg. The facts are as follows:

The plaintiff, McCloskey, was convicted before a justice of the peace in Pulaski County of two offenses, his fine being fixed in one case at the sum of one dollar, and in the other in the sum of fifty dollars. The defendant, Weigel, at the time had leased the county convicts from the county court, and was working them under his lease. Under the rules adopted by the county court for working county prisoners, the contractor had the right to put fetters, or shackles, upon any prisoner who improperly refused to work or attempted to escape. One of the rules provided that the contractor should use all reasonable means to prevent a convict from escaping. Another one provided that a contractor should appoint a warden and deputy warden, but that before said appointment became effective such appointment must be approved by the county court. After his conviction on the 10th day of June, 1908, the plaintiff was turned over to the defendant to work out his fine and costs. W. H. Rankin applied to the Governor for a pardon for the plaintiff, and the pardon was issued on the 24th day of June, 1908, and delivered to Rankin. Rankin carried the pardon out to the place where the plaintiff, with the other county prisoners, was worked by the defendant. The defendant was not present, and Rankin delivered the pardon to John Harden, who was the warden in charge of the convicts. Harden had been appointed by the defendant, and his appointment had been approved by the county court. The warden refused to turn the [3] plaintiff loose, saying that he had no authority to do so and that the pardon would have to be delivered to the defendant. Rankin testifies that he left the pardon with the warden and attempted to get in communication with the defendant over the telephone, but was unable to do so. On the other hand, the warden denied that Rankin left the pardon with him. The defendant lived about three miles from the camp where the convicts were worked and kept his books at his residence. He states that when he returned home that evening his wife delivered the pardon to him; that he immediately examined his books to see if there were any commitments against the plaintiff other than those named in the pardon, and that when he found there were not he immediately sent a messenger with the pardon to the camp with instructions to the warden to liberate the plaintiff. The pardon, according to the testimony of Rankin, was delivered to the warden at about 2 o'clock in the afternoon. The warden continued to work the plaintiff until about 4:30 o'clock, at which time the shackles were ordered to be cut off his leg, and this was done. The plaintiff, however, was detained in custody until 7 or 8 o'clock in the evening, this being the time that the warden received instructions from the defendant to liberate the plaintiff. The plaintiff testified that he made no effort whatever to escape while he was a prisoner in charge of the defendant, and that the iron spur was placed upon him the first day he was delivered into the custody of the defendant and remained there, both day and night, until he was liberated. He says that he suffered pain on account of the spur being on his leg, and that it caused a sore place to form there. The defendant testified that he was informed by the officers, before the plaintiff was delivered to him, that the plaintiff had a bad reputation and was likely to escape unless precautions were taken to prevent him; that in order to prevent his escape he placed the iron spur on his leg.

[4] Other facts will be referred to in the opinion. The jury returned a verdict for the plaintiff for one thousand dollars for false imprisonment and a separate verdict for one hundred dollars for placing and keeping the iron spur on the plaintiff's leg. Judgment was rendered upon the verdict in each cause of action, and the defendant has appealed.

James A. Comer for appellant.
John F. Clifford for appellee.

[6] HART, J. (*after stating the facts*).—Counsel for defendant made a motion to compel plaintiff to elect upon which cause of action he would proceed to trial, and assigns as error the action of the court in refusing to require plaintiff to make such election. An act of the General Assembly of 1905 provides, in effect, that when causes of a like nature, or relative to the same question, are pending in any circuit court in this State, the court may consolidate said causes when it appears reasonable to do so. Acts of 1905, page 798. If separate actions had been brought, we think the court could have consolidated them under this statute. Therefore, no prejudice could have resulted to the defendant by the court refusing to require plaintiff to elect upon which cause of action he would proceed. See Mahoney v. Roberts, 86 Ark. 130, 110 S. W. 225; Ashford v. Rich-

ardson, 88 Ark. 124, 113 S. W. 808; Western Union Tel. Co. v. Shofner, 87 Ark. 303, 112 S. W. 751.

It is next contended by counsel for defendant that the court erred in giving instructions on the measure of damages. He claims that the error consists in the court not telling the jury, in specific terms, that their finding as to the amount of damages must be based on the evidence, and insists that the instructions left it to the jury to find for the plaintiff in any amount that, in their judgment, should be proper. We have condemned instructions similar to the one now under consideration in several cases. See St. Louis, etc. R. Co. v. Steed, 105 Ark. 205, 151 S. W. 257; St. Louis, etc. R. Co. v. Dallas, 93 Ark. 209, 124 S. W. 247. However, we have never held that such an instruction is reversible error. In the case of St. Louis, etc. R. Co. v. Hydrick, 109 Ark. 231, 160 S. W. 196, the court said:

"While it is always better form, and the better practice, for the court to tell the jury that its findings on every issue of fact in the case must be based upon the [7] evidence, yet where it is plain from the charge of the court, taken as a whole, that the jury were told that their findings must be based upon the evidence, the jury could not be misled nor feel authorized to make a finding that was not based upon the evidence because some separate or particular instruction omitted this precaution. The jury were sworn, in the first instance, to try the case and a true verdict render according to the law and evidence. Kirby's Digest, § 4530. That being true, it is not likely that any man of sufficient intelligence to be a competent juror would feel authorized to wander beyond the evidence to find matters upon which to predicate his findings in the case. The conscientious juror would necessarily feel restrained by his oath to base his findings upon the evidence."

It is also insisted by counsel for defendant that the verdict of the jury on the cause of action for false imprisonment is excessive; and in this contention we think he is correct. A pardon is effective upon delivery and acceptance. See Redd v. State, 65 Ark. 485, 47 S. W. 119; Ex parte Hunt, 10 Ark. 284. The plaintiff was lawfully in the custody of the defendant as lessee of the county prisoners under a contract made by him with the county court. While this is true, when the time for which a convict has been sentenced has expired, or when he has been pardoned by the Governor, he is in law no longer a convict, and cannot be held as such. The defendant himself did not remain with the convicts and have direct charge of them. He delegated that authority to a warden who was appointed by him with the approval of the county court. It was the duty of Rankin, who procured the pardon for the plaintiff, to deliver the pardon first to the warden in order that he might examine it and see that it was issued by the Governor and ascertain that it was what it purported to be. It was then the duty of the warden to cease working the plaintiff. It is insisted by counsel for defendant that he should have had a reasonable time to have examined his records in order to ascertain whether or not the plaintiff had been pardoned [8] for all offenses for which commitments had been delivered to him. This is true; but the warden refused to release the plaintiff solely on the ground that he did not have authority to do so. He told the person who had the pardon that the defendant alone reserved the right to discharge the plaintiff. The defendant having delegated to the warden the authority to have charge of the persons worked by him, it was within the scope of the authority of the warden to have examined the records himself and have determined whether there were other commitments under which the plaintiff might be held. It was his duty to have made such an examination, or caused it to have been made at once, or to have discharged the prisoner. A prisoner who has been pardoned by the Governor is entitled to his freedom, and to deprive him of it is unlawful. Therefore, the plaintiff was entitled to a judgment for some amount. As above stated, he was in legal custody of the defendant, and he had suffered all the humiliation it was possible for him to suffer solely on account of being a prisoner. The undisputed evidence shows that the illegal detention of the plaintiff by the defendant was not wilful. No indignities were offered to the plaintiff by the defendant, or his servants, after the pardon had been presented to the warden. It is true he was required to work for about two hours and a half thereafter; but this was done under a misapprehension of the law on the part of the warden who had the legal custody of the plaintiff. Under these circumstances, we think that a judgment for $25 would have been sufficient compensation for the jury to have awarded, and a judgment for that amount will be affirmed.

We find no error in the record on the cause of action for compelling the plaintiff to wear a spur, and the judgment on that count will be affirmed.

NOTE.

What Is Excessive or Inadequate Verdict in Action for False Imprisonment.

I. General Rules, 506.
II. Excessiveness:
1. Official Imprisonment:
a. In General, 508.

b. Imprisonment of Passenger, 511.
c. Imprisonment for Shoplifting, 511.
d. Imprisonment by Military Authorities, 511.
e. Detention of Convict after Pardon, 511.
2. Private Imprisonment:
a. In General, 511.
b. Imprisonment by Private Detective, 512.
c. Imprisonment of Passenger, 512.
d. Imprisonment for Shoplifting, 512.
III. Inadequacy:
1. Official Imprisonment, 512.
2. Private Imprisonment, 513.

I. General Rules.

The amount of damages to be awarded in an action for false imprisonment is a question for the jury, and the general rule is that their verdict will not be disturbed on the ground of excessiveness unless it is so flagrantly large as to evince passion, partiality or corruption.

England.—Fabrigas v. Mostyn, 2 W. Bl. 929; Edgell v. Francis, 1 Scott. N. R. 121; Leeman v. Allen, 2 Wils. C. Pl. 160; Huckle v. Money, 2 Wils. C. Pl. 205.

Canada.—Clissold v. Machell, 25 U. C. Q. B. 80, 26 U. C. Q. B. 422; Markey v. Sloat, 41 New Bruns. 234.

United States.—Harris v. Louisville, etc. R. Co. 35 Fed. 116; Clarke v. American Dock, etc. Co. 35 Fed. 478.

California.—Gomez v. Scanlan, 155 Cal. 528, 102 Pac. 12.

Colorado.—Union Depot, etc. Co. v. Smith, 16 Colo. 361, 27 Pac. 329.

Georgia.—See Southern R. Co. v. Gresham, 114 Ga. 183, 39 S. E. 883.

Illinois.—Marsh v. Smith, 49 Ill. 396; Newton v. Locklin, 77 Ill. 103.

Indiana.—Efroymson v. Smith, 29 Ind. App. 451, 63 N. E. 328; Golibart v. Sullivan, 30 Ind. App. 428, 66 N. E. 188; Ayres v. Harmon, 56 Ind. App. 436, 104 N. E. 315.

Iowa.—Young v. Gormley, 120 Ia. 372, 94 N. W. 922.

Kentucky.—Webber v. Kenny, 1 A. K. Marsh. 345; Ross v. Kohler, 163 Ky. 583, 174 S. W. 36, L.R.A.1915D 598; Scott v. Com. 93 S. W. 668, 29 Ky. L. Rep. 571; Foor v. Coombs, 15 Ky. L. Rep. 845.

Minnesota.—Judson v. Reardon, 16 Minn. 431; Rauma v. Lamont, 82 Minn. 477, 85 N. W. 236; Nelson v. Halvorson, 117 Minn. 255, Ann. Cas. 1913D 104, 135 N. W. 818.

Missouri.—Dunlevy v. Wolferman, 106 Mo. App. 46, 79 S. W. 1165; Mueller v. St. Louis Transit Co. 108 Mo. App. 325, 83 S. W. 270.

New York.—Pastor v. Regan, 9 Misc. 547, 30 N. Y. S. 657; Fuller v. Redding, 16 Misc. 634, 39 N. Y. S. 109; Biggs v. Schultz, 42 Hun 657, 5 N. Y. St. Rep. 56.

Oklahoma.—Chicago, etc. R. Co. v. Radford, 36 Okla. 657, 129 Pac. 834.

Rhode Island.—Baker v. Tyler, 67 Atl. 430.

Tennessee.—Moore v. Burchfield, 1 Heisk. 203.

Virginia.—Boltons v. Vellines, 94 Va. 393, 26 S. E. 847, 64 Am. St. Rep. 737.

Washington.—Hamilton v. Pacific Drug Co. 78 Wash. 689, 139 Pac. 642.

West Virginia.—Davis v. Chesapeake, etc. R. Co. 61 W. Va. 246, 56 S. E. 400, 9 L.R.A. (N.S.) 993; Howell v. Wysor, reported in full, post, this volume, at page 519.

Wisconsin.—Sorenson v. Dundas, 50 Wis. 335, 7 N. W. 259.

Thus in Ross v. Kohler, 163 Ky. 583, 174 S. W. 36, L.R.A.1915D 621, the court said: "The rule seems to be that . . . the court will not disturb the verdict of a properly instructed jury, on account of the sum of damages allowed being excessive, unless it appears that there is a flagrant abuse of discretion by the jury, or that the jury was actuated by passion or prejudice." And in Markey v. Sloat, 41 N. Bruns. 234, it was said: "There remains the question of excessive damages. In actions of false imprisonment and other injuries to the person, or character, although the rule remains that only such damages are recoverable as naturally flow from the wrongful act, there is no standard by which the money value of such injuries may be measured, and the only limit to the damages to be awarded is that they must be reasonable in amount. Where the person or character is injured, it is difficult, if not quite impossible to fix any limit, and the verdict is generally a resultant of the opposing forces of the counsel on either side tempered by such moderating remarks as the judge may think the occasion requires. It must not be supposed, however, that even cases of this sort are quite beyond rule. If that were so there could be no such thing as new trial for excessive damages. In cases of contracts a rule can be applied to the facts so accurately, as to make the amount a mere matter of calculation. In cases such as this one is, the rule goes no further than to point out what evidence may be admitted and what grounds of complaint may be allowed for. But when this is done, the amount of damages is entirely in the disposition of the jury. A new trial will only be granted where the verdict is so large as to satisfy the court that it was perverse and the result of gross error; or when it can be shown that

the jury have acted under the influence of undue motives or misconception." See also Gomez v. Scanlan, 155 Cal. 528, 102 Pac. 12, wherein the court said: "The amount of money which will compensate one for an unwarranted restraint of his person is not the subject of exact computation. Especially is this true where the invasion of the right of personal liberty is accompanied by circumstances causing humiliation, shame, and public disgrace to the party injured. In cases of this kind the extent to which the allowance may go must, in large measure, be left to the sound discretion of the jury. A court is justified in overturning a verdict as excessive only where its amount is 'obviously so disproportionate to the injury proved as to justify the conclusion that the verdict is not the result of the cool and dispassionate discretion of the jury.'"

The fact that the amount awarded is larger than the court would have allowed, does not make the verdict excessive. Webber v. Kenny, 1 A. K. Marsh. (Ky.) 345; Biggs v. Schultz, 42 Hun 657, 5 N. Y. St. Rep. 56; Pastor v. Regan, 9 Misc. 547, 30 N. Y. S. 657. In the case last cited, the court said: "The amount fixed by the jury in this case was probably larger than would have been given by the court, but the jury are the tribunal especially charged with the decision of questions involving the amount of damages, and no court is at liberty to interfere with their decision unless there is a plain abuse of their discretion."

However, the verdict will be set aside or a remittitur ordered, when the damages awarded are out of all reason and conscience, and so disproportionate to the injury sustained that they show that the jury were influenced by passion or prejudice. Price v. Severne, 5 M. & P. 125, 7 Bing. 316, 20 E. C. L. 145; Fanjoy v. Portland, 29 N. Bruns. 24; Fotheringham v. Adams Express Co. 36 Fed. 252, 1 L.R.A. 474; McCarty v. Fremont, 23 Cal. 196; Elser v. Southern Pac. Co. 7 Cal. App. 493, 94 Pac. 852; Philadelphia F. Assoc. v. Fleming, 78 Ga. 733, 3 S. E. 420; Johnson v. Von Kettler, 66 Ill. 63; Fadner v. Filer, 27 Ill. App. 506; Moore v. Durgin, 68 Me. 148; Woodward v. Glidden, 33 Minn. 108, 22 N. W. 127; Reuck v. McGregor, 32 N. J. L. 70; McConnell v. Hampton, 12 Johns. (N. Y.) 234; Moore v. Burchfield, 1 Heisk. (Tenn.) 203; Ogg v. Murdock, 25 W. Va. 139; Marshall v. Heller, 55 Wis. 392, 13 N. W 236. See also Cincinnati, etc. R. Co. v. Cundiff (Ky.) reported in full, post, this volume, at page 513. Thus in Reuck v. McGregor, supra, the Court said: "The chief ground upon which a new trial is asked in this case is that the damages are excessive. In these actions of tort, the court has, unquestionably, the power to grant a new trial for that reason. It is a delicate, yet necessary power, and should be exercised whenever it appears that the damages are so exorbitantly high, and so far exceed the injury sustained, as to make it manifest to the court that the minds of the jury have been controlled by passion, partiality, prejudice, or intemperance." And in Woodward v. Glidden, 33 Minn. 108, 22 N. W. 127, it was said: "The action is for false imprisonment, and . . . the plaintiff is clearly entitled to maintain it, and to recover round damages. He is entitled to damages, both compensatory and punitive: the former, to make good the actual injury inflicted upon him; the latter, to punish and make an example of the wrongdoing of the defendant. But, notwithstanding the liberty necessarily allowed juries in estimating damages against a wilful wrongdoer, there must be reason even in verdicts. In this case the jury brought in a verdict for $2,917. It is manifest that the plaintiff was far from being entitled to any such sum as this for his actual or compensatory damages. By far the larger part of the sum must have been intended as punitory damages. But even as to damages of that kind a jury must keep within some reasonable limits. In our judgment the verdict was grossly excessive and exorbitant, and enormously disproportionate to the wrong of which defendant is guilty. We cannot account for it except upon the theory that the jury gave it under the influence of passion or prejudice. We are not unmindful that we are reviewing the action of the trial judge, which is to some extent discretionary, nor of his advantage over this court from the fact that he witnessed the trial; but we are, nevertheless, clear in the opinion that, in the exercise of a sound judicial discretion, the verdict should have been set aside and a new trial granted. We shall, therefore, reverse the order appealed from, and direct a new trial."

What are adequate damages is a question for the jury, and there seems to be no reported decision in which, in an action for false imprisonment, an English or Canadian court has set aside the verdict of the jury on the ground that the damages awarded were inadequate. It seems that such a verdict will never be set aside, in those jurisdictions, on account of the smallness of damages unless there has been an intentional violation of right or duty on the part of the jury. Mauricet v. Brecknock, 2 Dougl. 509; Bradlaugh v. Edwards, 11 C. B. (N. S.) 377, 103 E. C. L. 377; Apps v. Day, 14 C. B. 112, 78 E. C. L. 112; Sam Chak v. Campbell, 45 Nova Scotia 1. See also Barker v. Dixie, 2 Stra. 1051. In Bradlaugh v. Edwards, supra, Erle, C. J., in delivering the judgment of the court, said: "The last ground of the motion was, the inadequacy of the damages, the jury having

awarded the plaintiff only a farthing by way of compensation for his detention for several hours at the police station, when the expense actually incurred by him in defending himself and obtaining his release from that unfounded charge was £7. 14s. Now, if I saw clearly that there had been anything like an intentional violation of right or duty on the part of the jury, I should think it a fit case for the interference of the court. But, unless that was very clearly made out, I should be extremely scrupulous to enter into any discussion as to the amount of damages, which is entirely a matter for their consideration. Where a party has been illegally imprisoned, and has been put to expense in procuring his discharge he may very well urge that fact before the jury as an aggravation; but he has no right to demand to be reimbursed *ex debito justitiae*. It is in the discretion of the jury to give him such damages as they may consider a sufficient compensation for the wrong the party has sustained, irrespective of any expense he may, perhaps, needlessly have incurred in his defense."

The American courts are likewise reluctant to set aside the verdict of a jury on the ground that the damages awarded are not adequate compensation for the injury received from the false imprisonment, and the general rule is that the verdict will not be set aside on the ground that the damages awarded are too small. Henderson v. McReynolds, 60 Hun 579 mem. 14 N. Y. S. 351; Taylor v. Davis (Tex.) 13 S. W. 642; Wegner v. Risch, 114 Wis. 270, 90 N. W. 168. See also Gregory v. Chambers, 78 Mo. 294; Bergeron v. Peyton, 106 Wis. 377, 82 N. W. 291, 80 Am. St. Rep. 33. However, it has been held that the verdict will be set aside when the damages awarded are grossly inadequate to the injury sustained. Potter v. Swindle, 77 Ga. 419, 3 S. E. 94; Hoagland v. Forest Park Highlands Amusement Co. 170 Mo. 335, 70 S. W. 878, 94 Am. St. Rep. 740.

II. Excessiveness.

1. Official Imprisonment.

a. *In General.*

The following verdicts for official false imprisonment have been sustained as not excessive:

$16.—Cheng Fun v. Campbell, 44 Nova Scotia 51 (Chinaman detained and fined on false assumption that he had illegally evaded Canadian head tax, officer acted in good faith, amount awarded not unreasonable under circumstances);

$100.—Pearson v. Great Southern Lumber Co. 134 La. 117, 63 So. 759 (man, arrested without warrant on charge of breaking electric bulbs, was with guilty party at time);

$200.—Strozzi v. Wines, 24 Nev. 389, 55 Pac. 828, 57 Pac. 832 (man, dispute as to right to possession of land, void process, bad faith on part of prosecutor by taking possession while other party under arrest); Howell v. Wysor (W. Va.) reported in full, post, this volume, at page 579 (prosecution of husband for nonsupport of wife); Newton v. Locklin, 77 Ill. 103 (man, arrested by officer without warrant for violation of ordinance, illegally incarcerated for contempt of police justice, amount larger than proper, but not flagrantly excessive);

$250.—Brosde v. Sanderson, 86 Wis. 368, 57 N. W. 49 (man, imprisonment for two days, commitment void for failure of justice to enter continuance); Thomas v. Henderson, 125 La. 292, 51 So. 202 (voter illegally arrested, told to consider himself under arrest, and report next day, probable cause);

$300.—Coffin v. Varila, 8 Tex. Civ. App. 417, 27 S. W. 956 (woman, arrested on void warrant in order that prosecutor might obtain possession of property she was occupying, violently seized, bruised, imprisoned one hour); Hight v. Naylor, 86 Ill. App. 508 (respectable young man arrested by private citizen without process on charge of stealing bicycle, turned over to night watchman, abusive language used, detained one hour in public place, refused permission to see those who could establish innocence); Markey v. Sloat, 41 N. Bruns. 234 (man, charged with nonpayment of dog tax, illegal warrant executed by constable, confined three days, cost of obtaining discharge $65); Gordon v. Hogan, 114 Ga. 354, 40 S. E. 229 (man, arrested without warrant on belief that he had not paid debt);

$400.—Young v. Gormley, 120 Ia. 372, 94 N. W. 922 (man, arrested in presence of family on charge of interfering with city officials in opening street, no warrant, caused to repeatedly appear before charge finally dismissed);

$450.—Ball v. Horrigan, 65 Hun 621 mem. 19 N. Y. S. 913 (young girl, playing, arrested for knocking over beer barrels, put in police box, taken to station house in police wagon);

$500.—Nelson v. Halvorson, 117 Minn. 255, 135 N. W. 818, Ann. Cas. 1913D 104 (man, arrested without warrant, charged with embezzlement, taken to lawyer's office and voluntarily turned pockets inside out); Hamilton v. Pacific Drug Co. 78 Wash. 689, 139 Pac. 642 (man, arrested as absconding debtor, taken from stateroom of boat after going to bed, carried to jail, money and other belongings taken from him, placed in cell with fifteen men charged with crime, released next day after money had been garnished); Nelson v.

Kellogg, 162 Cal. 621, Am. Cas. 1913D 759, 123 Pac. 1115 (woman illegally arrested on civil process, $150 liability incurred in procuring release);

$600.—Fuller v. Redding, 16 Misc. 634, 39 N. Y. S. 109 (woman, arrested on charge of riding bicycle on sidewalk, void process, bail, case dismissed);

$700.—Bulmer v. O'Sullivan, 28 Nova Scotia 406 (solicitor forcibly removed from court room and locked in cell);

$750.—Ross v. Kohler, 163 Ky. 583, 174 S. W. 36, L.R.A.1915D 621 (girl of seventeen, arrested without warrant, taken to police headquarters in police automobile, questioned about homicide she knew nothing of, firearms displayed);

$775.—Ryan v. Donnelly, 71 Ill. 100 (young woman, discharged as servant, accused of stealing $200, room searched without warrant, made to leave bed and dress before strangers, put in jail over night, $200 later found in accuser's possession);

$800.—McKelvey v. Marsh, 63 App. Div. 396, 10 N. Y. Ann. Cas. 178, 71 N. Y. S. 541 (innocent woman, imprisoned seven hours, void process, stripped naked before strange men); Rauma v. Lamont, 82 Minn. 477, 85 N. W. 236 (man, forcibly ejected from premises, assaulted, cursed, threatened with pistol and confined in filthy jail two and one-half hours); Judson v. Reardon, 16 Minn. 431 (man, arrested by fireman for driving across hose, not taken before magistrate, detained in jail two and one-half hours); Foor v. Coombs, 15 Ky. L. Rep. 845 (debtor, illegally arrested in civil action, no process, forced to pay debt to obtain release); Clissold v. Machell, 25 U. C. Q. B. 80, 26 U. C. Q. B. 422 (man, confined on charge of stealing, abused by magistrate trying case);

$1,000.—Thorp v. Cavalho, 14 Misc. 554, 36 N. Y. S. 1 (respectable man, requested by a friend to cash order, arrested for passing forged instrument, detained hour and half); Biggs v. Schultz, 42 Hun 657, 5 N. Y. St. Rep. 56 (crab vendor, arrested for trespassing on dock, detained over night, gave bail, mistake as to legal right on part of prosecutor); Fenelon v. Butts, 53 Wis. 344, 10 N. W. 501 (woman, taken from family, incarcerated in filthy cell, with nursing baby, mental anguish and impairment of health); Bolton v. Vellines, 94 Va. 393, 26 S. E. 847, 64 Am St. Rep. 737 (captain of police, arrested for appearing in uniform after term of office had expired, believed he held over until successor qualified, carried through streets in prison van, searched and imprisoned until released on habeas corpus); Chapman v. Cawrey, 50 Ill. 514 (tenant returning home at night found entrance closed, removed obstruction, ordered to leave by landlord, threatened to kill landlord if he interfered, arrested and confined for thirty-six hours; amount said to be very moderate); Wheeler, etc. Mfg. Co. v. Boyce, 36 Kan. 350, 13 Pac. 609, 59 Am. Rep. 571 (man, confined in jail without trial for refusal to deliver sewing machine which his wife had bought and paid for, malicious, larger verdict would have been sustained);

£200.—Edgell v. Francis, 1 Scott. N. R. (Eng.) 121 (secretary of bank, handcuffed and locked in cage over night at instigation of director of branch office where secretary was examining books late at night);

$1,250.—Rucker v. Barker (Tex.) 151 S. W. 871 (young man, refused to give up seat at medicine show, arrested in presence of crowd, dragged, struck with pistol, thrown down, imprisoned with negroes and Mexicans for about two hours);

£300.—Leeman v. Allen, 2 Wils. C. Pl. (Eng.) 160 (woman, cursed and imprisoned for few hours by "reforming" constables); Huckle v. Money, 2 Wils. C. Pl. (Eng.) 205 (printer, detained for six hours and treated civilly while in custody);

$1,700.—Reno v. Wilson, 49 Ill. 95 (arrest of respectable young man under degrading and humiliating circumstances and confinement all night in filthy jail with no food but bread and water, and publicly taken through streets next day, not the least pretense for charging with larceny);

$2,000.—Gomez v. Scanlan, 155 Cal. 528, 102 Pac. 12 (married woman, illegally arrested on pretended charge of larceny, mistreated and detained publicly before crowd for three or four hours, hysterical and sick in bed for two days);

$2,500.—Smith v. Macomber, 28 R. I. 248, 66 Atl. 570 (young man, paying unwelcome attentions to young lady, assaulted by her admirer, sought to have assailant arrested by young lady's uncle, who was chief of police, uncle arrested him instead, kept him in confinement several hours, lower court erred in ordering remittitur of $2,300); Allen v. Fromme, 141 App. Div. 362, 126 N. Y. S. 520 (young man, void execution, bail, required to keep jail limits, unable to attend to business or visit mother, about to enter profession, stigma on reputation);

$3,000.—Monjo v. Monjo, 53 Hun 145, 6 N. Y. S. 132 (mother, arrested on refusal to give up young child as decreed in divorce, conducted through public place to station house and imprisoned all night); Union Depot, etc. Co. v. Smith, 16 Colo. 361, 27 Pac. 329 (hackman, arrested on depot grounds for soliciting business by special railroad police under circumstances indicating oppressive use of supposed authority);

$3,500.—Cuthbert v. Galloway, 35 Fed. 466 (man, detained three days on false charge of embezzlement);

$4,000.—Clarke v. American Dock, etc. Co. 35 Fed. 478 (respectable woman, arrested on false charge, and confined with disorderly woman, no probable cause and purpose was to keep her away until her things could be put out and house torn down);

£3,000.—Fabrigas v. Moystyn, 2 W. Bl. (Eng.) 929 (false imprisonment of a native by the Governor of Minorca).

The following verdicts for official false imprisonment have been declared excessive:

$200.—Lewis v. Clegg, 120 N. C. 292, 26 S. E. 772 (man, wrongfully arrested to enforce payment of debt, no actual damages; held that nominal damages only could be recovered);

$288.—Yost v. Tracy, 13 Utah 431, 45 Pac. 346 (man, arrested for making threats, could have given bail for good behavior but refused to do so, offered to go to jail unattended, dissatisfied when sheriff refused to lock him up on void commitment; remittitur of $188 required);

$400.—Robinson v. Clark, 53 Ill. App. 368 (man, arrested for wrongfully selling score cards on show grounds, detained one-half hour); Fanjoy v. Portland, 29 N. Bruns. 24 (man, imprisoned on false assumption that taxes had not been paid, no harsh treatment or want of courtesy; verdict reduced to 100);

$475.—Ogg v. Murdock, 25 W. Va. 139 (man, sixty years old, arrested under bona fide belief he was nonresident debtor, imprisoned four days in damp iron cell, absence of malice, no injury sustained other than loss of time);

£100.—Price v. Severne, 5 M. & P. 125, 7 Bing. 316, 20 E. C. L. 145, 9 L. J. C. Pl. 99 (begging relative turned over to constable and confined in inn for one night, paid expenses next morning);

$500.—Moore v. Durgin, 68 Me. 148 (man, arrested on charge of obstructing highway, renewing bridge under valid contract with city, ordered by city to stop, no injury except brief detention, courteously treated; remittitur of $400 required); Miller v. Ashcraft, 98 Ky. 314, 32 S. W. 1085 (man, restrained by town marshal few minutes, circumstances not humiliating or degrading, no injury, temper ruffled, second trial gave but $100);

$600.—Spillett v. Clear Lake Boating, etc. Co. (Ia.) 155 N. W. 822 (man, confined in jail one hour in night, no abusive treatment; remittitur of $400 required);

$750.—Leonard v. Pawtucket Amusement Co. (R. I.) 94 Atl. 669 (man, loud laughing at serious moving picture, arrested, no actual damage, account in paper; remittitur of $550 required);

$800.—Condron v. Carr, 156 App. Div. 658, 141 N. Y. S. 721 (laboring man, technical false arrest on charge of stealing feed, detained three hours, bail given; remittitur of $700 required);

$1,000.—Fair v. Himmel, 50 Ill. App. 215 (saleswoman, accused of stealing scarf pin, hand put on shoulder and told to go to office where she remained for some considerable time of own volition); Philadelphia F. Assoc. v. Fleming, 78 Ga. 733, 3 S. E. 420 (man, detained for short time until he was subpœnaed for grand jury in an arson case, treated well and suffered no indignity);

$2,000.—Brown v. Chadsey, 39 Barb. (N. Y.) 253 (stockholder of bank, arrested on suspicion of robbing bank, satchel searched on street, compelled to appear twice at police court, dismissed when no complaint made); Davern v. Drew, 153 App. Div. 844, 138 N. Y. S. 1017 (workman, held for extradition, mistaken identity, photographed, finger prints taken, imprisoned two days, arrest caused by officer of Employers' Protective Association in labor matters; remittitur of $1,000 required); Hamlin v. Martin, 56 Ill. 315 (man, arrested on suspicion at instigation of private person, confined about eight hours, strong circumstantial grounds for belief of guilt);

$2,500.—Stearns v. Oppenheim, 146 App. Div. 651, 131 N. Y. S. 533 (lawyer, received paper from an arrested man, refused to deliver to detectives, assaulted and imprisoned over night; remittitur of $1,500 required);

$2,917.—Woodward v. Glidden, 33 Minn. 108, 22 N. W. 127 (man, imprisoned without process for purpose of forcing payment of debt, detained three hours, no special indignity or actual injury);

$3,000.—Reuck v. McGregor, 32 N. J. L. 70 (respectable man, accused of stealing cloth, police called, gave bail, accuser honestly mistaken in identity of cloth);

$4,000.—Schneider v. McGill, 64 S. W. 835, 23 Ky. L. Rep. 587 (clerk of elections, arrested by police for disorderly conduct, detained three hours, no unusual indignity or violence); Johnson v. Von Kettler, 66 Ill. 63 (man, confined for contempt for failure of wife as administratrix to pay claim against estate, void commitment, conduct of husband fraudulent, and proceedings instigated in good faith; remittitur of $2,000 not sufficient);

$8,000.—Fadner v. Filer, 27 Ill. App. 506 (man, imprisoned few hours, struck blow but no evidence of injury arising therefrom, excessiveness not cured by remittitur of $2,000);

$37,500.—Kilbourn v. Thompson, MacArthur & M. (D. C.) 401 (man, illegally arrested by sergeant at arms of House of Representatives and confined for thirty-five days, no unnecessary harshness; remittitur of $17,500 required).

b. *Imprisonment of Passenger.*

The following verdicts for official false imprisonment of passengers have been sustained as not excessive:

$500.—Alabama, etc. R. Co. v. Kuhn, 78 Miss. 114, 28 So. 797 (passenger illegally arrested for jumping off moving train, marched through street, fined, account published in papers); St. Louis, etc. R. Co. v. Tukey (Ark.) 175 S. W. 403 (sober passenger, arrested, detained about ten minutes);

$625.—Chicago, etc. R. Co. v. Radford, 36 Okla. 657, 129 Pac. 834 (passenger arrested for refusing to pay fare after forfeiting nontransferable ticket bought from scalper, handcuffed and caused to sit in train with another prisoner);

$900.—Davis v. Chesapeake, etc. R. Co. 61 W. Va. 246, 56 S. E. 400, 9 L.R.A.(N.S.) 993 (passenger riding past station by mistake, refused to pay additional fare, arrested, fined $100 and ten days in jail, imprisoned two days);

$1,000.—Illinois Cent. R. Co. v. Wilson, 103 S. W. 364, 31 Ky. L. Rep. 789 (passenger charged with theft, detained in coach, turned over to police and searched).

The following verdicts for official false imprisonment of passengers have been declared excessive:

$550.—Palmer v. Maine Cent. R. Co. 92 Me. 390, 42 Atl. 800, 69 Am. St. Rep. 513, 44 L.R.A. 673 (passenger arrested for evading fare, refused to tell conductor whether signature on mileage book was his, taken before magistrate and fined, could have avoided trouble by answering conductor's question; remittitur of $540 required);

$4,000.—Elser v. Southern Pac. Co. 7 Cal. App. 493, 94 Pac. 852 (male passenger wrongfully ejected and imprisoned for one day, no malice and conductor mistaken about validity of ticket; remittitur of $3,000 required); Cincinnati, etc. R. Co. v. Cundiff, reported in full, post, this volume, at page 513 (passenger, county clerk, charge of disorderly conduct and drunkenness, no excessive force or brutal treatment, no physical injury, evidence of drunkenness, detained about one hour, marched in stocking feet about eight hundred yards to police station).

c. *Imprisonment for Shoplifting.*

The following verdict for official false imprisonment in a shoplifting case has been sustained as not excessive:

$3,000.—Ayres v. Harmon, 56 Ind. 436, 104 N. E. 315 (woman, charged with shoplifting, followed by private detective, arrested, taken along public street to station house, roughly treated, nervous shock).

The following verdict for official false imprisonment in a shoplifting case has been declared excessive:

$500.—Simper v. Carroll, 31 Ohio Cir. Ct. Rep. 386 (woman, arrested for shoplifting, taken to police headquarters and searched, restrained two hours, no malice, remittitur of $200 ordered.

d. *Imprisonment by Military Authorities.*

The following verdicts for official false imprisonment by military authorities have been declared excessive:

$8,000.—Moore v. Burchfield, 1 Heisk. (Tenn.) 203 (man, arrested by Confederate conscription officer, shot at, run over by horse, cursed, detained five hours before escape);

$9,000.—McConnell v. Hampton, 12 Johns. (N. Y.) 234 (respectable man, arrested on suspicion by military officer on charge of treason, confined five days, slept on floor, bought own food, court-martialed);

e. *Detention of Convict after Pardon.*

The following verdict for the detention of a convict after pardon has been declared excessive:

$1,000.—See the reported case (detention of convict after pardon by warden under assumption that only contractor to whom convict was hired could release, no harshness, shackles removed after two hours, and convict released after five hours; verdict for $25 would be sustained).

2. Private Imprisonment.

a. *In General.*

The following verdicts for private false imprisonment have been sustained as not excessive:

$125.—Price v. Bailey, 66 Ill. 48 (boy, arrested by pretended officer and tried and sentenced by pretended court on charge of breaking window, fined three dollars, and had to give security before release, detained two hours);

$250.—Golibart v. Sullivan, 30 Ind. App. 428, 66 N. E. 188 (boy, caught stealing cherries, tied with rope and detained three hours, legs and arms bleeding); Kroeger v. Passmore, 36 Mont. 504, 93 Pac. 805, 14 L.R.A. (N.S.) 988 (woman, detained in office three-quarters of an hour for refusal to return deed, sick and nervous);

$500.—Talcott v. National Exhibition Co. 144 App. Div. 337, 128 N. Y. S. 1059 (man, entered ball park but unable to buy ticket, tried to leave but prevented by special police on account of crowds entering gate, detained about one hour);

$2,500.—Gallon v. House of Good Shepherd, 158 Mich. 361, 122 N. W. 631, 133 Am. St. Rep. 387, 24 L.R.A.(N.S.) 286, 16 Detroit Leg.

N. 638 (girl, detained seven years in charitable institution);

$5,000.—Grace v. Dempsey, 75 Wis. 313, 43 N. W. 1127 (man, seized and carried to house of priest, forced to kneel and apologize for accusing priest of adultery with his wife).

The following verdicts for private false imprisonment have been declared excessive:

$250.—Sorenson v. Dundas, 50 Wis. 335, 7 N. W. 259 (man, imprisoned in own room one-half hour, charged with larceny, fright and mental distress);

$650.—Marshall v. Heller, 55 Wis. 392, 13 N. W. 236 (woman, piece worker, dispute over compensation, refused to turn finished pants over to owner, told she could not go away without leaving pants, conflict in evidence as to whether or not door was locked half hour);

$1,100.—Whittaker v. Sanford, 110 Me. 77, Ann. Cas. 1914B 1202, 85 Atl. 399 (woman, member of religious sect, kept on yacht against will, treated as guest, no humilating circumstances, taken on shore by husband and visited neighboring islands with her children, but refused permission to permanently leave yacht; remittitur of $500 required).

b. *Imprisonment by Private Detective.*

The following verdicts for private false imprisonment by private detectives have been sustained as not excessive:

$1,271.—Pinkerton v. Sydnor, 87 Ill. App. 76 (night watchman, arrested by private detectives, charged with robbing safe, detained three days, handcuffed, chained to bed);

$5,000.—Harris v. Louisville, etc. R. Co. 35 Fed. 116 (man, arrested by mistake in identity by private detective without warrant and carried in irons to another state, where under duress released the detective agency from liability for tort);

The following verdict for private false imprisonment by private detectives has been declared excessive:

$20,000.—Fotheringham v. Adams Express Co. 36 Fed. 252, 1 L.R.A. 474 (man, constantly guarded by private detectives for two weeks, cross-examined and treated as criminal, and actions implied that force would be used if he attempted to assert liberty; remittitur of $8,000 required).

c. *Imprisonment of Passenger.*

The following verdict for private false imprisonment of a passenger has been sustained as not excessive:

$525.—Mueller v. St. Louis Transit Co. 108 Mo. App. 325, 83 S. W. 270 (street car passenger, refusal to accept transfer, forcibly detained on car).

d. *Imprisonment for Shoplifting.*

The following verdicts for private false imprisonment in shoplifting cases have been sustained as not excessive:

$500.—Dunlevy v. Wolferman, 106 Mo. App. 46, 79 S. W. 1165 (woman, accused of leaving store without payment for meat, bought no meat, followed by manager, roughly seized on street, taken back to store and released);

$1,200.—Efroymson v. Smith, 29 Ind. App. 451, 63 N. E. 328 (woman, charged with shoplifting, taking shoes across store to show to daughter by permission, seized by arm, searched, no apology);

$2,500.—Siegel v. Connor, 70 Ill. App. 116, *affirmed* 171 Ill. 572, 49 N. E. 728 (woman, charged with shoplifting, taken to office and five dollars exacted for two handkerchiefs worth fifty cents each).

The following verdicts for private false imprisonment in shoplifting cases have been declared excessive:

$500.—Gore v. Marshall, 184 Ill. App. 486 (man, shoplifting, detained few moments, no showing that case called for punitive damages);

$1,000.—Kress v. Lawrence (Tex.) 162 S. W. 448 (boy, twelve years old, shoplifting, taken to office, voluntarily turned pockets inside out; remittitur of $500 required);

$2,500.—Cobb v. Simon, 119 Wis. 597, 97 N. W. 276, 100 Am. St. Rep. 909 (woman, shoplifting, locked in room and searched, no publicity or disgrace, no physical injury except heart difficulty, weakness, and headache; any verdict above $1,000 would be excessive).

III. Inadequacy.

1. Official Imprisonment.

The following verdict for official false imprisonment has been declared to be inadequate:

$25.—Potter v. Swindle, 77 Ga. 419, 3 S. E. 94 (man, arrested without warrant, on suspicion that he was escaped convict, handcuffed, detained five days, carried out of county).

The following verdicts for official false imprisonment have been declared not to be inadequate:

1 farthing.—Apps v. Day, 14 C. B. 112, 78 E. C. L. 112 (man, taken before magistrate on unfounded charge of stealing ferret); Bradlaugh v. Edwards, 11 C. B. (N. S.) 377, 103 E. C. L. 377 (man detained in police station several hours, expense of obtaining release £7. 14s.);

6 cents.—Wegner v. Risch, 114 Wis. 270, 90 N. W. 168 (woman, technical false arrest, policeman thought she was insane, acted strange, taken to station house, no indignity); Henderson v. McReynolds, 60 Hun 579

mem. 14 N. Y. S. 351 (man, detained only long enough to walk across street);

$1.—Sam Chak v. Campbell, 45 Nova Scotia 1 (Chinaman, arrested and held on suspicion of violating Canadian head tax law, claimed $550 actual damages, but offered no evidence to prove same, officers acted in good faith and there were mitigating circumstances); Salo v. Smith, 25 Cal. App. 295, 143 Pac. 322 (man, arrested by officer on suspicion of felony, detained unreasonable time before complaint, no actual damages sustained and detention was due to inability of officer to know what to charge in complaint, for reason that assaulted person was dangerously ill, nominal damages awarded by the court on the pleadings);

£5.—Mauricet v. Brecknock, 2 Dougl. (Eng.) 509 (man, held to bail in bankruptcy, verdict on writ of inquiry after judgment by default, actual expense £30);

$50.—Taylor v. Davis (Tex.) 13 S. W. 642 (man arrested, mistaken identity, discomforts of prison, loss of employment at $35 per month and board, which would have continued five months, no proof that other employment could not be obtained, humiliation);

$100.—Jacques v. Parks, 96 Me. 268, 52 Atl. 763 (man, arrested on illegal tax warrant, detained thirteen days, obliged to pay tax and $23 before release, harsh treatment, riding in wet clothes in December, damages assessed by court).

2. PRIVATE IMPRISONMENT.

The following verdict for private false imprisonment has been declared to be inadequate:

1 cent.—Hoagland v. Forest Park Highlands Amusement Co. 170 Mo. 335, 70 S. W. 878, 94 Am. St. Rep. 740 (finder of pocket book on amusement grounds, tried to turn it over to proper official, abused and cursed by employees who claimed they were proper officials, marched through crowd to policeman, who took pocket book and released prisoner);

The following verdicts for private false imprisonment have been declared not to be inadequate:

$100.—Young v. Rossi, 30 Fed. 231 (libel for wrongful imprisonment on board vessel, damages assessed by court);

$500.—Roza v. Smith, 65 Fed. 592 (libel for unlawful detention on board vessel, man confined in irons and kept in custody eighteen hours on charge of instigating desertion, damages assessed by court).

CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY ET AL.

v.

CUNDIFF.

Kentucky Court of Appeals—November 9, 1915.

166 Ky. 594; 179 S. W. 615.

Officers — Railroad Policemen — Time for Qualifying.

Const. § 236, provides that the general assembly shall prescribe a time when the officers authorized by the constitution to be appointed shall enter upon their duties. Ky. St. § 3755, provides that, if the official bond is not given and the oath of office taken within 30 days after notice of appointment, the office shall be considered vacant. Section 779a provides that railroads, on application to the governor, may have certain persons appointed to act as policemen on trains, who shall qualify by executing bond and taking the oath of office, and be paid by the railroad, which, when it no longer requires their services, may file notice to that effect. Held that, where a special railroad policeman appointed and commissioned in June, 1906, did not take the oath and execute bond until July, 1907, the date of his notice of his appointment should have been avowed to render evidence of his powers to act himself or by deputy admissible, and that there was a presumption that he did not execute the bond and take the oath within the prescribed 30 days after notice of his appointment, so that the office was vacant.

Term of Office.

Under Const. § 93, providing that inferior and state officers may be appointed for a term not exceeding four years and until their successors are qualified, and Ky. St. § 779a, providing for the appointment of railway police officers, to be paid by the railway and to hold office during its pleasure, it was intended to create the office for the four-year term permitted by the Constitution, and the failure to fix the term as one not longer than four years does not make the statute unconstitutional.

Effect of Expiration of Term.

Under Const. § 93, providing that inferior and state officers may be appointed as prescribed by law for a term not more than four years and until their successors are appointed and qualified, the appointment of a special railway police officer under Ky. St. § 779a, on application to the governor to serve during the railroad's pleasure, does not provide for a succession in such office, so that, when the term expires either by operation of law or by the will of the railroad, the office ceases, and another appointee does not take it as successor.

Status as De Facto Officer.

A special railway police officer whose office has become vacant for failure to take the oath and execute his bond within the time prescribed by the constitution is not a "de facto officer."

Same.

The railroad, which has obtained the officer's appointment, has no right to regard him as a de facto officer, since it is incumbent upon it to see or know that he has qualified to act as an officer de jure before he is given employment on its trains.

Right to Summon Bystanders to Assist.

While every citizen is bound to assist a known public officer in making an arrest when called upon to do so, without information as to the offense charged or inquiry into the regularity of the process, and is protected in making such arrest, yet, where a special railway police officer, not a known public officer, but, assuming to act as an officer, summons a railroad employee to aid in ejecting and arresting a passenger the employee is liable as such if the alleged officer was a trespasser.

Responsibility of Railroad for Acts.

In view of Ky. St. § 3755, providing that, if an official bond is not given and the oath of office taken within 30 days after notice of appointment to a public office, it shall be considered vacant, a railroad employing a special police officer is not in the position of a third person who may claim that the acts of a de facto officer are valid as to him, but is responsible for his claim of right, so that for his acts thereunder it is liable.

[See Ann. Cas. 1913D 112.]

False Imprisonment — Acts of Servant — Proof of Motive.

In an action against a railroad, its special police officer and another for wrongful ejection and arrest, where the evidence justifies compensatory damages only, evidence as to the special officer's motive in making the arrest is inadmissible.

Punitive Damages.

Where there was nothing in the conduct of defendant railroad's special police officer and its employee, acting under his direction, in ejecting and arresting plaintiff that can be considered as wanton or reckless disregard of plaintiff's rights as a passenger, and where neither their language nor manner was insulting, punitive damages are not recoverable.

Excessiveness of Damages.

A verdict of $4,000 for alleged wrongful ejection of plaintiff from defendant's train, and his arrest and detention for an hour, without a showing of any excessive force or brutal treatment or physical injury, even if plaintiff was not drunk or disorderly, as alleged, is in excess of what will justly compensate him for the suffering endured.

[See note at end of this case.]

Appeal from Circuit Court, Boyle County.

Action for false imprisonment. W. C. Cundiff, plaintiff, and Cincinnati, New Orleans and Texas Pacific Railway Company et al., defendants. Judgment for plaintiff. Defendants appeal. The facts are stated in the opinion. REVERSED.

Nelson D. Rodes, Charles H. Rodes and *John Galvin* for appellants.

Robert Harding, Charles Montgomery, Emmet Puryear and *John W. Rauclings* for appellee.

[595] NUNN, J.—This is an appeal from a judgment rendered against the appellant railway company, Samuel Morrow, and C. N. Mitchell, in favor of appellee for the sum of $4,000. The petition charges that the railway company and its servants, the co-defendants, wrongfully, maliciously and forcibly ejected him from its train, and caused him to be taken by other railroad servants to a police station at Ludlow and there locked up. The defendants filed separate answers, in which they alleged that Mitchell and Morrow were officers of the Commonwealth and not servants or employees of the railroad. Mitchell and Morrow admitted that they took the appellee, Cundiff, off of the train and delivered him to other police officers at Ludlow, Kentucky, but they say that, acting as police officers of the Commonwealth, they arrested him because he was drunk, using profane language and behaving in a disorderly manner on the train. They claim to have acted in good faith and upon probable cause, and without malice toward appellee. In brief, the facts are as follows:

Appellee was the County Court Clerk of Casey county and a candidate for re-election. In the latter part of August, 1913, a considerable number of men from Casey and surrounding counties went to Cincinnati on a Sunday excursion. Appellee lived at Liberty, the county seat, which was 17 miles from Moreland, the nearest station on appellant's road. In company with many others, they left Liberty on Saturday night about 11 o'clock, and drove overland in order to reach Moreland at 5 o'clock Sunday morning, when the excursion train was due. There was jamaica ginger in the party before they left Liberty, and it is inferable from the record that on the road to Moreland, and on the train to Cincinnati, members of the party were drinking intoxicants of some [596] kind, although there is no evidence that Cundiff partook until he reached Cincinnati. Just why he went to Cincinnati on a Sunday excursion is not a necessary, if a fair, inquiry. He attempts to excuse the trip, however, by stating that his brother-in-law lived there, and, also, calls attention to the fact that a good many voters from his county were going and he wanted to "electioneer" with them. He admits taking several drinks

of beer in Cincinnati, but does not fix the number. His friends count at least six that he drank. How many of these are in addition to those admitted by Cundiff the record leaves in doubt. He maintains, however, that he was not drunk, and his friends, certainly not less drunk, corroborate him. According to his story, he was worn out by the time the train was ready to leave Cincinnati that evening at 6 o'clock, and quite naturally his party were at the station a long while, perhaps an hour, before starting time. Before the train gates were opened they made one or more trips to a nearby saloon, where appellee admits taking a final glass of beer, and Waldon, his closest companion, bought a flask of brandy. When the gates were opened they got aboard the train. It consisted of 14 cars. Appellee and his companions got on the second car from the rear end. It was August, the shed was close, the crowd was large, and the train was next to a stone wall, where the sun had been shining all day. Of course, it was oppressive in the car, and, from these circumstances, it is easy to understand how, in connection with being up all night and going all day in a pair of new shoes, appellee felt the need of rest. He says as much, and immediately they were seated, he put up his hat, pulled off his coat, removed his collar, unbuttoned his shirt, and took off his shoes. In order that he might not be disturbed, he gave his ticket to Waldon, his companion, with request that he hand it to the conductor. Thus relieved, and so clad, he went to sleep. He never knew when the train started. In fact, the first thing he says that he did know was when, in the fifth car from the engine, Morrow caught him by the collar and jerked him out of the seat, and, with the help of Mitchell, marched him to the baggage car, where there were four other drunken passengers. Cundiff says he asked Morrow, "What is the matter? What have I done? What are you doing?" Morrow replied, "I am an officer." Cundiff says, "I am clerk of the [597] county court." To which Morrow replied, "Go on there, I will take care of you." When the train reached Ludlow, Cundiff and the other men in the baggage car were taken off. Cundiff says he then appealed to Morrow for release on the ground of politics and former association with some of Morrow's relatives; but Morrow was obdurate. Cundiff then discovered that he was without coat, collar, hat, or shoes, and asked for time to go aboard to get them. The train was held while Morrow went back for them, but he was only able to find the coat and hat. Cundiff and the baggage car outfit were delivered into the hands of an alleged police officer at Ludlow, while the other men from Casey continued their journey homeward. With Cundiff in his stocking feet, they were marched some 800 yards to the police station. Cundiff says the other men were put in a cell, but they left him out in the corridor and locked him up. As to being locked up anywhere no witness supports him, and appellant's witnesses deny it. The mayor came down in a short time and looked him over, and said, "I find no fault in this man." According to precedent, ancient, if not honorable, he desired to wash his hands of the affair by directing his release. To this Cundiff demurred and insisted that a charge be preferred and a day fixed for trial, and that he be admitted to bail. After some argument, a day was set and Cundiff prepared an appearance bond in his own hand, which a sympathizing by-stander signed. On the day fixed for trial Cundiff appeared; the case was heard; attorney for the railroad took a part, and Cundiff was acquitted.

Three of Cundiff's companions claim to know when Morrow arrested him, but none of them followed to see what became of him. With Cundiff they occupied seats near the end of the car, facing each other. These men testified that Cundiff went to sleep and never moved from his place until he was pulled out of it by Morrow. They insist that he was not drunk or offensive or creating any sort of disturbance. Waldon, his closest associate, was removed to the baggage car soon after Cundiff was taken off, and he is frank enough to say: "You see, the fact of the business is, when they taken Mr. Cundiff, you know, you see I had lost sleep all night, had been up, and was wore out and sleepy, and I just simply laid down and went to sleep. Some of the gentlemen just taken me over in the baggage car and I slept in [598] there, and then I went back to my car." He explains that all his brandy was gone when he returned.

Morrow testified that he first saw Cundiff and Waldon together that evening as they came through the station gate "walking and staggering along down the train." They got aboard the 12th car, that is the second from the rear. Morrow was acting as a police officer (whether rightfully so is another question). The whole length of the train was his beat. He next saw Cundiff out in the aisle near the middle of the car. A man was trying to get by him. Cundiff was making secret order signs, and not receiving a proper response remarked that any man that did not belong to his secret order "is a —— ——— fool." Morrow caught him by the shoulder and told him he was an officer and cautioned him of the presence of ladies and asked him to take his seat and get out of the way. Cundiff wanted to talk to him about his secret order, and upon receiving information that Morrow did not belong, expressed the opinion, "well, —— ——; you have lost the

best years of your life." Morrow shoved him down in the seat and went on to the rear of the train. Coming back in three or four minutes he found him two cars ahead, where he was falling over, and making signs to, an old gentleman. He was advising the old man, with some profanity, to "join as soon as possible." Morrow warned him that if he did not sit down and keep quiet he would have to arrest him. Morrow went on to the front of the train, and then made another round trip without encountering Cundiff. On his next trip, he found Cundiff in the fifth car from the engine, seated, and cursing because he could not find a member of his secret order on the train. Morrow then arrested him and deputized Mitchell, a railroad employee, to take him to the baggage car. Morrow thus described his appearance:

"He didn't have any coat, and his shirt was open; his person was exposed; he did not look like he had combed his head for some time; his hair was stringing around his face; the smell of beer was strong on his breath, . . . and his shirt-tail was out."

Mitchell, the old man, and other passengers corroborate Morrow in many of these details, and it is established beyond controversy, that the arrest occurred in the fifth car from the engine.

[599] Reversal is asked on several grounds: (1) Morrow acted as a police officer of the Commonwealth and Mitchell was his deputy, and the court erred in rejecting evidence tending to show Morrow's power so to act and deputize Mitchell. (2) The court erred in giving an instruction authorizing the recovery of punitive damages. (3) The verdict is excessive.

Appellants offered to prove that Morrow was a railroad policeman, appointed and commissioned by the Governor of Kentucky in June, 1906, and that on July 3, 1907, he qualified to act as such by taking the oath of office and executing bond to the Commonwealth under the provisions of Section 779a, Kentucky Statutes. The court ruled that the evidence offered was incompetent. The point was saved by avowal to the above effect. The statute referred to provides that railroad corporations may apply to the Governor and have certain designated persons appointed and commissioned to act as policemen, with powers of sheriffs or constables upon trains and about depots. Any person so appointed shall qualify in the county of his residence by executing bond with good security and taking and subscribing to the oath of office required by the Constitution. These facts must be endorsed upon his commission. Certified copy of the commission, together with the endorsements thereon, shall be recorded in the county court clerk's office of every county in which it is intended the policeman shall act. The policeman is subject to all the liabilities of sheriffs and constables, and for which the surety on the bond is responsible. The compensation of such policeman is paid by the railroad at whose instance he was appointed and is fixed by agreement between them. When the railroad deems that his services are no longer required, it may file notice to that effect in the several counties where his commission is recorded, and thereupon his right to act as policeman shall cease.

There is nothing in the case to show that the conductor or other employees of the railroad caused Morrow to arrest or reject Cundiff from the train. He acted upon his own initiative. Whether he was a servant of the railroad to the extent that the railroad would be answerable for his conduct, if, in fact, he had been lawfully commissioned and qualified to act as railroad policeman, is a question not presented by this record. We have reached the conclusion that he was not authorized to [600] make the arrest by virtue of the commission issued to him by the Governor. (1) He failed to qualify within the time required by law. (2) His term of office had expired when he made the arrest. His commission was issued on June 22, 1906. Pulaski was the county of his residence, and he there took the oath of office and executed bond on July 3, 1907. Certified copies of the commission and qualification were subsequently recorded in Kenton county, where the arrest was made. Section 236 of the Constitution provides that the General Assembly shall by law "prescribe a time when the several officers authorized or directed by this Constitution to be elected, or appointed, shall enter upon the duties of their respective offices, except where the time is fixed by this Constitution." In compliance with this constitutional requirement, Section 3755 of the Kentucky Statutes was enacted, and is as follows:

"If the official bond is not given and the oath of office taken on or before the day on which the term of office to which a person has been elected begins, or in case of persons appointed to office 30 days after such person has received notice of his appointment, the office shall be considered vacant and he shall not be eligible thereto for two years."

The avowal does not show when Morrow received notice of his appointment. In view of the lapse of more than a year between the date of his commission and the time of his qualification, we think the date of notice should have been avowed in order to render the evidence competent. This lapse of time, unexplained, amounted to such an unreasonable delay as to raise the presumption that he did not execute the bond and take the oath of office within 30 days after he received

notice of his appointment. Therefore, we must hold that the office was made vacant, and he rendered himself ineligible thereto for two years.

The arrest was made in August, 1913, more than seven years after his appointment, and more than six years after his attempted qualification. Under the Constitution, his term of office was four years. It follows, therefore, that it had expired when the arrest was made, assuming that he ever was legally qualified to make the arrest. Legislative authority to create this office comes from Sections 93 and 107 of the Constitution, which are as follows:

[601] "Sec. 93. Inferior and State officers, not specifically provided for in this Constitution, may be appointed or elected in such manner as may be prescribed by law, for a term not exceeding four years, and until their successors are appointed or elected and qualified."

"Sec. 107. The General Assembly may provide for the election or appointment, for a term not longer than four years, of such other county or district ministerial and executive officers, as may from time to time be necessary."

It will be noticed that Section 779a is silent as to the length of time that a railroad policeman shall hold his office, except the fact that it may be terminated at the pleasure of the railroad at whose instance the appointment was made. But the failure of the Legislature to fix a term not longer than four years does not of itself render the act unconstitutional.

"In construing statutes the court will never adopt a construction that makes them invalid or unconstitutional, if any other is susceptible from their words." Standard Oil Co. v. Com. 119 Ky. 75, 82 S. W. 1020, 26 Ky. L. Rep. 985; Render v. Louisville, 142 Ky. 409, 134 S. W. 458, 32 L.R.A.(N.S.) 530; Com. v. Hodges, 137 Ky. 233, 125 S. W. 689; Com. v. International Harvester Co. 131 Ky. 551, 115 S. W. 703.

Agreeable to this rule of construction, and as applied in the case of Sinking Fund Com'rs v. George, 104 Ky. 260, 47 S. W. 779, 84 Am. St. Rep. 454, we hold that the Legislature intended to create an office for the term permitted by the Constitution, that is, four years, and no more. In that case, the court had under consideration an act of the Legislature creating a board of penitentiary commissioners. The board consisted of three members holding office, one for a term of two years, one for four, and the other for six years. George was elected for the six year term. The constitutionality of the act was attacked on the ground that an office had been created for a term longer than four years. The court held the act constitutional, but limited George's term of office to four years. We quote from the opinion:

"As the General Assembly expressed a willingness that one of the commissioners should hold for two years longer than the Constitution permits, it is certainly reasonable to conclude that it was the will of that body that the commissioner should hold for four years, as this [602] term is necessarily included in the longer one which it fixed. To hold the act void in so far as it makes the term six years instead of four, still the balance of the act is complete and enforcible. . . . The General Assembly has not only shown a willingness that the terms shall be as much as four years, but that they shall be six. If the unconstitutional portions of an act can be stricken out, and that which remains is complete in itself, and capable of being executed in accordance with the apparent legislative intent, wholly independent of that which is rejected, it must be sustained. When that part of the act which adds two years to the constitutional term of four years is rejected, there will be three commissioners, one of whom shall hold for a term of two years, and two for a term of four years each, and, in the language of the act, holds 'until their successors are elected and qualified.'"

Arguing that Morrow was lawfully qualified in the first place, appellant contends that under Section 93 of the Constitution he was lawfully acting as policeman, although the four year term had expired, because, as it says, no successor had been appointed or qualified to take his place. We do not consider this reasoning sound for two reasons: First, the avowal is lacking in that regard. And, in the next place, the statute shows that no such thing as succession in this office was contemplated. When the term of office of a railroad policeman expires, whether by operation of law or at the will of the railroad, the office he held ceases with the officer. When another is appointed he does not take it as successor to anyone.

Neither can it be said that Morrow was a *de facto* officer. Nor did the railroad, responsible for his appointment, have the right to so regard him. It was incumbent upon the railroad to see or know that he had qualified to act as an officer *de jure* before he be given employment on its trains.

"When an officer is called upon to justify an illegal arrest and he relies upon his official capacity, it is usually considered necessary that he should prove not only that he was an acting officer, but that he was an officer in truth and right, duly commissioned and qualified to act as such." Vol. 2, R. C. L. 490.

[603] Morrow not being a public officer, his summons to Mitchell to aid in keeping Cundiff in custody does not relieve Mitchell of responsibility.

"Every citizen is bound to assist a *known* public officer in making an arrest, when called,

upon to do so. . . . According to the better considered authorities private persons may respond to the call of a *known* officer without waiting for information as to the offense which the criminal has committed and without pausing to inquire into the regularity of the process; and whoever in good faith renders assistance and obeys the orders and directions of a *known* public officer in response to a call for assistance is protected in making the arrest, although the officer may be acting wrongfully and may be personally liable for the false arrest." 2 R. C. L. 491.

But where the party making the arrest is not a known officer, but only assumes to act in that particular case by special appointment, persons aiding the supposed officer are bound to know whether he has authority to make the arrest or not, and in case he is a trespasser for want of authority, those aiding him are also liable. Dietrichs v. Schaw, 43 Ind. 177. See, also, note, Tryon v. Pingree, 112 Mich. 338, 70 N. W. 905, 67 Am. St. Rep. 421, 37 L.R.A. 222.

Section 3755, Kentucky Statutes, supra, prescribing the time in which an officer shall qualify, in express terms vacates the office for failure to comply therewith. The railroad is not in the position of a third party who may claim that the acts of a *de facto* officer are valid as to it. The railroad is responsible for his claim of such right, and whatever steps he takes under such claim of right are taken at their peril.

The instructions authorized the jury to find for Cundiff such damages as would reasonably and fairly compensate him for the mortification and humiliation he experienced in being arrested and evicted from the train, if it was done wrongfully and without probable cause. In their discretion they were also authorized to award punitive damages, if they believed the defendants acted maliciously and with a reckless and wanton indifference to Cundiff's rights as a passenger on the train.

Appellant's counsel, at the trial, asked Morrow if, at the time he arrested Cundiff, he believed in good faith that he had a right to make the arrest. The court sustained [604] an objection to this question, and appellant excepted and avowed:

"That the witness, if permitted to answer, would state that he believed in good faith and honestly that he was entitled to do that for the protection of the women and children and other passengers on board the train against drunken and disorderly persons."

We think this evidence would have been competent had Cundiff made out a case warranting an instruction on punitive damages. Where at best the evidence justifies recovery of compensatory damages only, this evidence as to motive is not proper. However, we feel that it was error to give an instruction on punitive damages. The elements of unnecessary force and oppression are wanting. There was nothing in the conduct of Morrow and Mitchell that can be considered as a wanton or reckless disregard of Cundiff's rights as a passenger. Neither was their manner or language insulting. On another trial the court will omit the instruction on punitive damages. Louisville, etc. R. Co. v. Scott, 141 Ky. 538, Ann. Cas. 1912C 547, 133 S. W. 800, 34 L.R.A.(N.S.) 206; Louisville, etc. R. Co. v. Ballard, 88 Ky. 159, 10 S. W. 429, 2 L.R.A. 694; Memphis, etc. Packet Co. v. Nagel, 97 Ky. 9, 29 S. W. 743; Southern R. Co. v. Hawkins, 121 Ky. 415, 89 S. W. 258; 13 Cyc. 109. See cases cited Hobson on Instructions, Sec. 176.

We are also of opinion that the damages allowed are excessive, even if it be conceded that Cundiff was not drunk or disorderly, and that his arrest and eviction were wrongful. Proof of these facts would only entitle him to compensatory damages for the humiliation. Nothing is shown in the way of excessive force or brutal treatment. He was detained at the police station for only an hour. No physical injury was inflicted. We are of opinion that the damages awarded are in excess of what would justly compensate him for the suffering endured.

In the case of Schneider v. McGill, 64 S. W. 835, 23 Ky. L. Rep. 587, one McGill, the clerk at a primary election, was arrested by a police officer for breach of the peace that had not been committed. McGill was imprisoned for about three hours. In a civil action against the policeman for false arrest and imprisonment the jury awarded McGill four thousand dollars. In holding that such a verdict was clearly excessive this court said:

"We are also of opinion that the amount of the verdict is excessive, so much so as of itself to authorize a [605] reversal. The proof shows that appellee was charged with an ordinary misdemeanor when arrested, and was kept in custody only about three hours, and suffered no unusual indignity and no violence. We have found no case where a judgment for $4,000 for false imprisonment for only a few hours has been sustained; on the contrary, we find many cases where verdicts for less amounts have been held excessive."

The cases referred to below involve questions somewhat similar to this, and verdicts in smaller sums than in the case at bar were held to be excessive: In Cincinnati, etc. R. Co. v. Carson, 145 Ky. 81, 140 S. W. 71, four hundred dollars; in Southern R. Co. v. Hawkins, 121 Ky. 415, 89 S. W. 258, 28 Ky. L. Rep. 364, one thousand dollars; in Louisville, etc. R. Co. v. Breckenridge, 99 Ky. 1, 34 S. W. 702, five hundred dollars; in

Lexington, etc. R. Co. v. Lyons, 104 Ky. 23, 46 S. W. 209, 20 Ky. L. Rep. 516, two hundred and sixty dollars; in Louisville, etc. R. Co. v. Fish, 127 S. W. 519, five hundred dollars; and in Camden Interstate R. Co. v. Frazier, 97 S. W. 776, 30 Ky. L. Rep. 186, five hundred dollars.

Judgment reversed. Whole court sitting.

NOTE.

In the reported case a verdict for four thousand dollars for the false imprisonment of a passenger is set aside as excessive, it appearing that the passenger was detained at the police station only one hour, and that no physical injury was inflicted. Other cases discussing what is an excessive verdict in an action for false imprisonment will be found in the note to Weigel v. McCloskey, reported ante, this volume, at page 503.

HOWELL

v.

WYSOR ET AL.

West Virginia Supreme Court of Appeals—June 23, 1914.

74 W. Va. 589; 82 S. E. 503.

Evidence — Loss of Official Document — Mode of Proof.

While the loss and contents of a warrant offered in evidence and connected with a legal proceeding should ordinarily be proved by the legal custodian of such paper, rather than by other witnesses, yet if the fact and contents of such paper otherwise sufficiently appear from other parts of the record to which the paper belongs, admitted in evidence, the admission of the evidence of such other witness will not constitute reversible error.

False Imprisonment — Issues — Truth of Charge.

On the trial of an action for false imprisonment and assault, the truth of the matter charged in a void warrant on which plaintiff was unlawfully arrested, is immaterial.

[See Ann. Cas. 1914A 1018.]

Notaries Public — Power to Issue Warrant.

Notaries public, by section 4, chapter 51, serial section 2798, Code 1913, constituted conservators of the peace, have no authority as such to issue warrants, returnable before themselves, or before justices of the peace, for violations of sections 16cII, chapter 144, serial section 5174, Code 1913; nor is any one unless the wife or an agent of the West Virginia Humane Society, authorized to make such complaints.

Powers of Notary.

The authority of notaries public, as well as of justices, as conservators of the peace, not being otherwise prescribed by statute, is limited to the powers possessed by conservators of the peace at common law, prior to the enactment of St. 1 Ed. iii, c. 16, authorizing the appointment of justices of the peace. Those duties were to prevent and arrest for breaches of the peace, in their presence, but not to arraign and try the offender.

False Imprisonment — Instructions Approved.

There was no reversible error in the giving and refusing of the instructions in this case.

Damages Not Excessive.

Nor can we judicially say the verdict and judgment for plaintiff for $200.00 was excessive.

[See note at end of this case.]

(Syllabus by court.)

Error to Circuit Court, Mercer county.

Action for false imprisonment and assault and battery. Mark Howell, plaintiff, and J. M. Wysor et al., defendants. Judgment for plaintiff. Defendant Wysor brings error. The facts are stated in the opinion. AFFIRMED.

Woods & Martin for plaintiff in error.

[590] MILLER, P.—Of the three counts of the declaration, the first charges [591] malicious prosecution, the second false imprisonment, and the third assault and battery.

On the trial, when defendants proposed to prove by sundry witnesses the truth of the charge in the warrant upon which plaintiff was arrested, plaintiff objected and withdrew the first count, and announced that he relied solely on the second and third counts.

There was a verdict and judgment for plaintiff for $200.00, and which by the present writ of error defendants seek to reverse.

The first point of error is that the court permitted plaintiff to prove by himself and his counsel, in place of the clerk or custodian of the court papers, the probable loss and contents of the original warrant issued by defendant Wysor, as notary public, in place of offering the clerk into whose hands the evidence tended to show the warrant had been placed by plaintiff's counsel, along with all the other court papers, at the close of a previous trial. Plaintiff's counsel swore he had examined the court papers, and was unable to find the warrant. A certified transcript of the docket of the justice, before whom plaintiff was tried on the warrant, admitted in evidence, showed the issuance of the warrant, the appearance of the accused, trial, acquittal, and discharge. The certificate of the justice to the transcript certified also that he

had delivered the original warrant to plaintiff's counsel before the previous trial. It may have been technical error to attempt to prove the loss and contents of the warrant by plaintiff and his counsel, instead of by the clerk, but as the transcript of the justice showed the fact of the issuance of the warrant, the character of the charge, failure of plaintiff to support his wife and children, his arrest, and the result of the trial, we do not think the error was material or prejudicial. The issuance of the warrant, and the arrest, were facts conceded on the trial, and there was an attempt to justify on the truth of the charge, showing want of malice. We do not think the error such as calls for reversal.

The second ground of error is the refusal of the court to permit defendants to show the truth of the charge made in the warrant. As plaintiff withdrew his first count, charging [592] malicious prosecution, we do not think the court erred. The truth of the matter charged was immaterial on the trial for false imprisonment. The court below permitted evidence to show the friendly feeling and good will of defendants towards plaintiff, at and before his arrest. This was as much as defendants were entitled to on the trial of the second and third counts. It is conceded that the warrant issued by Wysor, notary public, on complaint of defendant Hughes, and addressed to and executed by defendant McClentock, a deputy sheriff, charging plaintiff with nonsupport of his wife and children, made a misdemeanor by section 16c I, chapter 14, serial section 5173, Code 1913, was an illegal proceeding, and upon which defendants could not legally justify false imprisonment or assault.

That the warrant was void, we think clear, first, because Wysor, as notary public, had no jurisdiction in the premises. Section 16c II, of said chapter 144, serial section 5174, Code 1913, gives justices of the peace jurisdiction to issue such warrants, but not notaries public: Second, because Hughes, who made the complaint, is not of the classes of persons authorized by said section 16c I, to make such complaint. By that section "the wife or any agent of the West Virginia Humane Society" may make such complaint. Hughes was therefore an intermeddler, unauthorized. We do not overlook section 4, chapter 51, serial section 2798, Code 1913, respecting notaries, prescribing among other things, that "He shall also be a conservator of the peace within his county, and as such conservator shall exercise all the powers conferred by law upon justices of the peace." This statute confers on him none of the judicial powers of a justice; but only the power of a justice as a conservator of the peace.

Anciently and prior to Statute 1 Ed. iii, chapter 16, authorizing the appointment of justices of the peace, "Conservators of the Peace," were common law officers, elected by the people. Their duties as such were to prevent and arrest for breaches of the peace in their presence, but not to arraign and try the offender. 6 Chitty's English Statutes (6th Ed.) 775, and note; Smith v. Abbott, 17 N. J. L. 358, 366; In re Barker, 56 Vt. 14, 20. Section 28, article 8, of [593] our Constitution, prescribing the jurisdiction of justices of the peace, says, among other things, "they shall be conservators of the peace." This plainly meant to confer on them the powers anciently exercised by the common law officers. Wherefore, we construe said section 4, chapter 51, of the Code, making notaries conservators of the peace, and as such giving them the same jurisdiction as justices, as limiting them strictly to the powers of justices as such conservators, and as not conferring judicial powers. 29 Cyc. 1068–1070. At page 1070, it is said, of the office of notary, among other things: "In general the office is ministerial and not judicial; but in some jurisdictions it has been held with respect to particular acts that notaries act judicially." The only case of that kind in this state, so far as we recall, is Henderson v. Smith, 26 W. Va. 829, 53 Am. Rep. 139, holding that the official act of a notary in taking and certifying the acknowledgement and privy examination of a married woman to a deed was in the nature of a judicial act, and that though imperfectly performed, the evidence not showing malice, or corrupt or impure motive, he was not liable in damages for such act. The opinion gives the reason for this holding. In that case, however, the damages accrued from the imperfect exercise of authority conferred. In the case at bar there was no authority whatever for the act attempted. The writ in this case being void, issued by an officer without authority, on the complaint of one not authorized, though directed to an officer with authority to execute lawful writs of justices constituted no protection to any of the defendants for false imprisonment or assault.

The third ground of error assigned is the rejection of defendants' instruction to the jury to find for them. As this instruction was based on defendants' theory that plaintiff's case failed for want of proof of the original warrant, enough has been said to show want of merit in this point.

The fourth point is that the court erroneously rejected defendants' instruction to the jury No. 2, saying that though they must find for plaintiff, the amount was entirely with them, and which might be any where between the amount sued for and one cent. Such instruction, we think, would [594] have been misleading. True no elements of damage were proven, except loss of time, and the humiliation from the arrest. One cent would

have been little compensation for such injury. The jury might have misconstrued such an instruction. The court gave for defendants instruction No. 3, telling the jury, according to the rule in Ogg v. Murdock, 25 W. Va. 139, that they could only allow plaintiff compensatory damages, that is, damages to indemnify him, and not vindicative or punitive damages. This instruction sufficiently covered the question of damages, we think.

Lastly, it is suggested the verdict is excessive. We doubt whether in morals plaintiff was entitled to any verdict. Wysor and wife were his neighbors and friends, and out of their own substance had supplied plaintiff's wife and little children with the necessary food when he was neglecting them and they were crying for food. Wysor and the other defendants were evidently inspired by proper motives, but as often happens, evil has been returned for good. The jury, however, and not ourselves, are the judges, and seeing no error in the record for which we would be authorized in reversing the judgment, it must be affirmed. Judgment affirmed.

Affirmed.

NOTE.

The reported case, in holding that a verdict for two hundred dollars is not excessive in an action for the false imprisonment of a man on a charge of nonsupport, follows the general rule that the amount of damages to be awarded in an action for false imprisonment is a question for the jury. For an extended discussion of what is an excessive or inadequate verdict in an action for false imprisonment, see the note to Weigel v. McCloskey, reported ante, this volume, at page 503.

WESTERN UNION TELEGRAPH COMPANY

v.

BLAKE.

Arkansas Supreme Court—June 29, 1914.

113 Ark. 545; 169 S. W. 240.

Telegraphs and Telephones — Delay of Death Message — Proximate Consequence.

A telegram notifying the addressee that one denominated father had died and would be buried the following evening carries with it a suggestion that, if the addressee cannot arrive at the hour named, the funeral will be postponed; and, where the telegraph company delayed the message, recovery cannot be defeated because the addressee could not have reached the place of the funeral in time had the message been promptly delivered.

Evidence — Hearsay — Statement of Unexecuted Intention.

In an action for damages for delay in the transmission of a death message, testimony by the son and son-in-law of the deceased who assisted his wife in making the funeral arrangements that, had the addressee notified them of his intention to come, the funeral would have been postponed is not hearsay.

Telegraphs and Telephones — Delay — Negligence for Jury.

In an action for damages for delay in the transmission of a death message, evidence whether it could have been delivered within time by the exercise of reasonable care held sufficient to go to the jury.

Mental Anguish — Damages Excessive.

Where a telegraph company negligently delayed the transmission of a message informing plaintiff that his father-in-law, whom he had not seen for over seven years, with whom he had had intimate relations, had died, and the delay prevented plaintiff from reaching the place of death in time for the funeral, an award of $250 damages is excessive by $200, where the body, which was not embalmed, would have been decomposed had the funeral been delayed to await plaintiff's coming, and the only service plaintiff could have rendered would have been to follow the remains of his father-in-law to the grave.

[See note at end of this case.]

Appeal from Circuit Court, Bradley county: WELLS, Judge.

Action for damages. Ben Blake, plaintiff, and Western Union Telegraph Company, defendant. Judgment for plaintiff. Defendant appeals. MODIFIED.

STATEMENT BY THE COURT.

[546] Ben Blake instituted this action against the Western Union Telegraph Company to recover damages for mental anguish alleged to have been suffered by him on account of the negligent delay in delivering a telegram to him.

On the 16th day of September, 1913, Ruben Upshaw, the father of the wife of the plaintiff, died at his residence about thirteen miles in the country from Doniphan, Mo., and his family sent to the plaintiff the following message:

"Doniphan, Mo., September 16, 1913.
"Ben Blake, Warren, Ark.:
"Father Upshaw died this morning. Will bury to-morrow evening.
(Signed) "W. T. Elkins."

Elkins was also a son-in-law of Ruben Upshaw, and he sent the telegram at 3 P. M.

on the day that Mr. Upshaw died. It was sent at the instance of the family to notify the plaintiff and his family of the death of Mr. Upshaw, so that they might attend his funeral. The plaintiff had been living in Warren for about seven years, and was acquainted with a great many people there. He had not visited his father-in-law since he came there to live, but had sent his family to visit him. For seventeen years prior to the time that plaintiff moved to Warren he lived on his father-in-law's farm, and his relation to his father-in-law was nearly like that of a son. The families corresponded after the plaintiff moved to Warren, although he did not himself write to his father-in-law.

The telegram in question was not delivered to the plaintiff until the morning of the 18th of September. The remains of Mr. Upshaw were buried at 4 o'clock on the evening of the 17th of September. His body was not embalmed, and the undertaker testified that the body of the deceased could not have been kept, without decomposition setting in, at that time of the year, longer than twenty-four hours. The son of the deceased testified [547] that he assisted his mother in making the funeral arrangements for the burial of his father, and that if they had received a message from the plaintiff asking them to delay the funeral until the arrival of himself and his family they would have done so; that the object of sending the message to the plaintiff was to notify him of the death of Mr. Upshaw so that he and his family might attend the funeral.

On the part of the defendant it was shown that the message was delivered at its office in Doniphan for transmission at about 3 o'clock on the 16th day of September, 1913; that on account of the instruments not being able to be worked the message could not be sent until 6 o'clock. It was received by the operator at Warren at 6:20 P. M. on the same day. The operator at Warren testified that he was unacquainted with the plaintiff and made every reasonable effort to find him but was unable to do so; that he inquired at the postoffice and the telephone office and was unable to locate him; that he was finally informed that he worked for the Bradley Lumber Company, and he inquired of that company but was unable to locate him; that the Arkansas Lumber Company had an office within the corporate limits and a commissary outside of the corporate limits; that he inquired at the office of that lumber company, where he thought the time of the men was kept, and that the party that answered the telephone told him that the plaintiff worked for the lumber company, but that he could not tell where he lived or what position he held; that the delivery limits of the defendant did not extend beyond the corporate limits.

In rebuttal it was shown by the plaintiff that the timekeeper of the Arkansas Lumber Company did know plaintiff, and that it was the custom of that company, when a message was sent to any of its employees at its office in the corporate limits of the city of Warren for the message to be delivered to the person to whom it was sent.

[548] The timekeeper of the lumber company testified that the telegraph company did not inquire whether or not plaintiff worked for the lumber company.

The jury returned a verdict for the plaintiff in the sum of $250, and the defendant has appealed.

Other facts will be referred to in the opinion.

George H. Fearons, N. B. Scott and *Rose, Hemingway, Cantrell & Loughborough*, for appellant.

B. L. Herring for appellee.

[549] HART, J. (*after stating the facts*).—It is first contended by counsel for defendant that the latter had no notice that it was contemplated that the funeral would be postponed. The testimony shows that if the message had been delivered on the afternoon on which it was sent the plaintiff and his family could not have left Warren until 2 o'clock A. M. the next morning, and could not have arrived at Doniphan until between 9 and 10 o'clock on the morning of the 18th inst.; that the funeral was had at 4 o'clock on the evening of the 17th inst. Therefore, they contended that the plaintiff and his family could not have attended the funeral, had plaintiff received the message on the afternoon on which it was sent, and that the language of the telegram did not convey any notice that the funeral would be postponed.

In the case of Harrison v. Western Union Tel. Co. 143 N. C. 147, 10 Ann. Cas. 476, 55 S. E. 435, in regard to a similar contention, the court said:

"We think the learned counsel for the defendant takes a view much too restricted when he contends that the only purpose of the telegram was to notify the mother of the hour of the interment, and that nothing else was reasonably within the contemplation of the parties. The evident purpose was to notify the stricken mother at once that her son was dead, to the end that she might come without delay and have the melancholy pleasure, and perform the sacred duty, of being with his remains as long as possible before they were committed forever to the grave.

"The fact that the hour fixed for the funeral is stated in the telegram is a mere incident to the general purpose for which the telegram was evidently sent."

So it may be said here the language of the telegram notified the defendant of the

near relationship between the plaintiff, the sender of the telegram, and the person [550] named in it. The message itself suggested that its object was to notify the plaintiff of the death of a near relative, and also carried with it the suggestion that if there was not sufficient time for the plaintiff to arrive at the hour named in the message the funeral would be postponed until he could arrive.

It is next insisted by counsel for defendant that there was no competent testimony tending to show that the funeral would have been postponed had the message been received from the plaintiff to the effect that he desired to attend it. We do not agree with them in this contention. The son and son-in-law of the deceased testified that they assisted Mrs. Upshaw in making the funeral arrangements, for her deceased husband, and that it was understood and agreed between themselves that the funeral would be postponed if word was received from the plaintiff and his family that they desired to attend; that the object in sending the message to the plaintiff was to notify him and his family of the death of Mr. Upshaw in order that they might attend the funeral. The son and son-in-law having testified that they assisted in making the funeral arrangements, their testimony in regard to the postponement of the funeral was not hearsay, and was therefore competent to show that the funeral would have been postponed had the plaintiff notified them to do so.

It is next insisted by counsel for defendant that it is not liable, because the plaintiff did not live within the free-delivery limits of the telegraph company at Warren, and that no fee was paid to send a special messenger to deliver it. The testimony shows that the plaintiff was a night watchman for the Arkansas Lumber Company and lived just outside the delivery limits of the telegraph company at Warren; that the lumber company had an office within the free delivery limits at Warren, and that it was the custom of the timekeepers to deliver telegrams to employees which were sent to its office within the free delivery limits; that the plaintiff was well known to the officers of the lumber company there, and that the [551] lumber company would have delivered the message to him, had it been delivered to its office within the corporate limits of Warren. The question of whether the defendant company, by the exercise of ordinary diligence, could have delivered the message to the plaintiff within its delivery limits, under the facts and circumstances adduced above, was one of fact for the jury, and was properly submitted to it for its determination. Arkansas, etc. R. Co. v. Stroude, 82 Ark. 117, 100 S. W. 760. See also Western Union Tel. Co. v. Webb, 94 Ark. 350, 126 S. W. 1072. It will be remembered that, although the telegraph operator at Warren testified that he inquired at the office of the Arkansas Lumber Company for the plaintiff and was told that he worked for the company but that his address and whereabouts were not at the time known, the timekeeper for the lumber company testified that he did know the plaintiff, and that no inquiry was made of him by the telegraph company. It was also shown that if the message had been delivered to the lumber company its employees would have delivered the message to the plaintiff.

It is next contended that the verdict was excessive; and in this contention we agree with counsel for defendant. It is true that in the case of the Western Union Tel. Co. v. Rhine, 90 Ark. 57, 117 S. W. 1069, we allowed a recovery of $400 under somewhat similar circumstances. There it was shown that the body became badly decomposed and offensive odors came from it, and we said it could have afforded the mother but little consolation or satisfaction to have viewed her son's remains in such condition, if indeed it was practical for her to view them at all. There is a great difference, however, between the affection existing between a mother and her son and a son-in-law and his father-in-law. The body of the deceased in the present case was not embalmed, and the undertaker testified that the body could not have been kept longer than twenty-four hours without becoming decomposed. Mr. Upshaw died on the morning of the 16th inst. and was buried at 4 o'clock in the afternoon on the next day. The testimony shows that, had the [552] telegram been delivered to the plaintiff without delay, he could not arrive at Doniphan until between 9 and 10 o'clock on the morning of the 18th. He would then have had to travel thirteen miles to the residence where the deceased's body lay, and by the time he arrived there the body would have been necessarily discolored and badly decomposed. Therefore, instead of seeing the features of Mr. Upshaw as they appeared in life, he would only have been permitted to follow it to the grave. The plaintiff had not seen his father-in-law for seven years, and did not during that time visit him, although a correspondence was kept up between his family and that of his father-in-law. The plaintiff himself, however, had not written to his father-in-law during these seven years. The son and another son-in-law lived near Reuben Upshaw and made all arrangements for the funeral. There was no duty devolving upon plaintiff in that regard, and all he could have done would be to follow the body to the grave. We think under the circumstances related above that the verdict of $250 was too much. We think that $50 would have been a sufficient amount to compensate plaintiff for all mental pain suffered by him. The judgment, therefore, will be reversed, and judgment will be entered here for plaintiff in the sum of fifty dollars.

NOTE.

What Is Excessive Verdict for Mental Anguish in Telegraph Case.

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Introductory.

In the note to Western Union Tel. Co. v. Bickerstaff, Ann. Cas. 1913B 242, the earlier cases discussing the question what is an excessive verdict for mental anguish in a telegraph case are collated. The present note treats the recent cases in the manner followed in the earlier note.

Generally.

The amount of damages to be awarded for mental anguish caused by the negligent transmission of a telegram is a question for the jury and the general rule is that a court will not interfere with a verdict on the ground of excessiveness unless the amount awarded is so palpably large as to indicate that the jury have been actuated by passion or prejudice, or moved by undue sympathy. Western Union Tel. Co. v. Rowell, 166 Ala. 651, 51 So. 880; Western Union Tel. Co. v. Dunlap, 183 Ala. 454, 62 So. 763; Markley v. Western Union Tel. Co. 159 Ia. 557, 141 N. W. 443; Albrook v. Western Union Tel. Co. 169 Ia. 412, 150 N. W. 75; Young v. Western Union Tel. Co. 107 N. C. 370, 11 S. E. 1044, 22 Am. St. Rep. 883, 9 L.R.A. 669; Robertson v. Western Union Tel. Co. 95 S. C. 356, 78 S. E. 977; Western Union Tel. Co. v. Vance (Tex.) 151 S. W. 904; Western Union Tel. Co. v. Tucker (Tex.) 152 S. W. 199; Western Union Tel. Co. v. Wilson (Tex.) 152 S. W. 1169; Western Union Tel. Co. v. Richards (Tex.) 158 S. W. 1187; Western Union Tel. Co. v. Gest (Tex.) 172 S. W. 183; Western Union Tel. Co. v. Riviere (Tex.) 174 S. W. 650; Western Union Tel. Co. v. Holcomb (Tex.) 175 S. W. 750. In Albrook v. Western Union Tel. Co. supra, the court said: "It is said the amount of damages awarded is excessive. In Mentzer v. Western Union Tel. Co. 93 Ia. 752, 62 N. W. 1, 57 Am. St. Rep. 294, 28 L.R.A. 72, and Cowan v. Western Union Tel. Co. 122 Ia. 379, 98 N. W. 281, 101 Am. St. Rep. 268, 64 L.R.A. 545, the jury in each case returned a verdict for a smaller amount than the verdict in this case and it is said by appellant that the facts were as aggravated as here. But the fact that the jury did so is not a precedent for what the court ought to do. It is a question for the jury. The fact that the jury in this case allowed a larger amount than we would does not necessarily require us to fix the amount. Such a rule would put the court in the place of the jury. We may interfere if the award is clearly excessive, but the fact that the jury allowed more than we would does not necessarily indicate that the jury acted through passion or prejudice. There is, of course, no fixed standard. One jury might award a larger sum than another where the facts were no more aggravated. The damages are not based at so much per hour as suggested by appellant. Plaintiff was not prevented from being present at his mother's funeral, but he was delayed about nine hours waiting along the way and at railway stations with his mother lying dead and he delayed in meeting his relatives, and not permitted to participate in the funeral arrangements. Some men are so constituted that they are able to control their feelings better than others and it is for the jury to say how much in this case plaintiff should recover. The circumstances were such as to produce mental suffering." So in Western Union Tel. Co. v. Dunlap, 183 Ala. 454, 62 So. 763, in sustaining an award of seven hundred dollars for delay in forwarding a telegram sent to inform a daughter that her father was near death, the court said: "While the amount of plaintiff's damages was, under the evidence, a question for the jury, we are decidedly of the opinion that the verdict was so excessive as to require the trial court to set it aside and award the defendant a new trial. There was not any count, nor even a claim, that there was any wantonness as to the delay in delivery of the message; and we see no basis in, or tendency of, the evidence to support a verdict for the amount awarded here. While, as before stated, the amount of the damages in this case is for the jury to say, yet we will say, in the language of another, that it is for another jury, and not this one, unless the plaintiff . . . shall within thirty days from the date of this decree, remit $550 of the verdict and judgment recovered, and agree to accept a judgment for $150, and the defendant . . . shall agree to accept such reduction of the judgment appealed from, in which event the judgment appealed from will be so corrected as to amount and, as corrected, affirmed." In Western Union Tel. Co. v. Tucker (Tex.) 152 S. W. 199, it was said: "In this case it is further insisted that the

verdict is excessive, and that for this reason the trial court should have granted a new trial. There is no fixed rule for the allowance of damages in cases of the kind under consideration. The rules on the subject are well settled. In all such cases a large discretion is confided to the jury and the trial court, and where, as here, the amount of damages has been approved by the trial court, the verdict will not ordinarily be disturbed, unless its excess be so great when considered in reference to the evidence as to make it probable at least that the verdict was the result of passion."

Person Prevented from Reaching Relative before Death.

The following verdicts for mental anguish suffered because of the inability to reach a parent before his or her death have been sustained as not excessive.

$1000.—Southwestern Tel. etc. Co. v. Gehring (Tex.) 137 S. W. 754 (daughter prevented from reaching father three hours before he died through negligence of telephone company; father unconscious whole time);

$850.—Western Union Tel. Co. v. Daniels (Tex.) 152 S. W. 1116 (daughter prevented from reaching mother before her death and burial);

$550.—Markley v. Western Union Tel. Co. 159 Ia. 557, 141 N. W. 443 (son prevented from reaching mother before her death).

The following verdict for mental anguish suffered because of the inability to reach a father before his death has been declared excessive.

$700.—Western Union Tel. Co. v. Dunlap, 183 Ala. 454, 62 So. 763 (daughter prevented from reaching father before his death, could not have reached him in time had there been no delay, attended funeral; verdict reduced to $150).

The following verdicts for mental anguish suffered because of the inability to reach a son or daughter before his or her death have been sustained as not excessive:

$1000.—Western Union Tel. Co. v. Seffel, 31 Tex. Civ. App. 134, 71 S. W. 616 (mother prevented from reaching daughter before her death);

$947.50.—Western Union Tel. Co. v. Vance (Tex.) 151 S. W. 904 (father prevented from reaching seventeen year old married daughter before her death, daughter unconscious and could not have recognized father).

The following verdict for mental anguish suffered because of the inability to reach a brother before his death has been sustained as not excessive:

$2500.—Stuart v. Western Union Tel. Co. 66 Tex. 580, 18 S. W. 351, 59 Am. Rep. 623 (brother prevented from seeing brother before death, or attending his funeral).

The following verdict for mental anguish suffered because of the inability of a wife to reach her husband before his death has been sustained as not excessive:

$1000.—Western Union Tel. Co. v. Clark (Tex.) 25 S. W. 990 (wife deprived of consolation of being present and administering to husband in his last illness).

Person Prevented from Reaching Relative before Final Unconsciousness.

The following verdict for mental anguish suffered because of the inability to reach a dying relative before final unconsciousness has been sustained as not excessive:

$1500.—Western Union Tel. Co. v. Hill (Tex.) 162 S. W. 382 (husband prevented from reaching wife).

Person Prevented from Attending Funeral of Relative.

The following verdicts for mental anguish suffered because of the inability to be present at the funeral of a parent have been sustained as not excessive:

$1050.—Western Union Tel. Co. v. Gest (Tex.) 172 S. W. 183 (daughter prevented from attending father's funeral);

$1000.—Western Union Tel. Co. v. Smith, 15 Ky. L. Rep. 334 (son prevented from attending father's funeral);

$674.—Postal Tel. Cable Co. v. Thornton, 153 Ky. 176, 154 S. W. 1100 (son prevented from attending mother's funeral);

$500.—Western Union Tel. Co. v. Wilson (Tex.) 152 S. W. 1169 (son prevented from attending mother's funeral);

$375.—Western Union Tel. Co. v. Sharp (Ark.) 180 S. W. 504 (daughter prevented from attending father's funeral).

The following verdicts for mental anguish suffered because of the inability to be present at the funeral of a parent have been declared excessive:

$3000.—Western Union Tel. Co. v. Evans, 108 Ark. 39, 156 S. W. 424 (son prevented from attending funeral of mother, burial was to take place in distant town away from those who could have consoled son; verdict reduced to $500);

$250.—See the reported case (man prevented from attending funeral of father-in-law, had not seen deceased for seven years, did not correspond with him, other relatives made funeral arrangements, and body would have been decomposed and funeral been delayed until his arrival; verdict reduced to $50).

The following verdict for mental anguish suffered because of the inability to be present at the funeral of a son has been sustained as not excessive:

$750.—Western Union Tel. Co. v. Kinsley, 8 Tex. Civ. App. 527, 28 S. W. 831 (mother prevented from attending son's funeral).

The following verdict for mental anguish suffered because of the inability to be present at the funeral of a daughter has been declared excessive:

$5000.—Western Union Tel. Co. v. Skinner (Tex.) 128 S. W. 715 (mother prevented from attending daughter's funeral; verdict reduced to $1000).

The following verdict for mental anguish suffered because of the inability to be present at the funeral of a sister has been sustained as not excessive:

$500.—Western Union Tel. Co. v. Toms, 99 Ark. 117, 137 S. W. 559 (brother prevented from attending sister's funeral).

The following verdicts for mental anguish suffered because of the inability to be present at the funeral of a brother or sister have been declared excessive:

$1000.—Western Union Tel. Co. v. Freeman (Ark.) 180 S. W. 743 (sister prevented from attending sister's funeral; verdict reduced to $400); Western Union Tel. Co. v. Holcomb (Tex.) 175 S. W. 750 (brother prevented from attending brother's funeral; verdict reduced to $500);

$500.—Western Union Tel. Co. v. Scanlon, 115 Ark. 515, 171 S. W. 916 (sister prevented from attending sister's funeral; verdict reduced to $250).

Person Prevented from Seeing Remains of Relative before Burial.

The following verdicts for mental anguish suffered because of the inability to see the remains of a relative before burial have been sustained as not excessive:

$1475.—Western Union Tel. Co. v. Beringer, 84 Tex. 38, 19 S. W. 336 (son prevented from seeing remains of father and being present at his funeral);

$500.—Western Union Tel. Co. v. Jeanes (Tex.) 29 S. W. 1130 (son prevented from seeing father before burial and attending his funeral).

Person Deprived of Consolation of Relative at Death of Another Relative.

The following verdicts for mental anguish suffered because of being deprived of the consolation of a relative at the death or funeral of another relative have been sustained as not excessive:

$1207.87.—Western Union Tel. Co. v. Tucker (Tex.) 152 S. W. 199 (anguish of mother over failure of her parents to attend her child's funeral);

$225.—Western Union Tel. Co. v. Mooney (Tex.) 160 S. W. 318 (woman deprived of consolation of sister immediately following death of husband).

The following verdict for mental anguish suffered because of being deprived of the consolation of a relative at the funeral of another relative has been declared excessive:

$500.—Western Union Tel. Co. v. Crow, 106 Ark. 117, 152 S. W. 1015 (husband deprived of consolation of wife at his father's funeral; verdict reduced to $100).

Person Deprived of Funds with Which to Bury Relative.

The following verdicts for mental anguish suffered because of the deprivation of funds with which to bury a relative have been sustained as not excessive:

$1500.45.—Western Union Tel. Co. v. McFarlane (Tex.) 161 S. W. 57 (mental anguish of husband because of improper transmission of telegram asking funds to bury wife, body decomposed, improper burial in distant county);

$600.—Western Union Tel. Co. v. Richards (Tex.) 158 S. W. 1187 (failure to transmit promptly message asking funds to bury wife, husband suffered many hours and wife buried as pauper).

Miscellaneous Verdicts.

The following miscellaneous verdicts for mental anguish suffered because of the failure promptly to transmit a telegram have been sustained as not excessive:

$1500.—Western Union Tel. Co. v. Rowell, 166 Ala. 651, 51 So. 880 (husband delayed two days in reaching sick wife, would have secured necessary medical attention, life might have been saved);

$1000.25.—Western Union Tel. Co. v. Stephens, 2 Tex. Civ. App. 129, 21 S. W. 148 (suffering of parents because of failure of physician to reach sick child);

$375.—Robertson v. Western Union Tel. Co. 95 S. C. 356, 78 S. E. 977 (mental anguish of wife for fifteen hours by being deprived of the presence of her husband after sudden illness);

$300.—Western Union Tel. Co. v. Arant, 88 Ark. 499, 115 S. W. 136 (mother prevented from bringing home body of son, buried in another state, anxiety for weeks until body could be exhumed and brought home, unable to see remains on account of condition of body).

The following miscellaneous verdicts for mental anguish suffered because of the failure promptly to transmit a telegram have been declared excessive:

$1200.—Western Union Tel. Co. v. Riviere (Tex.) 174 S. W. 650 (daughter kept from dying father's bedside twelve hours; recognized her when she arrived and spoke to her by name, lived three days; verdict reduced to $600);

$1000.—Western Union Tel. Co. v. Flannagan, 113 Ark. 9, 167 S. W. 701 (suffering of

wife by not being met by husband on arriving in strange city, place to stay provided by husband's employer; verdict reduced to $100).

ORR ET AL.

v.

SUTTON ET AL.

Minnesota Supreme Court—July 17, 1914.

127 Minn. 37; 148 N. W. 1066.

Appeal — Decision on Former Appeal — Law of the Case.

A proposition decided upon a former appeal becomes the law of the case and should not be re-examined in a subsequent appeal in the same action.

[See 2 R. C. L. tit. *Appeal and Error*, p. 223.]

Tender — Evidence Sufficient.

The pleading and evidence required a finding on the issue of tender of payment by the judgment debtor under which plaintiffs affected redemption. If the findings in this case are to be construed to the effect that, by direct authority of the judgment debtor, a tender in lawful money of the full amount of plaintiffs' judgment was not made to them personally prior to the time when they could use the same for redemption purposes, they are not justified by the evidence.

Tender of Payment of Judgment.

No one in the line of redemptioners, nor an intermeddler, may by tender of payment of a judgment impair or destroy a judgment creditor's right to use the judgment to effect redemption.

[See note at end of this case.]

Same.

To destroy a judgment creditor's right to use the judgment as a means for obtaining certain land through redemption, it is not indispensable that the judgment creditor, in addition to tender of payment, bring suit to compel satisfaction of the judgment and deposit the money tendered in court.

[See note at end of this case.]

Same.

A tender by the judgment debtor of the full amount due on a judgment, under which the judgment creditor has filed an intention to redeem land, before the arrival of the time when the judgment could be used for such purpose, and under circumstances clearly disclosing that both parties appreciated the purpose of such tender, destroys the right of the judgment creditor to thereafter use the judgment as a basis for redeeming such land.

[See note at end of this case.]

Same.

But if a redemption is made by a judgment creditor whose right to make it, though good on the face of the record, has, in fact, been destroyed by the tender of the payment of the judgment, the title of the purchaser at the sale nevertheless passes to him, if the holder thereof accepts the redemption money with full knowledge of the tender.

[See note at end of this case.]

Mortgages — Redemption from Foreclosure.

Assuming a valid tender proven, it is held:

(a) That the defendant Torinus, the holder of the title acquired through the mortgage foreclosure sale, by accepting the redemption money paid by plaintiffs, judgment creditors, with full knowledge of the facts showing that they had no right to redeem, thereby suffered plaintiffs to succeed to his title and cannot now question the validity of their redemption.

(b) That the evidence does not show any rights or equities which required the court to relieve the defendant William Sutton, junior to plaintiffs in the line of redemptioners, who atempted to redeem under a mortgage, recorded without the prepayment of the registry tax. Nor has Sutton alone, or in conjunction with any other defendant, any equities through which to attack plaintiffs' title.

(c) That the defendant Sauntry, the owner, after the expiriation of the year of redemption, had no interest in the land so as to question plaintiffs' redemption, and his right to have the land applied to the payment of such of his debts as were liens thereon, depended entirely upon the lienholders making redemption in strict conformity with the statute.

(Syllabus by Court.)

Appeal from District Court, St. Louis county: FESLER, Judge.

Action to quiet title. Charles N. Orr et al., plaintiffs, and William Sutton et al., defendants. Judgment for plaintiffs. Defendants appeal. The facts are stated in the opinion. AFFIRMED.

J. N. Searles, Manwaring & Sullivan and *Butler & Mitchell* for appellants.

William G. White and *Theodore Hollister* for respondents.

[39] HOLT, J.—Action to quiet title. William Sauntry owned an undivided half of valuable mining lands in St. Louis county, this state, which he mortgaged to secure the sum of $30,000. He defaulted and the mortgage was duly foreclosed by advertisement. The year for redemption expired on September 20, 1911. The rights acquired by the purchaser at the sale were on the last named date held by Louis E. Torinus, the sheriff's certificate having been duly assigned to him. The mortgagor was insolvent, and unsatisfied judgments existed against him. Transcripts of the following judgments were docketed in St. Louis county prior to September 21,

1911: (1) A transcript of a judgment in favor of Nathan E. Franklin for $8,243.34, docketed July 22, 1910. This judgment was assigned to Louis E. Torinus and proper record made on September 23, 1911; (2) a transcript of judgment in favor of Fred Rossiter for $1,589.35, docketed October 24, 1910; (3) a transcript of a judgment in favor of John J. Kilty for $329, docketed at 5:15 p. m. September 20, 1911, together with proper records showing an assignment of the judgment to William Sutton, September 18, 1911; and (4) a transcript of a judgment in favor of Robert W. Hunt & Co. for $741.38, docketed at 5:19 p. m. September 20, 1911, with proper records showing an assignment of this judgment to plaintiffs January 11, 1911. In the evening of September 20, 1911, William Sauntry executed a second mortgage on the land to William Sutton to secure a demand note for $50. It appears that this indebtedness represented a portion of attorney's fees owing to one Grannis from Sauntry which Grannis assigned to William Sutton. This mortgage was filed in the office of the register of deeds at 10 p. m. on the same day. But no mortgage registry tax was paid thereon until long afterwards. No registry number was placed on the mortgage, nor was it indexed until the next morning after it then had been taken to the county treasurer and he had certified thereon that it was exempt from taxation. Proper notices of [40] intention to redeem were filed so that the respective judgment creditors were placed in line of redemptioners in the order above given and the mortgagee William Sutton last, provided each had a good right to redeem. Sauntry, the mortgagor and owner, did not redeem. Louis E. Torinus redeemed on September 25, 1911, as assignee of Franklin judgment. Fred Rossiter the next in line did not offer to redeem. Nor did William Sutton make any attempt to redeem as assignee of the Kilty judgment. On October 5, 1911, plaintiffs, as assignees of the Robert W. Hunt & Co. judgment, redeemed; and on October 9, 1911, William Sutton in turn redeemed as mortgagee in the $50 mortgage mentioned. The sheriff upon each of these redemptions issued his certificate to the redemptioner. October 10, 1911, William Sutton, claiming to be the owner of the land under his redemption, mortgaged the same to Louis E. Torinus to secure the payment of $10,000. The complaint sets out the various matters very fully, alleges conspiracy between the defendants to circumvent plaintiffs and deprive them of their right to redeem, and asks that the claims of each defendant to the land be barred and the cloud cast upon plaintiffs' title by the Sutton redemption, the Torinus mortgage, and the records thereof be removed. In addition to Torinus, Sutton and Sauntry, the latter's wife and one Lyman Sutton are made defendants, also the lessees of the mine, but the latter are in no way affected. The court found plaintiffs to be the owners, that the defendants had no right, title or lien in or to the land, and directed judgment quieting title in plaintiffs and removing the cloud cast on their title by the record of the Sutton redemption and mortgage, and the mortgage to Torinus. Defendants appeal from the order denying their motion for a new trial.

The defendants contend for a new trial upon three grounds: (1) No mortgage registry tax was required upon the $50 mortgage under which Sutton redeemed, hence his redemption vested title in him; (2) plaintiffs lost their right to redeem by the tender of payment of their judgment prior to the time when such right could be exercised; (3) even if the tax be held applicable to this mortgage, equities will relieve defendants since its nonpayment was the result of an honest [41] mistake induced by the conduct of the administrative officers of the state and county, and the tax was paid before the trial.

In a former opinion in this case (Orr v. Sutton, 119 Minn. 193, 137 N. W. 973, 42 L.R.A.(N.S.) 146) we held that this mortgage, upon which the registry tax imposed by chapter 328, p. 448, Laws 1907, was not paid before it was recorded, furnished no sufficient legal basis for redemption from the foreclosure sale here involved. This was following and applying the rule announced in State v. Fitzgerald, 117 Minn. 192, 134 N. W. 728, that all mortgages including those of $50 and less are subject to the registry tax. We are earnestly importuned to re-examine the question, on the ground that that decision is wrong and that the court was led astray, because counsel on both sides designedly took the position that the law violated the Constitution, unless it was held applicable to all mortgages however small. Even if the court, as now constituted, entertained doubts concerning the soundness of the Fitzgerald decision, a well-settled rule of law stands in the way of any re-examination of the question upon this appeal, for on this proposition our former decision herein is the law of the case and binding on us. There is nothing in the situation which calls for a deviation from this well-established doctrine. No application was made for reargument when the former appeal was determined. In Terryll v. Faribault, 84 Minn. 341, 87 N. W. 917, it is said: "The case was here on a former appeal and the notice of claim for damages was held sufficient. 81 Minn. 519, 84 N. W. 458. That decision, whether right or wrong, must be treated as the law of the case and the question cannot be re-examined at this time." The same rule was stated thus in Bradley v. Norris, 67 Minn. 48, 69 N. W. 624: "This court has the right to overrule the decision

made on the former appeal in some other case, but in this case it must be followed." See also Schleuder v. Corey, 30 Minn. 501, 16 N. W. 401; Smith v. Glover, 50 Minn. 58, 52 N. W. 210, 912; Tilleny v. Wolverton, 54 Minn. 75, 55 N. W. 822; Maxwell v. Schwartz, 55 Minn. 414, 57 N. W. 141; St. Paul Trust Co. v. Kittson, 67 Minn. 59, 69 N. W. 625; Phelps v. Sargent, 73 Minn. 260, 76 N. W. 25; Piper v. Sawyer, 78 Minn. 221, 80 N. W. 970; Hibbs v. Marpe, 84 Minn. 178, 87 N. W. 363. To the same effect many authorities may [42] be cited from other jurisdictions: Adams Co. v. Burlington, etc. R. Co. 55 Ia. 94, 2 N. W. 1054, 7 N. W. 471; Heffner v. Brownell, 75 Ia. 341, 39 N. W. 640; Bem v. Shoemaker, 10 S. D. 453, 74 N. W. 239; Bolton v. Hey, 168 Pa. St. 418, 31 Atl. 1097; and Case v. Hoffman, 100 Wis. 314, 72 N. W. 390, 74 N. W. 220, 75 N. W. 945, 44 L.R.A. 728.

One of the main defenses pleaded is, plaintiffs were tendered payment of their judgment before the time arrived at which it might be used to effect redemption, therefore the one made by them was wrongful and of no validity to pass title. It is undisputed that on September 27, 1911, Lyman Sutton, accompanied by defendants' attorney, brought $785 in gold coin to plaintiffs' office and tendered the same to them personally in payment of the judgment held by them. The amount was sufficient and was verified by one of plaintiffs. Beyond quibble written authority from Sauntry to Lyman Sutton to make the payment was exhibited to plaintiffs. The money was not Sauntry's. It was furnished by Lyman Sutton. When plaintiffs refused to accept, Sutton placed the money in his safe, where it remained ready for plaintiffs until some time in the following December. Defendants insist a valid tender was proven and should have been definitely found by the court, and, in case the findings should be construed as negativing a tender, they contend the evidence does not justify the same. It is commendable to find only the ultimate facts. But in this case tender was set up as a specific defense or ground for contesting the validity of plaintiffs' redemption. Whether William Sauntry actually offered plaintiffs lawful money in sufficient amount to pay their judgment prior to their redemption, was a matter of pure fact. Whether such fact constituted a legal defense, is a question of law. The court below may have been satisfied of the existence of the fact, but may have concluded that the legal effect was of no consequence to defendants. This court may take a different view. It is thus apparent that an absence of a specific finding upon the issue of tender is not fair to defendants, nor, indeed, to plaintiffs were they appellants. It is true the request to make findings on this issue was not in the proper form (Hall v. Sauntry, 72 Minn. 420, 75 N. W. 420, 71 Am. St. Rep. 497), nevertheless tender was so important [43] a matter to a right decision that the findings should not leave the fact of its being made in doubt. This is a case where a definite finding should have been made on this issue. Turner v. Fryberger, 99 Minn. 236, 108 N. W. 1118, 109 N. W. 229. Moreover, even if the findings, coupled with the court's refusal to amend the same to show tender, should be construed equivalent to a finding that tender was not proven, we are of opinion that the evidence as it now stands does not so warrant. The money was there. Plaintiffs were lawyers. They knew as well as defendants what it was intended for, and what was at stake. Their refusal to accept payment was no doubt a deliberate act with full knowledge of the situation. They took the chance of defendants not being able to establish that the tender was made by authority and direction of Sauntry, or else that the law did not give the debtor the right to stop plaintiffs at that time from resorting to the land for the satisfaction of their judgment. We shall therefore assume that plaintiffs were tendered payment of their judgment before the arrival of the time when they could use it for the purpose of redemption.

True, no one in the line of redemptioners, either ahead of or behind plaintiffs, nor any intermeddler, could extinguish or impair their right to redeem by offering to pay their judgment. The only one who possessed this right on September 27, 1911, was the judgment debtor. His right was absolute. It is immaterial who furnished him the money, or what his motives were, he was then entitled to pay the judgment or cause it to be paid, for the time had not arrived when plaintiffs could use it for redemption purposes.

It is asserted the tender was unavailing because when refused the only way to keep it good was to pay the money into court and begin an action to compel a satisfaction of the judgment. Section 7908, G. S. 1913, is cited. This provision does not in terms apply to this case. But we may admit that the procedure suggested by respondent is not improper. However, it is not absolutely necessary in order to give effect to the tender. The testimony shows that the gold was kept intact for plaintiffs for some time after this action was brought and the answer served. In the answer Sauntry still asserts a readiness to pay. At any time after Sutton's redemption [44] plaintiffs could have received from the sheriff full payment of their judgment and all moneys paid by them in their attempt to redeem, including the wrongful payment of the Kilty judgment. We think the tender was kept good and the money is

available now. Dunn v. Dewey, 75 Minn. 153, 77 N. W. 793; Murray v. Nickerson, 90 Minn. 197, 95 N. W. 898.

The claim is also presented that the tender unaccepted was of no effect. Harking back to the early case of Jackson v. Law, 5 Cow. (N. Y.) 248, Law v. Jackson, 9 Cow. (N. Y.) 641, text books and decisions state that a judgment lien cannot be discharged by tender. There must be actual payment. The argument is that so long as the judgment remains a lien it furnishes a basis under the statute for the right to redeem. But there is quite a unanimity among the authorities, in states where the mortgagee's estate is considered a lien or pledge merely, that a tender of the debt discharges the lien. Kortright v. Cady, 21 N. Y. 343, 78 Am. Dec. 145; Moore v. Norman, 43 Minn. 428, 45 N. W. 857, 9 L.R.A. 55, 19 Am. St. Rep. 247. That there are inherent differences in the quality of a judgment lien and a mortgage lien which justify the rule that a tender of payment of one does not discharge a tract of land from its lien, while it does as to the other, may be doubted. The owner of the debt in either case may voluntarily release any real estate from the one as well as from the other without discharging any part of the debt. Be that as it may, this court has recognized the distinction in Rother v. Monahan, 60 Minn. 186, 62 N. W. 263. But that case also clearly establishes the principle applicable here, namely, that a tender of payment of a judgment by the judgment debtor destroys and extinguishes the right to make the judgment the basis for a redemption. It may well be that, before any notice of intention to use the judgment as against any particular land is filed, a tender of payment does not impair or destroy the judgment creditor's right to make use of or enforce the judgment generally. But when, after he has so done, the judgment debtor tenders payment, the creditor must accept the money and let that land alone. Any further attempt to proceed against the land in question after such tender must be considered wrongful. Mr. Justice Mitchell thus states the [45] view of the court in the case cited: "The act of the defendant in attempting, under the circumstances, to use this judgment for redemption purposes was wholly in his own wrong. If, under similar circumstances, he had attempted to enforce the judgment by execution, a court would have unquestionably enjoined him from doing so, or, if a sale had been made on the execution, set it aside as wrongful, and an abuse of the process of the court, and compelled defendant to accept the tender and satisfy his judgment. Mason v. Sudam, 2 Johns Ch. (N. Y.) 172. The same principle applies where, as in this case, the defendant has wrongfully attempted, notwithstanding the tender, to use the statutory process of redemption for the purpose of collecting his judgment out of this land. It is wholly immaterial what the object of the debtor and mortgagor was in making the tender,—even if it was to prevent a redemption by defendant. He must be presumed to have some interest in preventing such a redemption. It may be that he had made some advantageous arrangement with the plaintiff, the holder of the certificate of sale. But what his intent or motive was it is not for the courts to inquire. He had a legal right to pay the judgment, and thereby prevent a redemption by defendant. Defendant's duty and only right, under the circumstances, was to accept the tender and satisfy the judgment. His refusal to do so and his attempt to use his judgment for redemption purposes were wrongful and a clear abuse of the statutory right of redemption. The court will, under such circumstances, set aside the attempted redemption, and compel defendant to do what he ought to have done in the first instance,—accept his money and satisfy his judgment." And we think it has been definitely determined in Roberts v. Meighen, 74 Minn. 273, 77 N. W. 139, that it is not necessary, in order to make the judgment creditor's attempt to redeem wrongful, that the judgment debtor prior to redemption bring the money into court and commence suit to compel satisfaction of the judgment. In that case payment was merely tendered, no money was brought into court and no action brought until after redemption. The point was distinctly made in appellant's brief that such tender was not sufficient to destroy the right to use the judgment as a basis for redemption. Chief Justice Start, who tried the case [46] of Rother v. Monahan, supra, in the court below and therein adverted to the rule that tender of payment of a judgment does not release its lien on real estate, writes the opinion sustaining the court below in the ruling that the tender as made destroyed the right to use the judgment for redemption purposes.

Is any defendant in position to object to plaintiffs' redemption? When the owner fails to redeem from a mortgage foreclosure sale, the purchaser acquires the title the owner had when the mortgage was given. If lienholders redeem under the statutory provisions, the title acquired by the purchaser at the foreclosure sale is thereby vested in such redemptioners. Even when the redemptioner has no right to make it, or does not conform to the law in so doing, the title nevertheless passes to him, if the one from whom redemption is made accepts the redemption money, unless there exists some lienholder whose redemption is interfered with or prejudiced. Willard v. Finnegan, 42 Minn. 476, 44 N. W.

985, 8 L.R.A. 50; Todd v. Johnson, 50 Minn. 310, 52 N. W. 864; same case in 56 Minn. 60, 57 N. W. 320; Clark v. Butts, 73 Minn. 361, 76 N. W. 199. No doubt Torinus could have objected to plaintiffs' redemption, but he did not. By accepting the redemption money paid by plaintiffs he relinquished to them the title he had. He turned over his money to be used by Sutton in making the redemption from plaintiffs. There is nothing in the record to suggest that Torinus did not have full knowledge of the tender when he accepted and receipted for the money. And we think it follows from the authorities hereinbefore cited that the only person who may attack a redemption fair on the face of the record, but wrongful in fact, where the redemption money has been accepted by the one holding the title of the purchaser at the foreclosure sale, is one who has still some beneficial interest in the land, or one who, being a subsequent lienholder, has availed himself of the right to redeem strictly in accordance with the provisions of the statute.

Whether Torinus be regarded as acting for Sutton or for himself alone, the fact remains that plaintiffs' right to redeem was conceded by both in that their redemption money was accepted and in that both plant themselves on the redemption by which Sutton [47] claims to have succeeded to the title plaintiffs secured by their redemption.

The defendant Sutton insists that in equity he should be relieved from the mistake he made in not paying the mortgage registry tax, notwithstanding the former decision that he had no legal statutory right to redeem. For the purpose of considering the equities urged, let us for the moment assume that the provisions of the redemption statute may be suspended or abrogated by the courts. The one who asks equitable relief, even against a wrongdoer, must show equities of some merit and clean hands. If we take plaintiffs on the one hand and Torinus and the Suttons on the other, we look in vain for any appealing equities. The Suttons sought the land. So did plaintiffs. Each party bought up judgments against Sauntry for the sole purpose, apparently, of thereby securing title to this land. William Sutton made no attempt to redeem under the Kilty judgment, but the money plaintiffs paid on that was also accepted and receipted for by Torinus, presumably under Sutton's direction, so that, on October 5, 1911, when Sutton attempted to redeem, the only equity or right he had was this $50 mortgage. It is perfectly obvious that the only reason for purchasing this small, stale claim against Sauntry was to circumvent plaintiffs who had outwitted him in the race to be the last in the line of redemptioners. Both Sauntry and the Suttons are very careful in the pleadings, as well as in the testimony, to deny any intent to obtain for Sauntry either the land or any beneficial interest whatever therein. Sauntry and his wife would be the only persons in all this company entitled to consideration in the search for equities, and they disclaim. Torinus got in to make $2,500, the Suttons to get the land, and when the means provided for that purpose slipped from under, this mortgage was obtained as a last resort. Neither the claim supporting the mortgage, nor the circumstances under which it was procured, furnish equities of merit.

It is also apparent that William Sutton was not misled by the interpretations placed on the mortgage registry law by either state or county officials, even if this should be held excusable. His attorneys counseled together on this proposition, evidently without [48] placing reliance on the advice given, or the practice adopted, by any official. In fact, no attempt was made, on the night the mortgage was filed for record, to have the indorsement made on the mortgage by the proper official, that it was exempt from taxation in accordance with the custom adopted in St. Louis county.

Neither does it appear to us that William Sauntry may invoke equities to vest title in Sutton under his attempted redemption. Sauntry's failure to redeem terminated his estate in the land. His title had vested in Torinus as assignee of the purchaser at the foreclosure. It did not harm Sauntry if Torinus allowed plaintiffs to redeem without right. On the contrary Sauntry's debt to plaintiffs of over $700 was thereby effaced. If there had been any claim on the part of Sauntry that he had some beneficial interest in or to the land which the Suttons were assisting him to secure, the case might have been brought under the principle controlling in Roberts v. Meighen, supra. But it is clear from the pleadings and from the evidence that both Sauntry and the Suttons take the position that Sauntry has no interest whatever in the land, that the redemption under the $50 mortgage was for the benefit of the Suttons alone, outside of the $2,500 bonus to Torinus, and that the sole ground upon which Sauntry contests plaintiffs' redemption is that he is entitled to have the land appropriated to pay his debts to the greatest possible extent. However, he could not compel Sutton to redeem. The right of Sauntry to have the land appropriated to the payment of the liens of his creditors was all the time subject to the condition that such creditors availed themselves of the redemption statute in strict conformity to its provisions. That was wholly within their choice. Hoover v. Johnson, 47 Minn. 434, 50 N. W. 475; State v. Kerr, 51 Minn. 417, 53 N. W. 719; Bartleson v. Munson, 105 Minn. 348, 117 N. W.

512. If Sutton because of noncompliance with the redemption laws failed to appropriate the land to the satisfaction of Sauntry's debts, and cannot be relieved, it would seem to follow that the only right which Sauntry now claims, namely, to have his $50 debt to Sutton wiped out, is also gone.

But we do not believe provisions of the redemption statute can be abrogated, or in particular cases relieved against by the courts [49] in the absence of some agreement or act of waiver of the party whose rights are to be affected. No one will claim that, if through a mistake a mechanic's lien was filed too late, equity could relieve. Nor can an owner be heard to be relieved against his mistake in permitting the year of redemption to expire, or a creditor against the mistake or omission to file his lien as the statute requires, except in cases where the mistake or omission has been induced by the agreement or acts in the nature of waiver on the part of the person who is to be affected by the relief. No act of plaintiffs can be pointed to as inducing William Sutton or Torinus to accept the redemption money, or to refrain from paying the mortgage tax, or to take any other step to acquire the land. It is true, the mortgage without the tax paid was not a nullity, except as a basis for redemption. Cases like Forest Lake State Bank v. Ekstrand, 112 Minn. 412, 128 N. W. 455; Mason v. Fichner, 120 Minn. 185, 139 N. W. 485; Boyd First State Bank v. Hayden, 121 Minn. 45, 140 N. W. 132; Staples v. East St. Paul State Bank, 122 Minn. 419, 142 N. W. 721, are cited to the effect that equity will relieve against mistake in not paying the mortgage registry tax. But these cases relate to a reformation of instruments which defectively expressed the intention of the parties because of mutual mistake. In none did the court attempt to affect the rights of third parties who had neither taken part nor induced the transaction. In State v. Kerr, supra, it is said the court does not possess the power to enlarge the redemption statute: "The right of redemption is a strict legal right, to be exercised, if at all, in accordance with the terms of statute by which the right is conferred, unless waived or extended by the party whose interests are to be affected. . . . As a general rule, it may be said that when a valid legislative act has determined conditions on which rights shall vest or be forfeited, and no fraud has been practiced, no court can interpose conditions or qualifications in violation of the statute. The courts have no power to relieve against statutory forfeitures." When William Sutton attempted to use his $50 mortgage as a basis of redemption, the right had been forfeited because the mortgage was not legally on record. As tending in the same direction, see Bagley v. McCarthy Bros. Co. 95 Minn. 286, 104 N. W. 7; Brady v. [50] Gilman, 96 Minn. 234, 104 N. W. 897, 1 L.R.A.(N.S.) 835, 113 Am. St. Rep. 622.

So that, assuming the tender of payment of plaintiffs' judgment made their attempt to redeem wrongful, they nevertheless are now owners, because their redemption, fair on the face of the record, was acquiesced in by Torinus, from whom they redeemed by his accepting their money, thereby transferring the purchaser's title at the foreclosure sale to them; and as to William Sauntry he has foreclosed himself from attacking plaintiffs' title, because he disclaims all beneficial interest in or to the land through the Sutton redemption; and as to William Sutton, if Torinus acted for him, he is bound by the acceptance of plaintiffs' redemption money, and if he relies on his redemption, he had no legal or equitable right to make it.

Taking the view of the evidence most favorable to defendants on all controverted matters, we nevertheless reach the conclusion that the decision of the trial court must be affirmed.

PHILIP E. BROWN, J. (*dissenting*).—When the opinion in this case came to the writer the following dissent was prepared and submitted. Subsequently, pursuant to what seems to be the usual practice, the latter part of the main opinion was rewritten and enlarged. That the controversy may be brought to an end, the dissent is filed without alteration.

I dissent from the propositions that Sutton should not be relieved from the consequences of failing to pay the mortgage registry tax and that plaintiff is entitled to equitable relief.

An excusable mistake whereby one loses a valuable legal right gives rise to an equity, not only as against the person responsible for it or privy thereto, but also against anyone who will not be injured by its correction. Lane v. Holmes, 55 Minn. 379, 57 N. W. 132, 43 Am. St. Rep. 508. Orr would not, in legal contemplation be injured by judicial recognition of Sutton's redemption; for the sole purpose of the statute allowing a creditor to redeem is that his claim may be saved and paid, which would be accomplished in this case if plaintiffs' right to question Sutton's redemption were denied. The [51] statute does not contemplate speculation in the mortgaged property with the view of obtaining title thereto, except as such is necessarily involved in efforts of creditors to save their claims and as incident to the end that the property shall go as far as possible towards payment of the mortgagor's debts. Sprague v. Martin, 29 Minn. 226, 13 N. W. 34. Hence neither Orr's nor Sutton's acts should be re-

garded as those of an owner seeking to protect his specific rights in property as such, and their respective redemptions should be considered solely with reference to their status as creditors attempting to save their claims, which, if valid, are entitled to due protection, regardless of amount. Aside from fraud, the desire of either to secure the land itself is immaterial, either for or against him, and the equities of each, if any, should rest in and be weighed by their standing as creditors. Thus tested, the circumstances disclosed on the trial presented no equity in Orr needing protection, for his rights as a creditor were conserved by Sutton's redemption; whereas Sutton had on equity arising from the fact that he would lose at least the security for his debt unless the mistake, whereby his attempt to redeem fell short of legal requirements, was corrected. That this mistake, though one of law, was excusable, seems unquestionable; for if Sutton was not equitably justified in accepting the prior practical construction placed upon the statute by the officers of the state, including the attorney general, it is difficult to conceive of such justification for any act attributable to an erroneous conception of the law. In a proper case, however, one may be relieved of the effect of a mistake of law. See Benson v. Markoe, 37 Minn. 30, 34, 33 N. W. 38, 5 Am. St. Rep. 816; Gerdine v. Menage, 41 Minn. 417, 421, 43 N. W. 91; Lane v. Holmes, supra; Truesdale v. Sidle, 65 Minn. 315, 67 N. W. 1004; Dodge v. Kennedy, 93 Mich. 547, 53 N. W. 795; Pomeroy, Eq. Jur. (3d ed.) 839, 849. The rule established by these authorities is, as reiterated in Forest Lake State Bank v. Ekstrand, 112 Minn. 412, 416, 128 N. W. 455, that equity will relieve from a mistake of law where one party by availing himself thereof will secure without consideration an unjust advantage of the other party, who is blameless in the premises. Certainly it seems that Sutton's failure to pay the 50-cent registration tax comes within the rule, wherefore [52] his redemption should be recognized and adjudicated effective, thereby preventing grave consequences as the result of trivial, and in no sense wilful, fault.

But assuming this position untenable, what is plaintiff's standing to seek equitable relief? What is he other than an intermeddler seeking speculative gain through his own wrong, thus attempting to pervert the redemption law? Legally he had a lien when he redeemed, for, under our decisions, the tender did not destroy that; but it was a naked, technical lien, existing merely because his wrong had not yet been remedied by wiping his judgment from the records. After the tender, or at least so long as it continued to be operative, no remedial right thereon remained against Sauntry except as to the money tendered. Rother v. Monahan, 60 Minn. 186, 188, 62 N. W. 263. Only as a creditor with a vested right to have the property applied to the satisfaction of his debt did he have any right to redeem. Sprague v. Martin, 29 Minn. 226, 232, 13 N. W. 34. After the tender, therefore, he had no better standing to redeem than one without a lien, who, as declared in Nelson v. Rogers, 65 Minn. 246, 248, 68 N. W. 18, has no such specific interest in the property as to constitute him a proper redemptioner under the statute. Such also is the rule declared applicable in the present case, so that "any further attempt to proceed against the land in question after such tender must be considered wrongful;" but nevertheless Orr's redemption is upheld because Torinus, the purchaser, accepted the money. In short, it is held, in effect, that one having no right to redeem may do so and thus acquire title to the land, if no one entitled to object does so. Upon the same reasoning it would seem that the necessity of a lien or some specific interest in the property as the basis of the right to redeem could be waived, which certainly is not the law as heretofore understood by this court. See Todd v. Johnson, 50 Minn. 310, 313, 52 N. W. 864. It is difficult to comprehend how this holding consists with the nature of the creditor's rights under the statute, after the year for redemption by the mortgagor has expired, such being the equitable substitute for his prior right to subject the property to execution (Powers v. Sherry, 115 Minn. 290, 294, 132 N. W. 210), or with the character of the relief sought, the same being essentially [53] equitable (Mathews v. Lightner, 85 Minn. 333, 336, 88 N. W. 992, 89 Am. St. Rep. 558). To grant plaintiff any relief in the premises is not only to place a premium upon wrongful speculation by creditors, but also to forget that equity should not be oblivious to the stain on plaintiff's hands, nor need a complaining defendant to close its doors to one who comes limping upon a crutch of wrong. Had plaintiff alleged the facts regarding the tender his complaint would unquestionably have been demurrable, and he should not be held to be in any better position with the proofs in to the same effect.

But can it properly be said that none of the defendants are in position to object to plaintiff's redemption? Assuming that Sutton, as a subsequent lienholder, was not, and accepting as sufficient predicate for an estoppel or waiver, the statement of the court that "there is nothing in the record to suggest that Torinus did not have full knowledge of the tender when he accepted and receipted for the money" paid on plaintiff's redemption, the question of Sauntry's right still remains. Under the reasoning of Rother v. Monahan,

supra, he could have maintained an action, after tender to restrain plaintiff from attempting to enforce the judgment for any purpose, and must have prevailed; from which it would seem to follow that he could resist its enforcement by objection to redemption. The only escape from this conclusion lies in the determination of the court, following Willard v. Finnegan, 42 Minn. 476, 44 N. W. 985, 8 L.R.A. 50, that after Sauntry's year of redemption expired he had no interest in the property to protect and was without right to question Orr's redemption or to take steps necessary to insure redemption by Sutton. Here it is the court seems to lose sight of Sauntry's rights, both legal and equitable. The mortgagor's rights were summarily disposed of in Willard v. Finnegan, supra, without discussion and seemingly with little consideration, whereas under the rule of Rother v. Monahan, supra, he "must be presumed to have had some interest in preventing such a redemption." This presumption should be conclusive for the reason, if no other, that the mortgagor is necessarily concerned in carrying out the policy of the law, declared in Martin v. Sprague, 29 Minn. 53, 56, 11 N. W. 143, 145, "to save the property of debtors from being sacrificed, and to enable debtors [54] to retain their property; or, if they shall fail to do so, then to secure its application, so far as may be, to the payment of the demands of creditors." To effect the latter purpose his interest extends beyond the expiration of his redemption period; for to make the two coterminous would be to deny him the right to seek the accomplishment of that end. As was said in the Rother case, it well may be that, though he has lost the right to redeem, he may have some advantageous arrangement with a particular creditor looking to the saving of the property or valuable rights therein, or else, it may be added, he may require protection from the effect of prior covenants. See Allis v. Foley, 126 Minn. 14, 147 N. W. 670. It may be that he can neither redeem nor make any advantageous arrangement during the year, but can thereafter secure valuable concessions from one creditor, though not from another. Should he then be deprived of the right, by tender, to eliminate the latter from the succession of redemptioners, thus removing an obstacle to the effectuation of his plans? Having an absolute right to make the tender, he should be accorded the unconditional right to avail himself of the benefit thereof, without the expense, delay, annoyance and uncertainty incident to litigation of an issue as to whether he will in fact be benefited, especially as against the creditor who has wrongfully refused such tender. Though he cannot, after expiration of his redemption period, be regarded as having any title whatever to the property, as former owner thereof he should be dealt with as leniently as possible and afforded every opportunity consistent with the rights of others to save what he can out of it, both for his own and his family's benefit. These considerations should certainly outweigh the claims of one asserting merely technical rights based upon a claim for money of which he will not be deprived by their denial.

The injustice, departure from the settled policy of the redemption law, and danger involved in the rule established by the majority opinion would be clearer if Sutton's mortgage had secured $50,000 instead of $50. Yet the court's reasoning would require the same holding in such case, including denial of the right of redemption to one who, under very recent decisions, unquestionably had an equitable lien upon the property and was thus strictly within the statutory [55] designation of those entitled to redeem, and who, in matter of procedure, was generally, if not technically, within the law.

Finally, neither Sutton nor Sauntry should be deprived of any right here claimed because of Torinus' acceptance of the money paid on Orr's redemption.

I think the order should be reversed.

HALLAM, J. (*dissenting*).—I dissent.

It is conceded that the redemption by plaintiffs was void; that when, after tender to them of the amount of their judgment, they persisted in using this judgment for the purpose of redeeming the land of their debtor from a sale on a prior lien, such use of the judgment was wholly in their own wrong, and that, upon demand of a party having a proper interest to conserve, the court would set aside the attempted redemption and compel the plaintiffs to accept the tender and satisfy their judgment. Mitchell, J., in Rother v. Monahan, 60 Minn. 186, 62 N. W. 263.

The position of the majority of the court is that none of the defendants are in a position to take advantage of the admitted invalidity of plaintiffs' redemption and that accordingly plaintiffs must get the land; that these defendants who are manifesting such intense interest in this litigation either have no interest in the subject matter at all, or else they have by their conduct precluded themselves from asserting their rights.

To this I do not agree. I am of the opinion that William and Lyman Sutton, by virtue of their interest in the certificate from which plaintiffs' redemption was made, are in a position to object to the use of this judgment by plaintiffs for the purpose of redemption.

The relation of these defendants to the property is undisputed. Torinus held the sheriff's certificate from which plaintiffs at-

tempted to redeem. It is conceded that Torinus was not the sole beneficial owner of this certificate. The fact is that William Sutton and Lyman Sutton had undertaken the task of redeeming the property of their uncle William Sauntry from the foreclosure sale and from other subsequent liens. They set about to raise the money to purchase the [56] sheriff's certificate of sale then held by the Weyerhaeusers, and also what is known as the Franklin judgment. This required over $45,000, more money than they had. William Sutton furnished $15,800, Lyman Sutton $12,980. Torinus loaned them $7,500. He was to be repaid this amount in any event, and $10,000 if they got the property. They borrowed the balance in small amounts from various parties. These facts were undisputed, and the court was asked to so find, but declined to do so. The Suttons were the real beneficial owners of the sheriff's certificate from which plaintiffs undertook to redeem. This is virtually conceded.

It follows that the Sutons may challenge this redemption by plaintiffs, unless they have in some manner estopped or precluded themselves from exercising that right. There is no claim of estoppel in the proper sense of that term. They have done no act upon which plaintiffs have in any sense relied. The claim is that, under the doctrine of Willard v. Finnegan, 42 Minn. 476, 44 N. W. 476, 8 L.R.A. 50, Torinus, and all claiming under him, have waived their right to object to the plaintiffs' redemption. Referring to plaintiffs' brief on reargument, they say: "He (Torinus) cannot raise the question because he has accepted and retained the plaintiffs' money and has thereby waived all irregularity and invalidity in the redemption proceedings:" and again: "If Sutton was a joint owner with Torinus then the act of his joint owner (in whose name the certificate for convenience had been placed) in accepting and retaining the money of the plaintiffs certainly estopped him (Sutton) and the same result must necessarily and logically follow if Lewis E. Torinus was holder of the certificate as a sort of trustee." The alleged waiver or estoppel is predicated on these facts:

It is admitted that the money paid by plaintiffs to the sheriff was received by Torinus and turned over by him to William Sutton, and that William Sutton immediately used it for the purpose of an attempted subsequent redemption from plaintiffs under the $50 mortgage. The two Suttons were acting in unison, and the act of one doubtless bound both. This act, plaintiffs claim, cut the ground from under their feet and left them no standing to assail the invalidity of plaintiffs' redemption. Curiously enough, neither this alleged [57] waiver nor the facts out of which it is claimed it arose were pleaded by plaintiffs, either in the complaint or reply. Had the case been tried on the pleadings, plaintiffs' case must surely have failed. Evidence of the facts mentioned was, however, received without objection and the failure to plead is accordingly not of vital importance.

The fact is, William Sutton also claimed a lien under his $50 mortgage subsequent to plaintiffs', if plaintiffs had any lien at all, and under this alleged subsequent lien he claimed a right to effect a subsequent redemption. It turned out that neither plaintiffs nor William Sutton under this latter alleged lien had any legal right to redeem. William Sutton and the others interested in the Torinus certificate could have resisted the claim of plaintiffs to redeem. But William Sutton did not want to stand on this ground alone. No one claims he was obliged to. He wanted also to assert his own right to redeem under his own alleged later lien. What he did do in effect was to take $45,000 or more left with the sheriff by plaintiffs and immediately handed it back to plaintiffs with the amount of their judgment added. It was therefore used to restore to plaintiffs what they had paid out in making redemption under their lien, and for no other purpose.

The intervention of the sheriff in these redemptions was not important. He was a mere conduit. The effect was the same as though Sutton had received the money from plaintiffs in person and in person handed it back to plaintiffs. The majority opinion holds this conclusive evidence of a waiver of the indisputable right that Sutton then had to assert that plaintiffs' redemption was void. The consequence of holding this conclusive of a waiver is of great importance in this case. It means that the Suttons were under the necessity of either standing solely upon their claim of the insufficiency of plaintiffs' redemption, or else raising another $45,000 to place in the sheriff's hands to await the outcome of a determination of that question of right. Such a requirement was onerous. We may infer from the methods the Suttons were obliged to use, and the number of persons upon whom they were obliged to draw to raise the first $45,000, that they could never have raised another similar amount at all. Persons who redeem without any right, as plaintiffs did, [58] should not have it in their power to put a party, who of right owns property, to any such alternative. The Suttons might properly have said to plaintiffs: "Here is your money. If your redemption is wrongful you are entitled to your money back; if your redemption is valid, we still claim a right to redeem from you, and then you are entitled to the same amount plus the amount of your judgment lien. Here it is. It will serve no useful purpose to

require us to go elsewhere and raise another $45,000 so as to leave with the sheriff for you two rolls of money, one for you to take if your redemption is valid, the other if it is void. It may be admitted there is some technical justification for such a proceeding. As a practical proposition, however, the placing of two such sums in the hands of the sheriff would simply impose on us a tremendous burden which would not benefit you. You could not have it all in any event. To require such a course would be to sacrifice substance to form."

Here is involved not the mere question of waiver of some technical formality in procedure, but the acquisition through an alleged waiver of the title to property of great value.

Waiver has been defined as "a technical doctrine introduced and applied by the courts for the purpose of defeating forfeitures." 40 Cyc. 254; Kiernan v. Dutchess County Mut. Ins. Co. 150 N. Y. 190, 196, 44 N. E. 698. Waivers, where they operate to dispense with merely formal requirements in judicial procedure and to defeat forfeitures, are, and should be, favored, but where the sole effect of a waiver is, not to defeat forfeiture, or dispense with formality, but to deprive a party of some substantial property rights without any substantial consideration, i. e., in fact to work a forfeiture, a waiver should not be favored and should not be extended by the application of merely technical rules. In such cases it should be necessary, to make a waiver effective, that the party claiming it should have been led to act upon the facts going to make up the waiver to his detriment. Bigelow, Estoppel (6th ed.) §§ 730, 731. Had the Suttons not taken this redemption money, their title to this property would be secure. I am not willing to hold that the defendant William Sutton, by the act of merely receiving this redemption money and immediately tendering it back to plaintiffs, passed the title and interest [59] of these parties to this valuable property to plaintiffs. No decided case has ever so held. In every case where the certificate holder has been held estopped, the record shows that he accepted and appropriated the money in such a way as to deprive the redemptioner of it.

Plaintiffs use the term "waiver" and I have done the same. This question is perhaps more properly a question of election than waiver. It is conceded that a man cannot ordinarily occupy inconsistent positions. By acceptance of benefits of a transaction he may bar himself from repudiating the transaction. Pederson v. Christofferson, 97 Minn. 491, 496, 106 N. W. 958. But the taking of one of two inconsistent positions will not always preclude the party taking it from later availing himself of the other, if no prejudice is done to anyone thereby. As to this, Mr. Bigelow, in his work on Estoppel, in treating the subject of "election and inconsistent positions generally" says: "However, the estoppel arising from accepting the benefits of a contract applies only when the party may accept or reject without serious inconvenience." This is an unquestioned rule as applied to contracts. Bigelow, Estoppel (7th ed.) p. 747; City of Cincinnati v. Cameron, 33 Ohio St. 336, 374; Zottman v. San Francisco, 20 Cal. 98, 81 Am. Dec. 96 (Field, C. J.); Potter v. Brown, 50 Mich. 436, 15 N. W. 540 (Cooley, J.); Black v. Dressell, 20 Kan. 153 (Brewer, J.). As said by Field, C. J., in 20 Cal. 107, 81 Am. Dec. 96, "the party must also be in a situation where he is entirely free to elect. . . . The mere retention and use of the benefit resulting from the work where no such power or freedom of election exists, or where the election cannot influence the conduct of the other party with reference to the work performed, does not constitute evidence of acceptance." The same principle is applicable here. Defendants Sutton in this case had no real freedom of choice. The statutes did not permit them to wait until the regularity of plaintiffs' redemption could be tested before making redemption under their claimed subsequent lien. They were obliged to act within five days. They could not, without serious inconvenience, which as a practical proposition probably amounted to impossibility, leave this large fund in the hands of the sheriff, and at the same time avail themselves of their right to make or attempt to make their subsequent [60] redemption. In my opinion they did not lose their right to question plaintiffs' void redemption by receiving from plaintiffs this money and forthwith offering to return it to them in the manner disclosed by the record in this case.

NOTE.

Effect of Tender of Amount Due on Judgment.

An unaccepted tender of the amount due on a judgment does not extinguish the judgment lien. People v. Beebe, 1 Barb. (N. Y.) 379; Jackson v. Law, 5 Cow. (N. Y.) 248, *affirmed* in 9 Cow. 641; Ex p. Peru Iron Co. 7 Cow. (N. Y.) 540; Lincoln Sav. Bank v. Ewing, 12 Lea (Tenn.) 598. See also Rother v. Monahan, 60 Minn. 186, 62 N. W. 263. Thus, in Lincoln Sav. Bank v. Ewing, supra, the court said: "The case before us presents the question whether the lien of a judgment can be discharged by a tender which leaves the judgment itself in full force. . . . A judgment is the highest form of security for a debt, and the lien is made to inhere in it. Payment would seem to be, and so it has been

held, the only act by which the defendant can discharge the lien. The doctrine of tender, strictly speaking, is not applicable; for a tender cannot be made after action commenced: Keith v. Smith, 1 Swan (Tenn.) 92. And the remedy of the debtor, if a tender be refused, is to apply to the court to restrain the sale, and enter satisfaction of the judgment by the money brought in: Jackson v. Law, 5 Cow. (N. Y.) 248, *affirmed* 9 Cow. 641; Tinney v. Wolston, 41 Ill. 219; Freeman on Judgments, sec. 384. The reason is, says an eminent judge and professor, that a judgment, being a debt of record, is not discharged by a tender, as it is, in no case, the effect of a tender to discharge the debt. The judgment could only be extinguished by actual satisfaction. As long as it remains in force it must, by its very nature, as prescribed by statute, be a lien on the land. If its existence continue, it cannot be deprived of its ordinary and usual characteristics."

The holding of the reported case, that a tender of payment by the judgment debtor destroys the right of the judgment creditor to make the judgment the basis for a redemption, is supported by the following decisions. Rother v. Monahan, 60 Minn. 186, 62 N. W. 263; Roberts v. Meighen, 74 Minn. 273, 77 N. W. 139.

After a tender of the amount due on a judgment and a payment of the money into court, a sale made to enforce the judgment by execution is wrongful. Mason v. Sudam, 2 Johns. Ch. (N. Y.) 172, wherein the court said: "The master, as agent for the plaintiffs, had offered to the agent of the executors the amount of the execution and the fees before the sale, and that offer had been rejected. The subsequent sale was, therefore, entirely in their own wrong."

It has been held that a tender of the amount due on a judgment while an appeal from the judgment is pending, prevents the accrual of further interest. Ferrea v. Tubbs, 125 Cal. 687, 58 Pac. 308. And in other cases it has been recognized that a tender, properly made and kept good, stops interest. Rogers v. McDearmid, 7 N. H. 506; Jackson v. Law, 5 Cow. (N. Y.) 248, *affirmed* 9 Cow. 641. In Shumaker v. Nichols, 6 Grat. (Va.) 592, wherein it did not appear that the money was not used after tender by the judgment debtor for his own purposes, the tender was held not to stop interest.

In Nesbit v. Martin, 4 Pa. Co. Ct. 95, *affirmed* 118 Pa. St. 138, 12 Atl. 442, 4 Am. St. Rep. 573, it was held that an unaccepted tender by a third person did not work an equitable assignment of the judgment. The court said: "Was Mr. Miller bound, either in law or equity, to receive the debt, interest and costs due on said judgment from the petitioners, and assign the judgment to them? Was their tender and his refusal to receive the same and to make the assignment equivalent to a payment? Did this work an equitable assignment of the judgment in their favor? If we but consider that an execution on this judgment was in the hands of the sheriff, and that a sale of the defendant's real estate was advertised to take place that day, that these parties were strangers to the judgment, and that their tender was not made at the request or with the consent of the defendant, the proper answer to these questions will be suggested. Costs had accumulated on the execution in the hands and in the favor of the sheriff, and he had property levied upon out of which to make these costs, as well as the plaintiff's debt and interest. The plaintiff, by authority of law, had made the sheriff his agent to collect his debt and interest, and the costs that he, the sheriff, might be entitled to under the law, for the services thus rendered; and the plaintiff was not bound to receive the debt, interest and costs from a stranger and take upon himself the burden of becoming paymaster to the sheriff; neither was he bound to make the assignment in order to get his money. We are, therefore, of the opinion that the refusal of the plaintiff to receive the amount of the tender and make the assignment did not work an equitable assignment of the judgment in favor of the petitioners."

Where a tender is made and refused, the court may direct the money to be paid into court, and, when that is done, order the judgment to be satisfied. Campion v. Friedberg, 55 Ill. App. 450. See also Rother v. Monahan, 60 Minn. 186, 62 N. W. 263; Jackson v. Law, 5 Cow. (N. Y.) 248, *affirmed* 9 Cow. 641. And it has been said that a tender is nugatory at law unless it is followed by a payment of the money into court and a motion to enter satisfaction on the record. Shumaker v. Nichols, 6 Grat. (Va.) 592.

STATE

v.

MEWHINNEY.

Utah Supreme Court—May 9, 1913.

43 Utah 135; 134 Pac. 632.

Criminal Law — Sufficiency of Record — Waiver of Rights.

The transcript of the proceedings before an examining magistrate, affirmatively showing that the defendant "waived the service of

an attorney," shows that defendant was apprised of his right to such services.

Preliminary Examination — Presumption Supporting Acts of Magistrate.

In the absence of any showing to the contrary, it must be presumed that the examining magistrate performed the duty, imposed on him by statute, to warn one accused of crime of his right to the assistance of an attorney.

Waiver of Examination — Effect.

Const. art. 1, § 13, provides that offenses heretofore required to be prosecuted by indictment shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by accused, with the consent of the state. Comp. Laws 1907, § 4670, which was in force before the adoption of the constitution, provides that the testimony of each witness in cases of homicide must be reduced to writing as a deposition by the magistrate, or under his direction. Held that, where accused with the consent of the state waived the preliminary examination, he must be held to have waived the necessity of the magistrate's hearing any testimony as to the charge against him, so that there was no testimony to be heard or reduced to writing.

Jury — Finding on Challenge — Review.

Where it appears on error assigned to the refusal to sustain certain challenges for bias that the court might have found that the jurors challenged were fair, impartial, and conscientious men, the action of trial court in overruling the challenges will not be disturbed.

Procedure in Challenging.

Where 12 jurors are called and sworn on their voir dire and examined, and part of them excused for cause, and both the state and the defendant are required to exercise or waive their right to peremptorily challenge the jurors remaining in the jury box, leaving those not challenged to be sworn to try the case before any additional jurors should be called to take the place of those challenged and excused, the procedure is proper.

Remarks of Counsel — Prejudice.

Where counsel on a murder trial was given every opportunity to bring all the facts before the jury, and the court in sustaining an objection to a statement by the prosecuting attorney that, of the articles coming into the possession of the chief of police, a cap was the most important, remarked that the assumption implied something that was not of record and not evidence in the case, error, if any, in such remark is not prejudicial.

Evidence — Articles Taken from Accomplice.

In a prosecution for murder in the first degree, committed within and as a part of an attempted robbery, articles of wearing apparel and other articles found on or taken from defendant's accomplice after the attempted robbery are admissible.

Insanity as Defense—Presumption.

There is a legal presumption of sanity.

Test of Responsibility.

Where the evidence to establish defendant's insanity can be considered only to show general insanity, the test of responsibility is the capacity of the defendant to distinguish between right and wrong at the time of and with respect to the criminal act.

[See generally Ann. Cas. 1912A 36; 76 Am. St. Rep. 85.]

Same.

Where defendant committed murder to avoid apprehension and conviction for an attempted robbery, and relies upon insanity as a defense, the test of mental responsibility is not whether he was a confirmed thief and had not the will power to resist theft, but whether he had the mental capacity to distinguish between right and wrong with respect to the murder.

Instructions as to Insanity.

On a trial for murder, defended on the ground of insanity, where the evidence can be considered only to show general insanity, and the court properly defines the test thereof, its failure to enlarge upon different phases of insanity and mental weakness is not prejudicial to defendant.

Homicide — Conviction of Lower Degree — Degree Fixed by Statute.

A jury in any homicide case has the power, though not the legal or moral right, to disregard the evidence, and find one, who is clearly guilty of first degree murder, guilty of manslaughter, or acquit him.

[See note at end of this case.]

Same.

On a trial for murder, under an information framed upon the theory of a deliberate and premediated murder, and under the statute providing that murder committed in an attempt to commit robbery is murder in the first degree without deliberation or premeditation, where the evidence requires a finding that the murder was committed in an attempt to rob, and the court submits the case upon each theory of the information, there is no error in refusing to charge as to second degree murder; since the statute defines the crime shown by the evidence to be first degree murder, and the court is not required to charge on second degree murder so as to empower the jury to disregard the evidence and return a verdict contrary to law.

[See note at end of this case.]

Same.

In such case, the court might have submitted the question of second degree murder without committing error against accused.

[See note at end of this case.]

Instructions — Request Not Based on Evidence — Intent of Accused.

On a trial for murder in the first degree, on the theory of its commission during an attempt to rob, where there is no evidence that defendant had voluntarily abandoned the attempted robbery before firing the fatal shot, an instruction that, if defendant had abandoned the intention to rob before he shot deceased, the killing would not have been in an attempt to rob, and unless wilful and

premeditated, the killing would not have been murder in the first degree, is properly refused.

Character of Accused — Instruction Approved.

In an instruction, that when a person is charged with the commission of a crime the law presumes that he is a man of "average" character and that the failure to call witnesses to prove his general good character raises no presumption against it, the use of the word "average" in place of the usual adjective "good" is not prejudicial.

Recommendation of Mercy — Instructions Relating to Power of Jury.

In a trial for murder in the first degree, where the court, after calling attention to the statute enabling the jury to recommend life imprisonment in case they found defendant guilty of that degree of homicide, charged that in considering the question they were not restricted by any rule of law or public policy, but were entitled to decide the question from such considerations as might appeal to them, as reasonably entitled to be weighed in determining such recommendation, is not objectionable as in any way directing or controlling, or attempting to control or direct, the judgment of the jury on the question of recommendation.

Appeal from District Court, Salt Lake county: LOOFBOUROW, Judge.

Criminal action. Harley Mewhinney convicted of murder in first degree and appeals. The facts are stated in the opinion. AFFIRMED.

S. P. Armstrong and *H. J. Brothers* for appellant.

A. R. Barnes, E. V. Higgins and *George C. Buckle* for appellee.

[138] FRICK, J.—Appellant was charged with, and, upon a trial by a jury in the district court of Salt Lake county, convicted of, murder in the first degree. The court, in due time, entered judgment sentencing appellant to suffer death. He appeals from that judgment.

[139] Numerous errors are assigned. Before proceeding to a consideration of the assignments relating to the alleged errors occurring at the trial, we shall dispose of those which relate to the quashing of the information and the impaneling of the jury.

Counsel for appellant at the proper time interposed a motion to quash the information filed in the district court against him upon the grounds:

(1) That the magistrate before whom the original complaint was filed, and before whom appellant was taken after his arrest, did not inform or advise him "of his rights to the aid of counsel:" and (2) because "the testimony of the, or any of the, witnesses against him was not reduced to writing by the magistrate." The first ground is clearly untenable. The transcript of the proceedings before the magistrate affirmatively shows that the appellant "waived the service of an attorney." If this means anything, it means that appellant was apprised of his right to have such services.

In the absence of any showing to the contrary, we must presume that the magistrate performed the duties imposed upon him by our statute. Such is the holding of the courts. (People v. Figueroa, 134 Cal. 159, 66 Pac. 202.) In the case at bar, as we have pointed out, it, however, affirmatively appears that appellant waived any aid or assistance from counsel.

Referring, now, to the second ground of the motion, it is true that Comp. Laws 1907, section 4670, in terms provides that "the testimony of each witness in cases of homicide must be reduced to writing as a deposition, by the magistrate, or under his direction." This section in substantially the same form was in force long before Utah became a state. 2 Comp. Laws 1888, section 4883. It was carried into the Revised Statutes of 1898 as section 4670 of that revision and is now known by the same number in Comp. Laws 1907, supra. Since said section was originally passed the Constitution of this state was adopted where, in article 1, section 13, it, among other things, is provided:

[140] "Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the state, or by indictment with, or without such examination and commitment."

Although the language of section 4670, supra, is positive and without exception that in homicide cases the testimony of the witnesses must be reduced to writing, yet, in view of the constitutional provision that the accused with the consent of the state may waive the examination the statute cannot be given application according to the strict letter thereof. If the accused or the officer representing the state desires an examination to be held, then of course witnesses must be heard, and if they are heard their testimony must be reduced to writing as required by the statute. If, however, no examination is desired and is expressly or by implication waived, as held by us in State v. Gustaldi, 41 Utah 63, 123 Pac. 897, then there is no need of hearing any testimony, and hence there is none to be reduced to writing. In the case at bar the transcript of the proceedings had before the committing magistrate affirmatively shows that appellant, with the consent of the state, expressly waived the preliminary examination mentioned in the

Constitution. This he could do, and, having done so, he likewise must be held to have waived the necessity of the magistrate to hear any testimony with respect to the charge filed against him. There was therefore no testimony to be reduced to writing. Nor can there be any doubt as to appellant's competency to waive the examination, nor as to having done so, since he does not assail the truth of the statements to that effect contained in the magistrate's transcript, as he could have done under the ruling of this court in State v. Gustaldi, supra. See also upon this point, State v. Ritty, 23 Ohio St. 562. The motion to quash, for the reasons aforesaid, was therefore properly overruled.

It is also insisted that the court erred in refusing to sustain certain challenges for cause that were interposed by appellant's [141] counsel against at least four prospective jurors upon the ground of both expressed and implied bias. It is accordingly urged that appellant was required to remove those jurors from the panel by the exercise of four peremptory challenges, which reduced by that number the quota of such challenges vouchsafed to him by our statute. We have carefully examined all of the testimony of those jurors given upon their *voir dire*, and we are satisfied that this case falls squarely within the rule laid down by this court upon this question in the recent case of State v. Thorne, 41 Utah 414, Ann. Cas. 1915D 90, 126 Pac. 286. The only difference between this and the Thorne Case is that, while there might have been some doubt in our minds with respect to the qualifications of some of the challenged jurors in the Thorne Case, there is no such doubt in this case. If there were, however, the rulings of the trial court fall squarely within what is said in the Thorne case, supra. Further, by carefully going over the jurors' examination, we are impressed with the fact that they were fair, impartial, and conscientious men, and the trial court was clearly justified in overruling the challenges. This contention, therefore, cannot be sustained.

It is further contended that the court erred in requiring appellant to exercise his peremptory challenges at times when the jury box was not filled with jurors. The jury was impaneled and the challenges were required to be exercised in the manner stated by Mr. Justice McCarty in State v. Riley, 41 Utah 225, 126 Pac. 294. We there held that the course of procedure followed in that case was proper. This case is therefore controlled by that one, and this assignment must also fail.

Passing to a consideration of the assignments relating to the alleged errors occurring at the trial, it becomes necessary to state as briefly as possible the controlling facts. From the evidence it is made to appear that the homicide in question occurred while appellant and an accomplice were engaged in the perpetration of or attempt to perpetrate a robbery. The undisputed facts relating to the homicide are substantially [142] as follows: On the afternoon of the 6th day of October, 1911, between three and four o'clock, a Mrs. Fuller, after meeting one Sol. S. Brown, a friend of hers, on the street in Salt Lake City, went with him to her room on the second floor of the Romona rooming house, which is located on the corner of Second East and Second South streets in said city. Mr. Brown wore a large and conspicuous diamond ring on one of his fingers of the approximate value of $350. In going upstairs to the room Mrs. Fuller noticed the appellant and his accomplice in the hallway. Within a few minutes after Mrs. Fuller and Mr. Brown had entered the room aforesaid, there was a knock at the door, and Mrs. Fuller went to open it. Upon opening the door she saw two men in the hallway (one of them the appellant) with handkerchiefs tied over the lower portions of their faces. As soon as she had opened the door, they forced their way into the room. One of the men had a revolver in his hand and immediately upon entering the room pointed it at Mr. Brown, and the other remained standing at the door, which he had closed after him. Mr. Brown at once went forward and grappled with the one having the revolver, catching his hand or forearm in such a manner as prevented him from shooting Mr. Brown, and a hard struggle ensued between them. Mr. Brown seemed to hold his own, and the man with the revolver, seemingly, could make no headway in obtaining the coveted prize, the ring. He called to his accomplice, who still stood guarding the door, for help, and said, "Pull the ring off his finger." The accomplice immediately left the door and went to the assistance of the other and in doing so struck Mr. Brown several times on the head with what is termed a "black-jack," inflicting scalp wounds which subsequently bled somewhat freely. The struggle now went on between the three, but as soon as the one had left the door Mrs. Fuller ran out of the room, down the hallway, and into the street crying for help as she went. Considerable uproar was thus caused, and it was not long before the man who had stood by the door also slipped out of the room, Mr. Brown and the other still continuing the [143] struggle for supremacy, while Mr. Brown was also crying for help. Immediately after the one with the blackjack had left the room Mr. Brown heard the steps of a man in the hallway approaching the door which was now standing ajar. The one with the revolver, who was still continuing the struggle and still trying to obtain the diamond ring, apparently also heard the

steps of the approaching stranger, whose name it was afterwards learned was Erickson, and he then also broke away from Mr. Brown, who was becoming quite weak from the blows he had received on his head and the continued struggle, and ran out of the door into the hallway which led downstairs into the street. Immediately after getting outside of the door of the room in which the struggle took place, the one with the revolver was met by Mr. Erickson, who was coming to Brown's assistance, and as soon as he saw Mr. Erickson, and within a very few feet from the door, he raised his revolver and shot Mr. Erickson, the bullet penetrating his chest and passing through a portion of the heart. Mr. Erickson staggered back into a room near by and fell on the floor and in a few minutes thereafter expired from the effects of the bullet wound. Both of Brown's assailants had in the meantime run down the steps and had reached the street, where they separated. It was only a few minutes afterwards, however, when the one who had the revolver and who shot Erickson was apprehended on the street in front of the rooming house while in the act of inducing an expressman, whose express wagon he had climbed onto, to drive him hurriedly away from the place. He was immediately taken to the police station after he was apprehended as aforesaid. A short time after the arrest he was identified as the one with the revolver by both Mrs. Fuller and Mr. Brown, and was further identified as the one who did the shooting and as being the appellant in this case. The other one was apprehended later on the same day and was also identified by Mrs. Fuller and Mr. Brown as the one who was with appellant and the one who struck Mr. Brown with the blackjack. During the struggle in the room the handkerchiefs were torn [144] from the faces of the two men, and a full view of their features was thus obtained by both Mrs. Fuller and Mr. Brown. There is much other evidence respecting the identity of appellant and his accomplice which we need not refer to here. It must suffice to say that under the evidence no other conclusion is permissible than the one arrived at by the jury, namely, that the appellant is the one who had the revolver and who killed Mr. Erickson, and that the killing was done within and as a part of the *res gestæ* of the attempted robbery.

It is contended that the court erred in one of its rulings which it is said trenched upon the province of the jury with respect to an important fact in the case. The matter arose during the progress of the trial and while counsel for appellant was cross-examining the chief of police, who was one of the state's witnesses. The witness had testified that at the time the appellant and his accomplice were brought to the police station some articles, including a cap, came into his possession, which it was shown were either taken from appellant's person when he was brought to the station or identified at the time as having been in his or his accomplice's possession at the time of the attempted robbery, or immediately thereafter. Appellant's counsel, Mr. Armstrong, on cross-examination, questioned the witness with regard to the articles aforesaid, and Mr. Farnsworth, the prosecuting attorney, interposed an objection to the method pursued by counsel. The record of the proceeding in this respect reads as follows:

"Q. So that you were not very careful in designating these different articles, about how they came into your possession? A. I was reasonably careful, as you see by the tags. Q. The important one, however, does not seem to be very well designated? A. Which is the important one? Q. The cap. Mr. Farnsworth: We object to counsel making any such assumption as that. The Court: The objection is sustained. It implies something that is not of record, not evidence in the case. Mr. Armstrong: Exception."

[145] The contention that in sustaining the foregoing objection, and in making the remark, the court invaded the province of the jury, seems to us untenable. In view that the record discloses that counsel were given every opportunity to lay all the facts before the jury, the matter seems somewhat trivial. While the objection was extremely technical, yet the supposed question to which the objection was sustained was, in its nature, an assumption of a fact by counsel rather than a question to the witness which he was expected to answer. It is very clear that no prejudicial error resulted or could result from the court's ruling, and this assignment must therefore be overruled.

The contention that the court erred in admitting in evidence the articles of wearing apparel and other articles found on or taken from appellant's accomplice after the attempted robbery is clearly without merit. Wharton, Crim. Ev. (10th Ed.) section 312, p. 610.

Counsel for appellant strenuously insist that the court erred in charging the jury upon the question of insanity. It may be said that appellant produced some evidence in support of his plea of insanity. It was contended at the trial, and is now insisted, that appellant had acquired the habit of using drugs, such as opium and morphine, and that their use affected his mental capacity. To establish that fact he produced in evidence the depositions of two witnesses of Terre Haute, Ind., one of whom testified that he was acquainted with appellant from 1900 to 1907 and that during that period of time

appellant habitually used "both opium and morphine." When asked what effect the use of those drugs had upon appellant's mental condition as observed by the witness, he said:

"The use of drugs seemed to make him very thin and at times dull and stupid."

When pressed for further particulars with regard to the effect that the use of drugs had upon appellant's mind, the witness said:

"I am not aware of any specific facts and circumstances."

[146] The testimony of the other witness is substantially the same; the only difference being that the other one said that appellant used the drug for a period of about five years between 1900 and 1907. After the year 1907 the witnesses did not come in contact with appellant. Upon substantially the foregoing testimony the two witnesses were permitted to give their opinion with respect to the sanity of appellant, and they both testified that in their opinion appellant was insane, and that the insanity was caused through the use of drugs as aforesaid. It also was shown that when appellant was arrested he had some morphine on his person, and that he afterwards called for some, and that the city physician ordered the officers to permit him to have about two grains daily for some time after his arrest. In addition to the foregoing testimony respecting appellant's insanity and the use of drugs, a young doctor who had about three years' experience in the general practice as a physician, and without any further experience, was called as an expert upon the question of insanity. His conclusions regarding appellant's mental condition were mainly based upon the effect that the habitual use of opium or morphine usually has upon the mind. The doctor, however, did not testify from actual experience, as his answers to the following questions clearly indicate:

"Q. And of these alkaloids you say that morphine is the most active and the most detrimental to the faculties of the mind? A. I have read authorities stating that fact. Q. You don't state that of your own knowledge as a chemist or anything? A. No, sir; I could not do that. Q. Not from your own practical experience, but from your reading of it? A. Yes, sir."

Upon substantially the foregoing testimony the doctor was permitted to answer a hypothetical question which was propounded to him by appellant's counsel, in which the facts as testified to by the witnesses aforesaid, together with the effect that the use of drugs had on the mind and appellant's habits with regard to their use as disclosed by the evidence, and further that the robbery was attempted in broad daylight [147] in a well-tenanted apartment or rooming house, and a few other unimportant facts, were recited. The doctor in answering the question said that in his opinion appellant was insane when he attempted to commit the robbery and when he shot and killed the deceased, Erickson. Upon the part of the state there was abundant testimony to the effect that appellant's conduct and demeanor immediately after the shooting and since then were always normal and rational. A physician who had frequently observed him after the shooting also testified that he did not use morphine in excessive quantities, and did not have the appearance of one who did so, and that in his judgment appellant at the time of the commission of the offense was and ever since has been sane. Upon the question of insanity the court instructed the jury that, before they could find appellant guilty as charged in the information, they "must be satisfied beyond a reasonable doubt from all the evidence in the case that the defendant at the time of the perpetration of, or attempt to perpetrate, such robbery or burglary, had formed the intent to commit such robbery or burglary, and that he had the mental capacity to distinguish between right and wrong with reference to said robbery or burglary; and, if you should find from the evidence in this case that the defendant at the time in question had not the mental capacity to form an intent to perpetrate a robbery or burglary, then you cannot convict him of murder in the first degree." The court further instructed the jury upon this question that: "The test of responsibility for a criminal act, when insanity is relied upon as a defense, is the capacity of the defendant to distinguish between right and wrong at the time of and with respect to the act which is the subject of inquiry; and, if after a fair and conscientious consideration of all the facts and circumstances in evidence you are not satisfied beyond a reasonable doubt that the defendant had the capacity to distinguish between right and wrong at the time of and with reference to the act in question, then you cannot convict him." The same thought in other forms was repeated in several of the instructions.

[148] It is insisted that the capacity to distinguish between right and wrong with respect to the criminal act in issue is not the true test of mental responsibility. It is contended that, in addition to that test, the jury should also be told that they must find that the accused had the will power to overcome or resist the impulse to commit the act with which he stands charged. Let us assume at the outset that, under certain circumstances where a plea of insanity is interposed as a defense, it may become necessary to charge the jury as contended for by counsel, and that in all cases where such a plea is interposed it would be unobjectionable although not nec-

essary to do so. And let us assume further that in this case it would not have been at all improper for the court in its charge to have gone further into the question of insanity along the lines suggested by counsel. The foregoing assumptions are, however, not decisive of the question we are called upon to determine. In reviewing a charge upon any particular subject, as well as in reviewing the requests refused, we must constantly keep in mind the facts and circumstances of the particular case as they are made to appear from the evidence. What meager evidence of insanity there is in this case is limited entirely to generalities. The whole superstructure of the so-called insanity claim is built upon the statements of two laymen, who, for some years prior to 1907 (three years before the murder in question was committed), were acquainted with the appellant, and who testified that during that time—that is, during the time they knew him—he was addicted to the use of morphine and that the use thereof "at times made him dull and stupid." Basing their opinions upon these meager facts, the two laymen tell us that the appellant was insane. In addition to their opinions, we also have a young doctor, who, after having the foregoing evidence detailed to him, also is willing to venture the opinion that the appellant was insane. There is absolutely no evidence of any actual mental lesions or any mental disease of any kind or of any hallucinations or other mental derangement.

[149] All that we have here, therefore, to establish insanity and to overcome the legal presumption of sanity, are a few general guesses based upon a few isolated facts which in and of themselves do not necessarily point to either insanity or to any serious mental derangement.

If the evidence in this case, therefore, is considered for the purpose of raising a doubt of the sanity of appellant, it can be considered for no other purpose except to show what may be called simple or general insanity. The existence of mental lesion, disease, or other aberration cannot be assumed or inferred, because there is absolutely no evidence to support such an inference. Under such circumstances, the test of responsibility that is applied by the overwhelming weight of authority is substantially the one given by the district court in this case in its charge to the jury. That test is thoroughly discussed by the authors of the following works: 1 Wharton, Crim. Law (10th ed.) sections 50–55; Wharton on Homicide (3d ed.) sections 537, 539; 1 Wharton & S. Med. Jur. section 175, and cases there cited. See also People v. Calton, 5 Utah 458–460, 16 Pac. 902; 3 Thompson on Trials (2d ed.) sections 536–541, where the test is approved.

We need not pause here to go over the reasons why the test is deemed a proper and a practical one except in those cases where the evidence discloses some special mental weakness, disease, delusion, or aberration. That the test in a case like the one presented by this record is the proper one impresses us as clearly sound, and this impression is not weakened after considering counsel's argument advanced in behalf of their contention. They, in effect, argue that if appellant was controlled by an irresistible impulse to commit the robbery—that is, if he did not have the will power to resist the temptation or impulse to rob or steal—then he should be acquitted, although he possessed the mental capacity to distinguish between right and wrong with respect to the homicide. This, in our judgment, is neither good law nor good sense. Suppose A. is charged with the murder of B., which is committed because [150] he is detected by B. while he was in the act of committing a robbery or larceny. Upon being tried for the murder, A., however, establishes by indubitable proof that for a long time prior to the commission of the larceny he was a confirmed kleptomaniac; that is, that he was afflicted with that species of insanity which manifests itself in an irresistible impulse or desire to steal, and that he lacked the will power to control or overcome the impulse. Would this proof be sufficient to excuse the homicide? We think not. In the assumed case A. committed murder for precisely the same reason that appellant killed Erickson, namely, to avoid apprehension and possible conviction for the attempted robbery. Under such circumstances, the test of mental responsibility, therefore, is not whether the accused is a confirmed thief and has not the will power to resist theft, but it is whether he had the mental capacity to distinguish between right and wrong with respect to the act with which he is charged, in this case murder. According to counsel's theory, although the accused may have had ample mental capacity to realize that it was wrong to kill, yet, if he was afflicted with an irresistible impulse to steal, he ought to have been acquitted of both crimes. This, in effect, would be an inducement to every thief to slay every one who discovered a theft committed by him.

There is nothing in the evidence in this case which would have justified the jury in finding that appellant was afflicted with any mental lesion, disease, or weakness, and hence it was not necessary to go into those matters in the charge in charging upon the general subject of insanity. To hold, therefore, that the court should have charged as contended by counsel, and that the refusal of the court to do so constitutes prejudicial error, is to disregard the evidence and the reasons which

require such a charge, and further requires us to assume facts and conditions not directly testified to by any one nor legitimately deducible from any facts and circumstances that were testified to. The court, in our judgment, in submitting the question of general insanity [151] to the jury, clearly safeguarded all of appellant's rights in that regard.

We repeat that the question here is not the abstract one whether the court could not have properly enlarged upon the different phases of insanity or mental weakness, but the question we have to meet is whether the evidence required the court to so enlarge upon those subjects, and whether in having failed to do so the appellant was prejudiced. We are clearly of the opinion that the appellant was not prejudiced, and that the judgment, therefore, should not be reversed upon this ground.

When the cases cited by counsel upon this question are analyzed, it will be found that in all of them there were some facts and circumstances which made the doctrine contended for by them applicable to some extent at least. It must be conceded, however, that there are a few cases which seem to hold that the doctrine is applicable upon a mere general claim of insanity as was the case in the case at bar. We cannot yield assent to such a doctrine.

It is further insisted that the court erred in refusing to charge the jury with respect to second degree murder. This question, like the one of insanity, must of necessity, to a large extent at least, be controlled by our statute when considered in connection with the evidence adduced at the trial. In this connection it is contended that inasmuch as the information was framed upon the theory of a deliberate and premeditated murder and in view that the court submitted the case to the jury upon that theory as well as upon the statute which provides that murder "committed in the perpetration of or attempt to perpetrate robbery" also constitutes murder in the first degree without deliberation or premeditation, therefore the court should also have submitted the question of second degree murder to the jury. It is true that the court submitted the elements of deliberation and premeditation to the jury. From that it does not follow, however, as contended, that the court should also have submitted the question of an unpremeditated or second degree murder to the jury. Where [152] there was some evidence in this case from which the jury could have found a deliberate and premeditated murder, yet the jury would not have been justified in finding that the murder in question was not committed in an attempt to perpetrate a robbery, and upon the latter question there is not even room for doubt or conflict. Under our statute a murder so committed constitutes murder in the first degree and legally can constitute nothing else. True, a jury in any homicide case has the power to disregard the evidence and may find one who is clearly guilty of first degree murder guilty of manslaughter or acquit him.

From this it is assumed that, because a jury may do this, therefore a court must submit all the degrees of murder, and thus give the jury the right to pass upon the several degrees of murder. This contention loses sight of the legal principle involved in the statute just referred to which does not segregate murder committed in the perpetration of or attempt to perpetrate a robbery into degrees. While it is true that under our jurisprudence a jury has the power, with or without reason, either to reduce the degree of the crime, if it be divided into degrees, or acquit the accused, it does not follow that a court is bound in effect to charge that they may disregard the law, the evidence, and their oath in arriving at a verdict. Neither is it correct to say that, by not submitting the question of second degree murder in a case where the killing was perpetrated in an attempt to rob, the court thereby in effect coerces the jury to find the accused guilty of murder in the higher degree. Whether such might be the effect under our statute depends upon the evidence. If the evidence justifies a finding that the murder was committed in the perpetration of or attempt to perpetrate a robbery, it is the duty of the court to charge that, if they find beyond a reasonable doubt that the murder was "committed in the perpetration of or attempt to perpetrate a robbery," they should find the accused guilty of first degree murder, and if the evidence, as in the case at bar, does not justify the jury under their oaths to find otherwise, the court need not submit the question [153] of second degree murder at all, although it might do so without committing error against the accused. In such a case, in merely charging on first degree murder the court does not, as is contended, withhold anything from the jury, but simply charges the law. It is the law that fixes the degree of the offense, and when the facts are not in dispute and clearly show that the murder in question was committed as aforesaid, the jury have neither the legal nor a moral right to refuse to follow the law and in refusing to do so in effect amend or repeal the statute.

Of course, if the jury refuses to be bound by either law or fact, a court is powerless, but the court is not required to partake of the wrong and in effect suggest to the jury that they may do what the law does not sanction. Here again the question is not whether

it would have been improper for the court to have charged with regard to murder in the second degree, but the question is whether under all the facts and circumstances of this case (not some other case) the trial court committed prejudicial error in refusing to so charge. Upon this question we are of the opinion that there was absolutely no evidence either direct or inferential which would have justified a finding by the jury other than that the murder in question was committed in an attempt to perpetrate a robbery. If this be correct, why submit a question to the jury upon which an affirmative finding can in no event be justified? Is not the question of whether there is any evidence in support of any essential fact as much a question of law in a homicide case as any other? Must the court in advance abdicate its prerogatives to the jury simply because that jury has the power, and perhaps the inclination, to disregard both law and fact? In this case the jury, however, followed the law, and in passing upon the facts observed their oath, and hence fully discharged their duty. Further, the case was fairly and impartially tried. What plausible reason, therefore, can an appellate court give for interfering with the verdict and judgment? Again, this case in principle is not distinguishable from State v. Thorne, supra, in which we held that [154] under a similar state of facts the court committed no error in refusing to charge on second degree murder.

In passing this point we desire to say that a trial court should, in every case where there is any direct or inferential evidence with respect to the different degrees of murder, charge the jury with regard to all the degrees, and this rule should be followed where there may be any doubt with regard to whether the higher degree is established or not. This is contemplated by our statute which divides crimes into degrees and which requires the jury to find in the lesser degree in case of doubt. That statute should, however, not be given controlling effect in a case of murder committed in the perpetration of or attempt to perpetrate robbery, because a murder so committed is not divisible into degrees. In such a charge of murder the killing was either committed in the perpetration of or attempt to perpetrate robbery or it was not. If the evidence, as in the case at bar, is clear and undisputed that it was, then the murder is first degree murder and nothing else, and the mere fact that the jury has the power to ignore the evidence and find otherwise does not change the law. In this case the jury was by force of the evidence compelled under their oaths to find that the murder was committed in an attempt to perpetrate robbery. By authority of what law or system of logic could they also legally have found that it was not so committed? If they could not have so found without ignoring both law and fact, no prejudicial error could have been committed in not telling them that they might do so.

The following cases are based upon a statute like ours with respect to murder, and it is accordingly held that, if the jury find that the murder was committed in the perpetration of or attempt to perpetrate a robbery, they have no alternative save to find the perpetrator guilty of murder in the first degree: State v. Gray, 19 Nev. 212–218, 8 Pac. 456; State v. Williams, 28 Nev. 407, 82 Pac. 353, and cases there cited. See also People v. Wardrip, 141 Cal. 229, 74 Pac. 744. Some of the very cases that counsel cite to sustain their contention that the court should have charged the jury with respect [155] to second degree murder hold directly to the contrary. For example, in Davis v. U. S. 165 U. S. at pages 378 and 379, 17 S. Ct. at page 362, 41 U. S. (L. ed.) 750, Mr. Justice Brewer, in referring to the question now under consideration, said:

"There was no testimony to reduce the offense, if any there was, below the grade of murder. If the defendant was sane and responsible for his actions, there was nothing upon which any suggestion of any inferior degree of homicide could be made, and therefore the court was under no obligation (indeed, it would simply have been confusing the minds of the jury) to give any instruction upon a matter which was not really open for their consideration."

So here: If the jury believed that the appellant fired the fatal shot and that he was mentally responsible, then they had no choice, and it was their sworn duty to find him guilty of murder in the first degree.

It is also contended that the court erred in refusing to charge the jury that, if appellant had abondoned the intention to rob before he shot Erickson, then the killing would not have been committed in an attempt to rob, and therefore, unless it was a "willful, deliberate, malicious, and premeditated killing," the killing would not have been murder in the first degree. The court properly refused to so charge, if for no other reason than that there was no evidence whatever that appellant had voluntarily abandoned the attempted robbery before he fired the fatal shot. Indeed, the only evidence upon the question is inferential, and that is directly contrary to such a claim. Upon this question the cases last above cited are decisive against counsel's contention.

Counsel for appellant requested the court to charge the jury that one who is charged with a criminal offense is presumed to have a "good character and reputation." The court refused the request in the language

proposed, but charged the jury upon that subject as follows:

"When a person is charged with the commission of a crime, the law presumes that he is a man of average character, [156] and the failure to call witnesses to prove his general good character raises no presumption against it."

It is now insisted that the court erred in giving the charge aforesaid and in refusing the proffered one. It is contended that the error consists in using the qualifying adjective "average" instead of "good" in defining the presumption with respect to character. It is true that the adjective usually used is "good." Many authorities are, however, to the effect that the law presumes one accused of crime to be possessed of a fair, or ordinarily fair, character. In the case of Mullen v. U. S. 106 Fed. 894, 46 C. C. A. 24, cited by appellant's counsel on this point, in referring to the presumption now under consideration, it is said:

"It is in consonance with the general principle of law that a man is presumed to stand ordinarily well, and to have at least the average qualities of morality and good conduct."

In People v. Fair, 43 Cal. at page 149, Mr. Justice Wallace says that the law presumes every one possessed with a "character of ordinary fairness." To the same effect is 1 Bish. Crim. Proc. (3d ed.) section 1112; and Underhill, Crim. Ev. section 76. While perhaps it would have been better if the court had used the phrase "good character," yet, in view of all that the court said in the instruction, the jury could not have been misled by the use of the word "average." It seems clear to us that the appellant could not have been prejudiced from anything said or omitted, and therefore this contention cannot prevail.

Finally it is contended that the court erred in its charge to the jury with respect to their right to recommend life imprisonment in case they found appellant guilty of murder in the first degree. The court, in calling attention to the statute upon that subject which confers the right upon the jury to recommend life imprisonment in case they find appellant guilty of first degree murder, charged as follows:

"In considering this question you are not restricted by any rule of law or public policy, but are entitled to decide the question from such considerations as may appeal to you as [157] reasonably and conscientiously entitled to be weighed in determining the giving or withholding of such recommendation."

It is contended that this charge is open to the same objection as the one which we condemned in the case of State v. Thorne, 39 Utah 208, 117 Pac. 58. This contention is not tenable. The court in this case in no way did, nor attempted to, direct or control the judgment of the jury in arriving at a conclusion upon the question of recommendation. That is what was attempted in the Thorne Case, and it was that attempt which we condemned. While the trial courts discharge their full duty under the statute when they direct the attention of the jury thereto, and that thereunder it is their province to make or withhold a recommendation of imprisonment for life in case they find the accused guilty of murder in the first degree, yet the mere fact that a court may say what is said in the instruction in this case cannot have the effect of avoiding the verdict and the judgment based thereon. To so hold would amount to a mere travesty.

In conclusion we desire to say that after a careful examination of the entire record we cannot avoid the conclusion that the appellant has had a full, fair, and impartial trial. Moreover, all of his rights have been carefully safeguarded at all stages of the trial by vigilant and able counsel, who, although acting without any reward or compensation, have manifested a most commendable interest in the prisoner's behalf.

The judgment should be, and it accordingly is, affirmed.

. . . . . .

McCARTY, C. J.—I fully concur in the reasoning of and the conclusions reached by Mr. Justice Frick in the foregoing opinion. In view of the importance of the case I am impelled to make the following additional observations:

The information charges, without referring to the burglary or robbery, that the defendant "willfully, unlawfully, feloniously, deliberately, premeditatedly of his malice aforethought, and with a specific intent to take the life of the [158] said C. L. Erickson," shot and killed him. Second degree murder is included in the charge as alleged. But the evidence without conflict shows that at the time defendant fired the fatal shot he was perpetrating a burglary. (Comp. Laws 1907, section 4336) and attempting to perpetrate a robbery. The evidence also shows that the burglary, attempted robbery, and homicide were so connected and interwoven, each one with the other two, that they constituted one transaction. Comp. Laws 1907, section 4161, provides, among other things, that murder when "committed in the perpetration of, or attempted to perpetrate, any . . . burglary, or robbery, ... is murder in the first degree." The killing of Erickson was, therefore, under the circumstances as shown by the undisputed evidence, murder in the first degree, unless the defendant was, at the time he fired the fatal shot, insane. Upon this point, as the record now stands, there is no room for doubt. The question upon which there seems to be a difference of opinion is as to whether second degree murder

is included in a homicide committed in the perpetration of or attempt to perpetrate a burglary or robbery. In all classes and kinds of intentional murder in which the crime is divided into degrees, the element that distinguishes first degree murder from murder in the second degree is the "premeditation and deliberation with which first degree murder is committed." (2 Bish. Crim. L. (7th ed.) section 728; 21 Am. & Eng. Enc. of Law (2d ed.) 157; 21 Cyc. 728.) Under section 4161, supra, murder committed in the perpetration of any of the felonies therein enumerated is murder in the first degree, regardless of whether the killing is premeditated and deliberate or even intentional. The killing may be accidental, but it nevertheless is murder in the first degree. (State v. Thorne, 39 Utah 208, 117 Pac. 58.)

I am unable to conceive of a state of facts or circumstances, and certainly none has been suggested, under which a murder committed in the perpetration of or attempt to perpetrate any of the felonies mentioned in section 4161, supra, would or could be less than murder in the first degree. As I have stated, the elements of first degree murder, [159] namely, premeditation and deliberation, that distinguishes first degree murder from second degree murder, are not essential, when the crime is committed in the perpetration of or attempt to perpetrate any one or more of the felonies referred to, to make the crime murder in the first degree. (21 Cyc. 719–723; 21 Am. & Eng. Enc. of Law (2d ed.) 167; State v. Thorne, 39 Utah 208, 117 Pac. 58.) The reason for the rule is well stated by the Supreme Court of California in the case of People v. Milton, 145 Cal. 169, 78 Pac. 549, as follows:

"In this (referring to the class of murder committed in the perpetration of or attempt to perpetrate arson, rape, robbery, or burglary) the law has said to the malefactor: 'If in your perpetration of or attempt to perpetrate arson, rape, robbery, burglary, or mayhem you shall take the life of a fellow being, intentionally or unintentionally, your crime is murder in the first decree. The killing may be willful, deliberate, and premeditated, or it may be absolutely accidental. In either case, you are equally guilty. The elements of willfulness, deliberation, and premeditation are not indispensable to your crime. The murder, under section 187 of the Penal Code, is established, in that the killing is unlawful, it having been perpetrated in the performance or attempt to perform one of these felonies, and the malice of the abandoned and malignant heart is shown from the very nature of the crime you are attempting to commit. Therefore, if in perpetrating arson, although in the belief that the building is unoccupied, some person within the building, unknown to you, shall lose his life, you are guilty of murder in the first degree. Or if in burglariously entering premises which you believe to be unoccupied you shall accidentally take the life of one whose presence is unsuspected by you, still your crime is murder in the first degree.' That such is the true meaning and construction of our statute there can be no doubt."

(State v. Thorne, 41 Utah 414, Ann. Cas. 1915D 90, 126 Pac. 286; Morgan v. State, 51 Neb. 672, 71 N. W. 788; State v. Young, 67 N. J. L. 224, 51 Atl. 939.)

Counsel for appellant, proceeding upon the theory that second degree murder is necessarily included in a homicide committed in the perpetration of or attempt to perpetrate any of the felonies enumerated in section 4161, supra, argues that in a prosecution for such murder it is the province of the jury, under section 4892, if the defendant is found guilty, to determine whether he is guilty of first degree [160] or second degree murder. The section referred to reads as follows:

"Whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty."

The difficulty with counsel's position is that under the plain provisions of section 4161 murder committed in the perpetration of or attempt to perpetrate any felony mentioned therein is first degree murder only, and that section 4892 has no application. As I have suggested, there is no conceivable state of facts or circumstances under which this class of murder can be anything less than murder in the first degree. For illustration, take a case in which an incendiary, believing that a certain building is uninhabited and unoccupied, willfully and maliciously applies the torch to it, and after the structure is enveloped in flames he discovers that it is occupied by a human being who is unable to make his escape therefrom, and the incendiary makes every effort in his power to rescue such party but is unable to do so. Under such circumstances the killing would be murder in the first degree. I think it is plain that in a homicide belonging to this class there is no line of demarcation that distinguishes it into degree. If it may be separated into different degrees, where is the line to be drawn between the first and second degree? Is it second degree murder when it appears from the evidence that the defendant in the commission of or attempt to commit one or more of the felonies mentioned had no specific intent to take human life and that the killing was wholly accidental? The question is answered by the statute which declares that the killing of a human being even under such circumstances is murder in the first degree.

The Texas Court of Appeals, in construing a statute containing provisions which are

substantially the same as sections 4161 and 4892, supra, said:

"The statute, and the decisions construing that statute, have not yet laid down the proposition that the accused firing at the intended victim in cases of robbery and killing another party would reduce that killing to murder in the second degree. The shooting would still be murder in the first degree, because the statute expressly [161] says that all murder in robbery or in the perpetration of robbery would be murder in the first degree. *This statute eliminates murder in the second degree in homicides of this character.*" (Italics mine.) (Milo v. State, 59 Tex. Crim. 196, 127 S. W. 1025.)

True the jury have the power in this class of homicides to find the accused guilty of any of the lower degrees necessarily included in the charge set forth in the information, or to acquit him. They may do this even though it is conclusively shown by the evidence that he is guilty of murder in the first degree and there is no evidence tending to reduce the crime to a lower degree. But it does not follow that because a jury have the power to ignore the evidence, and, in violation of their oaths, to bring about a miscarriage of justice by refusing to do their duty, the court should in its instructions authorize and in a sense invite them to do so.

I am clearly of the opinion that in this case the court did not err in refusing to instruct the jury on the question of murder in the second degree. As I read the record and understand the law applicable thereto, second degree murder is not in this case. The defendant, under the undisputed evidence, is guilty of murder in the first degree or he is not guilty at all of the crime of which he stands convicted. (State v. Thorne, supra.)

Under section 4336 all that was necessary for the state to prove in order to establish first degree murder was that defendant, while he was perpetrating or attempting to perpetrate burglary or robbery, shot and killed Erickson, and the question of whether the killing was deliberate, premeditated, and with malice aforethought, or whether it was unintentional on the part of defendant, was immaterial. The court, by charging the jury that before the defendant could be convicted of murder in the first degree the state must prove beyond a reasonable doubt that the killing was deliberate, premeditated, with malice aforethought, and with the "specific intent to take the life of said C. L. Erickson," imposed upon the state a greater burden to prove first degree [162] murder than the law applicable to the facts required. In other words, the instruction, notwithstanding the evidence conclusively shows that the homicide was committed in the perpetration of burglary and attempted robbery, required the jury, before they could legally convict the defendant of murder in the first degree, to find from the evidence beyond a reasonable doubt that the killing was willful, deliberate, premeditated, and with malice aforethought. The charge, in this regard, was therefore much more favorable to the defendant than the law and the facts warranted. The contention seems to be that because the court erroneously instructed the jury that in order to convict the defendant of murder in the first degree they must find from the evidence beyond a reasonable doubt that the fatal shot was fired willfully, deliberately, premeditatedly, with malice aforethought, and with the specific intent to take the life of Erickson, the court should have committed further error favorable to the defendant and to the prejudice of the state by submitting to the jury the question of second degree murder.

Moreover, as I read and construe section 4161, an instruction on the question of second degree murder would, in effect, have withdrawn from the consideration of the jury the question of whether the homicide was committed in the perpetration of burglary and attempted robbery. The court could not have submitted the question of second degree murder without in effect annulling the statute. It sometimes happens that the rapist, burglar, robber, and incendiary, in perpetrating or attempting to perpetrate one or more of the felonies mentioned in section 4161, kills, without any specific intent so to do, a human being. The killing, as a matter of fact, may be wholly accidental. In such case the killing is not deliberate nor premeditated, but is, nevertheless, murder in the first degree. Take for example a case such as I have suggested in which the court, in defining murder in the first degree, charges the jury in the language of the statute, namely, that "every murder . . . committed in the perpetration of or attempt to perpetrate [163] any rape, arson, burglary, or robbery, . . . is murder in the first degree." It must be conceded that, if the statute is to be given any effect whatever, such instruction correctly defines murder of the first degree when the homicide is committed in the perpetration of or attempt to perpetrate any of the felonies mentioned therein. Now it is apparent that should the court, after giving the instruction suggested, proceed to define second degree murder, it must repeat the language of the statute down to and including the words "in the" and then substitute the words "second degree" for the words "first degree" which would, in effect, annul the statute, and, as I have stated, take from the jury the question of first degree murder.

It is suggested that there is evidence tending to show that defendant was addicted to the use of morphine or opium, and that the

use of such drugs had weakened and impaired his mental faculties to such an extent as to render him incapable of deliberation and premeditation, or of forming a design to kill, thereby reducing the crime from first degree to second degree murder. The court carefully and elaborately charged the jury on the question of insanity, and the defendant's rights in that regard were carefully guarded. Upon that issue the court instructed the jury in part as follows: "An insane person is not criminally responsible under the law for his acts. The words 'insane person' include . . . distracted persons and persons of unsound mind. . . . When evidence is introduced tending to prove insanity sufficient to raise a reasonable doubt of defendant's sanity at the time of the commission of the act, then the presumption of sanity ceases, and the prosecution is bound to prove the sanity of the accused beyond a reasonable doubt. So in this case, if the jury, after considering all the evidence, entertain a reasonable doubt of the sanity of the defendant at the time of the alleged offense, then he must be acquitted. . . . When the evidence is completed, and the case finally submitted to you, the defendant *cannot be convicted of any crime* unless from all the evidence in the case, taken together, you are satisfied, beyond a reasonable doubt, [164] that the defendant was sane at the time the act in question was committed." (Italics mine.) "You are instructed that if you are not satisfied from a careful and conscientious consideration of all the evidence in the case, beyond a reasonable doubt, that at the time of the commission of the act charged the defendant knew right from wrong with respect to said act, then you cannot find him guilty of any crime; and so far as this case is concerned it is not material what caused such insanity."

Assuming, for the sake of the argument, that the defendant, without either deliberation or premeditation, and without forming a design or intent to take human life, fired the fatal shot that killed Erickson—and we may go a step farther and assume that the weapon was accidentally discharged—the killing, nevertheless, was, under the statute, murder in the first degree, unless the defendant, at the time he fired the shot, was insane. Of course, if he were insane he could not legally be convicted of any crime. The jury, however, found against the defendant on the question of insanity.

I have examined the record in this case with more than ordinary care and am forced to the conclusion that the defendant had a fair and impartial trial and that he was properly convicted.

STRAUP, J. (*dissenting*).—Our statute (Comp. Laws 1907, section 4159) defines murder to be "the unlawful killing of a human being with malice aforethought." Section 4161 defines the degrees of murder. It is:

"Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed; or perpetrated by any act greatly dangerous to the lives of others and evidencing a depraved [165] mind, regardless of human life, is murder in the first degree. Any other homicide committed under such circumstances as would have constituted murder at common law is murder in the second degree."

The information charged first degree murder thus: That the defendant "willfully, unlawfully, feloniously, deliberately, premeditatedly, of his malice aforethought, and with the specific intent to take the life of the" deceased, shot and killed him. The facts are referred to by Mr. Justice Frick. The state, as it had the right to do, went to the jury on two theories: One that the defendant in the commission of, or attempt to commit, a robbery, shot and killed the deceased; the other, that the deefndant willfully, maliciously, deliberately, and premediatatedly, and as specific intent to take the life of the deceased, and as specifically alleged in the information, shot and killed him. There is ample evidence to support both. The court submitted the case on both and in such respect charged that, if the jury found that the defendant in the commission of or attempt to commit a robbery or burglary shot and killed the deceased, that constituted first degree murder. It further charged that "every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious and premeditated killing," was also first degree murder. The court in such particular and at some length charged what was meant by the terms "willful," "deliberate," and "premeditated." It then charged that, before the defendant could be convicted of murder in the first degree, the state must prove beyond a reasonable doubt that "the killing was unlawful;" that it was "deliberate;" that it was "premeditated;" that it was "with malice aforethought;" and that it "was with the specific intent to take the life of" the deceased.

The defendant's theory was that by the habitual and excessive use of morphine and other drugs his mental faculties were impaired to such an extent as to render him (1) wholly irresponsible for his acts; or (2) incapable of deliberation and premeditation, or of forming or entertaining a design or an

intent to kill or rob. Conforming to the first, [166] he requested the court to charge that if the jury found that the defendant, because of an habitual use of such drugs, had become wholly irresponsible for his acts, they should acquit him; conformably to the second, that if the jury found "that the defendant was intoxicated by the use of morphine or other drugs at the time of the killing, you may take that fact into consideration in determining his condition of mind, though such intoxication may have been voluntary," that "in this case, if you believe from a preponderance of the evidence that the defendant was addicted to the use of morphine or opium or both, and by reason of the continued and habitual use of either or both of such drugs was brought or left in such weakened mental condition that he was incapable of deliberation and premeditation, as defined in these instructions, he is not guilty of murder in the first degree." The defendant also requested the court to define murder in the second degree and to submit such questions to the jury. The court refused to give these requests.

Notwithstanding the charge, *that before the jury could convict the defendant of first degree murder the state was required to prove that the killing was unlawful, willful, deliberate, premeditated, with malice aforethought, and with the specific intent to take the life of the deceased*, the court, nevertheless, refused to submit to the jury the question of second degree murder; and, by the charge, bound the jury to convict the defendant of first degree murder, or to find him not guilty. The court submitted to the jury the question of the defendant's insanity or irresponsibility, but with the direction that, "before the defendant can be convicted of murder in the first degree upon the theory" that the deceased "was killed by the defendant while the defendant was engaged in the perpetration of or attempt to perpetrate a robbery or burglary, you must be satisfied beyond a reasonable doubt, from all the evidence in the case, that the defendant, at the time of the perpetration or attempt to perpetrate said robbery or burglary, had formed the intent to commit said robbery or burglary, and that he had the mental capacity to distinguish between right and wrong with reference [167] to said robbery or burglary; and, if you should find from the evidence that the defendant at the time in question had not the mental capacity to form an intent to perpetrate a robbery or burglary, then you cannot convict him of murder in the first degree." The court then, after charging on burden of proof as to the issue of insanity, charged that "the test of responsibility for a criminal act when insanity is relied upon as a defense is the capacity of the defendant to distinguish between right and wrong at the time of and with respect to the act which is the subject of inquiry;" and if the jury were "not satisfied beyond a reasonable doubt that the defendant had the capacity to distinguish between right and wrong at the time of and with reference to the act in question, then you cannot convict him."

The refusal of the requests, and the charge in the particulars referred to, present the principal questions for review. The most serious is the refusal to submit to the jury the question of second degree murder, and binding them, as did the court, to either find the defendant guilty of first degree murder or to acquit him. This presents two questions: (1) May the court, in any case upon a charge of first degree murder, and upon a plea of not guilty and a trial, itself, instead of the jury, determine the degree of murder? And (2) if so, is this a proper case in which the court may do so? Because of our recent decision in the case of State v. Thorne, 41 Utah 414, Ann. Cas. 1915D 90, 126 Pac. 286, where it was held that the court in that case was justified in refusing to submit to the jury the question of second degree murder, I approach the first with some hesitation. While I think the doctrine in the Thorne Case is stated too broadly, still, were it not for the second question, and the extent to which it is here carried, I should be inclined to yield assent without further observations.

I have already referred to the statute defining murder and first and second degree murder. Section 4893 of the statute provides that "the jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged." Section 4892, that "Whenever a crime is distinguished into degrees, *the* [168] *jury*, if they convict the defendant, *must find* the degree of the crime of which he is guilty." Section 4906, that "upon a plea of guilty of a crime distinguished or divided into degrees, the court must, before passing sentence, determine the degree." Here, then, are express statutes which, on a plea of not guilty and a trial require the jury, and on a plea of guilty the court, to determine the degree, whenever a crime is distinguished into degrees. Murder, under the statute, is distinguished "into degrees." The charge here is murder. It is charged in the first degree. Second degree is "necessarily included in" the charge of first degree murder. The one is just as much charged in the information as is the other. I think the statutes referred to are peculiarly applicable to a charge of first degree murder. I see no license to disregard them or to hold them inapplicable to a charge of murder as here charged, a willful, deliberate, malicious, and premeditated murder. Under such statutory provisions I think the great weight of

authority is that upon an information or indictment for first degree murder, and upon a plea of not guilty and a trial, it is the exclusive province of the jury to determine the degree of murder, not only when the charge or claim is that the murder was willful, deliberate, and premeditated and with malice aforethought, but also when perpetrated by poison, or done in the commission of or attempt to commit felonies enumerated in the statute defining murder in the first degree. The cases so holding are collected and cited in notes to the case of State v. Phinney, 12 Ann. Cas. 1081, and 12 L.R.A.(N.S.) 935. The reasons for the rule are stated in those cases. Other cases in support of the rule are also cited and referred to by the appellant in his brief. The California and Nevada cases cited in the prevailing opinion do not, in my judgment, support a contrary doctrine. In 10 Nev. cited, the question of second degree murder was not withheld from but was expressly submitted to the jury. In 28 Nev. and in 141 and 145 Cal. cited, questions of withholding or submitting second degree murder were not involved. Neither is the case of Davis v. U. S. 165 U. S. 373, 17 S. [169] Ct. 360, 41 U. S. (L. ed.) 750, in point, for there the prosecution was under a statute different from ours; one where homicide was not divided into degrees of murder as is the case under our statute, and where there was no statute, as we have, "that whenever a crime is distinguished into degrees, *the jury*, if they convict the defendant, *must find* the degree of the crime of which he is guilty." There, however, are cases supporting a contrary or "minority" rule, the rule stated in the Thorne case. They are also collected and cited in notes to 12 Ann. Cas. and 12 L.R.A. (N.S.) heretofore referred to. Some of them may be distinguished because of dissimilar statutes. That is especially true of the cases from Nebraska and New Jersey. There seem to be no statutes in those states corresponding with sections 4892 and 4906 of our statute. Others may be distinguished because no request to charge on second degree murder was asked. However, there are cases there cited, notably from Michigan and Iowa, which apparently support the rule laid down in the Thorne case.

The ruling is here defended and upheld upon the theory that the evidence without dispute shows the murder was committed in the commission of or attempt to commit a robbery; and, since the statute declares a murder so committed to be murder in the first degree, the court was justified in refusing to submit to the jury the question of second degree murder and in giving the binding instruction to convict the defendant of first degree murder or to find him not guilty. In this no distinction is drawn between a proper statement of the law and a binding instruction to the jury which takes from them the ascertainment and determination of the degree. Of course, a murder committed in the commission of or attempt to commit a robbery, or perpetrated by poison, is, by the statute, declared to be first degree murder; and the jury should be so instructed, and that if they so find the facts beyond a reasonable doubt to convict the defendant of first degree murder. So, too, does the statute declare that "any other kind of willful, deliberate, malicious and premeditated killing," or "perpetrated [170] from a premeditated design unlawfully and maliciously to effect the death" of a human being, is also first degree murder. Declaring to the jury the law as to what constitutes first degree murder is one thing; withholding from them the right to find second degree murder, when by the information second degree as well as first degree is charged, is quite another and different thing. Asserting, as is done, that since the statute declares a "*murder committed* in the perpetration of or attempt to perpetrate a robbery," etc., is first degree murder, and if the evidence shows the "murder (defined by the statute to be 'the unlawful killing of a human being with malice aforethought') was committed" that way, the court is not required to submit to the jury second degree murder, adds nothing; for the statute as well declares a "murder committed" under other enumerated circumstances is also first degree murder. Yet it is said if the evidence shows a "murder committed" in the perpetration of a robbery, etc., second degree murder need not to be submitted to the jury, because the statute defines that to be first degree murder; but if the evidence shows a "willful, deliberate, malicious and premeditated" murder, second degree murder should be submitted, though the statute as well declares that also to be first degree murder. The question is asked, how can a murder committed in the perpetration of a robbery, etc., be second degree murder? As well ask how can a willful, deliberate, malicious, and premeditated murder be second degree murder? Let the thought be carried a little further by asking: How can a guilty man be innocent; and how can a verdict of not guilty be rendered in either supposed case?

The declaration in an early day of Chief Justice Shaw in a criminal case (Com. v. Porter, 10 Metc. (Mass.) 263) may not be here amiss:

"It is the proper province and duty of judges to consider and decide all questions of law which arise, and that the responsibility of a correct decision is placed finally on them; that it is the proper province and duty of the jury to weigh and consider evidence, and *decide all questions of fact*; and that the

responsibility of a correct [171] decision is placed upon them. And the safety, efficacy, and purity of jury trial depend upon the steady maintenance and practical application of this principle."

The further observation is there made by him that while it is the duty of the court to declare the law and the jury to accept it as so declared, they, nevertheless, in a criminal case by a general verdict "declare the law as well as the fact." And that is our statute. Comp. Laws. 1907, section 4876. Every first degree murder involves elements of a willful, deliberate, malicious, and premeditated killing. On the first appeal in the Thorne case, 39 Utah 208, 117 Pac. 58, we held that allegations in an information of an unlawful, malicious, deliberate, and premeditated killing are supported by proof of a killing committed in the perpetration of or attempt to perpetrate a robbery, on the theory that a willful and premeditated intent to commit the felony is transferred from that offense to the homicide actually committed and is the legal equivalent of and tantamount to the allegations of a willful, deliberate, and premeditated killing. And on no other theory can such a ruling be upheld.

When, therefore, all the provisions of the statute referred to are considered, I see no reason for holding that when the murder is shown to have been committed without dispute by poisoning, or in the commission of, or attempt to commit, a felony enumerated in the statute defining first degree murder, the degree of murder is for the court; but when the evidence without dispute, and by the most positive and direct testimony shows the murder to have been committed, not in such manner, but by a willful, deliberate, malicious, and premeditated killing with malice aforethought, a murder also defined by the statute to be first degree murder, the degree is for the jury. Under the statute I do not see wherein the court has any greater license in the one case than in the other to itself, instead of the jury, determine the degree of murder. The statute requiring the jury to "find the degree," where the crime is "distinguished into degrees," makes no such distinction. In considering the power of the court and the province of the jury with respect to the subject [172] in hand, we must bear in mind the well-recognized distinction between our civil and criminal jurisprudence. In a civil case, if all the material allegations of the complaint are established by evidence without dispute, the court is given the power, and it is its duty, if requested, to direct a verdict for the plaintiff; and though the case under such circumstances should be submitted to the jury, and a verdict nevertheless rendered in favor of the defendant, the court, on its own motion, or upon plaintiff's may set the verdict aside, as being against and contrary to the evidence. The court may not do that in a criminal case. Though all the allegations of the information or indictment be established by most direct and positive evidence wholly without dispute, and though the defendant offered no evidence whatever, the court, nevertheless, may not direct a verdict against him, and if upon a submission of the case, under such circumstance, a verdict is rendered in favor of the defendant, which manifestly is contrary to and against all the evidence and wholly unsupported by it, still the court may not, upon its own motion or that of the state, and against the objection of the defendant, set the verdict aside.

Take the case in hand, where it is claimed the evidence without dispute shows first degree murder; and let it further be assumed that the defendant had offered no evidence of any kind, but had rested when the state rested, and the jury had rendered a verdict of not guilty—a verdict let it be assumed in the very teeth of all the evidence—yet the court could neither on its own motion nor that of the state have interfered with it. This proposition is conceded. What significance is to be attached to it? That the jury in a criminal case, so far as concerns the state, are not only the judges of the credibility of the witnesses and the weight to be given the testimony, but are also the exclusive judges of the facts. They, as concerns the state may or may not decide questions of fact and find a verdict conformably with the evidence. They, in such respect, are given unlimited power, wholly uncontrolled by the court, to decide all questions of fact and render a verdict contrary to the evidence. It may be said [173] the jury in such case would not properly perform their duty. That is not the point. The pertinent question is: May the court in such case influence, coerce, or control the jury, or interfere with their verdict when so rendered, in the very teeth of all the evidence? When a jury in a civil case renders a verdict not conformable with and not supported by the evidence, the court may interfere on its own motion, or that of the party aggrieved. So may it in a criminal case on behalf of the defendant, when a verdict is rendered to his prejudice not conformable with and not supported by the evidence, or one against law. But, as concerns the state, the court may not interfere, though the verdict is wholly unsupported by, and is contrary to, all the evidence; and though the jury in the rendition of it disregarded both law and evidence.

It is said in some of the cases that, if the evidence without dispute shows first degree murder, the court should not submit the question of second degree to the jury and thereby

permit or give them to understand that they may render such a verdict when there is no evidence to support it. But in such case such a verdict would not be supported by evidence. It would not only amply support such a verdict, but would also support a verdict of a higher degree, of first degree murder. Evidence which would support first degree, of necessity must also support second degree murder. That is the effect of the holding in People v. Dillon, 8 Utah 92, 30 Pac. 150. If, however, the argument is sound and is carried to a conclusion, then why should the court submit a case at all to the jury when the evidence wholly without dispute and by the most positive and direct testimony manifestly shows murder in the first degree committed by the defendant, and no evidence whatever offered by him to controvert it? To say, as is said in some of the cases, the court is required to submit the case to the jury to determine whether the defendant committed the acts constituting the charged offense, is to beg the question; for such a contention assumes some conflict or uncertainty in the evidence, either with respect to the commission of the offense, or as to [174] the person who committed it, or that such questions rest upon inferences and deductions and not upon positive, direct, and uncontroverted evidence. Let us adhere to the admitted proposition, the conceded premises, the defendant's guilt of first degree murder clearly shown by the most positive and direct evidence wholly without conflict. According to all the cases no matter how conclusive may be the evidence in favor of the state and against the defendant, the court, nevertheless, upon a plea of not guilty and a trial, is bound to let the case to the jury. If they in such case have the unlimited power, wholly uncontrolled by the court, to render a verdict of not guilty, then why have they not the same power to render any other verdict, which on the information or indictment may be rendered?

It seems somewhat of an anomaly to say that the jury have the unlimited power, wholly uncontrolled by the court, to render a verdict of not guilty in disregard of all the evidence, but may not render a verdict of second degree murder because the evidence without dispute shows first degree murder. What appears to be a conclusive answer to the contention is this: Had the jury in this case, notwithstanding the court by its charge bound them to render a verdict of first degree murder or to find the defendant not guilty, rendered a verdict of murder in the second degree, what power under our Constitution or the statute had the court, either on its own motion, or that of the state, and against the objection of the defendant, to set the verdict aside? None whatever. This but shows that the jury, so far as concerns the state, had the right and power to render any kind of a verdict which under the information could be rendered; and any verdict so rendered could not, against the defendant's objection, be questioned or assailed on the ground that it is against law or the evidence. And if such a verdict had been rendered, and the court were powerless to interfere, then what right had the court in the first instance, on the submission of the case to the jury, against the defendant's requests and objections, to so restrict, direct, and control the jury as was here done? The court may, and it [175] is its duty when requested, to inform the jury of the different verdicts which on the information or indictment may be rendered. But the court may not, against the defendant's requests and objections, restrict, direct, or influence the jury as to which of such verdicts should be rendered by them. And as second degree murder is necessarily included in the charge of first degree murder, and as the statute expressly requires the jury, not the court, to determine the degree, where the crime is distinguished into degrees, I think the question of second degree murder ought to have been submitted to the jury.

I have thus considered the question from the standpoint that the evidence without dispute shows murder in the first degree. I shall now consider it from the standpoint that there is evidence to justify a verdict of second degree murder. There is evidence to show that the defendant was addicted to the use of morphine or opium. The controversy in that respect was: To what extent had he used such drugs, and what effect had they upon him? The contention of the defendant was twofold: One, a destruction or impairment of his mental faculties to such an extent as to render him wholly irresponsible for his acts; the other, that his mental faculties were weakened and impaired to such an extent as to render him incapable of deliberation, premeditation, or of forming a design or intent to kill, thereby reducing the crime from first degree to second degree murder. The state contended that the defendant, though addicted to the use of the drugs, had not used them to such an extent as to render him either irresponsible for his acts, or incapable of deliberation or premeditation or of forming a design or intent to kill. The court submitted the case to the jury on the theory only of whether the defendant was irresponsible for his acts; whether he had the capacity to distinguish right from wrong as to the robbery; whether he was insane. The defendant's evidence as to his insanity or entire irresponsibility was not strong. It, however, is conceded to be sufficient to require a submission of such issue to the jury. No one

has questioned that. If it was so sufficient, [176] I do not see why the defendant was not also entitled to go to the jury on the theory of an impairment of his mental faculties by the use of the drugs to such an extent as to render him incapable of deliberation and premeditation, or of forming a design or an intent to kill.

The jury on the evidence, finding that the defendant was not wholly irresponsible, might have reached the conclusion, had they not been directed against it, and had the question of second degree murder been submitted to them, that the defendant's mental faculties, because of an habitual and excessive use of the drugs, nevertheless, were impaired to such an extent as to render his capacity to deliberate and premeditate, or to form a design or an intent to kill, reasonably doubtful, and thus induced to find him guilty of second degree murder. And had such a verdict been rendered, on such a theory, I do not see how it could be said to be against, or unsupported by, evidence, in view of the concession that there was sufficient evidence to carry the case to the jury on the issue of insanity and irresponsibilty *caused by an excessive and habitual use of the drugs*. But the jury were not allowed to consider the effect of such drugs upon the defendant's mind for the purpose of determining whether he had the capacity to deliberate, premeditate, or of forming an intent to kill. And this, notwithstanding the court submitted to the jury the question of first degree murder on two theories: One, that the murder was committed in the commission of or attempt to commit a robbery; the other, that the killing was willful, deliberate, with premeditation and malice aforethought, and with the specific intent to take the life of the deceased, and as specifically in the information charged. So, though it be claimed that the jury, on the theory that the murder was committed in the commission of or attempt to commit a robbery, could not consider the excessive use of the drugs and the effect they had upon the defendant's mind except to determine whether he was wholly irresponsible, they, nevertheless, had the right to consider such use and effect on the theory that the killing was willful, deliberate, and premeditated. If [177] not, then as well say a jury in a charge of first degree murder could only consider the defendant's intoxication or the effects of alcoholism upon him, only for the purpose of determining whether he was insane, or wholly irresponsible for his acts, and not whether he had the capacity to deliberate and premeditate, and in determining whether he was guilty of first or second degree murder. The Thorne Case involved no question as to the defendant's mental capacity or condition. In such respect this case is dissimilar to that. So upon the evidence I think the court ought to have submitted to the jury the question of second degree murder.

Now, the defendant requested the court to charge that if the jury found the defendant was addicted to the use of the drugs they should consider the effect thereof, whatever they might find in such particular, in determining his condition of mind and his capacity to deliberate and premeditate. As has been seen, the court refused this and submitted to the jury the consideration of the effect of such drugs only in determining whether the defendant was capable of distinguishing between right and wrong "with reference to the robbery and burglary" and "the mental capacity to form the intent to perpetrate a robbery or burglary." And it is said this is all that was necessary because the evidence shows the murder was committed in that manner. But that is not the only theory on which the state tried the case and went to the jury and on which the court, on behalf of the state, submitted it to them. The court also submitted it on the theory of a willful, deliberate, malicious, and premeditated killing. There, too, is ample evidence to support that. It about as strongly supports the one as the other. And the court, notwithstanding a submission on the theory that the murder was committed in the commission of or attempt to commit a robbery, nevertheless, in most direct and positive terms, unqualifiedly charged the jury *that before they could convict the defendant of first degree murder* the state was required to prove beyond a reasonable doubt that *the killing was unlawful, that it was deliberate*, [178] *that it was premeditated, that it was with malice aforethought, and that it was with the specific intent to take the life of the deceased*. Right or wrong, it was the duty of the jury to accept that. Comp. Laws 1907, section 4876. It must be presumed that they did so. And therefore, by their verdict, must it also be presumed that they found the murder was committed in such manner. They could not have done otherwise without disobeying the charge in such particular. It is said this charge, though no complaint is made of it by either party and though it is not before us for review, is wrong; and then it is asserted that the claim is made further error should have been committed by submitting second degree murder. The proposition to be demonstrated is: Was or was not the court required to submit to the jury second degree murder? If the conclusion, that to submit such question would have been error, is to be taken as the major premise of the syllogism, or the negative assumed of the proposition sought to be proved, then of course there is nothing to demon-

strate. For, when it is once assumed, or the conclusion is reached, that to submit such question would have been error, all argument must cease. No matter what we may think of the charge submitting to the jury the question of a deliberate, malicious, and premeditated murder and requiring the jury to find that kind of murder to convict the defendant of first degree murder, it nevertheless, uncomplained of by either party, was given as the law of the case which the jury were required to accept and to render a verdict accordingly; and the presumption that they did so must equally be indulged whether the charge is right or wrong, favorable or unfavorable to the defendant or the state. The information in express terms charged a deliberate, malicious, and premeditated murder. Under that information the state could prove the commission of such a murder or one committed in the perpetration of a felony. It was to its advantage to go to the jury, as it did, on both theories. And since the court submitted to the jury the question of a deliberate, malicious, and premeditated murder, and required the jury to find [179] that the murder was committed in such manner before they could convict the defendant of first degree murder, then, it seems to me, must it necessarily follow that the court ought also to have submitted the question of second degree murder and the effect, if any, the use of the drugs had on the defendant's mental capacity and condition to deliberate and premeditate. To escape this conclusion must it be presumed that the jury did not obey the positive and commanding language of the court as to the finding of a deliberate, malicious, and premeditated murder before they could convict the defendant of first degree murder—that they did not consider such question so submitted to them and did not find that the murder was so committed—or else must there be a different finding made on the record that the murder was not committed in such manner but in the commission of or attempt to commit a robbery? I think we may not do either. We may not in a civil, much less a criminal case, try it de novo on the record, and treat as found that which may be, or even ought to have been, found.

There is another question of less moment—the charge with respect to the test of insanity or irresponsibility. The court charged:

"The test of irresponsibility for a criminal act, when insanity is relied upon as a defense, is the capacity of the defendant to distinguish between right and wrong at the time of and with respect to the act which is the subject of inquiry."

This thought is repeated several times in other portions of the charge. The defendant, by his request, asks the court to also embody the additional element of "sufficient will power to govern his action" and to "resist impulses to commit crime." The refusal to so charge is also complained of.

Insanity or mental unsoundness embraces many different species. In some cases the subject, because of a diseased or disordered mind, lacks intelligence and the power to reason—to think rationally. Such a person is therefore incapable of comprehending the nature and quality [180] of an act done and of distinguishing between right and wrong with respect to it. When such is the particular form of malady the test is, as was charged: Did the defendant have the capacity to understand the nature and quality of the act, and to distinguish between right and wrong with respect to it? Many cases so hold. But it also is well recognized in medical jurisprudence that one may be capable of understanding the nature and quality of an act and know that it is morally wrong or unlawful, yet, understanding this, may, because of a diseased, impaired, or deranged mind, lack will power and ability to choose and to control conduct, or actions, in the light of his understanding and intelligence. In such case the true test is not capacity merely to distinguish between the rightfulness and wrongfulness of an act committed, but also sufficient will power to choose whether he shall do or refrain from doing it. Many cases so hold. Lack of will power may be caused not only by mania, hallucinations, or irresistible impulses to commit crime, or other maladies impelling violence or impulses to commit crime, but also by maladies of a negative character showing inability to control, to govern generally, to choose, to will. It is common knowledge that that portion of the brain which is concerned with the will may be so diseased or impaired as to destroy will power and yet the person may not be possessed of mania, hallucinations, or irresistible impulses. I see no evidence that the defendant was possessed of "irresistible impulses to commit crime," or that his malady was of such a character or took such a form. The court therefore was not required to embody such an element in the charge in stating the test of insanity. But I think there is evidence of a malady, if any at all, involving a diseased or an impaired will power. Again, it is common knowledge that the general effect of an excessive and habitual use of morphine and opium is to impair, and in some instances to wholly destroy, will power. It is this faculty which usually is first affected by the use of such drugs. Evidence of this was also given at the trial. We are therefore concerned with a malady which involves [181] not only the faculty to think rationally, and to reason, and the capacity to understand right from wrong, but also

the faculties of the will, the capacity, the power, to choose, to govern and to control conduct and actions. In view of this I think the court in its charge too much restricted the test and ought to have charged substantially as was charged and approved in the case of Davis v. U. S. 165 U. S. 373, 17 S. Ct. 360, 41 U. S. (L. ed.) 750, and in accordance with the doctrine stated in State v. Reidell, 9 Houst. (Del.) 470, 14 Atl. 550, and supported by many other cases, when the particular malady involves or affects will power.

Rehearing denied July 3, 1913.

NOTE.

Right of Jury to Convict for Lesser Degree under Indictment or Information Charging Act Declared by Statute to Be Murder in First Degree.

Majority Rule.

A number of recent cases support the majority rule laid down in State v. Phinney, 13 Idaho 307, 12 Ann. Cas. 1079, that the jury have the right to convict for a lessor degree under an indictment or information for murder in the first degree committed by poisoning, or done in the commission of or attempt to commit a felony, though the statute provides that homocide so committed shall be murder in the first degree, since it is the exclusive province of the jury to determine the degree of murder. State v. Curtis, 93 Kan. 743, 145 Pac. 858; Com. v. Fellows, 212 Pa. St 297, 61 Atl. 922; Com. v. Frucci, 216 Pa. St. 84, 64 Atl. 879; Com. v. Romezzo, 235 Pa. St. 407, 84 Atl. 400; Jones v. State, 128 Tenn. 493, 161 S. W. 1016; Shipp v. State, 128 Tenn. 499, 161 S. W. 1017; Burton v. Com. 108 Va. 892, 62 S. E. 376. *Compare* Com. v. Kovovic, 209 Pa. St. 465, 58 Atl. 857. In Burton v. Com. supra, wherein it appeared that the indictment was in the usual form for murder, the court said: "By section 4041 of the Code it is provided that 'If a person indicted for murder be found guilty by the jury, they shall in their verdict fix whether he is guilty of murder in the first or second degree. . . . It is true that our statute (section 3662, Va. Code, 1904) which defines murder, says, among other things, that 'murder by lying in wait' shall be murder in the first degree. But this is to be read along with the power conferred upon the jury by the sections just quoted. Our jurisprudence, in this and in other respects, may be amenable to criticism of schoolmen and logicians, but subjected to the test of actual experience it has appeared in practice to be well that the law, after framing definitions and formulating rules of conduct, should allow to courts and juries, in their application and enforcement, a certain latitude and discretion. And so it comes to pass that a man may be indicted for murder of the first degree by the various means embraced in the statute, the evidence adduced may tend to the proof of the offense named in the indictment and none other, and yet the jury, acting under this discretion with which they have been clothed by the law, may find the offender guilty of a less offense. And it is well in practice that it should be so, else, owing to the tenderness of juries and their reluctance to impose the highest penalty, many crimes would go wholly unpunished, and thus the rigor of the law would tend rather to the promotion than to the prevention of crime."

A distinction has been drawn between a proper statement of the law and a binding instruction to the jury which takes from them the ascertainment of the degree, and an instruction of the latter kind is erroneous. Com. v. Fellows, 212 Pa. St. 297, 61 Atl. 922; Com. v. Frucci, 216 Pa. St. 84, 64 Atl. 879. And see Com. v. Kovovic, 209 Pa. St. 465, 58 Atl. 857; Com. v. Romezzo, 235 Pa. St. 407, 84 Atl. 400; Com. v. Harris, 237 Pa. St. 597, 85 Atl. 875. In the case first cited the instructions complained of were in part as follows: "We do not know that we should take the chance of confusing you by defining the various degrees of homicide, for the reason that it does seem to us that in this case your verdict should be murder in the first degree or not guilty. We have before suggested that we do not deem it necessary in this case to define murder in the second degree or to explain it, nor do we deem it necessary to define manslaughter and to explain it, for the reason that there are no elements of manslaughter in the case, and there seems to be nothing in the testimony that would fix the degree of the defendant's guilt at murder in the second degree, if he be guilty at all. It seems to us, under the evidence, that he is either guilty of murder in the first degree or he is not guilty of anything, and that is why we have considered it best not to confuse you, in your disposition of the case, by burdening you with definitions of offenses which we conceive have no application here. If you find, from all the evidence in the case, that this defendant has committed a wilful and deliberate murder, you convict him of murder in the first degree, for, as we have suggested, that is the only question in the case, if the evidence is to be believed, unless you find that, at the time of the commission of the offense, the defendant was not responsible. If you find that, it does not reduce the crime, but operates in the acquittal of the defendant entirely, and your

verdict would be not guilty." The court said: "The Act of March 31, 1860, P. L. 382, under which defendant was indicted, provides, inter alia: 'And the jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, ascertain in their verdict whether it be murder of the first or second degree.' This is an imperative duty, which under the express provisions of the statute the jury alone must perform. The court cannot be the keeper of the consciences of, nor the arbitrator of the facts for, the jury, because in the law it is otherwise written. Binding instructions to find the defendant guilty of murder of the first degree or to acquit, and which gave the jury no alternative in finding the degree, violate the statutory rule and are erroneous. . . . In not a single case, however, has this court departed from the settled rule that instructions to either convict of murder of the first degree or to acquit were erroneous, except in those instances where the error in this respect was held not to be reversible because the general charge fairly left the whole question to the jury. While murder is a common-law offense, our statute fixes what constitutes the degree thereof, and imposes on the jury the duty of ascertaining the same. In the case at bar the learned court below instructed the jury that he did not deem it necessary to define murder of the second degree or explain it, for the reason that under the testimony the verdict should be murder of the first degree or not guilty. These instructions are substantially reiterated several times in the charge. They are in substance binding instructions to either return a verdict of murder of the first degree or to acquit, and the general charge did not save the error. No alternative as to the degree was suggested in the charge. We concede that courts will not be astute in sustaining unsubstantial technicalities in favor of criminals whose guilt is clear and where a just verdict has been returned. The instructions in this case, however, not only violated an express provision of the statute, but the settled rules of law applicable thereto as well. The learned trial judge, actuated by a sense of duty, no doubt, thought the defendant should be convicted of murder of the first degree, and inadvertently went further than the act of assembly permits or the decisions of our court justify in his effort to reach this result."

Minority Rule.

In some jurisdictions, it has been held recently that where a person is charged with the commission of murder by an act declared by statute to constitute murder in the first degree, the jury, if they find the accused guilty, must find him gulty of murder in the first degree. People v. Rogers, 163 Cal. 476, 126 Pac. 143; King v. People, 54 Colo. 122, 129 Pac. 235; State v. Zeller, 77 N. J. L. 619, 73 Atl. 498; People v. Schleiman, 197 N. Y. 383, 18 Ann. Cas. 588, 90 N. E. 950, 27 L.R.A.(N.S.) 1075; State v. Spivey, 151 N. C. 676, 65 S. E. 995; State v. Walker (N. C.) 86 S. E. 1055; Essery v. State, 72 Tex. Crim. 414, 163 S. W. 17; State v. Thorne, 39 Utah 208, 117 Pac. 58, 41 Utah 414, Ann. Cas. 1915D 90, 126 Pac. 286. And see the reported case. *Compare* State v. Matthews, 142 N. C. 621, 55 S. E. 342. In State v. Spivey, supra, the evidence showed that the homicide was committed by lying in wait or in an attempt to commit arson. The court in approving an instruction that the jury must find the defendant guilty of murder in the first degree or not guilty, said: "In the present case the murder was committed by lying in wait, or in the attempt to perpetrate the crime of arson. There was no evidence from which the jury could have found murder in the second degree or manslaughter. So sharply was this the contention between the state and the prisoner, that the record does not disclose any prayer from the learned counsel of the prisoner presenting the view of murder in the second degree. The only inference that could have been drawn from the evidence was that a murder in the first degree, by lying in wait or attempting to perpetrate arson, had been committed; and if the prisoner was the criminal, then his crime was murder in the first degree. . . . After a careful review of the decisions of this court, and a critical examination of the statute (Revisal, sections 3631 and 3271), we deduce the following doctrine: Where the evidence tends to prove that a murder was done, and that it was done by means of poison, lying in wait, imprisonment, starving, torture, or which has been committed in perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, and where there is no evidence and where no inference can fairly be deduced from the evidence of or tending to prove a murder in the second degree or manslaughter, the trial judge should instruct the jury that it is their duty to render a verdict of 'guilty of murder in the first degree,' if they are satisfied beyond a reasonable doubt, or of 'not guilty.' If, however, there is any evidence or if any inference can be fairly deduced therefrom, tending to show one of the lower grades of murder, it is then the duty of the trial judge, under appropriate instructions, to submit that view to the jury. It becomes the duty of the trial judge to determine, in the first instance, if there is any evidence or if any inference can be fairly deduced therefrom, tending to prove one of the lower grades

of murder. This does not mean any fanciful inference tending to prove one of the lower grades of murder; but, considering the evidence 'in the best light' for the prisoner, can the inference of murder in the second degree or manslaughter be fairly deduced therefrom. When the evidence discloses a murder in one of the specific methods which, by the statute, is made per se murder in the first degree, 'the state is not required to prove premeditation, because the manner of doing the act necessarily involves premeditation, unless the prisoner is mentally incapable of deliberation or doing an intentional act. The jury must, of course, be instructed that they must be satisfied beyond a reasonable doubt that the evidence brings the murder within one of the specific methods mentioned in the statute, and that the prisoner perpetrated the murder, and that the prisoner was mentally capable of committing the crime.'"

In State v. Zeller, 77 N. J. L. 619, 73 Atl. 498, the court said: "The third and fourth points are based upon the ground that the court took from the jury the function imposed upon it by the statute of determining the degree of guilt of the prisoner, by instructing them that under the law and the evidence they could not find Zeller guilty of murder in the second degree, and that the law and the evidence, if a verdict of guilt were found, would warrant no other verdict than murder in the first degree. While the statute (Pamph. L. 1898, p. 824, sec. 107) prescribes that the jury, if they find one guilty of murder, shall declare by their verdict whether it be murder in the first degree or murder in the second degree, this does not, in our opinion, confer upon the accused any right to have the jury left free to find him guilty of murder in the second degree if there be no reasonable ground for such a verdict in the evidence. Our statute (Pamph. L. 1898, p. 824, sec. 106) declares that murder committed in the perpetration or attempt to perpetrate a robbery is murder in the first degree. All the evidence that tended to implicate Zeller in the murder of William Read (including Zeller's own confession) tended to show that the murder was committed in the perpetration of a robbery. All the circumstances of the homicide bore a similar import as to the character of the crime. If, under the evidence, Zeller was guilty at all, he was guilty of a murder committed in the perpetration of a robbery. The charge of the trial judge upon this question was therefore entirely proper." In Essery v. State, 72 Tex. Crim. 414, 163 S. W. 17, it was tersely said that "when the Code said that murder committed in a certain way was murder of the first degree, the law so makes it, and a jury by their verdict could not find otherwise." In People v. Schleiman, 197 N. Y. 383, 18 Ann. Cas. 588, 90 N. E. 950, 27 L.R.A.(N.S.) 1075, which was a prosecution based on an indictment containing a count for premeditated murder and one for murder perpetrated while engaged in the commission of burglary the court said: "The definition of murder in the first degree in the Penal Code (now the Penal Law) of this state, when committed 'From a deliberate and premeditated design to effect the death of the person killed, or of another,' is broad enough to embrace murder in the second degree, as defined in the same statute, or manslaughter in either of its degrees. Hence, if the defendant had been tried for killing Mrs. Staber with a deliberate and premeditated design to effect her death, the refusal of the trial judge to instruct the jury in reference to these lesser degrees of felonious homicide would unquestionably have been error. But the defendant was not tried for deliberate and premeditated murder at all. He was tried for killing Mrs. Staber without a design to effect her death, while he was engaged in the commission of a burglary. The evidence was directed toward the establishment of that form of murder in the first degree and toward nothing else. No suggestion was made in the charge that the defendant could possibly be found guilty of deliberate and premeditated murder. The accusation which the jury passed upon was an accusation of killing while engaged in the perpetration of a felony, a crime in which it is not necessary to prove any design to effect death. Under such circumstances, the power to convict of a lesser degree of felonious homicide which belongs to the jury in cases where the degree depends upon the intent cannot properly be exercised; because an intent to kill is not a necessary ingredient of the offense in this kind of murder. It is enough to show, beyond a reasonable doubt, that the killing was done while the slayer was committing or attempting to commit a felony. . . . Where the indictment charges murder in the first degree in the common law form only or murder in the first degree committed from a deliberate and premeditated design to effect death and the defendant is tried upon that charge, he is entitled, if he so requests, to have the jury instructed that it is within their power to find a verdict for a lesser degree of felonious homicide. Upon a murder trial such instruction may properly be refused only where the evidence is directed toward the establishment of a kind of murder in which the intent to kill is immaterial. Such was the case here. No attempt at all was made to prove the second count of the indictment which was in the common law form. As has already been pointed out, the prosecution sought only to prove, not the intentional killing of Mrs. Staber by the defendant, but her death at his hands, irre-

spective of any intent to kill her, while the defendant was engaged in the commission of a burglary. Intent not being an element of the crime of murder in the first degree, when committed under such circumstances, there was no room for the exercise of a power to find the defendant guilty of a lesser degree of felonious homicide depending upon the existence or non-existence of deliberation and premeditation. Hence, the learned trial judge committed no error in refusing to charge in reference to the various degrees of crime in this case or in instructing the jury that they must find the defendant guilty of murder in the first degree or not guilty. His action in this respect indicated, on the contrary, a clear and accurate comprehension of the law of criminal procedure as applicable to the circumstances of the case. The conditions are exceptional, however, which warrant a refusal to instruct the jury as to their power to convict of a lower degree of the crime charged for which the defendant is upon trial and great care should be observed, as was done here, not to withhold such instruction unless the case is one like that before us, where there was no possible view of the facts which would justify any other verdict except a conviction of the crime charged or an acquittal."

NOLAN v. GLYNN.

Iowa Supreme Court—September 25, 1913.

163 Iowa 146; 142 N. W. 1029.

Witnesses — Cross-Examination of Plaintiff — Showing Animus.

As tending to show the animus actuating plaintiff in an action for breach of promise to marry, and as bearing on her credibility as a witness, cross-examination of her should be allowed to show that she sought to have the president of the bank, of which defendant was cashier, discharge a girl employee, on the ground that defendant was under her influence, and later changed her mind on this subject, and sought to have defendant discharged, stating in each instance that if this was done she would be satisfied and would not prosecute her action.

Privilege — Physician — Waiver by Patient.

While one, by testifying to a consultation by her with, or examination of her by, a physician at a certain time, waives the privilege to have him not testify in respect therefor, the waiver is not such as to allow him to testify as to an earlier consultation or examination, or the purpose for which at such earlier time he gave her medicine.

[See Ann. Cas. 1915A 438.]

Breach of Promise of Marriage — Evidence — Understanding of Family.

Proof of the understanding by members of the family of one of the parties that they were to marry may not, in an action for breach of marriage promise, be considered as evidence of an agreement to marry.

[See note at end of this case.]

Same.

Testimony that it was the understanding of the members of the family of plaintiff, in an action for breach of marriage promise, that she was to marry defendant is objectionable as an opinion or conclusion of the witness.

[See note at end of this case.]

Damages — Seduction — Abortion.

While in an action for damages from breach of marriage promise alone seduction, accomplished through the promise, and pregnancy, resulting from the seduction, may be shown, on the ground of the mental anguish and humiliation from the breach of being intensified thereby, abortion, though at the instance of defendant, may not be shown; this being an element of damages only in an action for seduction.

[See Ann. Cas. 1914B 1200.]

Instructions — Applicable to One Cause of Action — Harmless Error.

Though the petition in one count, alleging breach of promise of marriage, seduction, pregnancy, and abortion at the instance of defendant, might well be treated as one for breach of promise alone, with the other matters pleaded in aggravation of damages, yet plaintiff having, under Code, § 3470, also a cause of action for seduction, with right, under section 3545, to prosecute both causes of action in one action, and the court, in receiving evidence and giving instructions, having seemed to rule that both causes of action were alleged, and objection not having been raised to each not being stated in a separate count, as they should, an instruction authorizing recovery of an element of damages recoverable only in an action for seduction is not reversible error; defendant not being prejudiced thereby.

Appeal from District Court, Warren couty: HAYS, Judge.

Action for breach of promise of marriage and seduction. Mary Nolan, plaintiff, and William H. Glynn, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. REVERSED.

Berry & Watson and *John A. Guiher* for appellant.

C. A. Robbins, A. W. and *Phil R. Wilkinson* and *A. V. Proudfoot* for appellee.

[147] LADD, J.—The defendant began paying attentions to plaintiff in 1901, and continued so to do until some time in 1909. The petition alleged that they became engaged to marry in October, 1904; that later he seduced her, and when she became pregnant advised and caused an abortion to be committed [148] upon her; and that, after repeatedly postponing marriage, finally he declined to carry out his promise. The answer was a general denial. The testimony of plaintiff tended to sustain these allegations of the petition, and is somewhat corroborated by the letters of the defendant, while the latter, though admitting having visited plaintiff during the period stated, denied ever having proposed or promised marriage, and testified that he had never had intercourse with her or known of her pregnancy or of the commission of an abortion. It is evident from this statement that the evidence was such as to carry these issues to the jury, and only the questions of law raised by the record need be reviewed.

I. On cross-examination plaintiff testified that she was acquainted with Ella Doheny, who was employed in the bank at Cunning of which defendant was cashier, also with Simon Casady, of Des Moines, and J. N. Casady, of Norwalk, who were interested in the bank as president and vice president, and was then asked, "Is it, or is it not, true that during the year 1911 you requested Simon Casady and J. N. Casady, or either of them, to discharge Mr. Glynn from the bank?" An objection as immaterial, irrelevant, incompetent, and not cross-examination was sustained. "Q. Is it true that you wrote a letter to either one of those gentlemen, Casady, and asking them in regard to the Doheny girl working in that bank, and in regard to Mr. Glynn working in that bank?" A like objection was sustained. Thereupon counsel for defendant stated that it was proposed to show that:

Plaintiff sought an interview with Simon Casady and J. N. Casady, they being officers of the bank in which defendant works, and at her solicitation at that time an interview was granted, and that the object of that interview was the discussion of matters between her and Mr. Glynn connected with this case, and that she in that interview some time in the month of June, I think 22d of June, 1911, stated to the two Casadys that she thought the trouble with Glynn was the [149] —or words to that effect—was that he was under the influence of this Ella Doheny; that she would be satisfied if they would discharge the Doheny girl (this was the purpose of our motion) from the employment of the bank, not file her petition, and not prosecute her case against Glynn; that afterwards she wrote a letter we have, in which she said that she was mistaken, and the relations existing between the Doheny girl and the defendant were not what she thought they had been, and now, if they would discharge Glynn, she would be satisfied, and her petition would not be filed, and this case would not be prosecuted; that subsequently on her own motion she sought another interview, and said that she was mistaken again, and that if they would agree to discharge the Doheny girl (and this conversation occurred along after the petition was filed) that she would be satisfied and not prosecute the case, or would dismiss it, or words to that effect. Now the intention of this testimony is to show the animus of this prosecution, to show her attitude, and to show the matter of good faith as affecting her credibility as a witness in the case. Court: The ruling will have to remain. The objection is sustained.

We think the inquiries in view of the explanation fairly within the range of proper cross-examination. The evidence sought to be elicited would have tended to show the animus actuating her in the action and have borne more or less directly on her credibility as a witness. As the trial court exercises a large discretion in fixing the limit of cross-examination tending to disclose motive or interest, we might not have been inclined to reverse on this ruling; but, as the matter concerned the relations of the parties to the action, we think the evidence, if offered on another trial, should be received.

II. Plaintiff testified to having first discovered that she was pregnant on November 8, 1906, and that she consulted Dr. Sherman near the last of the month, and about two weeks later he gave her medicine; and that he operated on her to cause an abortion April, 1907, which resulted later. The doctor denied all this, and testified that plaintiff never asked him "to perform an abortion on her," but on objection was [150] not permitted to testify whether as early as August in 1906 she consulted him as to whether she was pregnant, or he examined her to ascertain this. The ruling was correct. By her testimony she had waived the privilege as to any consultation or examination had in December or about that time (Woods v. Lisbon, 150 Ia. 433, 130 N. W. 372), but not as to more remote period, and, though the testimony called for may have been material, he was not at liberty to give it over her objection that the consultation was privileged.

III. The plaintiff testified that in April, 1907, Dr. Sherman gave her a paper of tablets, known in the record as Exhibit W. W., to be dissolved in water and used as a douche. The doctor denied having given her these in 1907, or to have given her the directions she had testified to, but stated that he gave them or similar ones to her in 1905, and on objec-

tion was not permitted to testify for what purpose they were then given, or whether they were to be used following an abortion. Assuming that he would have testified most favorably to defendant, he must have related a transaction which could have had no connection whatever with that of which she had spoken. Undoubtedly in testifying to receiving the tablets in April, 1907, and their purpose, she waived the right to insist on the protection of the statute excluding the physician's testimony concerning the same (Woods v. Lisbon, supra), but only as to matters concerning which she spoke. What the doctor may have done two years previous she did not allude to, and as to that his lips were sealed. The rule is said in 4 Wigmore on Evidence, section 2388, to be that: "A waiver is to be predicated not only when the conduct indicates a plain intention to abandon the privilege, but also when the conduct, though not evincing that intention, places the claimant in such a position with reference to the evidence that it would be unfair and inconsistent to permit the retention of the privilege. It is not to be both a sword and a shield."

For this reason, doubtless, the testimony of the doctor denying that he gave her the tablets in 1907, and stating that [151] they were given on another occasion two years previous, was received. What their purpose was then would throw no light on the transaction in 1907, and would tend to open up professional matters on which plaintiff had the right to have him remain silent. In Treanor v. Manhattan R. Co. 28 Abb. N. Cas. 47, 21 Civ. Pro. 364, 16 N. Y. S. 536, the testimony of the physician related to the precise matters concerning which the complainant had testified, and therefore the implied waiver related thereto and not to an independent transaction. The ruling was correct.

IV. A sister of plaintiff was asked, as was also her mother, in substance, "Whether or not it was understood by all members of your family that Mary was to be married to Mr. Glynn?" and over objection as incompetent, irrelevant, and immaterial, "unless they got that understanding from Mr. Glynn, or what Mr. Glynn said to them," answered in the affirmative. Had this evidence been tendered solely as tending to establish an engagement to Mary, there would be much force in defendant's contention, for, though this may be proven "by unequivocal conduct of the parties, and by a general, yet definite and reciprocal, understanding between them, their friends and relations, and corroborated by their actions, that a marriage was to take place" (Thurston v. Cavenor, 8 Ia. 155), this must be shown by what was done and said evidencing such understanding, not among friends and relatives, but between the alleged contracting parties and such friends and relatives as assumption in conversation of an engagement or that they were to become husband and wife, or otherwise recognizing the relationship. In measuring the damages to which she might be entitled to recover, the humiliation she endured because of breaking the engagement, and the wounding of her feelings thereby, were important elements, and the fact that the members of the family with whom she constantly associated knew of their relationship could but add to and accentuate the poignancy of her grief and mortification. For this reason, the knowledge of the members of the family may be shown. [152] Reed v. Clark, 47 Cal. 195; Dunlap v. Clark, 25 Ill. App. 573. Evidence that plaintiff had communicated to her family the fact of the engagement also has been received as tending to prove consent to or mutuality of the promise to marry. Thurston v. Cavenor, 8 Ia. 155; Lewis v. Tapman, 90 Md. 294, 45 Atl. 459, 47 L.R.A. 385.

But in the eighth instruction the court told the jury that, in determining whether there was an agreement to marry, they might consider, among other things, "how the immediate relatives and friends of their respective families understood their relation toward each other." We have discovered no authority holding that proof of the understanding in the family of either party may be considered as evidence of an agreement to marry. Certainly Thurston v. Cavenor, supra, should not be construed as so holding. The point discussed was whether a modification concerning an admission by plaintiff should have been inserted in an instruction. That is the excerpt therefrom quoted above it was not intended to say the contract might be shown by the understanding of friends or relatives appears from the inapplicability of the citations following. In Daniel v. Bowles, 2 C. & P. 553, 12 E. C. L. 258, the evidence was of a conversation by defendant with the mother of plaintiff at one time and with the mother and daughter at another, and nothing will be found in Chitty on Contracts or Blackstone's Commentaries bearing on the question as to whether the understanding of the respective families may be proven. Even if what is said in Thurston v. Cavenor could be construed as so holding, it is mere dictum. To receive such evidence as tending to prove a contract would be going farther than admitting hearsay—it would be receiving testimony of a conclusion based on hearsay. The members of the family may have reached their understanding from what plaintiff had said in the absence of defendant, or have inferred as much from the long-continued attentions of defendant. And yet such attention, however long-continued, if without a proposal or promise of marriage, would not justify such

a conclusion. [153] Whitcomb v. Wolcott, 21 Vt. 368. Of course, the bearing of the parties toward each other, what they may say when together in the presence of friends and relatives, always may be shown. Russell v. Cowles, 15 Gray (Mass.) 582, 77 Am. Dec. 391. "All the facts and circumstances existing between the parties prior to or after the time when the alleged marriage contract was entered into, tending to establish an engagement, must be regarded as proper evidence for the consideration of the jury." Richmond v. Roberts, 98 Ill. 472.

"The ordinary politeness and civility which a gentleman extends to a lady are not to be considered as furnishing any proof of such a promise. The safest rule which we can lay down is this: If you find that the attentions which the defendant paid the plaintiff, and the intercourse between them, were such as were usual with persons engaged to be married, and such as are unusual with persons between whom there exists no such relation, they are competent for you to consider as evidence which may or may not, as you may determine, suffice to prove a promise of marriage. It is not necessary for you to consider that there was an express promise made and accepted in terms; but if his conduct was such as to induce her to believe that he intended to marry her, and she acted upon that belief, the defendant permitting her to go on trusting that he would carry the intention into effect, that will raise a promise upon which she may recover. But this must be shown by facts and circumstances, and you cannot consider the understanding of the friends of the parties as to relation between them." Perkins v. Hersey, 1 R. I. 493. See, also, Kelley v. Highfield, 15 Ore. 277, 14 Pac. 744; Clark v. Hodges, 65 Vt. 273, 26 Atl. 726; Rutter v. Collins, 96 Mich. 510, 56 N. W. 93; Peppinger v. Low, 6 N. J. L. 384.

In Leckey v. Bloser, 24 Pa. St. 401, the ruling by which several witnesses were allowed to testify from the conduct of the parties whether a mutual attachment in their opinion existed, or only the relation of ordinary acquaintances and friends, was denounced as erroneous, saying: "On such a [154] subject the jury is as competent to weigh the facts and deduce the appropriate conclusions as the witness. And if the witness have no facts to describe to a jury, what are his conclusions and impressions but the baseless visions of his imagination? The question here was, Had Leckey promised to marry the plaintiff? There was no direct evidence of the promise; but it was competent for her to prove such attentions on his part as ordinarily characterize a matrimonial engagement, and as might lead a jury to presume a promise. The law has an open ear for the complaints of deserted innocence, and the tribunals of the law are quite ready enough to give full effect to such circumstantial evidence as is usually submitted in actions of this sort, to prove the promise of the recreant lover; but if he is to be charged with infidelity to his vows, not upon proved circumstances, but upon the surmises, suspicions, opinions, and the impression of witnesses, we shall be in great danger of producing more evils than we remedy, and of sacrificing the legal rights of a man to redress the imagined wrongs of a woman." And so the opinion of the witnesses in this case as to what members of the family understood, whether based upon the attentions paid plaintiff or other information, should have been excluded on the objection urged because calling for an opinion or conclusion of the witnesses, and the instruction was erroneous in allowing the consideration of the inference of third parties in determining the existence of a contract.

V. The court, in the ninth paragraph of the charge, said to the jury:

"If you find from a preponderance of the testimony as hereinbefore defined to you that such marriage contract was entered into substantially as charged in plaintiff's petition, and that plaintiff is entitled to a recovery in this case, under these instructions, then it will be proper for you in estimating or determining the amount of her recovery to take into consideration her wounded feelings, humiliation, her loss of social standing, the amount and value of the defendant's property, [155] as indicating what she has a right to expect to enjoy from a consummation of said marriage, and all the other facts and circumstances disclosed upon the trial hereof, as tending to show what the plaintiff has lost by reason of the defendant's failure to perform said marriage contract, as alleged in her petition. And you should allow her such sum as, in your judgment, will make her whole for the injury she has sustained by reason of the breach of such contract.

And if you shall further find from the preponderance of the testimony that while the marriage contract was in existence and by reason thereof the defendant seduced the plaintiff, had sexual intercourse with her, and that he advised or procured an abortion to be performed upon her, then and in such case you will be entitled to consider, in estimating the amount of such recovery, her pain and suffering occasioned thereby, her mental anguish, humiliation, and shame, injury to health, if any has been shown, and any other injury that she sustained by reason thereof, as the same has developed upon the trial hereof.

If you should fail to find that plaintiff has established by a preponderance of the testimony that during the existence of the mar-

riage contract and by reason thereof the defendant seduced the plaintiff, had sexual intercourse with her, and that an abortion or miscarriage was produced with the advice of the defendant, then you will not be entitled to consider such facts in estimating the amount of plaintiff's recovery, even though you find her entitled to recover."

No exception is taken to the first paragraph; but it is insisted that the last two are erroneous for that, as is said: (1) Abortion, and especially criminal abortion, ought not to be considered in aggravation of damages in an action for breach of promise; and (2) that physical pain and suffering because of pregnancy or childbirth, mature or premature, should not be taken into account in estimating damages in such a case. Assuming the action to have been for damages resulting from the breach of promise alone, can these be said to have been the natural consequence of such breach? Seduction, accomplished through the promise, may be shown on the theory [156] that the mental anguish and humiliation resulting from the breach will be intensified thereby. Geiger v. Payne, 102 Ia. 581, 69 N. W. 554, 71 S. W. 571; Herriman v. Layman, 118 Ia. 590, 92 N. W. 710. But some courts hold that, as seduction constitutes an independent cause of action, and the parties are *in pari delicto*, such proof is inadmissible. See Weaver v. Bachert, 2 Pa. St. 80, 44 Am. Dec. 159; Burks v. Shain, 2 Bibb (Ky.) 343, 5 Am. Dec. 616, and the dissenting opinion of Breese, J. in Fidler v. McKinley, 21 Ill. 308. Evidence of pregnancy resulting from seduction also is admissible, for the grief and humiliation of a woman occasioned by the breach in that situation necessarily would be greater than would be likely had not pregnancy followed. Tyler v. Salley, 82 Me. 128, 19 Atl. 107; Sherman v. Rawson, 102 Mass. 395; Kelley v. Riley, 106 Mass. 339, 8 Am. Rep. 336. But proof of the effect of pregnancy on bodily health is not admissible (Tyler v. Salley, supra), for that is a consequence of the physical condition, and in no sense of breaking the promise of marriage. The infirmities due to pregnancy and the physical suffering incident to childbirth necessarily must have been endured had the promise been consummated by marriage, and therefore cannot be attributed to the breach. In other words, there is no casual connection between such suffering and the refusal to keep the promise, and therefore it is not an element to be considered in measuring the damages to be allowed. Such a case is readily distinguished from an action for seduction, the natural consequences of which is pregnancy and the suffering incident to childbirth, both of which are elements of damages. Stevenson v. Belknap, 6 Ia. 97, 71 Am. Dec. 392; Smith v. Milburn, 17 Ia. 30.

Because of the lack of causal connection, the fact that a miscarriage occurred or an abortion was committed may not be considered in aggravation of damages in an action for breach of promise. True, abortion may be shown in actions by the father for loss of services resulting from the seduction of a daughter; but such an action cannot be maintained unless [157] pregnancy results and sickness, with consequent loss of service, construed to include loss of the comfort and society of the daughter and the honor of the father and his family, and, if for his own protection against the original wrong the defendant subjects the daughter to another, corrupting her morals to an extreme degree, imperiling her health and life, and exposing her to a deeper disgrace, this but aggravates the original wrong by adding to the loss of service, which is the gist of the action. Klopfer v. Bromme, 26 Wis. 372; White v. Murtland, 71 Ill. 250, 22 Am. Rep. 101; Beaudette v. Gagne, 87 Me. 534, 33 Atl. 23.

But the perpetration of this offense, that is, of abortion, was as likely had there been no engagement, and if it occurred as an inducement to defendant to adhere to his agreement, as, some of the evidence tended to show, this was inconsistent with an inference that it was owing to a breach thereof. Moreover, according to the evidence, the abortion was committed long before the engagement was broken. The commission of an abortion is not the natural consequence of the breaking of an engagement to marry, and the evidence adduced did not tend to establish any causal connection between the two.

In Giese v. Shultz, 53 Wis. 462, 10 N. W. 598, the jury was directed that, "if . . . you should find that the defendant seduced the plaintiff under a promise of marriage, and got her with child, you will, in addition to the damages I have named, take into account this fact, and give such damages as she has sustained by reason of that additional injury," and the court in adjudging this erroneous, said:

"Other elements of injury, such as loss of time, expenses of medical and other attendance, and the like, might be held proximate, and might therefore increase the damages, in an action of trespass *per quod servitium amisit*, in which the seduction of the servant is proved in aggravation of the damages. In that form of action the loss of service caused by the seduction is the primary cause of action, and, of course, such [158] loss is proximate. And the same may be said of the expenses which are the direct result of the act which caused the loss of service. But in this case the cause of action is further removed, from the injuries just mentioned. The breach of the promise of marriage is the foundation of the action; the seduction is the result of such promise—perhaps proxi-

mate—although, but for the authorities, that might well be doubted; but the loss of service and expenses of sickness, which might or might not result from the seduction, are certainly not the proximate results of the breach of promise, although they may be of the seduction."

On another trial practically the same instruction was given, and from the second opinion, found in 65 Wis. 487, 27 N. W. 353, it appears there was a miscarriage, and the court held this improper for the consideration of the jury.

Schmidt v. Durnham, 46 Minn. 227, 49 N. W. 126, is not necessarily inconsistent therewith. In so far as the conversation of these parties concerning the commission of an abortion was connected with the promise of marriage or its performance, evidence thereof undoubtedly was admissible; but whether the crime was in fact perpetrated had no bearing on the issue, and neither the crime, if such there were, nor the suffering occasioned thereby was a consequence flowing from the breach of promise alleged. But see section 985, Sutherland on Damages.

As the petition was in one count, the court might well have construed it to claim such damages only as resulted from the breach of the contract to marry, and have treated the allegations concerning seduction and pregnancy as in aggravation of the damages consequent of the breach. Geiger v. Payne, 102 Ia. 581, 69 N. W. 554, 71 N. W. 571. But in receiving evidence, and in giving this and other instructions, the court must have construed the petition as stating two causes of action, that of seduction, and breach of promise to marry. In actions for seduction, all the natural consequences, such as pregnancy, childbirth, sickness, and like matters, including abortion at the instance of the defendant, [159] may be considered in estimating the compensation to be awarded plaintiff. McCoy v. Trucks, 121 Ind. 292, 23 N. E. 93; Gunder v. Tibbits, 153 Ind. 591, 55 N. E. 762; Klopfer v. Bromme, 26 Wis. 372; 4 Sutherland on Damages, section 1283; 35 Cyc. 1320.

Undoubtedly both causes of action could have been prosecuted in one action for, under section 3470 of the Code, an unmarried woman may prosecute an action for her own seduction, and section 3545 of the Code provides that: "Causes of action of whatever kind where each may be prosecuted by the same kind of proceedings, if held by the same party, and against the same party, in the same rights, and if action on all may be brought and tried in that county, may be joined in the same petition." See Turner v. Bank, 26 Ia. 562; Devin v. Walsh, 108 Ia. 428, 79 N. W. 133. Of course, each cause of action should have been stated in separate counts; but no objection was raised on this ground, though the circumstance that the facts which might have been pleaded in aggravation were included in the count alleging the breach strongly tended to define a purpose not to assert another cause of action. As the court seems to have ruled that both causes of action were alleged in the petition, and no prejudice resulted, we are not inclined to denounce the instruction as containing reversible error.

Because of the errors pointed out, the judgment is

Reversed.

NOTE.

Understanding of Family or Friends of Party as Evidence of Agreement to Marry.

The rule seems to be as declared in the reported case that the understanding of the families or friends of the parties to a supposed agreement to marry may not be considered as evidence of the agreement. Perkins v. Hersey, 1 R. I. 493; Munson v. Hastings, 12 Vt. 346, 36 Am. Dec. 345; Whitcomb v. Wolcott, 21 Vt. 368. See also Leckey v. Bloser, 24 Pa. St. 401; Clark v. Hodges, 65 Vt. 273, 26 Atl. 726. *Compare* Thurston v. Cavenor, 8 Ia. 155. In Perkins v. Hersey, supra, the court after charging the jury that an agreement to marry might be shown by facts and circumstances said: "You cannot consider the understanding of the friends of the parties as to the relation between them." In Munson v. Hastings, 12 Vt. 346, 36 Am. Dec. 345, explained in Whitcomb v. Wolcott, 21 Vt. 368, it was held that mere attentions on the part of an unmarried man to an unmarried woman do not constitute a marriage contract and the mere fact that the neighbors suppose such a contract must exist adds nothing to their weight. The court said: "The law has not determined that any particular period of courtship shall be evidence of a marriage contract. . . . Nothing need be added as to the probable opinions and belief of third persons. It is clear that to allow such opinions to influence the finding of this contract, as between the direct parties to it, would be giving place to a principle which is wholly inadmissible in other cases."

In Thurston v. Cavenor, 8 Ia. 155, it was said that the promise of the defendant to marry in a suit for the breach of a promise to marry "may be shown . . . by the unequivocal conduct of the parties, and by a general, yet definite and reciprocal understanding between them, their friends and relations, evinced and corroborated by their actions that a marriage was to take place."

In the reported case it is said that the case of Thurston v. Caviar, supra, should not be

considered as holding that "proof of the understanding in the family of either party may be considered as evidence of an agreement to marry" and it seems that the proper construction of the decision is that an agreement to marry may be shown by the facts and circumstances and the conduct and relation of the parties.

For a general discussion of the question whether a contract to marry may be implied, see the note to Vaughan v. Smith, Ann. Cas. 1914C 1092.

WAY
v.
BARNEY.

Minnesota Supreme Court—November 20, 1914.

127 Minn. 346; 149 N. W. 462, 646.

Corporations — Holder of Stock as Security — Liability to Creditors.

Evidence in an action to enforce a stockholder's constitutional liability against one who appeared upon an insolvent local corporation's stockbooks as a general owner of stock, held to sustain a finding that the failure of the corporation's records to show that the stock was issued to and held by defendant as collateral security for an advance made by a third person was not due to the negligence of fraud of the corporation but to his own negligence, wherefore he was estopped, as against creditors, to deny his liability as a stockholder.

[See note at end of this case.]

(Syllabus by court.)

Appeal from District Court, Hennepin county: STEELE, Judge.

Action to enforce stockholder's constitutional liability. Charles M. Way, receiver, plaintiff, and Fred E. Barney, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. AFFIRMED.

Mercer, Swan & Stinchfield for appellant.
James E. Trask and *John M. Bradford* for respondent.

[347] PHILIP E. BROWN, J.—This is an action to enforce against defendant constitutional liability as a stockholder of a bankrupt local corporation. Plaintiff prevailed. Defendant appealed from an order refusing amendments of the findings and a new trial.

The complaint was sustained on demurrer in 116 Minn. 285, 133 N. W. 801, 38 L.R.A. (N.S.) 648, Ann. Cas. 1913A 719, where it was held, among other things, that the discharge of a corporation under the Federal Bankruptcy Act does not discharge or extinguish the constitutional liability of its stockholders for the payment of its debts.

Plaintiff claimed that on April 19, 1905, defendant subscribed for and became the owner of 50 shares of the capital stock of the Winslow Furniture & Carpet Co. the bankrupt corporation, of the par value of $5,000, issued in his name, an entry whereof was then made upon the stock books of the company, and that such ownership [348] continued so to appear until its bankruptcy. Defendant denied subscription for stock in or ever having been a stockholder of the corporation. He admitted the issuance, and delivery, of the shares to him in his name on the date stated, but asserted that he merely held the title in trust for the Winslow Co., as collateral security for a loan and credit aggregating $5,000, made to it by the Salisbury & Satterlee Co., another corporation, pursuant to the terms of a prior agreement between these companies, to which he was not a party; further, that the issuance of this stock and the entry of his name upon the records as a stockholder, without indicating his true relation thereto, was a fraudulent or negligent violation of the corporation's duty, the agreement mentioned, and his rights in the premises. He claimed also to have surrendered the stock in compliance with this agreement while the Winslow Co. was a going concern.

Little dispute exists as to the facts. In April, 1905, the Winslow Co., which had theretofore been a retail furniture dealer in St. Paul, contemplated opening a branch in Minneapolis, and with that end in view conferred, through Mr. Winslow, its president, with Messrs. Salisbury & Satterlee, president and vice president of a company then engaged, under that name, in wholesaling furniture in the latter city, regarding the purchase by it of shares of the former's capital stock. What occurred, the agreement entered into, and how interest was paid on the advances subsequently made, will best be understood by stating the testimony of the last-named officers as witnesses for defendant. Mr. Satterlee, after testifying that Mr. Winslow advised him of the contemplated establishment of the branch, continued:

"And that he wanted to know if he couldn't interest us in taking some financial interest in the business; that he had had some kind of proposition from other people and wanted us to take stock. We told him we wouldn't take stock, couldn't take it and wouldn't. We conversed along that line for some time and

then we suggested, I suggested, or Mr. Winslow, in our conversation, it came to this arrangement, that we would let them have approximately $2,500, worth of goods and $2,500 in cash and take stock in the Winslow & Ruff Furniture Co., as security, collateral security, this stock to be issued to Mr. Barney. It was first suggested by Mr. Winslow [849] to issue it to a man in our employ, but we didn't want to have anything to do with it for the reason that with the other trade in the city here it isn't advisable or desirable to have them feel that you are backing competition coming into the city. So we suggested Mr. Barney. He didn't know Mr. Barney; never had heard of him, and said if it was satisfactory to us it would be to him. So we made the deal on that basis."

Mr. Salisbury testified:

"Through Mr. Satterlee I learned Mr. Winslow desired to open a branch in Minneapolis and with Mr. Satterlee had several conferences with Mr. Winslow. It was his desire, as I recollect it, that we should take a certain amount of stock, $5,000 was the ultimate sum that we arrived at as necessary for us to participate in his patronage, to receive his patronage for our line of goods. I was not in favor, nor was Mr. Satterlee at our conferences, of taking stock in the Winslow Furniture & Carpet Co. or in the Winslow & Ruff Furniture Co., as it was at that time. And I presume there was suggestions made along several lines; as I remember it we were trying to reach a point where we could agree upon the conditions under which we could give them $5,000, a loan of $5,000 in credit, partly goods and partly cash. And it was my understanding that when the deal was finally consummated that Mr. Winslow was to issue $5,000 worth of stock to Fred E. Barney which he was to hold to secure us for the payment of the credit which we gave him; that he was to pay us 8 per cent interest, not on the $5,000, but on the cash as soon as it was invested or turned over, and upon the monthly balances of goods. The interest was paid for at least two years if not more. And the time of payment was not definitely settled or promised or understood, except that the success of the business from Mr. Winslow's standpoint would undoubtedly allow him to take up the credit or the loan within two or three years."

After the making of this arrangement defendant, at the request of the Salisbury Co., consented to take the stock in his name, and, likewise, on April 19, 1905, attended a stockholders' meeting of the Winslow Co., at which a resolution was passed to issue the shares to him, which was done, nothing being said about their being [850] collateral. At the same meeting defendant was elected a director of the corporation at Mr. Winslow's request. The original certificate of shares was not offered in evidence, but the stub of the stock book was. It reads as follows:

Certificate
No. 8
For 50 shares
Issued to
Fred E. Barney.
Dated April 19, 1905.
From Whom Transferred.

.....

Date .....190.....

No. Original Certificate	No. Original Shares	No. of Shares Transferred
.....	.....	

Received Certificate No.....
For ..... Shares
this .....day of .....190....

The within certificate, No. 8, is one of a series, aggregating $25,000 of preferred stock, and is entitled to the following preference, viz.: To be paid an annual cumulative dividend, on the date of the regular annual meeting of the corporation, of eight per cent, and in case of the winding up of said corporation, said preferred stock shall be paid in full before any common stock shall receive a dividend. The right to redeem the same at any time after five years is reserved."

"Winslow & Ruff Furniture & Carpet Company.

"By Irving M. Winslow, Pres.
"By Alfred Mortenson, Sec."

This was substantially in accord with the resolution authorizing its issuance. Later defendant executed a proxy and the shares were voted thereunder at the annual meeting of the company held in February, 1906. The company's articles of incorporation provided [851] that its government should be vested in a board of three directors, to be elected annually from the stockholders, but defendant was so chosen, with four others. The Salisbury Co. advanced the credit and loan as agreed. In 1908 the Winslow Co. was adjudged bankrupt. Several months prior thereto the Salisbury Co. obtained the stock certificate from defendant, who had retained it in his possession until then, and exchanged it for a note of the Winslow Co.; but no record of this transaction was entered upon the stock books. The Winslow Co. contracted debts after April 19, 1905, which remain unpaid, and for which claims were allowed in the sequestration action subsequently brought against it. The court found the ultimate facts substantially as stated; in effect determined defendant's claim of fraudulent or negligent violation of the duty owing defendant in issuing the stock without indicating its collaterality, unfounded, and concluded that defendant held himself out to creditors as the owner of the shares, and as to them was estopped from denying ownership. Defend-

ant challenges this determination and conclusion as being unsupported by either the evidence or findings.

In this jurisdiction, in harmony with the great weight of authority, one to whom corporate stock has been transferred as collateral security, but who appears upon the books of the corporation as its general owner, is liable as a stockholder for corporate debts: Field v. Evans, 106 Minn. 85, 118 N. W. 55; 19 L.R.A.(N.S.) 249, note; 121 Am. St. Rep. 197. But the rule is otherwise when the holder's true relation to the stock appears of record (Field v. Evans, *supra*), or where absence of such disclosure is not due to his failure to exercise reasonable care. Hunt v. Seeger, 91 Minn. 264, 98 N. W. 91. Subsequently to the issue of the stock here in question, the rule stated in the Field case was, to some extent, incorporated in our statutes. See R. L. 1905, § 2862.

At the outset it is to be remembered that we are not dealing with a case where any claim is made that defendant either requested or suggested any notation as to the stock being issued as collateral; and, further, that the root of the rule of estoppel in such cases is protection of creditors, and although stock be issued by a corporation [352] directly to a creditor as collateral security, so that he does not become liable to the corporation for the price of the stock as a subscriber therefor, nevertheless, if he fails to do all that can be expected or required of a reasonably careful and prudent business man in the matter of seeing to it that the character of his holding appear of record, he will not be allowed to deny his liability to creditors not advised to the contrary by the stock books. Hamilton v. Levison, 198 Fed. 444, 446, *affirmed* 204 Fed. 72, 122 C. C. A. 386; State v. New England Bank, 70 Minn. 398, 402, 73 N. W. 153, 68 Am. St. Rep. 538. Since, therefore, one acting as a dummy for a creditor can stand in no better position than the creditor himself, the Field case must be deemed decisive of the questions here involved, unless it can be said that the evidence required a finding in favor of defendant's claim as to fraud or negligence. Considering the transactions between the two companies from a business standpoint, the inference may fairly be drawn that the Winslow Co.'s purpose was to obtain additional capital, or its equivalent, and that the Salisbury Co. desired patronage from it, but did not wish to be known as a stockholder, because other customers might object; wherefore defendant was induced by the latter to act as a "dummy," and to take the stock in his name in order to conceal the real transaction. Furthermore, there is no suggestion of thought, at that time, of liability or of the desirability of any record entry other than made; all evidently believing the branch establishing would succeed, for, otherwise, neither the Salisbury Co. nor defendant would have entered into the venture. While defendant disclaimed knowledge of the agreement between the two companies, the court was not required to accept this as conclusive. It would have been an unusual transaction for defendant to have accepted shares and a directorship in a corporation in which he had no real interest, without even knowing how many shares had been agreed upon or what he was to do to carry out the purpose of the corporation requesting him to act. Moreover, it is clear from his own statement that he understood the stock belonged to the Salisbury Co., to which he was to deliver it on demand; and, in any event, his lack of knowledge was attributable to his failure to seek it. An entry of the transaction on the books [353] of the Winslow Co., or a statement that the stock was issued as collateral, would have either fully or partially disclosed what was purposed to conceal.

We sustain the findings and hold the court justified in refusing to find either negligence or fraud on the part of the Winslow Co., and that defendant's negligence justified the conclusion of estoppel.

Order affirmed.

On December 11, 1914, the following opinion was filed:

PER CURIAM.—Attention has been called to an omission to make a specific ruling in the opinion on defendant's contention that plaintiff really represents simple creditors with the same standing only as such creditors have under the National Bankruptcy Act (Act July 1, 1898, c. 541, 30 St. 544), and, under the agreement found by the trial court, could not claim the benefit of the estoppel herein declared, except in some such capacity as that of *bona fide* purchasers or lien or judgment creditors; that under that act the creditors here cannot avail themselves of an estoppel which the corporation could not claim. Wherefore, it was urged, plaintiff was precluded from the benefit of an estoppel.

The point has been considered, and is overruled.

NOTE.

Liability for Corporate Debts or Calls of Person Who Holds Stock as Collateral Security.

It is purpose of this note to review the recent cases discussing the liability for corporate debts or calls of a person holding stock as collateral security. The earlier cases on this question are collected in the notes to Adams v. Clark, 10 Ann. Cas. 774; Tierney v. Ledden, 21 Ann. Cas. 105; State v. Bank of New England, 68 Am. St. Rep.

538 and Field v. Evans, 121 Am. St. Rep. 197.

In the absence of a statutory provision to the contrary, one to whom stock has been transferred in pledge or as collateral security, and who appears on the books of the corporation as owner of the stock, is liable as a stockholder to pay calls on unpaid stock subscriptions, and to respond to creditors under statutes imposing liability on stockholders for corporate debts. Hamilton v. Levison, 198 Fed. 444; McAllister v. American Hospital Assoc. 62 Ore. 530, 125 Pac. 286. And see the reported case. "It is settled in Minnesota that a pledgee whose name is unconditionally entered as a stockholder is liable under the statute." Hamilton v. Levison, supra. In McAllister v. American Hospital Assoc. supra, it was held that where one who had signed a note as endorser to enable a corporation to borrow money was given stock of the corporation as indemnity, the legal title of which was transferred to him, he was liable to the extent of the unpaid stock subscription which his shares represented to a creditor of the corporation. In Hamilton v. Levison, supra, it appeared that the defendant who was sued on his liability as a stockholder, "accepted the stock as collateral to a claim against the company; that he never signed any subscription paper; that the claim was subsequently paid; and that he then in good faith delivered up the certificate for cancellation." It also appeared that his name was unconditionally entered as a stockholder on the stock register and that the debts for the payment of which the suit was brought to enforce the stockholder's liability were incurred while the defendant held the stock. The court in holding the defendant liable said: "The defendant was liable from the time when he actually accepted the stock, and when, as a natural result of that acceptance, his name was entered unconditionally as a stockholder. He could only escape such liability by seeing to it that the character of his holding appeared upon the books of the corporation. Moreover, he remained liable until at the earliest his name was struck off, if it can be said to have been struck off by the entry made after he delivered up the stock. The intermediate liability between these two dates did not expire at the end of one year, as in the case of the liability of bank stockholders, in Minnesota, but it endured and was open to assessment when the corporation became insolvent."

It seems that where stock has been transferred as collateral security and it appears on the stock register of the corporation that the transfer was made for that purpose, the transferee is not liable as a stockholder for the debts of the corporation. Hamilton v. Levison, 198 Fed. 444. And see the reported case. In McAllister v. American Hospital Asso. 62 Ore. 530, 125 Pac. 286, it was held that where one who had signed a note as endorser to enable a corporation to borrow money was given stock of the corporation as indemnity, the legal title of which was not transferred to him, he was not liable to the extent of the unpaid stock subscription which his shares represented to the corporation or its creditors.

In some jurisdictions statutes have been enacted expressly exempting persons holding stock as collateral security from personal liability as stockholders. Western Pac. R. Co. v. Godfrey, 166 Cal. 346, Ann. Cas. 1915B 825, 136 Pac. 284. In that case the court in discussing the purpose of such a statute said: "It was not intended to make one who simply holds stock as collateral security . . . personally liable as a stockholder, except as otherwise expressly specified." In Hanson v. Sherman, 25 Cal. App. 169, 143 Pac. 73, wherein it appeared that a corporation issued to the defendant some of its stock as a pledge for the repayment of a loan, it was held that if the issuance of the stock was ultra vires, it did not have the effect of transforming the defendant from a pledgee into a stockholder so as to render him liable as a stockholder for the indebtedness of the corporation.

KNOWLES

v.

STATE.

Arkansas Supreme Court—June 1, 1914.

113 Ark. 257; 168 S. W. 148.

Criminal Law — Confession as Sufficient Corroboration of Accomplice.

Kirby's Dig. § 2384, provides that a conviction for a felony cannot be had on the testimony of an accomplice, unless corroborated by other evidence tending to connect defendant with the commission of the offense, and that the corroboration is not sufficient if it merely shows the offense was committed and the circumstances thereof. Section 2385 declares that the defendant's confession, unless made in open court, will not warrant a conviction, unless accompanied by other proofs that the offense has been committed. Held that, where defendant's daughter testified that defendant had had intercourse with her, with her consent, defendant's voluntary confession of the same fact to officers after his arrest for incest constituted sufficient corroboration to sustain a conviction.

[See note at end of this case.]

Incest — Marriage of Accused — Evidence Sufficient.

In a prosecution for incest alleged to have been committed by defendant with his daughter, a girl of 18, the state introduced a marriage certificate showing that defendant had married E. in Kansas on August 25, 1895, and E.'s sister testified that the woman mentioned in the marriage certificate was her sister and defendant's wife; that she was alive at the time of the trial; and that defendant had lived with her as his wife for the past 20 years. Held, sufficient to establish that defendant was a married man at the time of the commission of the crime.

Appeal from Circuit Court, Benton county: MAPLES, Judge.

Criminal action. J. M. Knowles convicted of incest and appeals. The facts are stated in the opinion. AFFIRMED.

Walter Mathews for appellant.

Wm. L. Moose and *Jno. P. Streepey* for appellee.

[258] HART, J.—J. M. Knowles has appealed from a judgment of conviction for the crime of incest, charged to have been committed by committing adultery with Pearl Knowles, his daughter. The facts are as follows:

Pearl Knowles testified: I am eighteen years of age, and am the daughter of the defendant, J. M. Knowles. I have had sexual intercourse with him several times a month for the past three years in Benton County, Arkansas. As a result of that intercourse, I gave birth to a child. It died about two or three days after its birth, and my father buried it in the yard near the house. I submitted to all these acts of intercourse of my own accord.

Bob Campbell testified: I am chief of police of the city of Eureka Springs, in Carroll County, Arkansas. I arrested the defendant there, and he wanted to know if he was charged with murdering his child. I told him that he was charged with having sexual intercourse with his daughter. He said: "If I am not charged with murdering the child, I am not uneasy. I do not care for the charge of doing business with my daughter, for I am guilty of that."

Sid Murphy testified: I am constable in Benton County, Arkansas. I went to Eureka Springs after the defendant was arrested there and brought him back to Benton County. While on the way back he confessed to me that he had been having intercourse with his daughter, Pearl Knowles, for the past three years.

[259] Campbell and Murphy each stated that the confession made to him was a voluntary one.

A marriage certificate was introduced to the effect that John M. Knowles and Miss Catherine Edmonson were united in marriage in the State of Kansas on the 25th day of August, 1895.

Margaret Jerminiger testified: I live in the State of Kansas, and have known the defendant for twenty years. He lived in Kansas until about three years ago. The Catherine Edmonson mentioned in the marriage certificate about referred to is my sister and the wife of the defendant. He has lived with her as his wife since their marriage, and she is now present in the court room. I have visited them frequently during their married life.

Jane Lovette testified: I attended Pearl Knowles when she gave birth to the child testified to in this case. The baby died two days after it was born.

Counsel for defendant contends that the court erred in refusing to give the following instruction:

"The court instructs the jury that you cannot convict the defendant upon the confession made by him to witnesses Sid Murphy and Bob Campbell unless such confession is accompanied by other proof that the offense with which the defendant is charged was actually committed by him and the proof required to accompany such confession, in order to convict the defendant, cannot be made by Pearl Knowles alone."

Section 2385, of Kirby's Digest, provides that the confession of a defendant, unless made in open court, will not warrant a conviction unless accompanied with other proof that such offense was committed. See, also, McLemore v. State, 111 Ark. 457, 164 S. W. 119.

Section 2384, of Kirby's Digest, provides that a conviction cannot be had in any case of felony upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows that the offense was committed and the circumstances thereof.

[260] The testimony shows that the prosecuting witness voluntarily committed sexual intercourse with her father, and this made her an accomplice. In most jurisdictions where the question has arisen, it has been held that the evidence of a person who was a voluntary party to an incest must be corroborated, because of statutes requiring the evidence of accomplices to be corroborated. See case note to 18 Ann. Cas. at page 975; see, also, Gaston v. State, 95 Ark. 233, 128 S. W. 1033. It is argued that the confession of the defendant is not a sufficient corroboration of the testimony of the prosecuting witness to warrant the conviction of the defendant.

To support his contention, counsel relies upon the case of Melton v. State, 43 Ark. 367; but we do not think that case is authority for the position assumed by counsel. In that case the alleged accomplice testified that the defendant confessed to him that he had committed the crime, and his testimony, together with that of another accomplice, was held not sufficient to warrant a conviction. Here the confession was not made by the defendant to an accomplice, but was voluntarily made to the officers who arrested him. The defendant's own free confession was sufficient proof to show his own connection with the crime. It has been expressly held that a confession of a defendant made to one who is not an accomplice, is sufficient to corroborate the testimony of an accomplice. Patterson v. Com. 86 Ky. 313, 5 S. W. 387; People v. Cleveland, 49 Cal. 578; Partee v. State, 67 Ga. 570. In the latter case it was urged that the court erred in charging the jury to the effect that the confession of the defendant was sufficient proof or corroboration to support the testimony of the accomplice and to authorize a legal conviction if it believed that he had voluntarily and freely made it. The court expressly held that voluntary confessions are sufficient to corroborate the testimony of an accomplice so as to support a verdict of guilty. We are of the opinion, therefore, that the court did not error in refusing to give instruction No. 4, asked by the defendant.

[261] In the case of Martin v. State, 58 Ark. 3, 22 S. W. 840, the court hold that an indictment of a father for incest committed by adultery with his daughter is defective if it fails to allege that the father was at the time a married man. The indictment in the instant case does allege that the father was a married man at the time he committed the incestuous adultery; but it is contended by counsel for defendant that there is not sufficient proof to show he was married. We do not agree with him in that contention. A marriage certificate was introduced in evidence showing that the defendant had married Catherine Edmonson in the State of Kansas on the 25th day of August, 1895. Margaret Jerminiger testified that the Catherine Edmonson mentioned in the marriage certificate was her sister and the wife of defendant; that she was alive at the time of the trial, and that the defendant had lived with her as his wife for the past twenty years. This was sufficient to establish the fact that the defendant was a married man at the time the crime was committed.

There is no error in the record, and the judgment will be affirmed.

NOTE.

Confession of Defendant as Sufficient Corroboration of Accomplice.

General Rule.

It is well settled that the confession of the defendant in a criminal prosecution, whether made in open court or extrajudicially, is sufficient to corroborate the testimony of an accomplice implicating the defendant in the crime for which he is prosecuted.

United States.—U. S. v. Lancaster, 44 Fed. 896, 10 L.R.A. 333.

Alabama.—Snoddy v. State, 75 Ala. 23; Crittenden v. State, 134 Ala. 145, 32 So. 273.

Arkansas.—Russell v. State, 97 Ark. 92, 133 S. W. 188, citing Nichols v. State, 92 Ark. 421, 122 S. W. 1003. And see the reported case. See also Wilhite v. State, 84 Ark. 67, 104 S. W. 531.

California.—People v. Cleveland, 49 Cal. 577; People v. Watson, 21 Cal. App. 692, 132 Pac. 836. See also People v. Davis, 135 Cal. 162, 67 Pac. 59; People v. Sullivan, 144 Cal. 471, 77 Pac. 1000; People v. Spadoni, 11 Cal. App. 216, 104 Pac. 588.

Colorado.—Tollifson v. People, 49 Colo. 219, 221, 112 Pac. 794.

Georgia.—Partee v. State, 67 Ga. 570; Anglin v. State, 14 Ga. App. 566, 81 S. E. 804. See also Schaefer v. State, 93 Ga. 177, 18 S. E. 552.

Iowa.—See State v. Forsythe, 99 Ia. 1, 68 N. W. 446. See also State v. Chauvet, 111 Ia. 687, 83 N. W. 717, 82 Am. St. Rep. 539, 51 L.R.A. 630; State v. Brown, 121 N. W. 513.

Kentucky.—Patterson v. Com. 86 Ky. 313, 99 Ky. 610, 5 S. W. 387, 765, 9 Ky. L. Rep. 481.

Maryland.—See Garland v. State, 112 Md. 83, 21 Ann. Cas. 28, 75 Atl. 631.

Montana.—See Territory v. Mahaffey, 3 Mont. 112.

Nevada.—See State v. Lovelace, 29 Nev. 43, 83 Pac. 330.

New York.—People v. Eaton, 122 App. Div. 706, 107 N. Y. S. 849, *affirmed* without opinion 192 N. Y. 542, 84 N. E. 1116.

Oregon.—State v. Meister, 60 Ore. 469, 120 Pac. 406.

Pennsylvania.—See Ettinger v. Com. 98 Pa. St. 338.

South Dakota.—See State v. Mungeon, 20 S. D. 612, 108 N. W. 552; State v. Kruse, 24 S. D. 174, 123 N. W. 71.

Texas.—Schoenfeldt v. State, 30 Tex. App. 695, 18 S. W. 640; Anderson v. State, 34 Tex. Crim. 546, 31 S. W. 673, 53 Am. St. Rep. 722; Burk v. State, 50 Tex. Crim. 185, 95 S. W. 1064; Bales v. State, 44 S. W. 517; Kenney v. State, 180 S. W. 238. See also

Hinman v. State, 59 Tex. Crim. 29, 127 S. W. 221. *Compare* Bismark v. State, 45 Tex. Crim. 54, 73 S. W. 965.

Utah.—Compare State v. Lay, 38 Utah 143, 110 Pac. 986; State v. Hansen, 40 Utah 418, 122 Pac. 375.

"The law does not authorize the court to require other and additional evidence than the proof of confession to corroborate the testimony of an accomplice, or other than the testimony of an accomplice to accompany proof of a confession." Patterson v. Com. 99 Ky. 610, 5 S. W. 765. "It is argued that as the confession, uncorroborated, itself would not be sufficient to convict, therefore it is not sufficient to prop up the testimony of the accomplice so that the two sorts of testimony together can legally convict. This is a non sequitur. On the contrary, the testimony of the accomplice would be wholly valueless, if it must be corroborated with evidence outside of itself which would legally be ample to convict. The testimony of the accomplice is good, competent evidence, but must be strengthened by other good and competent evidence in order to have sufficient force to carry legal conviction. . . . True, the corroborating circumstances must connect the defendant on trial with the crime; but surely his own free confession is as strong proof to show his own connection therewith as the strongest chain of circumstances, and much stronger than any number of slight links in an attenuated chain." Partee v. State, 67 Ga. 570.

Application of Rule.

In Russell v. State, 97 Ark. 92, 133 S. W. 188, it was held that the testimony of an accomplice could be corroborated by admissions made by the defendant and by circumstances which connected him with the crime charged, and that it was a question for the jury as to the effect to which the corroborative evidence was entitled. In People v. Eaton, 122 App. Div. 706, 107 N. Y. S. 849 (*affirmed* without opinion People v. Eaton, 192 N. Y. 542, 84 N. E. 1116) the court in discussing the evidence required to connect the defendant with the crime charged said: "The provision of the Code (section 399, Code Cr. Proc.) is satisfied, if the testimony of the accomplice is corroborated by such other evidence as tends to connect the defendant with the commission of the crime. When the defendant himself testified that he was connected with the crime, no further corroboration is required." In People v. Watson, 21 Cal. App. 692, 132 Pac. 836, wherein it appeared that the defendant was prosecuted for having caused an abortion it was held that the testimony of his accomplices might be corroborated by his own testimony. The court said: "It is . . . held that the necessary corroboration may be furnished by the defendant's own testimony. (People v. Sullivan, 144 Cal. 471, 77 Pac. 1000.) The testimony of the defendant admitting that he had prescribed for the girl, together with the testimony as to the uses to which the remedies prescribed might be put, and the other evidence referred to, must be said to have a strong tendency, aside from the testimony of the alleged accomplices, to connect the defendant with the commission of the crime charged." In Anglin v. State, 14 Ga. App. 566, 81 S. E. 804, it appeared that the defendant, who was a guard at a penitentiary, was indicted for aiding prisoners to escape. It was held that the confession of the defendant to the effect that "the door that he should have kept locked in order to guard his charges properly, and which he was instructed to keep locked, the key being in his possession, was left open," sufficiently corroborated the testimony of his accomplices who were prisoners and for whose escape the prosecution was had. The court said: "While this corroboration of what the witnesses testified to is slight, yet if the corroborating testimony was sufficient to satisfy the jury that the accomplices had testified truly, the jury were authorized to find a verdict of guilty." In State v. Hennessy, 55 Ia. 299, 7 N. W. 641, an instruction that "admissions made by the defendant to detective Smith, and other admissions made to Moran and to the deputy sheriff, Bathan, are competent evidence, and if you find that they tend to connect the defendant with the commission of the offense, then the accomplices are corroborated," was held to be proper. The court said: "The instruction would have been plainer if it had directed the jury that it was for them to find from the evidence whether such admissions were made. But that there were conversations between these witnesses and the defendant the evidence shows without conflict, and as the jury were required by the instruction to determine the effect of such interviews, and whether they tended to connect the defendant with the commission of the offense, we think the instruction was not misleading."

In Bales v. State (Tex.) 44 S. W. 517, the defendant was prosecuted for incest. He testified on chief that he did not have intercourse with his accomplice, but on cross-examination he said: "I don't think I did such a thing. I might have done so in my sleep." The court in holding that the testimony of the accomplice was sufficiently corroborated, said: "We want no better corroboration of the accomplice, Miss Ella Rose, than the testimony of the appellant. He evidently knew that he had intercourse with his niece, and did not want to admit or deny it directly. We think the testimony of the accomplice

is amply corroborated by that or the testimony of the appellant."

In People v. Zimmerman, 65 Cal. 307, 4 Pac. 20, it was held that an accomplice was corroborated by an admission of the defendant connecting himself with the crime.

In Snoddy v. State, 75 Ala. 23, it was held that the confession of the defendant admitting that he was present when a hog was killed but denying complicity in the act itself sufficiently corroborated the testimony of an accomplice implicating the defendant in the larceny of the hog under a statute prohibiting a conviction for a felony on the testimony of an accomplice unless corroborated by evidence tending to connect the defendant with the commission of the offense. The court said: "The confession of the defendant tended to show his participation in the killing, as well as in the act of carrying off the carcass. He confesses that he was present when the killing took place. This was sufficient to authorize the jury to conclude that he was a participant in the act, in as much as he immediately reaped the fruits of it by aiding in carrying away the carcass. It is no answer to this, that the defendant denied the fact of such participation. The settled and elementary rule as to confessions is, that the whole of what the defendant says on the subject, at the time of making the confession, must be admitted in evidence, and should be construed together by the jury. But all parts of the confession are not entitled to equal weight or credit. The jury may believe that part which inculpates the prisoner, and reject that which is exculpatory, if they see sufficient reason for doing so. What one charged with crime may say in his own favor may be rejected as unworthy of credit, while an admission against interest, or confession of guilt made at the same time, or in the same conversation, may be accepted as very probably true. . . . It was for the jury to determine the weight or degree of credit which should be attached to the confession, and to say whether it satisfactorily corroborated that portion of the statement of the accomplice which connected the defendant with the commission of the offense, which here may be assumed to be the act of killing the animal charge to be stolen."

In Anderson v. State, 34 Tex. Crim. 546, 31 S. W. 673, 53 Am. St. Rep. 722, it was held that the corpus delicti might be proved beyond a reasonable doubt by the testimony of an accomplice aided by the testimony of the defendant. See to the same effect Burk v. State, 50 Tex. Crim. 185, 95 S. W. 1064; Kennedy v. State (Tex.) 180 S. W. 238. In Anderson v. State, supra, it was said: "Was the corpus delicti proven? This must be done beyond a reasonable doubt. We proceed to answer the question upon the hypothesis that James Bagley was an accomplice to the crime. The corpus delicti cannot be proven by the uncorroborated testimony of an accomplice. Nor can the corpus delicti be proven alone by the confession of the accused. Must it be proven independently of the confession? This is not necessary. Can the confession aid, corroborate the testimony of the accomplice, and, when both are taken together, be sufficient to prove the corpus delicti beyond a reasonable doubt? We answer, yes, if certain facts are proved—namely, the body of the deceased, or portions thereof, must be found or seen and identified, so as to establish the fact that the person charged to have been killed . . . came to his death by the culpable act or agency of another person. Now, Bagley swears that he was present when appellant shot and killed Kirk; that on the next morning he assisted (by keeping watch) appellant in concealing the corpse. In this testimony we have all the facts which make up the corpus delicti—Kirk's dead body, and that death was caused by the guilty agency of the accused. But was Bagley an accomplice? Concede this; will not the law permit the prosecution to corroborate him as to this fact, as well as to any other corroborative fact? If not, why not? No reason can be given in support of the negative. We are not left in the dark upon this question. People v. Jaehne, 103 N. Y. 182; Carroll v. People, 136 Ill. 456; 3 Greenl. on Ev.; 1 Bish. Crim. Proc. sec. 1071. Bagley testified to facts which, if true, establish the corpus delicti beyond any sort of doubt. Was he corroborated? He was. How? By the confession of the appellant, 'that he had killed Henry Kirk.' Now, then, this evidence most clearly proves the corpus delicti in the manner required by statute, and there was no issue on this question except the credibility of Bagley and the witnesses who swore to the confession."

Patterson v. Com. 86 Ky. 313, 99 Ky. 610, 5 S. W. 387, 765, was decided under a statute providing that a confession of a defendant, unless made in open court, would not warrant a conviction, unless accompanied by proof that an offense was committed, and another statute providing that "a conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence tending to connect the defendant with the commission of the offense." The court in disposing of a contention that the lower court erred in failing to instruct the jury that an accomplice's evidence could not furnish the corroboration necessary to the support of evidence of an extra-judicial confession said: "As the law does not authorize the court to require other and additional evidence than the proof of confession to corroborate the testimony of an accomplice, or other than

the testimony of an accomplice to accompany proof of a confession, we think the court properly refused to give the instruction referred to."

But in State v. Hansen, 40 Utah 418, 122 Pac. 375, it was held that in a prosecution for adultery a confession made by the defendant could not be considered as a corroboration of the accomplice's testimony where the confession related to an entirely separate and distinct transaction from the one for which the defendant was tried and convicted.

ALABAMA CITY, GADSEN AND ATTALLA RAILWAY COMPANY

v.

CITY OF GADSEN.

Alabama Supreme Court—December 4, 1913.

185 Ala. 263; 64 So. 91.

Municipal Corporations — Warrants — Agreement for Interest.

A resolution of the mayor and aldermen that interest-bearing warrants be issued to plaintiff lighting company whose claims were past due, which was entered in the minutes and carried into effect by the clerk's interlineation of the provision for interest in the then outstanding warrants, is to be construed as an agreement to pay interest in consideration of plaintiff's continuing to furnish light to the city.

[See note at end of this case.]

Authorization of Warrants — Future Indebtedness.

A resolution of the mayor and aldermen that interest-bearing warrants "be issued covering the amounts due" plaintiff applies only to warrants then due and outstanding, and not to future indebtednesses.

Same.

Where a resolution of the mayor and aldermen authorizes the clerk to issue interest-bearing warrants to plaintiff covering the amounts then due only, the action of the clerk in issuing interest-bearing warrants for debts subsequently accruing does not bind the city.

Municipal Contracts — Necessity of Record.

An informal agreement by the mayor and aldermen that interest should be paid on plaintiff's claims, which was not entered in the minutes of the board for fear other creditors would demand interest, is of no effect.

Same.

The law requires a record of the proceedings of the mayor and aldermen, so that those acting under it may have no occasion to look beyond it, to avoid leaving such proceedings to be proved by parol evidence, and to make certain that rights shall not depend on the mere recollection of witnesses.

Interest on Warrants.

A payment to the holder of city warrants having been accepted as a payment of the principal, with the understanding that the right to more interest than paid should be settled in court, the question whether the amount so paid should be applied first to the payment of interest was eliminated from the case.

[See note at end of this case.]

Same.

Where a resolution of the mayor and aldermen provided for the issuance of interest-bearing warrants to plaintiff, whose claims were past due, which was carried into effect by the clerk's interlineation of the interest provision in outstanding warrants, plaintiff was entitled to interest for the time payment was thereafter further deferred.

[See note at end of this case.]

Same.

In the absence of constitutional or statutory inhibition, municipal corporations may contract for the payment of interest on warrants drawn to cover ordinary debts.

[See note at end of this case.]

Same.

Code 1907, § 1205, providing that, if no interest is stipulated to be paid on municipal warrants, they shall draw the legal rate after presentation, recognizes a municipality's power to contract to pay interest, but it did not require further presentation of warrants upon which the city agreed to pay interest, upon demand made prior to the enactment of the statute.

[See note at end of this case.]

Same.

Ordinarily city warrants draw interest, if at all, only after presentation to the disbursing officer and denial of payment for want of funds, since a municipal corporation, unlike a private person, is not bound to seek its creditors.

[See note at end of this case.]

Same.

Where a city being confessedly unable to pay plaintiff's warrants, after negotiations with plaintiff agreed to pay interest so as to effect a postponement of payment, such negotiations and agreement were equivalent to a presentation for payment.

[See note at end of this case.]

Interest — Recovery Separate from Principal.

The general rule is that when the principal subject of a claim is extinguished by the act of the plaintiff, or of the parties acting in unison, all its incidents go with it, which rule is applicable where interest is awarded in the way of damages; it being recoverable only in an action for the principal and not constituting a distinct claim.

Same.

Where the payment of interest is provided for by contract, it constitutes an integral part

of the debt, as much so as the principal debt itself, and an independent action for its recovery may be maintained notwithstanding payment of the principal as such has been made and accepted.

Accord and Satisfaction — City Warrants.

Evidence, in action to recover interest on city warrants, the principal and part of the interest on which had been paid, held insufficient to establish an accord and satisfaction.

Acceptance in Full Settlement.

To constitute an accord and satisfaction the sum less than the amount actually due must have been accepted in full settlement of the disputed claim.

Municipal Corporations — Presentation of Claims — Necessity.

Code 1907, § 1191, providing that claims against a municipality must be presented within a certain time or they shall be barred, is a statute of nonclaim, and presentation within its provision is not prerequisite to the bringing of suit.

Same.

A municipality cannot by ordinance impose on its creditors the duty of presentation of claims as a condition to the bringing of suit.

Interest on Warrants.

Where no date for payment of interest-bearing city warrants was stipulated, interest on the interest due should be allowed from the date of bringing suit, which event fixed the time when the interest became due and payable.

[See note at end of this case.]

Appeal from City Court of Gadsden: DISQUE, Judge.

Assumpsit to recover interest on city warrants. Alabama City, Gadsden and Attalla Railway Company, plaintiff, and City of Gadsden, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. REVERSED.

O. R. Hood for appellant.
M. C. Sivley for appellee.

[266] SAYRE, J.—Appellant company had been furnishing light to the city of Gadsden under a contract calling for monthly settlements, and appellee had fallen far behind in making payment. Appellant demanding its money, and appellee being unable to pay, negotiation between them resulted in the adoption of a resolution by the board of mayor and aldermen on October 1, 1906, as follows: "Resolved by the mayor and board of aldermen of the city of Gadsden that warrants be issued covering the amounts due, bearing interest at the rate of eight per cent. per annum, and the clerk be instructed to issue said warrants." The resolution was shown by the minutes of the board, and was carried into effect, so far as concerned the issue of warrants, by the clerk's interlineation of words into then outstanding warrants which imported that they were to bear interest. Viewed in connection with the evidence as to the previous contention between the parties, we think this resolution cannot be fairly construed otherwise than as an agreement on the part of the city, on the consideration that appellant would continue to carry the warrants then due and continue to furnish light under its contract, to pay interest on warrants then due and outstanding. We find no sufficient justification in the language employed for an interpretation which would bring future indebtedness within the scope and influence of the resolution. For a time the clerk issued warrants for subsequently accruing claims on account of light furnished which purported to bear interest. But this feature of the later warrants created no obligation on the city for the reason that in wording them as interest bearing [267] the clerk acted without authority. True, there was testimony going to show an informal agreement by the members of the board of aldermen of later date that interest should be paid; but this agreement found no place upon the record of the proceedings of the board of aldermen. In fact, the understanding of the parties and the direction of the board was that the so-called agreement should not be spread upon the minutes, this because it was supposed that publicity in the matter would stimulate other creditors of the city to demand interest on their deferred claims and because there was an appreciation of the consideration that all creditors in like case were entitled to like treatment. This manner of dealing with the so-called agreement rendered it null and of no effect. "The law requires a record to the end that those who may be called to act under it may have no occasion to look beyond it; to avoid the mischief of leaving municipal corporate action to be proved by parol evidence; to make it certain that rights which have accrued under such actions shall not be destroyed or affected by the always fallible and often wholly unreliable recollection of witnesses, however truthful and intelligent they may be."—2 McQuillan, Munn. Corp. p. 1358. This is the doctrine of our cases.—Perryman v. Greenville, 51 Ala. 507; Greenville v. Greenville Water Works Co., 125 Ala. 625, 27 So. 764.

On January 1, 1909, a number of warrants in favor of appellant, including those covered by the resolution of October 1, 1906, and as well others of later issue, were presented to the city treasurer for payment; but payment was denied for lack of funds. On December 31, 1909, appellant received payment of the principal of all these warrants with interest

from the date of presentation to the treasurer, such interest being paid under authority of section 1205 of the Code of 1907 (Act [268] of Aug. 13, 1907, p. 820, § 54), which provides that, "if no interest is stipulated to be paid on warrants drawn upon the treasurer and not paid for want of funds, then the legal rate shall be allowed from the time of presentation," etc., the denial of interest for the antecedent time being based, as the brief for appellee would seem to indicate, upon the theory that the municipality was without authority to contract for the payment of interest.

This action was brought to recover a balance due of interest claimed. The evidence shows very clearly that appellant (plaintiff below) has received the principal of the debt in controversy and received the same as a payment of the principal with the understanding and purpose that the contention as to whether appellee was further liable on account of interest should be settled by a resort to the courts, thus eliminating all question as to whether the amount so received should be applied first to the payment of interest.

Our judgment is that appellant was also entitled to interest upon the indebtedness covered by the resolution-contract of October 1, 1906, to the date of the payment made, less of course, any interest then paid. In view of the city's inability to meet its obligation to appellant at the time, the meaning of the contract was that appellant should receive interest during the time payment should be further deferred.

Municipal corporations, in the absence of constitutional or statutory inhibition, may contract for the payment of interest on their warrants drawn to cover ordinary debts.—2 Am. & Eng. Enc. of Law, (2d ed.) 26; State v. Stout, 43 Wash. 501, 86 Pac. 848, 10 Ann. Cas. 208 note. Section 1205 of the Code, to which we have referred, recognizes this law. This section did not, however, operate to require further presentation of the [269] claim upon the indebtedness affected by the resolution-contract of October 1, 1906. Ordinarily, city warrants draw interest, if at all, after they have been presented to the disbursing officer and payment denied for want of funds, this because a municipal corporation, unlike a private person, is not bound to seek its creditors.—10 Ann. Cas. supra. The negotiation and agreement between the parties to this case, had in view of the city's confessed inability to pay, and with the intent and effect of postponing the date of payment, was the equivalent of a presentation within the rule of the authorities. It established between the parties that status which exists between private persons standing in the relation of debtor and creditor plus an express agreement to pay interest.

Appellee insists that appellant's suit should not be entertained for the reason that it seeks to recover interest only; that the right to recover interest, which is a mere incident to and increment of the principal debt, was lost when payment of the principal was accepted. The general rule is that when the principal subject of a claim is extinguished by the act of the plaintiff, or of the parties acting in unison, all its incidents go with it. Such is the rule where by statute or the practice of the courts interest is awarded in the way of damages. In such case it does not constitute a distinct claim and can only be recovered in an action for the principal; but, where the payment of interest is provided for by contract, it constitutes an integral part of the debt, as much so as the principal debt itself, and an independent action for its recovery may be sustained notwithstanding payment of the principal as such has been made and accepted.—22 Cyc. 1571 et seq. Our cases hold nothing to the contrary. In Wescott v. Waller, 47 Ala. 492, payment of the principal by a debtor of doubtful solvency was made and received in full satisfaction. [270] That was held to be a good accord and satisfaction. In Crowder v. Red Mountain Min. Co. 127 Ala. 254, 29 So. 847, the pertinent ruling was that a contract void as to the principal debt was void also as to any interest accruing on such principal. Other cases cited by appellee to this point may be discriminated from the case at hand by the fact that in them there was no express contract to pay interest.

Appellee contends that there was an accord and satisfaction when appellant accepted the principal of its debt and such increment of interest as the appellee was willing to pay. This contention presents an issue of fact, depending upon the intent with which the payment was made and received, and must upon the testimony be resolved in favor of appellant. The board of mayor and aldermen had determined to pay the amount which was subsequently paid upon condition that appellant would receive same in full of its claim. Appellant did not agree. The matter was then referred to a committee consisting of the mayor and some members of the aldermanic board, which committee was raised to disburse the funds secured by an issue of bonds to pay the city's floating debt, and had power to act in the premises. This committee authorized the mayor to settle appellant's claim as the board of mayor and aldermen had proposed. But in fact appellant settled with the distinct understanding on its part that it would not yield its claim to the interest here sued for and would seek to determine its right thereto in an action at law. Appellee seems to base its contention for its plea of accord and satisfaction on the idea that the mayor, acting for the committee,

which in turn was acting for the board of the mayor and aldermen, had no authority to make payment except upon the condition that it should be accepted in full of appellant's claim. But the question of the mayor's authority is not involved. [271] The question is upon what understanding appellant, assuming of course that it acted in good faith and without misleading appellee's agent or agents, received the payment, and the proof is as we have stated it. On these facts there was no accord and satisfaction. To constitute an accord and satisfaction the sum less than the amount actually due must have been accepted by appellant in full settlement of its disputed claim.—Hodges v. Tennessee Implement Co. 123 Ala. 572, 26 So. 490.

We have decided that section 1191 of the Code of 1907 is a statute of nonclaim, and that presentation within its provision is not prerequisite to the bringing of a suit.—Anderson v. Birmingham, 177 Ala. 302, 58 So. 256. It hardly seems necessary to say that the municipality could not by ordinance impose the duty of prior presentation upon creditors of the city. In sustaining the demurrer to the complaint on the ground that it failed to aver a presentation of the claim to the city council or the clerk before suit brought, if that was the ground upon which the ruling proceeded, the court erred.

Interest on the interest due, in the circumstances of this case, no date for the payment of the deferred warrants having been stipulated, should be allowed, it seems, from the date of the bringing of the suit. That event fixed the time when interest under the contract became due and payable.—Ragland v. Wood, 71 Ala. 145, 46 Am. Rep. 305; Stickney v. Moore, 108 Ala. 590, 19 So. 76.

In order that a judgment may be rendered in accordance with our views, the evidence remaining the same, the judgment will be reversed, the cause remanded.

Reversed and remanded.

McClellan, Mayfield and Somerville, JJ., concur.

NOTE.

Interest on City Warrants.

The rule laid down in State v. Stout, 43 Wash. 501, 10 Ann. Cas. 208, that a municipality may by ordinance or contract provide for the payment of interest on its warrants, finds support in the reported case and in the recent case of Merchants' Loan, etc. Co. v. Chicago, 264 Ill. 76, 105 N. E. 726, *affirming* 182 Ill. App. 298. In that case it appeared that a city passed an ordinance requiring property owners to advance money for the construction of water mains, and authorizing the issuance of certificates or warrants providing for the payment of interest at five per cent, if at the expiration of two years the money loaned was not repaid. The plaintiff who held such a certificate sued on it and was permitted to recover the interest. The court said: "Under the statutes and the constant practice of government officials, it is manifest that to require the city to pay the interest in accordance with the terms of its express agreement is not contrary to public policy." See also Chicago v. Hurford, 238 Ill. 552, 87 N. E. 325.

Where there is a statutory provision allowing interest on city warrants it has been held that a city is liable on its interest bearing warrants. Thus in Cogswell v. Escanaba, 176 Mich. 156, 142 N. W. 549, wherein it appeared that a city purchased certain voting machines and gave an interest-bearing certificate of indebtedness the court held that the holder of the certificate was entitled to interest resting its decision on Darling v Mainstee, 166 Mich. 35, 131 N. W. 450, wherein it was remarked that a statute existed in Michigan authorizing the purchase of voting machines and the issuance of certificates of indebtedness providing for the payment of interest. In Drexel State Bank v. La Moure, 207 Fed. 702, it appeared that by statute in North Dakota, a city is authorized to issue special warrants in connection with the construction of public improvements, bearing interest at seven per cent payable at maturity. And in Chicago v. People, 116 Ill. App. 564, it was held that a municipality was liable for interest on vouchers issued for funds used in local improvements.

The recent decisions as to the right to recover interest on city warrants in the absence of statutory regulation or agreement hold that owners of city warrants or certificates are not entitled to interest. Thus in University State Bank v. Bremerton, 86 Wash. 261, 150 Pac. 439, it was held that a warrant expressly stipulating on its face that it was a noninterest-bearing instrument, did not carry interest. The court said: "Plaintiff contends also that the court erred in not allowing interest upon the warrants. Its warrant expressly stipulates that it is a noninterest-bearing instrument. This being true, we fail to see that the trial court committed any error in this regard." Substantially to the same effect was Weidner v. Reading, 20 Pa. Dist. 721. And in State v. New Orleans, 129 La. 537, 56 So. 433, it was held that the City of New Orleans, acting as an agent or trustee in managing the affairs of the metropolitan police board was not liable for the payment of interest on warrants issued by that board, it being merely an agency of the state. But in Barber Asphalt Paving Co. v. Chicago, 139 Ill. App. 121, it was held that a city was liable for the payment of interest after maturity where the city refused

payment of certain vouchers at their maturity. It was said: "Municipalities become liable for interest in three cases—where there is an express agreement, where money has been wrongfully obtained by them and where money is illegally withheld by them."

In Heuermann v. Church (Tex.) 150 S. W. 212, wherein it appeared that a provision in a city charter forbade the issuance of warrants bearing interest, an arrangement entered into by the city with a bank, to protect the city's credit by furnishing money to meet warrants which the city had not sufficient funds to pay, for which the bank received warrants with the understanding that they were to bear interest, was held not to be enforceable because of the prohibition in the city charter. The court said: "The city's charter (section 112), provides for the issuance of warrants on the city treasurer to creditors of the city, expressly stating, however: 'And such warrants shall not bear interest.' Section 115 reads: 'City warrants shall not bear interest and shall not be receivable for taxes,' etc. These provisions amount, we think, to an express direction against the payment by the city of interest on warrants issued by it." But in San Antonio v. Alamo Nat. Bank (Tex.) 155 S. W. 620, it was held under a statute providing that all judgments should bear interest, that a judgment on city warrants bore interest though by the terms of an ordinance the warrants did not, as the obligation on the warrants became merged in the judgment.

In Merchants' Loan, etc. Co. v. Chicago, 264 Ill. 76, 105 N. E. 726, a certificate or warrant stipulating for the payment of interest after two years was held to govern the time from which the interest commenced to run. In Drexel State Bank v. La Moure, 207 Fed. 702, wherein it appeared that the City of La Moure under statutory authorization issued certain special warrants for the purpose of making certain public improvements, it was held that the warrants bore interest from their maturity and that presentation for payment was not necessary to start the running of interest. While the reported case recognizes the ordinary rule that interest on city warrants commences to run from the time when presentation to the disbursing officer is made and payment is denied, it appears that actual presentation was unnecessary in that case because of the city's confessed inability to pay as evidenced by the negotiations between the parties.

HUTTON
v.
STATES ACCIDENT INSURANCE COMPANY.

Illinois Supreme Court—February 17, 1915.

267 Ill. 267; 108 N. E. 296.

Accident Insurance — Injury Received while Fighting.

Where an accident policy insures against an injury effected exclusively by accidental means, insured, who assaulted a third person, and was attacked and knocked down, breaking his leg, cannot recover under the policy, though insured intended by a single blow to render the third person unable to defend himself, for an effect which is the natural and probable consequence of an act or a course of action is not produced by "accidental means."

[See note at end of this case.]

Appeal from Appellate Court, Fourth District.

Action on accident insurance policy. John W. Hutton, plaintiff, and States Accident Insurance Company, defendant. Judgment for plaintiff in Circuit Court, Jasper county: Rose, Judge. Judgment affirmed by Appellate Court. Defendant appeals. The facts are stated in the opinion. Reversed.

Fithian & Kasserman and *McKenzie Cleland* for appellant.

William B. Wright for appellee.

[267] Cooke, J.—The appellee, John W. Hutton, obtained a judgment in the circuit court of Jasper county against the appellant, the States Accident Insurance Company, for $500, which was affirmed by the Appellate Court for the Fourth District. A certificate of importance having been granted, this appeal has been perfected from the judgment of the Appellate Court.

The suit was brought upon a policy of accident insurance issued by appellant, which insured the appellee against "injuries effected exclusively by external, violent and accidental means." The record discloses that at the close of appellee's case, and again at the close of all the evidence, a peremptory instruction was offered to find the issues for [268] the appellant, which was refused in each instance. In the Appellate Court this action of the court was assigned for error, and the errors there assigned have been reassigned here. While in the argument of appellant this action of the court is not specifically referred to, the effect of the argument

made is that there was no evidence tending to support appellee's claim or to disclose a cause of action, and this is the only question of law presented upon this appeal. Counsel for appellee in his brief states: "If this case has any standing in the Supreme Court it is upon the theory that there is no evidence in the record on behalf of plaintiff which, standing alone and undisputed, would support the verdict of the jury; in other words, if it is rightfully here it is because the court refused, at the close of plaintiff's evidence and at the close of all the evidence, to instruct the jury to find the issues for the defendant," and his argument, in effect, is directed to upholding the action of the court in refusing the peremptory instructions. We shall therefore consider the case as though this action of the court was specifically mentioned by appellant as the ground relied upon for reversal.

There was practically no conflict in the testimony of the various witnesses as to the facts. According to the testimony of appellee, in which the facts are presented in as favorable light as by any other witness, there had been some little difficulty between him and one John Huddlestun prior to November 9, 1911. On that evening he and Huddlestun had a conversation in the city of Newton in reference to their difficulty, after which appellee went to his office. Having finished his work there he went to a restaurant in that city to get his supper. As he entered the restaurant from the west he saw Huddlestun sitting on a stool on the south side of the room, at a lunch counter. Without saying a word to Huddlestun appellee walked up behind him and struck him a blow with his fist on the side of the face or head, intending, as he states, to hit him so hard that [269] "he wouldn't get up and begin it all over." The blow did not have the desired effect. Huddlestun immediately arose from his seat, whereupon the appellee struck at him again. Huddlestun then pushed or knocked appellee down, breaking his leg. It is uncertain from the testimony of appellee whether his leg was broken in the fall or whether it was twisted and broken before he fell, but in any event it was broken, according to the undisputed testimony, while he was engaged in the fight with Huddlestun.

Appellant contends that where an accident policy insures against an injury effected exclusively by accidental means there can be no recovery where such injury is the result of the voluntary act of the insured although such result may be entirely unexpected and undesigned, and insists that the evidence does not even tend to prove that the injury was caused by accidental means, inasmuch as appellee had voluntarily engaged in a fight, of which the injury received was but the natural and probable consequence. The contention of appellee is based upon the proposition that his act in assaulting Huddlestun was attended with an unexpected and unusual result,—that is, the breaking of his leg,—and one which could not have been reasonably anticipated and which he did not intend to produce. We are of the opinion that the position of appellee is not tenable. Where one voluntarily and deliberately engages in a fight or brawl and places another in a position where he, too, must fight to defend himself, it is a natural result, and one known to all sensible men as likely to follow, that one or both of the combatants will receive more or less serious injury. As to whether the assailant or the one assailed would be the more likely to be injured would depend upon the comparative strength and skill of the antagonists as well as upon the fortunes of the combat. It is shown in this case that both appellee and Huddlestun were large, powerful men, possessed of more than average physical strength. While appellee testifies that it was his intention to render Huddlestun [270] incapable of defending himself by a single blow, he was bound to take notice of the fact that he might not be able to accomplish that design, and that if he then persisted in the attack the chances were largely in favor of Huddlestun exercising the right to defend himself by all necessary means. Appellee persisted in the assault upon Huddlestun after having failed to accomplish his purpose in striking the first blow and continued the same up until the instant that his leg was broken. In the meantime Huddlestun was defending himself solely by the use of his arms and fists. Appellee was a practicing physician and surgeon, thirty-five years of age at the time of the assault, and a man of intelligence and experience. He was bound to know that one of the natural and probable consequences of voluntarily engaging in an assault under such circumstances was that he might be injured, although he could not, of course, foresee the exact form of the injury he might receive, or, indeed, be able to know certainly that he would be injured at all. Such being true and the assault committed upon Huddlestun being the deliberate and voluntary act of appellee, the injury which he received as a result cannot be said to have been caused by accidental means.

An effect which is the natural and probable consequence of an act or course of action cannot be said to be produced by accidental means. (1 Cye. 248.) In Fidelity, etc. Co. v. Stacey, 143 Fed. 271, 6 Ann. Cas. 955, 74 C. C. A. 409, 5 L.R.A.(N.S.) 657, suit was brought upon a policy which insured against disability or death resulting, directly and independently of all other causes, from bodily injuries sustained through external, violent and accidental means. In that case the in-

sured committed an assault upon one Porter, striking him in the face with his fist. As a result of the blow there was an abrasion of the skin on the hand of the insured which afterwards became infected and resulted in his death. It was there held that an injury received in this way was not by accidental means within the meaning of the policy.

[271] In Taliaferro v. Travelers' Protective Assoc. 80 Fed. 368, 49 U. S. App. 275, 25 C. C. A. 494, it was held that the death of the insured was not accidental where it appeared that in an altercation with another he was the first to draw his pistol, and, after stating that he "must have revenge" and warning the other "to put himself in shape," struck him in the face with his pistol, whereupon the other drew his own pistol and shot the insured, causing his death. In passing upon the question the court there said that "the deceased voluntarily engaged in an encounter with deadly weapons, the result of which was not an unlikely result but was such as any reasonable person might have foreseen," and that if a man should do an act from which it was possible death might not result but of which death would be the naturally expected result, such death could not be said to be accidental.

In Lovelace v. Travelers' Protective Assoc. 126 Mo. 104, 28 S. W. 877, 47 Am. St. Rep. 638, 30 L.R.A. 209, Lovelace, the insured, attempted to eject a man who was drunken and boisterous from the office of a hotel. In doing this he used no other means than his hands, and while making the attempt the other drew a pistol and shot him, causing his death. The court there held that the death of Lovelace was an accident and not a risk voluntarily assumed, inasmuch as he had made the attempt to eject the other by force from the office of the hotel without knowing that the other person was armed. In this case a different question would be presented if Huddlestun had resisted the attack on appellee by the use of a deadly weapon, but instead of that it is conclusively shown that the assault was met in kind and that he used no more than the necessary means which would have been employed by any reasonable man in his defense.

In Prudential Casualty Co. v. Curry, 10 Cal. App. 642, 65 So. 852, it was held that where the insured in an accident policy, while armed with a gun, brought on a difficulty with a third person also armed with a gun, with knowledge of that fact, and the third person shot the insured in self-defense, his [272] death was not occasioned by accidental means, for an accident may be said to be an unforeseen or unexpected event of which the insured's own misconduct is not the natural and proximate cause, and hence a result ordinarily and naturally flowing from the conduct of the insured cannot be said to be accidental even when he may not have foreseen the consequence, and the happening of an event, to be termed an accident, must not only be unforeseen but without the design and aid of the insured.

The above cases, while not involving the identical facts here presented, lay down the principle which must govern. Applying the rules there announced, we must hold that the evidence on behalf of appellee does not tend to show that the injury sustained by appellee was caused by accidental means, but does show that it was the natural and probable result of his voluntary act in making the assault upon Huddlestun.

The court erred in refusing to give the peremptory instructions. For this error the judgments of the Appellate and circuit courts are reversed and the cause remanded to the circuit court.

Reversed and remanded.

Farmer, J., dissenting.

Rehearing denied April 7, 1915.

NOTE.

Right to Recover under Accident Insurance Policy for Injuries Received while Fighting.

Generally.

If the insured in an accident insurance policy voluntarily and deliberately engages in a fight as the aggressor, and receives injuries which are the natural and probable consequence of his act, there can be no recovery under the policy as the injuries cannot be said to be produced by accidental means. Taliaferro v. Travelers' Protective Assoc. 80 Fed. 368, 49 U. S. App. 275, 25 C. C. A. 494; Fidelity, etc. Co. v. Stacey, 143 Fed. 271, 6 Ann. Cas. 955, 74 C. C. A. 409, 5 L.R.A. (N.S.) 65, *reversing* 137 Fed. 1012; Prudential Casualty Co. v. Curry, 10 Ala. App. 642, 65 So. 852; Gaines v. Fidelity, etc. Co. 111 App. Div. 386, 97 N. Y. S. 836, *affirmed* 188 N. Y. 411, 11 Ann. Cas. 71, 81 N. E. 169; Fidelity, etc. Co. v. Smith, 31 Tex. Civ. App. 111, 71 S. W. 391. And see the reported Case. In Fidelity, etc. Co. v. Stacey, supra, it appeared that the insured committed an assault and received an abrasion of the skin of one of his fingers. Subsequently the finger became infected, and blood poisoning resulted, from the effect of which he died shortly thereafter. The policy insured "against disability or death resulting directly, and independently of all other causes, from bodily injuries sustained through external, violent, and accidental means." The court said: "Everything connected with the transaction clearly indicates that the insured intended to do exactly

what he did on that occasion. Therefore the injury which he received at the time was the natural and logical result of an intentional act on his part. He was a man of intelligence, and it must be presumed that he knew that in making an assault with his fist in the manner described he would probably sustain more or less injury to himself. . . . . In order to enable one to recover in an action based on an accident policy on account of accidental injury, it must be shown that the insured would be entitled to recover for the original injury; and unless it appears that such original injury was due to an accident then known, or the results flowing therefrom could be imputed to the result of an accident, recovery could not be had. All other results are accidental causes disconnected with the original cause, and cannot be said to flow therefrom. . . . . In view of the facts in this case we are of opinion that the injury received in the first instance was not due to an accident, and therefore the results which flowed therefrom cannot be said to be due to an accidental cause. Such being the case, the court below should have instructed the jury that there was not sufficient legal evidence upon which to base a finding in favor of the defendants in error, and should have directed them to return a verdict in favor of the plaintiff in error. The court erred in refusing to instruct the jury to that effect." In Taliaferro v. Travelers' Protective Assoc. 80 Fed. 368, 49 U. S. App. 275, 25 C. C. A. 494, the sole question involved was whether the death of the insured was occasioned by accident, within the meaning of that term as used in the policy. It appeared that the deceased had been the aggressor in an altercation and was shot and killed after he had drawn his gun and struck his adversary in the face with it. The court said: "Where a person thus invites another to a deadly encounter, and does so voluntarily, his death, if he sustains a mortal wound, cannot be regarded as accidental by any definition of that term which has heretofore been adopted. It might as well be claimed that death is accidental when a man intentionally throws himself across a railroad track in front of an approaching train, or leaps from a high precipice, or swallows a deadly poison. It is possible that death may not result from either of these acts, but death is the result which would naturally be expected, and, if such is the result, it is not accidental." In Prudential Casualty Co. v. Curry, 10 Ala. App. 642, 65 So. 852, commented on and approved in the reported case, the court said: "In this case it appears from the undisputed facts that the insured, ... was at fault in bringing on the difficulty that resulted in his death, and that he accosted T. who was passing along the public road, and whom he knew to be armed with a deadly weapon, profanely challenging his relation with 'some women' and presenting a Winchester rifle at T. 'cocked and ready to shoot Teague.' That T. should thereupon defend himself by shooting and mortally wounding [insured] with the rifle gun he carried in plain view could not be said to be unforeseen. . . . . The risk of death having been voluntarily assumed under these circumstances by the insured . . . . and death having been produced by those means which were reasonably calculated to cause it, his death cannot be said to have been an accident under the terms of the policy insuring against death through accidental means; nor can it be said to have been produced through accidental means." In Fidelity, etc. Co. v. Smith, 31 Tex. Civ. App. 111, 71 S. W. 391, it appeared that the insured made an unprovoked assault on one B. and was injured by the latter in defending himself from the assault. The court said: "The testimony clearly shows an unjustifiable assault by the plaintiff upon the witness B. It is true that B. stated that he did not intend to injure the plaintiff, and that the injuries inflicted were accidental, but on cross-examination he said: 'I struck the plaintiff in the scuffle, and that was all there was to it. He only threw one chair at me. I didn't do anything after that. He was struck about that time by myself to protect myself. I struck him to keep him from making any further advances on me, and that in self-defense.' The language quoted shows that B. struck the plaintiff for the purpose of protecting himself; and while he may not have intended to inflict all the injury that was inflicted, his striking the plaintiff was by design and not accidental." In Gaines v. Fidelity, etc. Co. 111 App. Div. 386, 97 N. Y. S. 36, *affirmed* 188 N. Y. 411, 11 Ann. Cas. 71, 81 N. E. 169, it was held that there was sufficient testimony to justify the conclusion that the deceased came to his death as the result of an assault committed by him on the person of one C., that the shooting by C. which followed was the direct result of the assault, and that the injuries inflicted on the insured, which caused his death, were intentional and not accidental, thereby depriving the beneficiary of any right to recover under the policy.

If, however, an insured person engages in a fight and suffers unforeseen or unexpected injuries there may be a recovery under a policy insuring against injuries produced by accidental means. Travelers' Ins. Co. v. Wyness, 107 Ga. 584, 34 S. E. 113; Lovelace v. Travelers' Protective Assoc. 126 Mo. 104, 28 S. W. 877, 47 Am. St. Rep. 638, 30 L.R.A. 209; Union Accident Co. v. Willis, 44 Okla. 578, 145 Pac. 812, L.R.A.1915D 358; Union Casualty, etc. Co. v. Harroll, 98 Tenn. 591, 40

S. W. 1080, 60 Am. St. Rep. 873. Thus in Lovelace v. Travelers' Protective Assoc. supra, commented on in the reported case, it appeared that the insured was shot and killed while attempting to eject the slayer from the office of a hotel. In deciding whether the occurrence was an "accident" within the terms of the policy sued on, the court made a distinction between the natural and the unforseen risks assumed by the insured, and said: "It may be assumed that, by his course of conduct, he voluntarily assumed the risks of a fight. But there is nothing in the circumstances to show that he voluntarily assumed the risk of death. We consider his killing an 'accident,' in the popular and ordinary sense in which that word is generally used. It certainly was an accident, so far as he was concerned. We do not doubt that such should be the construction given to the word in the contract in suit; and that, in so concluding, we give effect to the true purpose and intent of the parties to the document." In Travelers' Ins. Co. v. Wyness, 107 Ga. 584, 34 S. E. 113, it appeared that the insured held a policy insuring him against "bodily injuries effected . . . through external, violent, and accidental means." The policy stipulated that it did not cover "intentional injuries inflicted by the insured or any other person," etc. After the death of the insured his wife brought suit on the policy; and the defense was that the insured came to his death as the result of intentional injury or injuries inflicted on him by one K. by means of a pistol. According to the testimony the insured and another were in a bar room, engaged in a discussion touching their relative physical prowess. K. entered, inquired as to the discussion and flourished a pistol. The insured exclaimed "Put up that damned thing; it is liable to go off," and grabbed it. K. attempted to retain his hold on it, and a scuffle for its possession ensued, during which a bystander ran up and seized K.'s arm. Just then the pistol was discharged inflicting the fatal wound. The court said: "It is well settled by the great weight of authority that where one person injures another, and the injury is not the result of misconduct or participation of the injured party, but is unforeseen by him, it is, as to him, accidental, although it may be inflicted intentionally by the other party." In Union Accident Co. v. Willis, 44 Okla. 578, 145 Pac. 812, L.R.A.1915D 358, it appeared that the policy provided for payment in the event that the insured should sustain personal bodily injury, effected directly and independently from all other causes through external, violent and purely accidental means. It was further provided that no indemnity should be paid for injuries intentionally inflicted on the insured by himself or some other person. The insured was knocked down by a blow in the face struck by another individual, and sustained a fracture of the skull, resulting in his death. The testimony as to the origin of the trouble and as to who was the aggressor was conflicting. The court held that the death was accidental as to the insured and said: "The result was unforeseen and unusual, and not such as would ordinarily follow a blow with the fist. It was not the logical result of a deliberate act, and could not reasonably have been anticipated. . . . It was the result of fortuitous circumstances." In Union Casualty, etc. Co. v. Harroll, 98 Tenn. 591, 40 S. W. 1080, 60 Am. St. Rep. 873, it was held that the death of the insured would be accidental although it appeared that he was advancing on his adversary in a threatening manner at the time the latter shot him, if the deceased did not know at the time that his adversary was armed with a deadly weapon. And for the same reason it was held that he had not voluntarily exposed himself to unnecessary danger, so as to defeat a recovery under the policy sued on. In Collins v. Fidelity, etc. Co. 63 Mo. App. 253, the court said: "An injury not anticipated and not naturally to be expected as a probable result, by the insured, though intentionally inflicted by another, is an accidental injury within the terms of the policy." See to the same effect Accident Ins. Co. v. Bennett, 90 Tenn. 256, 16 S. W. 723, 25 Am. St. Rep. 685.

For cases discussing generally the construction of a provision in an accident insurance relating to injuries resulting from the "intentional act" of the insured or another see the note to Ryan v. Continental Casualty Co. Ann. Cas. 1914C 1234.

If the insured is defending himself or is retreating from the attack of an adversary and receives an unforeseen or unintentional injury there may be a recovery under a policy insuring against injuries produced by accidental means. Phelan v. Travelers' Ins. Co. 38 Mo. App. 640; Myers v. Maryland Casualty Co. 123 Mo. App. 682, 101 S. W. 124; Erb v. Commonwealth Mut. Acc. Co. 232 Pa. St. 215, 81 Atl. 207. See also Newsome v. Travelers' Ins. Co. 143 Ga. 785, 85 S. E. 1035. See also Allen v. Travelers' Protective Assoc. 168 Ia. 217, 143 N. W. 574. In Phelan v. Travelers' Ins. Co. supra, it appeared that the plaintiff was injured while defending himself from an unexpected attack. The court said: "The defendant is unquestionably liable unless it escapes by reason of two of the conditions of the contract of insurance, or by either of such conditions. The first of these conditions is, that the injury shall happen 'through external, violent and accidental means.' The second is, that when the injury is occasioned by intentional injuries

inflicted by the insured or any other person.' As to the first point, there is no doubt here but that the injury to plaintiff was from external and violent means and the only question is, was it accidental? An accident, as commonly understood, is an occurrence which is not intended; and therefore a thing which is done intentionally is not done accidentally. But as to the condition of the policy now under consideration, we must restrict the words, accident and intentionally as they will apply to the conduct of the insured as distinguished from the conduct of the party doing the injury. . . . We are of the opinion that as to the plaintiff, the injury though intentionally inflicted by his assailant, was an accident within the meaning of the policy, and for which, but for the second condition above quoted, defendant would be liable." In Erb v. Commonwealth Mut. Acc. Co. 232 Pa. St. 215, 81 Atl. 207, it appeared that the insured was killed by shots from a pistol in the hand of his wife's sister, as they were fighting for its possession. The assault had been started by the deceased but at the time of the shooting he had withdrawn and was acting in defense. It was also found that the shooting was unintentional. The court said: "Under the words of the policy the death of an insured would not be effected by accidental means if it were not the natural and probable consequences of his own act, and should have been foreseen. It would not be accidental if the result of a duel or of a deadly assault commenced by him where he had reason to expect a deadly defense and generally where by his conduct he had invited violence, the reasonable consequence of which he should have anticipated. But under the facts of this case, the insured had no occasion to anticipate danger when he began the assault; he continued the struggle after he had lost the pistol to prevent its use against himself and had withdrawn from the conflict when he received the fatal wound."

Particular Clauses in Policy.

Where the accident policy sued under contains a specific clause against fighting, and it appears that the insured was injured in a fight in which he was the aggressor, there can be no recovery. Gresham v. Equitable Acc. Ins. Co. 87 Ga. 497, 13 S. E. 752, 27 Am. St. Rep. 263, 13 L.R.A. 838; Washington v. Union Casualty, etc. Co. 115 Mo. App. 627, 91 S. W. 988; Morris v. Travelers' Ins. Co. (Tex.) 43 S. W. 898. In Gresham v. Equitable Acc. Ins. Co. supra, it appeared that the accident policy sued on covered bodily injuries inflicted by external, violent and accidental means. It excepted, however, various classes of accidental injuries which might be embraced in those general terms, among them being those caused by duelling, fighting, wrestling, etc., those happening in consequence of voluntary exposure to unnecessary danger, hazard or perilous adventure, or while engaged in, or in consequence of, any unlawful act, and all injuries the result of design, either on the part of the claimant or any other person. The court said: "A faultless and unwilling conflict by the insured, one which he neither provoked nor invited, one which he did not accept when formally or informally tendered, one in which he was forced to engage for self-defence alone and from which he withdrew, or endeavored in good faith to withdraw, when his defence was accomplished, ought not to, and would not, be treated as a causative fight on his part within the meaning and intent of the policy, but would be regarded as right and proper resistance to aggressive or offensive violence. . . . In order to attribute to the insured anything caused by the fight he must have had some voluntary agency in causing the fight itself. If he had such agency, if by improper speech or voluntary conduct he was a material factor in bringing on the fight, he was, as between himself or his wife and the insurance company, chargeable with the consequences. If the fight was the cause of the mortal injury, and he was the cause of the fight, whether in whole or in part, he was, to that extent, the cause of his own death. If he begat the fight, and the fight begat the shooting, and the shooting begat the injury, he bore an ancestral relation to the last offspring as well as to the first. At all events, being father to the fight, neither he nor his wife, under the terms of this policy, could profit by the fight or by what it brought forth." In Washington v. Union Casualty, etc. Co. 115 Mo. App. 627, 91 S. W. 988, the court said: "The present action is based on a policy of insurance. The judgment in the trial court was for the plaintiff. The plaintiff became engaged in a difficulty with another, in which we shall assume the other party was the aggressor and that plaintiff was without fault. In the difficulty, the other party threw a brick at plaintiff striking him on the arm and injuring him. The policy contained the following clause: 'This insurance does not cover disability from chronic or venereal diseases or diseases not common to both sexes; or from diseases resulting from the use of intoxicants or narcotics; or from disease or sickness or injuries resulting from a surgical operation; or from injuries intentionally inflicted upon the assured or received while or in consequence of violating the law, or fighting.' There can be no doubt that the judgment rendered is in the face of the express provision of the policy. That provision is that, if the injury was intentionally inflicted, there was

no liability. In other words there was no insurance for such character of injury. Such has been the decision in a number of cases directly on the question." In Morris v. Travelers' Ins. Co. (Tex.) 43 S. W. 898, it appeared that the accident policy sued on insured against all accidents except those arising from causes therein mentioned, which were accidents from fighting, from violating law and from intentional injuries inflicted by the insured or another. The insured was killed in a fight brought on by himself. The court said: "It was admitted by appellants that [insured] came to his death while engaged in a fight brought on by himself, and in open violation of law, and that the policy was thereby rendered null and void."

However, it has been held that where the insured is fighting in self-defense and sustains an injury there may be a recovery under an accident policy although it contains a specific clause against fighting. Thus in Coles v. New York Casualty Co. 87 App. Div. 41, 83 N. Y. S. 1063, it appeared that the policy sued on provided that it did not cover injuries "'resulting, directly or indirectly, wholly or in part,' from 'fighting, wrestling, scuffling, altercation, feud, quarrel or assault,' or from 'voluntary or unnecessary exposure to danger.'" The insured was a bartender. On the occasion of his receiving the injury complained of he had opened the door of the bar room where he was employed and ordered an individual to leave the place because of some disturbance he was creating. The latter grappled with the plaintiff, causing him to fall, and thereby the injury was inflicted. The plaintiff testified that he acted solely in self-defense. The court in reversing a judgment in favor of the defendant, said: "In the absence of any contrary qualification in the language of the policy, it is reasonable to assume that the fighting, wrestling, scuffling, etc., which are guarded against by the provisions in question, refer to altercations for which the insured is in some degree to blame and in which he is, to some extent at least, a voluntary participant, and not to those which are unavoidable and beyond his control, or which have not been occasioned by any improper conduct on his part. The terms of the policy are to be strictly construed against the insurer, and all questions of doubt resolved in favor of the insured." In Supreme Council, etc. v. Garrigus, 104 Ind. 133, 3 N. E. 818, 54 Am. Rep. 298, the court said: "The charge that appellee was engaged in an affray is moreover the statement of a conclusion, and is not sufficient to meet the averments in the complaint, that appellee received the wound without any agency, fault or negligence on his part. If the facts were stated instead of the conclusion, as the rules of pleading require, it might appear that the only part appellee took was in defence of his person against the assaults of his adversary or adversaries, and that thus, whatever injuries he received were received without any fault or wrong on his part. Nor will it do to say, that because the injury was intentionally inflicted by the assailant and wrongdoer, it was not accident to appellee, within the meaning of the word 'accident,' as used in the relief fund laws, etc., of the order." However, in U. S. Mutual Acc. Assoc. v. Millar, 43 Ill. App. 148, the court said: "Under the certificate of insurance in this case, it is stated that the insurance under that certificate shall not extend to or cover accidental injuries resulting from, or caused directly or indirectly, wholly or in part, by fighting. That the injury to plaintiff resulted directly or indirectly from the fact of the altercation between him and C. is clearly shown by the evidence in this record, and this whether the injury occurred during or immediately following the struggle. The fact that the assured engaged in a fight, though he himself was not the assaulting party, is clearly within the meaning of the terms of the policy as excluding injuries so received from its operation and insurance as being caused by fighting or being intentionally inflicted by another."

Where it appears that the insured was injured while fighting and the action is defended on the ground that the injuries resulted from a "voluntary exposure to unnecessary danger," the right to recover depends on whether the insured was the aggressor. Thus in Empire L. Ins. Co. v. Johnson, 142 Ga. 330, 82 S. E. 893, an action on a policy which provided that the insurer did not assume liability for risks "where the accident or disability therefrom results wholly or partially, directly or indirectly, from voluntary exposure to unnecessary danger," it appeared that the insured was killed as the result of a blow received while fighting. The evidence of the details of the fight and particularly as to how it began was conflicting. The court held that it was proper under the issues of the case and the evidence, for the court to instruct the jury as follows: "If you believe the plaintiff's husband did not voluntarily enter into a fight, but became involved in it by the fault of Zuber, and what he did was in defense of himself, then such act on the part of the plaintiff's husband would not bar her right to recover, and she could recover the whole amount of the policy." In Campbell v. Fidelity, etc., Co. 109 Ky. 661, 60 S. W. 492, 22 Ky. L. R. 1295, it appeared that the insured was shot and killed by a policeman on whom he had committed an assault. The action was defended on the ground, inter alia, that the insured had voluntarily exposed himself to danger. On

appeal the court said that the jury should have been instructed in substance as follows: "If the jury believe from the evidence that [the assured] assaulted [the policeman] and at the time of such assault realized that such assault was dangerous to him [the assured] and with such knowledge and consciousness of such danger voluntarily made the assault which exposed him to the danger, they should find for the defendant." In Collins v. Fidelity, etc. Co. 63 Mo. App. 253, the court said: "As to voluntary exposure to danger, we need merely say that there was evidence tending to show that deceased wrongfully brought on the difficulty, which he must have known might likely result fatally, and which did result in his death, and did thereby expose himself to unnecessary danger. But there was also evidence in plaintiff's behalf, tending to show that he did not bring on the trouble and that the difficulty was without his fault and not within expectation. In such instance, though there is an exposure to danger, it is not a voluntary exposure. Each of these views were submitted to the jury and we must accept the verdict as supporting the plaintiff's contention. Since the deceased did not voluntarily expose himself to unnecessary danger, and since his death resulted from a pistol shot intentionally fired at him by K. we are led to the conclusion, . . . that the death was an accident, as that term should be applied to the deceased."

For a general discussion of the construction of the term "voluntary exposure to unnecessary danger" as used in an accident insurance policy, see the notes to Hunt v. U. S. Accident Assoc. 10 Ann. Cas. 449; Bakalars v. Continental Casualty Co. 18 Ann. Cas. 1123, and Empire L. Ins. Co. v. Johson, Ann. Cas. 1916B 267.

CHRISTENSON ET AL.

v.

MADSON.

Minnesota Supreme Court—October 30, 1914.

127 Minn. 225; 149 N. W. 288.

Insurance — Insurable Interest — Policy Taken Out by Insured.

Where a person procures insurance upon the life of another, it is the general rule that he must prove an insurable interest in such life in order to recover upon such policy; but, where a person insures his own life and appoints another to receive the proceeds of such insurance, the appointee establishes a prima facie right to recover by proving the contract of insurance and the happening of the event upon which it is to become payable. If facts exist which preclude such recovery they are matters of defense.

[See note at end of this case.]

Beneficial Associations — By-laws — Designation of Beneficiaries.

The classes of persons eligible as beneficiaries under policies issued by a fraternal association are to be determined by the rules adopted for the express purpose of governing such matters, and not by general statements made for the purpose of indicating the general object of such association, and restrictions limiting the classes who may be so designated must be expressed in positive terms and cannot be inferred from general statements.

Statement in Constitution as Restrictive.

The by-laws of the association having provided that policies may be made payable to the affianced wife of the insured, a policy so payable is valid, although the object of the association, as stated in its constitution, is to provide insurance for the surviving relatives of its members.

[See Ann. Cas. 1913E 492.]

Immoral Relation between Insured and Beneficiary.

Under the evidence in this case, the court did not err in refusing to find that immoral relations existed between the insured and his beneficiary.

(Syllabus by court.)

Appeal from District Court, Hennepin county: JELLEY, Judge.

Action on benefit certificate. William L. Christenson et al., plaintiffs, and Mary Madson, defendant. Judgment for defendant. Plaintiff's appeal. The facts are stated in the opinion. AFFIRMED.

Jay W. Crane for appellants.

Grotte & Bowen for respondent.

[226] TAYLOR, C.—On June 7, 1909, James P. Christenson procured the Danish Brotherhood in America, of which he was a member, to issue to him a benefit certificate for $1,000 payable, upon his death, to defendant, Mary Madson, as his betrothed. He paid all the assessments upon the certificate until his death which occurred in December, 1912. In October, 1911, he delivered the certificate to Mary Madson, the beneficiary therein named, who has ever since retained it, but he was never married to her. He had been previously married and had grown-up children, but his wife had procured a divorce from him on April 5, 1909. After his death, his children brought this suit against the brotherhood to recover the amount of the certificate. The brotherhood admitted liability under the certificate, paid the money into court, and

caused Mary Madson to be substituted as defendant.

The suit proceeded to trial between the children as plaintiffs and Mary Madson as defendant, and she will be referred to as defendant hereafter. The case was tried by the court without a jury. The court, among other things, found that defendant was the affianced wife of James P. Christenson; that both the law and the rules of the order authorized the issuance of benefit certificates payable to the affianced wife of the insured; and that the certificate in controversy was, by its terms, payable to defendant as such affianced wife. The court thereupon directed that judgment be entered to the effect that defendant was entitled to the proceeds of the certificate, and that the money paid into court be delivered to her. Plaintiffs appealed from an order denying their motion for a new trial.

1. Plaintiffs insist that the evidence is not sufficient to sustain the finding that defendant was betrothed to Christenson. His death [227] debarred her, a party in interest, from testifying as to conversations between them, and the only evidence to support the finding is the fact that the certificate, by his direction, was made payable to her as his betrothed. Plaintiffs invoke the rule, frequently stated in the books, that the beneficiary under a policy of life insurance, in order to recover thereon, must allege and prove an insurable interest in the life of the insured. This rule is based upon the theory that a policy, issued to one who has no interest in the continuation of the life of the person insured, is both a gambling contract, and a contract which creates a motive for desiring the termination of such life, and is therefore against public policy and void. The rule is applied very generally where the insurance is procured by the beneficiary and the suit is consequently founded upon a contract between the beneficiary and the insurer; but where the insured himself procures the insurance, the contract is between him and the insurer, not between the beneficiary and the insurer, and his interest in his own life sustains the policy and need not be proven. In such case he has the right to appoint the person to whom the proceeds of the policy shall go, and, if he make such appointment, the one so appointed takes by virtue of the contract between the insured and the insurer, not by virtue of a contract between the insurer and the appointee, and in order to recover thereon it is sufficient for the appointee to prove the contract and the happening of the event which entitles him to the benefit thereof. If there be facts which preclude the appointee from recovering, they should be alleged and proven as a defense. In other words, if the insured himself procured the issuance of the policy and caused the beneficiary to be named therein, the policy is *prima facie* evidence that the beneficiary so named is entitled to the proceeds thereof at the death of the insured; but, if the insured did not procure the issuance of the policy, the beneficiary thereunder must allege and prove the facts entitling him to receive such proceeds. In Campbell v. New England Mut. L. Ins. Co. 98 Mass. 381, the court say:

"The policy in this case is upon the life of Andrew Campbell. It was made upon his application; it issued to him as 'the assured;' the premium was paid by him; and he thereby became a member of the [228] defendant corporation. It is the interest of Andrew Campbell in his own life that supports the policy. The plaintiff did not, by virtue of the clause declaring the policy to be for her benefit, become the assured. She is merely the person designated by the agreement of the parties to receive the proceeds of the policy upon the death of the assured. The contract (so long as it remains executory), the interest by which it is supported, and the relation of membership, all continue the same as if no such clause were inserted. Fogg v. Middlesex Mut. F. Ins. Co. 10 Cush. (Mass.) 337, 346; Sandford v. Mechanics' Ins. Co. 12 Cush. 541; Hale v. Mechanics' F. Ins. Co. 6 Gray (Mass.) 169, 66 Am. Dec. 410; Campbell v. Charter Oak F. etc. Ins. Co. 10 Allen (Mass.) 213; Forbes v. American Mut. L. Ins. Co. 15 Gray (Mass.) 249, 77 Am. Dec. 360. It was not necessary, therefore, that the plaintiff should show that she had an interest in the life of Andrew Campbell, by which the policy could be supported as a policy to herself as the assured." The same rule is recognized by other courts. Ætna L. Ins. Co. v. France, 94 U. S. 561, 24 U. S. (L. ed.) 287; Provident L. Ins. etc. Co. v. Baum, 29 Ind. 236; Milner v. Bowman, 119 Ind. 448, 21 N. E. 1094, 5 L.R.A. 95; Prudential Ins. Co. v. Hunn, 21 Ind. App. 525, 52 N. E. 772, 69 Am. St. Rep. 380; Union Fraternal League v. Walton, 109 Ga. 1, 34 S. E. 317, 46 L.R.A. 424, 77 Am. St. Rep. 350; Foresters of America v. Hollis, 70 Kan. 71, 78 Pac. 160, 3 Ann. Cas. 535; Guardian Mut. L. Ins. Co. v. Hogan, 80 Ill. 35, 22 Am. Rep. 180; Massachusetts Mut. L. Ins. Co. v. Kellogg, 82 Ill. 614; Scott v. Dickson, 108 Pa. St. 6, 56 Am. Rep. 192; Hill v. United L. Ins. Assoc. 154 Pa. St. 29, 25 Atl. 771, 35 Am. St. Rep. 807; Brennan v. Prudential Ins. Co. 148 Pa. St. 199, 23 Atl. 901; Heinlein v. Imperial L. Ins. Co. 101 Mich. 250, 59 N. W. 615, 25 L.R.A. 627, 45 Am. St. Rep. 409; Fairchild v. North Eastern Mut. L. Assoc. 51 Vt. 613; Bursinger v. Watertown Bank, 67 Wis. 75, 30 N. W. 290, 58 Am. Rep. 848; Dolan v. Supreme Council,

etc. 152 Mich. 266, 16 L.R.A.(N.S.) 555, 15 Ann. Cas. 232, and note appended thereto.

2. Plaintiffs contend that defendant entered into meretricious relations with Christenson and by so doing terminated the betrothal. There is no finding that any improper relations existed between them. Plaintiffs made a motion to amend the findings by inserting [229] therein a statement that defendant became the mistress of Christenson. The court denied this application, and, under the evidence, it cannot be held that the court erred in so doing. As the existence of the alleged improper relations has not been established, it is not necessary to determine whether the marriage engagement would be broken by subsequent cohabitation without being married.

3. Plaintiffs further claim that the constitution of the Danish Brotherhood in America excludes the betrothed of the insured from the class of persons to whom benefit certificates may be made payable. The brotherhood is incorporated under the laws of the state of Nebraska. The certificate in question was issued in the state of Minnesota to a citizen of Minnesota. The laws of both Nebraska and Minnesota provide that such certificates may be made payable to the affianced wife of the insured; and the by-laws of the Danish Brotherhood contain a like provision. But plaintiffs contend that this provision of the by-laws violates the constitution of the brotherhood and is void. The provisions of the constitution upon which plaintiffs rely are the following:

"Sec. 2. The object of the Danish Brotherhood is to work toward a union among the Danes in America; to perpetuate the memories from Denmark and to strengthen each other in true brotherhood; to help one another by financial aid to sick and needy members; to help unemployed brothers to employment, and to provide for an insurance and guarantee fund, whereby every brother will have a guaranty that his surviving relatives, in case of his death, will receive a sum as stipulated by law, and to aid the local lodges, in cases where long continued sickness or some accident makes extra assistance necessary.

"Sec. 5. In case of the death of a brother, the brotherhood, according to the constitution and by-laws, shall provide for the payment to his surviving relatives of such sum as is described in his certificate of membership, and which, according to the constitution and by-laws, is his rightful due, either $250, $500 or $1,000, according to the scale after which he has paid, while the assessment, which every member must pay to this object, must not exceed the provisions described in the by-laws."

[230] These sections of the constitution merely give a general outline of the purpose of the brotherhood. They contain no prohibitory or restrictive language, and were not intended to mark out and limit, except in a general way, the nature and extent of the power to make contracts.

To determine whether a certain person may lawfully be appointed as beneficiary, we must look to the rules and regulations adopted for the purpose of pointing out and defining who may, and who may not, become such beneficiaries. Such questions are to be determined by the provisions established for the express purpose of governing such matters, and not by the general phrases used in setting forth the general purpose of the association. This is true although the specific regulations are found in the by-laws and the general language in the constitution. Of course mandatory provisions in the constitution, and prohibitions and limitations therein must be observed; but the statement of the purpose of the organization, couched in general terms, is not ordinarily intended to restrict and define with exactness the powers of the association. The restrictions and limitations upon the powers of the association are usually contained in provisions, either in the constitution or the by-laws, adopted for the express purpose of outlining, limiting and defining such powers; and whether the association has power to make a particular contract is ordinarily to be determined by reference to such specific regulations, and not by reference to the general language used to express the general object for which the association was formed. Banasek v. Western Bohemian Fraternal Assn. 122 Minn. 272, Ann. Cas. 1914D 1123, 142 N. W. 334, 49 L.R.A. (N.S.) 141; Walter v. Hensel, 42 Minn. 204, 44 N. W. 57.

It is also the general rule that restrictions limiting the classes who may be designated as beneficiaries must be expressed in specific and positive terms, and cannot be inferred from general statements contained in either the constitution or by-laws. Pleasants v. Locomotive Engineers Mut. L. etc. Ins. Assoc. 70 W. Va. 389, 73 N. E. 976, Ann. Cas. 1913E 490, and cases cited in note appended thereto.

The constitution of the Danish Brotherhood contemplates the [231] existence of appropriate by-laws. The by-law in question expressly provides that the insured may make his benefit certificate payable to his fiancée. There is no other specific provision in respect to this matter; and, as the constitution contains no prohibitory or restrictive language, the phrase, "surviving relatives," used in stating the general object of the brotherhood, cannot be construed as invalidating such by-laws or forbidding the insured to make his certificate payable to his affianced wife.

Order affirmed.

NOTE.

Selection by Insured of Beneficiary Not Having Insurable Interest in Former's Life as against Public Policy.

Life Insurance, 587.
Mutual Benefit Insurance, 587.
Rule in Kentucky, 588.

Life Insurance.

The general rule laid down in Dolan v. Supreme Council, etc. 15 Ann. Cas. 232, that public policy does not forbid a person to take out a policy of insurance on his own life and select as a beneficiary one who has no insurable interest in his life, where this is done in good faith and with no intention to violate the rule against wagering insurance contracts, is upheld in the following recent cases: Afro-American L. Ins. Co. v. Adams (Ala.) 70 So. 119; American Nat. Ins. Co. v. Moore (Ala.) 70 So. 190; Langford v. National L. etc. Ins. Co. 116 Ark. 527, 173 S. W. 414; Floyd v. Metropolitan L. Ins. Co. (Del.) 90 Atl. 404; Baltimore L. Ins. Co. v. Floyd (Del.) 91 Atl. 653; New York L. Ins. Co. v. Murtagh, 137 La. 760, 69 So. 165; Brogi v. Brogi, 211 Mass. 512, 98 N. E. 573; Sargent v. Hancock Mut. L. Ins. Co. 49 Pa. Super. Ct. 239; Mohr v. Prudential Ins. Co. 32 R. I. 177, 78 Atl. 554. In New York L. Ins. Co. v. Murtagh, supra, the rule was thus stated: "The objection that the beneficiary, Miss Delery, had no insurable interest in the life of W. H. Oncken, is without merit. Oncken insured his own life, paying the premiums, and designated Miss Delery as beneficiary. In Hearing's Succession, 26 La. Ann. 327, the court said: 'A man may take out a policy of insurance on his life in the name of any one, or, having taken it out in his own name, he may, with the consent of the assurers, transfer it to whom he pleases.' This doctrine was approved in Stuart v. Sutcliffe, 46 La. Ann. 247, 14 So. 912. See also Heinlein v. Imperial L. Ins. Co. 25 L.R.A. 627, note, and Rose Dolan v. Supreme Council, etc. 152 Mich. 266, 116 N. W. 383, 16 L.R.A.(N.S.) 555, 15 Ann. Cas. 232. In the last case the syllabus reads: 'The insurance of one's life for the benefit of another having no insurable interest therein is not contrary to public policy.'" In Deal v. Hainley, 135 Mo. App. 507, 116 S. W. 1, it was declared that an insured may designate a beneficiary having no insurable interest in the life of the insured, if the transaction is bona fide; but that if the transaction is collusive the beneficiary cannot recover under the policy but may be reimbursed for whatever money he advances. The court said: "Though defendant's nephew could not insure his uncle's life, the relationship and the intimacy and favors which grew out of it, are items to consider in dealing with the question of whether the uncle procured the policy and wholly for defendant's sake; for those circumstances enhance the probability that he did. If Coleman took the insurance on the inducement of defendant, who was the active and moving party in the transaction, the policy was speculative. [Wainewright v. Bland, 1 M. & Rob. (Eng.) 481; Shilling v. Accidental Death Ins. Co. 2 H. & N. (Eng.) 41; Bromley v. Washington L. Ins. Co. [122 Ky. 402] 5 L.R.A.(N.S.) 747; Cammack v. Lewis, 82 U. S. 643, 21 U. S. (L. ed.) 244.] In that event defendant is entitled to keep no more of the proceeds of the policy than the amount of his claim against Coleman's estate. . . . If Coleman procured the insurance, but on an understanding with defendant that the latter's interest in it should be only a security for what the former owed, then defendant may retain no more of the proceeds than enough to make him whole." In Prudential Ins. Co. v. Williams, 113 Ark. 373, 168 S. W. 1114, the same principle was applied to an assignment of an insurance policy. The court said: "Now, out of the conflict of authority on the question of wagering contracts of insurance, this court has taken the position in former decisions that a contract of insurance, taken out in the name of one who has no insurable interest in the life of the person insured, is a wagering contract and void (McRae v. Warmack, 98 Ark. 52), but that 'any person has a right to procure insurance on his own life, and afterward to assign the policy to another, provided it be not done by way of cover for a wager policy, even though the assignee has no insurable interest in the life of the insured.' Page v. Metropolitan L. Ins. Co. 98 Ark. 340."

Mutual Benefit Insurance.

The rule that in mutual benefit insurance as in ordinary life insurance, the selection in good faith by the insured of a beneficiary having no insurable interest in the former's life violates no consideration of public policy, is sustained by the reported case and other recent decisions Barnett v. United Brothers, etc. 10 Ala. App. 382, 64 So. 518; Slaughter v. Grand Lodge (Ala.) 68 So. 367, 369; Grand Lodge, etc. v. Barnard, 9 Ga. App. 71, 70 S. E. 678; Cain v. Knights of Pythias, 11 Ga. App. 364, 75 S. E. 444; Pollock v. Household, 150 N. C. 211, 63 S. E. 940; Pacific Mut. L. Ins. Co. v. O'Neil, 36 Okla. 792, 130 Pac. 270; Mutual Ben. L. Ins. Co. v. Cummings, 66 Ore. 272, 286, 126 Pac. 982, 133 Pac. 1169, 47 L.R.A.(N.S.) 252. See also Middlestadt v. Grand Lodge, etc. 107 Minn. 228, 120 N. W. 37. Thus in Barnett v. Unit-

ed Brothers, etc. supra, it was said: "The theory of the asserted right of the plaintiffs to recover the amount payable under the policy is that the designation of beneficiaries having no insurable interest in the life of the insured was the same in effect as if there had been no designation at all, and that the result was to entitle the plaintiffs as the next of kin to claim the benefit of the above-quoted by-law of the defendant. This theory involves the assumption that a person cannot insure his own life for the benefit of another who has no insurable interest in it. The assumption is unwarranted. The public policy which forbids a mere stranger, having no insurable interest, to take out or otherwise acquire insurance on the life of another (Helmetag v. Miller, 76 Ala. 183, 52 Am. Rep. 316) does not prevent one who procures and retains insurance on his own life from making the benefit payable to another, without regard to whether the latter has any insurable interest (Stoelker v. Thornton, 88 Ala. 241, 6 So. 680, 6 L.R.A. 140; Hill v. United L. Ins. Assoc. 154 Pa. St, 29, 25 Atl. 771, 35 Am. St. Rep. 807; Union Fraternal League v. Walton, 109 Ga. 1, 34 S. E. 317, 46 L.R.A. 424, 77 Am. St. Rep. 350; 25 Cyc. 708). The person with whom the defendant contracted, namely, the deceased, of course had an insurable interest in her own life."

In Sage v. Finney, 156 Mo. App. 30, 135 S. W. 996, it appeared that a member of a mutual benefit insurance company, finding that he was unable to continue payments on a policy of insurance on his own life, designated a third person as beneficiary to the extent of one-half the amount of the policy in consideration of the payment of the future premiums and assessments. It was held that while the law looked with disfavor on a situation where the beneficiary, having no insurable interest, agreed to pay the premiums on a policy, nevertheless where the beneficiary had acted in good faith, the court would always endeavor to reimburse him for the amount of money expended. The court said: "While one may insure his own life, paying premium thereon himself, in favor of another who has no insurable interest therein, as was said in Locher v. Kuechenmiester, 120 Mo. App. 701, 720, 98 S. W. 92, it is true the law looks with disfavor upon such transactions as this, where the insurance is procured with the consent of the insured but in favor of one with no insurable interest, who undertakes to pay the premiums therefor, and denounces them as wagering contracts. Though such contracts are obnoxious to public policy, because they tend to encourage one to hasten the event upon which the insurance depends, they are not unlawful in the sense that they are immoral nor as is a contract which stipulates for the doing of something prohibited by a positive statute. In this view, the courts accept such contracts as sufficient to give rise to equities between the parties which they will consider and apply, to the end of compensating one who has invested his means in good faith for the purpose of keeping the insurance in force. Indeed, the rule of decision with respect to such contracts seems to be that they are void only in so far as they purport to confer a right upon one, who has no insurable interest in the life of another, to the insurance over and above the amount of the indebtedness of the insured person to the beneficiary and such premiums and interest thereon as may have been paid on the policy by the beneficiary. It is said, although such contracts are invalid in so far as they attempt to transfer all or any precise amount of the insurance above the indebtedness of the insured to the beneficiary and beyond such premiums and interest as the beneficiary may invest therein, they are not of that fraudulent kind with respect of which the courts regard the parties equally culpable and refuse to interfere with the result of their action. In other words, such contracts, though considered and treated as invalid because obnoxious to public policy in so far as they purport to give the beneficiary any precise or definite amount of the insurance without regard to the amount of the indebtedness which the insured may owe to the beneficiary or the premiums and interest thereon which the beneficiary may have invested therein, are always treated with as sufficiently efficacious to afford the beneficiary an equitable right to the insurance money vouchsafed in the policy to the extent of compensating the indebtedness, if any, existing in his favor against the insured together with such premiums and interest as he has expended in keeping the insurance in force. [Warnock v. Davis, 104 U. S. 775, 26 U. S. (L. ed.) 924; Mutual L. Ins. Co. v. Richards, 99 Mo. App. 88, 72 S. W. 487; Strode v. Meyer Bros. Drug Co. 101 Mo. App. 627, 74 S. W. 379; Quinn v. Supreme Council, etc. 99 Tenn. 80, 41 S. W. 343.]"

Rule in Kentucky.

Whatever previous doubt there may have been as to the attitude of the Kentucky courts on the question under consideration, the matter seems to have been settled definitely by the case of Rupp. v. Western L. Indemnity Co. 138 Ky. 18, 127 S. W. 490, 29 L.R.A.(N.S.) 675, in favor of the beneficiary. In that case the court said: "This is a sound and reasonable rule, and if it were otherwise it would be in conflict with the universal doctrine that a person who is compos mentis can give away his property to

any person he pleases; it would operate to render invalid all devises to persons not closely enough related to have an insurable interest in the life of the testator. What reason can be given warranting the declaring of an insurance policy void when a friend, a stranger in blood, is made the beneficiary by the assured, that would not apply with the same force to a testator devising property to a person not having an insurable interest in the life of the testator? Yet such devisees have been universally upheld. Is it possible that a beneficiary in an insurance policy, such as is alleged in the case at bar, would have a greater desire for the premature death of the assured and take steps to produce it, than a creditor would especially Harris, who was only the surety of Embry in the case, supra, and in which case the policy was upheld and declared not to be a wagering contract?" And further on in discussing the case of Caudell v. Woodward which is cited in the previous note on this question as a possible authority for an opposite holding the court said: "It is claimed that in the case of Caudell v. Woodward [96 Ky. 646] supra, establishes a different principle. That case was decided upon the organic law of a fraternal order, but language is used in the opinion which, seemingly, sustains appellee's contention. However, the conclusion reached in the case at bar is also announced in that opinion; that is, one who obtains a policy of insurance on the life of another must have an insurable interest in the life of that other. The opinion in that case also announced the doctrine that one is prohibited from inducing another to take out insurance, or become the owner of such insurance by assignment, unless he has an insurable interest in the life of that other; and that Mrs. Woodward, a stranger, could not recover on the policy, because it is well settled that one obtaining a policy of insurance on the life of another, or who induced another to take out a policy for his benefit, must have an insurable interest. All these propositions are fundamental and sound in law. There is nowhere, however, any reason given in the Caudell case why a person cannot take out insurance on his own life, pay the premiums, and make a person who is not related to him the beneficiary; nor could there have been presented any reason against it that would not have applied with equal force to a gift of the same amount by will as well." To the same effect see Western L. Indemnity Co. v. Rupp, 147 Ky. 489, 144 S. W. 743; Allen v. Pacific Mut. L. Ins. Co. 166 Ky. 605, 179 S. W. 581.

NOZISKA ET AL.

v.

ATEN.

South Dakota Supreme Court—May 17, 1915.

35 S. Dak. 451; 152 N. W. 694.

Parties — Joinder of Plaintiffs — Action for Negligence of Attorney.

Where one claimant against a debtor assigned his claim to another, so that one suit could be brought on both claims, and both claimants signed the attachment bond, and were required to pay the amount thereof, both are proper parties plaintiff in an action against the attorney who brought the former suit for negligence which resulted in their being compelled to pay the amount of the attachment bond.

Amendments — Adding New Parties Plaintiff.

Where the attorney for plaintiffs, in support of a motion to amend a complaint in the name of two individuals against an attorney for negligence which resulted in plaintiffs having to pay an attachment bond which they had signed, files an affidavit showing that at the time he drew the complaint he thought the plaintiffs were partners, and that the claim on which the former suit was brought was a partnership claim, but that he afterwards learned that two others were partners of one of the plaintiffs, and that the other plaintiff had assigned his claim to the partnership for collection, the showing is sufficient to warrant the court, in its discretion, to permit the complainant to be amended by adding the other partners as parties plaintiff.

[See note at end of this case.]

Same.

Under Code Civ. Proc. § 150, authorizing the court before or after judgment, in furtherance of justice, to amend any pleading by adding or striking out the name of the party, the court has power to permit such an amendment to be made.

[See note at end of this case.]

Appeal from Circuit Court, Tripp county: WILLIAMSON, Judge.

Action for damages. John C. Noziska et al., plaintiffs, and A. K. Aten, Jr., defendant. Judgment for plaintiffs. Defendant appeals. The facts are stated in the opinion. AFFIRMED.

E. O. Patterson for appellant.

R. H. Molitor for respondent.

[453] WHITING, J.—This action was instituted in the name of John C. Noziska and F. F. Sinkler, as plaintiffs, and in their complaint they alleged, in substance, as follows: That the defendant is, and was at all times

therein mentioned, a duly licensed and practicing attorney at law, holding himself out as such attorney within this state; that plaintiffs employed the defendant, as such attorney, to prosecute a certain action in justice court, on behalf of plaintiffs and against one Mundorf and wife, for the recovery of money claimed to be due for merchandise sold and delivered by plaintiffs to said Mundorfs; that the defendant undertook to prosecute said action in a proper skilful, and diligent manner as the attorney for these plaintiffs; that the defendant, in prosecuting such action, procured the issuance of a writ of attachment, and, by virtue of such writ of attachment, had certain property of the Mundorfs seized, attached, and taken into the possession of one Holbrook, then a constable in and for the county wherein said action was brought; that these plaintiffs, by an undertaking given under the advice of defendant, indemnified the said Holbrook against loss by reason of said seizure and attachment; that it thereafter appeared that the said Mundorfs were not residents of this state; that thereupon said action, under the advice and procurement of defendant, was abandoned, and another action instituted on behalf of these plaintiffs by said defendant, in which said action defendant sought to make service of process on the Mundorfs by advertisement, though no writ of attachment or summons in garnishment was procured or issued in said second action; that, upon such defective service of process and lack thereof, such action was prosecuted to judgment, and the property of Mundorf, seized as aforesaid, and still held by said constable, was sold to satisfy the said judgment, all being done upon the advice of defendant acting as such attorney for plaintiffs; that thereafter Mundorf brought an action in conversion against the constable for the conversion of the property attached and held by him, and recovered judgment for the value of same, and for interest and costs, which said judgment these plaintiffs were compelled to, and did, pay and satisfy in accordance with their undertaking [454] and agreement with said constable to hold him harmless. Plaintiffs sought to recover from the defendant the amount so paid out in satisfaction of the judgment against the said constable. After answer plaintiffs sought leave of court to amend the complaint herein by substituting, in place of John C. Noziska as one of said plaintiffs, the names of John C. Noziska, E. D. Noziska, and D. L. Noziska, as copartners doing business under the firm name and style of Colome Mercantile Company. Leave was granted, and the complaint was amended by the change in the name of the plaintiffs, and by adding an allegation to the effect that the said parties named as copartners were copartners doing business under the name and style of Colome Mercantile Company, and further amended to show that the undertaking entered into with the constable was the joint undertaking of the said copartnership and Sinkler. Trial was had, and verdict rendered in favor of plaintiffs. Judgment having entered on said verdict, the defendant has appealed to this court from such judgment, and has assigned as error: (1) The granting of the order allowing the amendment to the complaint; (2) two certain rulings of the court sustaining objections to questions asked of the plaintiff Sinkler when a witness upon the stand; (3) the overruling of defendant's motion, made at the close of plaintiff's case, and at the close of all of the evidence, asking for a directed verdict in favor of defendant.

The two assignments questioning the rulings of the court in excluding evidence need no further attention from this court than to state that, even if erroneous, it is clear the rulings could not have been prejudicial.

In support of his motion for directed verdict, appellant urged that, in the action wherein it was claimed he was guilty of negligence, the sole plaintiff was the mercantile company; that appellant was not attorney for Sinkler in such action; that, under the evidence in the present case, no separate judgments could be entered in favor of the partnership and Sinkler; and that it appeared from such evidence that the plaintiffs were not jointly interested in the result of this action, but that their interests were separate and distinct. There is no merit in any of these contentions. It appeared that the mercantile company and Sinkler held separate accounts against the Mundorfs. In accordance [455] with the advice of appellant, Sinkler, for the mere purposes of suit and to prevent the necessity of two actions, assigned his claim to the mercantile company, in whose name, as plaintiff, the two actions in justice court were prosecuted, in both of which actions recovery was sought upon Sinkler's claim, as well as the claim of the nominal plaintiff. Appellant was attorney for both the mercantile company and Sinkler. The mere fact the action was brought in the name of one of such parties for the purpose of avoiding the necessity of two suits did not make him attorney for that one party only; in all that he did in the actions in the justice court appellant was acting as the attorney for both the partnership and Sinkler. It is unnecessary for us to consider the contention that no separate judgments could be entered herein for the reason that the trial court did not enter separate judgments. It needs neither argument nor authority to show that the claim of respondents against appellant is a joint claim. These parties had become

jointly obligated to save the constable harmless; their liability to such constable was not limited to the proportionate amounts of their claims against the Mundorfs; their liability being joint, their cause of action against appellant, which cause of action sprung from such liability to such constable, was also joint; and it was no affair of appellant's whether the amount paid to the constable was paid by one or both of said parties; this was a matter of adjustment solely between themselves.

Did the court err in granting the amendment? Appellant in objecting to such amendment, contended: (1) That the amendment proposed was not authorized by the statute, that such proposed amendment was in effect, the substitution of new parties plaintiff, and not the addition of new parties, and that the proposed complaint was not an amendment of the complaint, but a new complaint, setting forth a new cause of action; (2) that, from the affidavits submitted upon the hearing of the motion to amend, it appeared that all the facts presented as a basis for such amendment were within the knowledge of the plaintiffs at the time of the commencement of this action, and that their attorney knew, or should have known, of the existence thereof. From the affidavit of respondents' attorney, submitted upon the motion to amend complaint, it appeared that he drew the original complaint supposing [456] that the plaintiffs therein named were partners, that the claim upon which the suits in justice court were brought was a claim which they, as partners, held against the Mundorfs, and that these two plaintiffs individually had given the undertaking to the constable; that he had since learned that the three Noziskas were partners, and that such partnership was one of the real parties in interest, and should have been made a party plaintiff. While the showing made by defendant was such as might have justified the trial court in refusing the amendment, yet we do not believe, that such court, in granting the amendment, abused its discretion, provided, as a matter of law, it had power to allow the amendment.

Was the amendment such an one as is authorized by section 150, C. C. P.? Such section provides:

"The court may, before or after judgment, in furtherance of justice, . . . amend any pleading, . . . by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; or by inserting other allegations material to the case. . . ."

If this action had been brought by respondent Sinkler alone, and he had erroneously alleged, either that he alone entered into the undertaking with the constable, or that he and some other party other than the true party entered into such undertaking, certainly the trial court would have had authority to allow an amendment correcting the mistake in such allegation, as such amendment would be one that should be allowed in furtherance of justice, unless, for some reason shown to the court, the court, in the exercise of a wise discretion, should have refused same. Kelsey v. Chicago, etc. R. Co. 1 S. D. 80, 45 N. W. 204. After such amendment Sinkler could have prosecuted such action to judgment and recovered against appellant upon such amended complaint, provided appellant failed to demur to such complaint upon the ground of defect of parties plaintiff. That being true, it follows that there could be no error in granting to Sinkler the amendment showing who, in fact, was his joint obligor on the undertaking. If that had been the only amendment, then, unless there was a demurrer interposed upon the ground of defects in parties plaintiff, the cause could have been prosecuted to judgment, and judgment recovered by Sinkler, although his codefendant was nonsuited. If, after such amendment, the defendant [457] had—as he clearly in such case might—demurred upon the ground that there was a defect of parties plaintiff in that the partnership was not a party to such action, clearly the court, in sustaining such demurrer, would have been bound to allow such partnership to be joined in an amended complaint and the cause to proceed. 15 Enc. P. & P. 750, 751; 30 Cyc. 143, 144.

The judgment appealed from is affirmed.

NOTE.

Right to Amend Action by Adding New Parties Plaintiff.

General Rule, 591.
Application of Rule:
In General, 594.
Persons Interested with Original Plaintiff, 594.
Other Beneficiaries of Action for Death by Wrongful Act, 596.
Limitations of Rule, 599.

General Rule.

It is an almost universal rule, at law as well as in equity, that an action may be amended by adding proper or necessary parties plaintiff. The statutes generally subject the right to the sound discretion of the court.

England.—Broder v. Saillard, 2 Ch. D. 692; Long v. Crossley, 13 Ch. D. 388, 41 L. T. N. S. 793, 28 W. R. 226, 49 L. J. Ch. 168; Duckett v. Gover, 6 Ch. D. 82, 46 L. J. Ch. 407, 25 W. R. 554; Emden v. Carte, 17 Ch. D.

169, 44 L. T. N. S. 344, 29 W. R. 600, 50 L. J. Ch. 492; House Property, etc. Co. v. H. P. Horse Nail Co. 29 Ch. D. 190, 54 L. J. Ch. 715, 52 L. T. N. S. 507, 33 W. R. 562; Ayscough v. Bullar, 41 Ch. D. 341, 60 L. T. N. S. 471, 37 W. R. 529, 58 L. J. Ch. 474. See also Clay v. Oxford, L. R. 2 Exch. 54, 15 L. T. N. S. 286, 4 H. & C. 690, 15 W. R. 109, 36 L. J. Exch. 15, 12 Jur. N. S. 944. *Compare* Milligan v. Mitchell, 1 Myl. & C. 433, 7 L. J. Ch. 37, 3 Myl. & C. 72.

Canada.—Hogan v. Baetz, 1 West. L. Rep. (Yukon Ter.) 393; Ritchie v. Canadian Bank of Commerce, 1 West. L. Rep. (Yukon Ter.) 499. See also Yates v. Great Western R. Co. 24 Grant Ch. (U. C.) 495; Dunn v. McLean, 6 Ont. Pr. 97.

United States.—Royal Ins. Co. v. Miller, 199 U. S. 353, 26 S. Ct. 46, 50 U. S. (L. ed.) 226; Consolidated Water Co. v. San Diego, 84 Fed. 369; Rogers v. Penobscot Min. Co. 154 Fed. 606, 83 C. C. A. 380; Kaiser v. General Phonograph Supply Co. 171 Fed. 432; Fisher v. Rutherford, Baldw. 188, 9 Fed. Cas. No. 4,823. See also Lewis v. Darling, 16 How. 1, 14 U. S. (L. ed.) 819.

Alabama.—Berry v. Ferguson, 58 Ala. 314; Steed v. McIntyre, 68 Ala. 407; Bolman v. Lohman, 74 Ala. 507; McGhee v. Alexander, 104 Ala. 116, 16 So. 148; Weedon v. Jones, 106 Ala. 336, 17 So. 454; West End v. State, 138 Ala. 295, 36 So. 423; Hall v. Alabama Terminal, etc. Co. 152 Ala. 262, 44 So. 592.

Arkansas.—Bloom v. Home Ins. Agency, 91 Ark. 367, 121 S. W. 293.

California.—Polk v. Coffin, 9 Cal. 56; Cassin v. Nicholson, 154 Cal. 497, 98 Pac. 190.

Florida.—Camp Phosphate Co. v. Anderson, 48 Fla. 226, 37 So. 722, 111 Am. St. Rep. 77.

Georgia.—Napier v. Howard, 18 Ga. 437; Sears v. Odell, 66 Ga. 234; Grand Lodge Knights of Pythias v. Creswill, 128 Ga. 775, 58 S. E. 163. See also McHale v. Murphy, 73 Ga. 141.

Illinois.—Chapin v. Curtenius, 15 Ill. 427; Jenks v. Vandolah, 29 Ill. App. 163; Blumenthal v. Huerter, 3 N. E. 425; Lee v. Casey, 269 Ill. 604, 109 N. E. 1062. See also Strean v. Lloyd, 128 Ill. 493, 21 N. E. 533.

Indiana.—Hubler v. Pullen, 9 Ind. 273, 68 Am. Dec. 620; Frankel v. Garrard, 160 Ind. 209, 66 N. E. 687.

Kansas.—Black v. Missouri, etc. R. Co. 94 Kan. 28, 145 Pac. 903.

Kentucky.—Hoofman v. Marshall, 1 J. J. Marsh. 64; Stevens v. Terrel, 3 T. B. Mon. 131.

Maine.—Winslow v. Merrill, 11 Me. 127; Clark v. Anderson, 103 Me. 134, 68 Atl. 633. *Compare* White v. Curtis, 35 Me. 534; Ayer v. Gleason, 60 Me. 207.

Maryland.—Thillman v. Neal, 88 Md. 525, 42 Atl. 242.

Michigan.—Prather Engineering Co. v. Detroit, etc. Ry. 152 Mich. 582, 116 N. W. 376, 15 Detroit Leg. N. 280.

Minnesota.—See Clay County Land Co. v. Alcox, 88 Minn. 4, 92 N. W. 464.

Mississippi.—Stauffer v. Garrison, 61 Miss. 67; Rowzee v. Pierce, 75 Miss. 846, 23 So. 307, 65 Am. St. Rep. 625, 40 L.R.A. 402.

Missouri.—Grigsby v. Barton County, 169 Mo. 221, 69 S. W. 296; Merriman v. Springfield, 142 Mo. App. 606, 127 S. W. 122. *Compare* Chouteau v. Hewitt, 10 Mo. 131.

New Hampshire.—See Dow v. Jewell, 18 N. H. 340, 45 Am. Dec. 371.

New Mexico.—Durrett v. Chicago, etc. R. Co. 20 N. M. 114, 146 Pac. 962.

New York.—Dutcher v. Slack, 1 Code Rep. 113, 3 How. Pr. 322. See also O'Brien v. Heeney, 2 Edw. 242; Van Epps v. Van Duesen, 4 Paige Ch. 64, 26 Am. Dec. 516; Peck v. Mallams, 10 N. Y. 509; Robinson v. Thomas, 131 App. Div. 894, 115 N. Y. S. 921.

North Carolina.—Green v. Deberry, 24 N. C. 344; Kron v. Smith, 96 N. C. 389, 2 S. E. 532; Mills v. Callahan, 126 N. C. 756, 36 S. E. 164. See also Arendell v. Blackwell, 16 N. C. 354; Reynolds v. Smathers, 87 N. C. 24; Walker v. Miller, 139 N. C. 448, 4 Ann. Cas. 601, 52 S. E. 125, 111 Am. St. Rep. 805, 1 L.R.A. (N.S.) 157.

Oregon.—Liggett v. Ladd, 23 Ore. 26, 31 Pac. 81; Hume v. Kelly, 28 Ore. 398, 43 Pac. 380.

Pennsylvania.—Druckenmiller v. Young, 27 Pa. St. 97; Kaul v. Lawrence, 73 Pa. St. 410; Harrison v. St. Mark's Church, 14 W. N. C. 387. See also Moore v. Hirsh, 30 Pa. Co. Ct. 7; Rangler v. Hummel, 37 Pa. St. 130. *Compare* Chamberlin v. Hite, 5 Watts 373; Carskadden v. McGhee, 7 Watts. & S. 140.

Rhode Island.—Hazard v. Durant, 9 R. I. 602.

Tennessee.—Franklin v. Hays, 2 Swan 521; Gray v. Hays, 7 Humph. 588.

Texas.—See Mott v. Ruenbuhl, 1 White & W. Civ. Cas. Ct. App. 599.

Vermont.—Wyman v. Wilcox, 63 Vt. 487, 21 Atl. 1103. See also Vermont Min. etc. Co. v. Windham County Bank, 44 Vt. 489.

Virginia.—Coffman v. Sargston, 21 Grat. 263; Belton v. Apperson, 26 Grat. 207. See also Hooper v. Royster, 1 Munf. 119; Ball v. Johnson, 8 Grat. 281; Holland v. Trotter, 22 Grat. 136; Yates v. Law, 86 Va. 117, 9 S. E. 508.

Utah.—See Salt Lake County v. Golding, 2 Utah 319.

West Virginia.—See Welton Hutton, 9 W. Va. 339.

Wisconsin.—See Orton v. Knab, 3 Wis. 576.

And see the cases cited infra in the subdivision, *Application of Rule.*

"The question as to when and whether such parties should be brought in as necessary to a complete determination of the controversy is within the sound discretion of the trial court." Bloom v. Home Ins. Agency, 91 Ark. 367, 121 S. W. 293. "It is the constant practice of the courts of chancery to allow amendments of bills by the introduction of new plaintiffs, where the purposes of justice require it." Coffman v. Sangston, 21 Grat. (Va.) 263. "The statute, section 657, Revised Statutes 1899, which is looked to as authority to require the court to allow the amendment to stand, has always received a most liberal construction by the courts of this state, and while they are not all in accord upon the question of permitting an amendment of the petition by adding the name of a new party, where the new party added is the real party in interest, yet the later decisions on this question are to the effect that it may be done where the ends of justice will be met thereby, and the defendant not injured." Merriman v. Springfield, 142 Mo. App. 506, 127 S. W. 122. "Order XVI. rule 2, ... provides that 'where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff or plaintiffs, the court or a judge may, if satisfied that it has been so commenced through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person or persons to be . . . added as plaintiff or plaintiffs upon such terms as may seem just.'" Duckett v. Gover, 6 Ch. D. (Eng.) 82, 46 L. J. Ch. 407, 25 W. R. 554. In Long v. Crossley, 13 Ch. D. (Eng.) 388, 49 L. J. Ch. 168, 41 L. T. N. S. 793, 28 W. R. 226, it was said: "The 13th rule of Order XVI. provides that the court may, at any stage of the proceedings, order 'that the name or names of any party or parties' (which I take to mean 'any person or persons') 'whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the action, be added.' What is the question involved in the present action? Put broadly, it is the specific performance of the contract with the defendants. Is the presence of Mr. Long and his sister necessary in order to enable the court effectually and completely to adjudicate upon and settle this question? It appears to me that it is. It is said by Mr. North that, if they are added as co-plaintiffs, the action must still fail. I think that at present I have nothing to do with that. The object of the provisions of the rules was, not that a party's case should be so framed as to succeed, but that it should be so framed that it can be adjudicated upon by the court, whether in his favor or against him. I therefore allow an amendment by adding the proposed co-plaintiffs, and by stating the plaintiff's title under the marriage settlement." In Ayscough v. Bullar, 41 Ch. D. (Eng.) 341, 58 L. J. Ch. 474, 60 L. T. N. S. 471, 37 W. R. 529, it was said by Lindley, L. J.: "The whole object to be obtained by amending and adding a co-plaintiff is to better the position of the first plaintiff. . . . Now it appears to me that, when once you are satisfied that there has been a bona fide mistake, that the whole thing is honest, and that it is necessary in order to do justice to her and to the defendant that she should have this liberty to amend, such liberty ought to be granted."

The rule at common law was that an action at law could not be amended by adding parties plaintiff. Zukowski v. Armour, 107 Ill. App. 668; Ayer v. Gleason, 60 Me. 207; Chouteau v. Hewitt, 10 Mo. 131; Chamberlin v. Hite, 5 Watts. (Pa.) 373; Wood v. Metropolitan L. Ins. Co. 96 Mich. 437, 56 N. W. 8. "If by the common law amendments of the character made in this case were allowed, is it not obvious that much of the learning in the books on the subject of parties would have been useless, and instead of the labored essays of this branch of the law we meet with, the subject might have been disposed of in a much more summary way. The consequence of not joining a plaintiff as a party, is shown in all the elementary works on pleading; but we have not been enabled to find where it is said, that the omission can be obviated by an amendment. If it were allowable, it would certainly have been somewhere suggested. There is nothing in the affidavit which was the foundation of the motion to amend, which might not be alleged by every one making such applications, and if it were allowed, rules sanctioned by the profession from time immemorial would be subverted. Mistakes in the names of parties have been amended; but to allow new plaintiffs or defendants to be inserted in a declaration by way of amendment, would be going a length wholly unprecedented. The fact that the plaintiffs in this case were a company consisting of many individuals, does not vary the principle. The names of all the individuals composing a firm or company not incorporated, must be set forth with certainty in the declaration." Chouteau v. Hewitt, 10 Mo. 131. This rule still seems to obtain in at least one jurisdiction. Wood v. Metropolitan L. Ins. Co. 96 Mich. 437, 56 N. W. 8. In that case it was said: "In no case has it ever been contended that an amendment to bring in new parties in an

action at law could be allowed. . . . . The court was in error in permitting this amendment to be made. When it appeared upon the trial that the plaintiff was not the sole owner of the claim, the court should have directed a verdict in favor of the defendant. Plaintiff could not maintain the action in her own name when it appeared that she was not the sole owner of the claim, and, under the most liberal construction of the statute of amendments, the court had no power to amend by bringing in another party plaintiff."

An amendment of a cause of action by adding parties plaintiff may, in many jurisdictions, be made at any time before final judgment. Union Naval Stores Co. v. Pugh, 156 Ala. 369, 47, So. 48; Acquital v. Crowell, 1 Cal. 191; Polk v. Coffin, 9 Cal. 56; Price v. Goodrich, 141 Ill. App. 568; Gnuske v. Duffy, 177 Ill. App. 648; Edinger v. Heiser, 62 Mich. 598, 29 N. W. 367; Durrett v. Chicago, etc. R. Co. 20 N. M. 114, 146 Pac. 962; Hutchinson v. Reed, Hoffm. (N. Y.) 317; Hooker v. Norfolk Southern R. Co. 156 N. C. 155, 72 S. E. 210; Felty v. Deaven, 166 Pa. St. 640, 31 Atl. 333; Cimini v. Zambarano, 36 R. I. 122, 89 Atl. 295; Perkins v. Hays, Cooke (Tenn.) 189; Brazelton v. Turney, 7 Coldw. (Tenn.) 267. And see the reported case. See also Lee v. Casey, 269 Ill. 604, 109 N. E. 1062; Wilcox v. Hawkins, 10 N. C. 84. *Compare* McNabb v. Toronto Constr. Co. 19 Ont. W. Rep. 191, 2 Ont. W. N. 1086. Ross v. Carpenter, 6 McLean 382, 20 Fed. Cas. No. 12,072; Ingraham v. Dunnell, 5 Metc. (Mass.) 118. "It was not error or an abuse of discretion to allow an amendment at the trial, making an additional party plaintiff, so as to conform to the proof, even though six years had elapsed since the commencement of the suit." Gnuske v. Duffy, 177 Ill. App. 648. In Cimini v. Zambarano, 36 R. I. 122, 89 Atl. 295, it was said: "Under our statute courts are given broad powers in permitting amendments and in adding and striking out parties. Such powers have been exercised frequently after verdict and before the creation of the superior court by the Supreme Court after hearing upon petition for new trial. We see no objection to such action by the superior court after hearing upon motion for a new trial; provided amendments are permitted upon terms that shall protect the rights of adverse parties."

Application of Rule.

In General.

It is generally held that a creditor's bill may be amended by adding parties plaintiff. Richmond v. Irons, 121 U. S. 46, 7 S. Ct. 788, 30 U. S. (L. ed.) 864; Anderson v. Superior Ct. 122 Cal. 216, 54 Pac. 829; McDougald v. Dougherty, 11 Ga. 570; Perkins v. Berry, 103 N. C. 131, 9 S. E. 621; Stephenson v. Taverners, 9 Grat. (Va.) 398. *Compare* McLennan v. Montreal Bank, 17 West. L. Rep. (British Columbia) 489. In Maughan v. Blake, L. R. 3 Ch. (Eng.) 32, a plaintiff suing as a personal representative of a creditor's estate was permitted after discovering that the right to take out administration was in other persons, to amend her petition by making those persons coplaintiffs in a suit for the administration of a debtor's estate.

In Tillery v. Candler, 118 N. C. 888, 24 S. E. 709, an amendment adding a relator as a party plaintiff was held to be proper.

In Gannon v. Johnston, 40 Okla. 695, Ann. Cas. 1915D 522, 140 Pac. 430, it was held that an amendment adding the grantor as a party plaintiff was proper in an action by the grantee for the recovery of land. See to the same effect Augusta Mfg. Co. v. Vertrees, 4 Lea (Tenn.) 75.

In Livingston v. Marshall, 82 Ga. 281, 11 S. E. 542, it was held that a sworn bill might be amended by adding a new and proper party complainant, without swearing to the amendment.

Persons Interested with Original Plaintiff.

Where the plaintiff has an interest in the subject-matter of the suit, the petition may be amended, and other persons having a like interest may be joined as coplaintiffs. Murray v. Booker, 58 S. W. 788, 22 Ky. L. Rep. 781; Weinsteine v. Harrison, 66 Tex. 546, 1 S. W. 626; Sillings v. Bumgardner, 9 Grat. (Va.) 273. In Murray v. Booker, supra, a joint owner of the damaged property was permitted to be added as a party plaintiff by amendment in an action to recover damages resulting from the overflow of land. See to the same effect Cole v. Gilford, 63 N. H. 60. In McGhee v. Alexander, 104 Ala. 116, 16 So. 148, a bill to enforce a vendor's lien for unpaid purchase money was brought by the children of an intestate whose domicil was in Georgia. By the laws of Georgia a surviving husband shared equally with the children in the personal property of a deceased wife. It was held that an amendment adding the surviving husband of the intestate as a party plaintiff was proper.

Parties for whose use or benefit an action is brought, or who have an equitable interest in the cause of action, may be added as parties plaintiff by amendment. Patterson v. Stapler, 7 Fed. 210; Glenn v. Black, 31 Ga. 393; Fidelity, etc. Co. v. Nisbet, 119 Ga. 316, 46 S. E. 444; Beall v. Hutcheson, 131 Ga. 66, 61 S. E. 1125; McIntyre v. Easton, etc. R. Co. 26 N. J. Eq. 425; Cousar v. Heath, 80

S. C. 466, 61 S. E. 973; Lanes v. Squyres, 45 Tex. 382; Galveston, etc. R. Co. v. House, 4 Tex. Civ. App. 263, 23 S. W. 332; Townsend v. Three Lakes Lumber Co. 67 Wash. 654, 122 Pac. 29. See also Chicago, etc. R. Co. v. La Porte, 33 Ind. App. 691, 71 N. E. 166; Reed v. Reed, 16 N. J. Eq. 248. *Compare* Cass v. McCutcheon, 15 Manitoba 667, 669. In Glenn v. Black, 31 Ga. 303, the action was brought by a sheriff for the use of certain judgment creditors to recover the purchase price of lots sold by him and an amendment adding other usees was held to be proper. The court said: "The plaintiff, at the trial term, moved to amend his declaration by adding other usees than those originally named in it. This amendment neither introduced a new cause of action, nor in any way varied the liability of the defendant. Technically speaking, it did not change the party plaintiff. The sheriff is the party plaintiff; with him the contract set out in the declaration was made. The usees are introduced to show, in the language of the statute, who is, or are, interested in the enforcement of the contract. If any party having an interest identical with the usees named in the declaration, be accidentally omitted, it would be proper and just that the omission be supplied by amendment. It was argued that there was, by this amendment, a misjoinder of plaintiff's. But there was, in reality, after the amendment, but one plaintiff, viz.: the sheriff. . . . There can be but one recovery for such failure, or refusal to comply with the terms of the sale, and as the Act provides that the sheriff shall sue for the use of the party interested, all persons so interested should be joined as usees. The money recovered, if any, goes into the sheriff's hands, and he is subject to the order of the Court, in distributing it among the usees. The amendment was properly allowed." In Townsend v. Three Lakes Lumber Co. 67 Wash. 654, 122 Pac. 29, an action brought to recover damages for the unlawful cutting and removal of timber from the plaintiff's land, an amendment adding as parties plaintiff the plaintiff's father and mother, who appeared to have some legal or equitable interest in the land, was held to be proper.

As to the right to amend a petition or complaint by adding or substituting a new plaintiff suing for the use of the original plaintiff see the note to Louisville etc. R. Co. v. Ramsay, Ann. Cas. 1913B 108.

It seems that an action brought by either husband or wife may be amended by adding as a party plaintiff the other spouse, where the latter has a legal or equitable interest in the cause of action. Pitts v. Powledge, 56 Ala. 147; Seipel v. Baltimore, etc. R. Extension Co. 129 Pa. St. 425, 18 Atl. 568; Hasbrouck v. Winkler, 48 N. J. L. 431, 6 Atl. 22; Shaffer v. Eichert, 132 Pa. St. 285, 19 Atl. 81; Fenton v. Lord, 128 Mass. 466; Sillings v. Bumgardner, 9 Grat. 273; Hedican v. Pennsylvania F. Ins. Co. 21 Wash. 488, 58 Pac. 574; Davis v. Seattle, 37 Wash. 223, 79 Pac. 784. See also Ainger v. White, 85 Vt. 446, 82 Atl. 666. "During the trial in the District Court, it appeared that the original plaintiff's wife was a part owner of the goods for the destruction of which the suit was brought, and it was moved to nonsuit the plaintiff because his wife did not join in the action, the court refused to nonsuit and permitted the wife to be joined as co-plaintiff. We think the amendment was within the authority conferred by the statutes. . . . Besides, it did not in the least affect the merits of the suit. The husband, being in possession of the goods as an owner, at the time of the trespass by the defendant, a stranger to the title, had himself the right of recovering all the damages resulting from the injury done." Hasbrouck v. Winkler, 48 N. J. L. 431, 6 Atl. 22. "The objection to the amended complaint is not well taken. By the amendment the wife was joined with the husband. It will be assumed that the court was satisfied to grant the amendment, whether leave was formally entered before or after the amended complaint was filed. The property destroyed was community property, and there can be no question but that the wife was a proper party to the action with her husband." Hedican v. Pennsylvania F. Ins. Co. 21 Wash. 488, 58 Pac. 574. In Davis v. Seattle, 37 Wash. 223, 79 Pac. 784, the court in holding that an action by a married woman against a city for injuries sustained by her in falling on a defective walk could be amended by adding her husband as a party plaintiff, said: "The first contention of appellant which we will consider is that the court erred in allowing the amendment whereby the husband, B. W. Davis, was made a party plaintiff; appellant insisting that a married woman, residing with her husband, cannot, suing alone, recover damages for personal injuries sustained by herself, and that it is error to permit her, as such plaintiff, having no cause of action, to amend her complaint, and make her husband, the party having the cause of action, a party plaintiff, and to do so after the conclusion of the original plaintiff's evidence, and after she had rested her case on the trial. . . . While the respondent Alice J. Davis could not have recovered in this action, suing alone, did the court commit error in permitting the amendment whereby the husband, B. W. Davis, was made a party plaintiff, and afterwards, with his wife, recovered judgment? Section 4953, Bal. Code, provides: 'The court may, in furtherance of justice, and on such terms as may be proper, amend any pleadings or proceedings, by add-

ing or striking out the name of any party,' etc. We think that, under this section, and under the circumstances of this case, the amendment was properly allowed. Appellant did not claim any surprise, and made no request for a continuance; no new issues, requiring additional preparation for trial, were formed; unnecessary delay and loss of time were avoided; there was no material change in the cause of action or in the defense; and no abuse of discretion by the court was shown. The amendment was certainly in 'furtherance of justice,' was properly allowed, and not erroneous."

A suit on a partnership claim may be amended by adding as parties plaintiff partners whose names have been omitted. McNabb v. Toronto Constr. Co. 19 Ont. W. Rep. 191, 2 Ont. W. N. 1086, *reversing* 19 Ont. W. Rep. 15, 2 Ont. W. N. 992. Carne v. Malins, 6 Exch. (Eng.) 803, 2 L. M. & P. 498, 20 L. J. Exch. 434; Frese v. Bachof, 14 Blatchf. 432, 9 Fed. Cas. No. 5,110; Gonzales v. U. S. 37 Ct. Cl. 243; Godbold v. Blair, 27 Ala. 592; Silva v. De Freitas, 18 Hawaii 613; Lockwood v. Doane, 107 Ill. 235; Price v. Goodrich, 141 Ill. App. 568; Van Dyke v. Mosterdt (Ia.) 153 N. W. 206; First Nat. Bank v. Tappan, 6 Kan. 456, 7 Am. Rep. 568; Hucklebridge v. Railway Co. 66 Kan. 443, 71 Pac. 814; Tyrel v. Millihen, 135 Mo. App. 293, 115 S. W. 512; Pitkin v. Roby, 3 N. H. 138; McIlhenny v. Lee, 43 Tex. 205; Robertson v. McIlhenny, 59 Tex. 615; Laughlin v. Tips, 8 Tex. Civ. App. 649, 28 S. W. 551; Noyes v. Sawyer, 3 Vt. 160; Lewis v. Locke, 41 Vt. 11. See also Wilcox v. Hawkins, 10 N. C. 84; Holmes v. Pennsylvania R. Co. 220 Pa. St. 189, 69 Atl. 597, 123 Am. St. Rep. 685. And see the reported case. *Compare* Blackwell v. Pennington, 66 Ga. 240; Wilson v. Wallace, 8 Serg. & R. (Pa.) 53; Watt. v. Popple, 16 Manitoba 348. "The bill is brought in the firm name and right, and has been litigated in that right, and the want of the other member is a defect that can be cured by amendment." Frese v. Bachof, 14 Blatchf. 432, 9 Fed. Cas. No. 5,110. "The action was originally commenced in the name of B. H. Tyrrel, plaintiff. An amended petition was afterwards filed in which Elmer B. Tyrrel and Benj. L. Tyrrel were added as co-plaintiffs with the original plaintiff, B. H. Tyrrel, and it was alleged therein that the three co-plaintiffs were co-partners doing a general printing business under the firm or partnership name of B. H. Tyrrel. . . . It is said that such amendment changed the cause of action from one in favor of one party to a cause of action in favor of several. Or from a several cause of action to a joint cause of action. This argument is without merit. The cause of action was in no respect changed. No new or different cause of action was introduced thereby. The controversy remained the same as it was before the amendment and the parties were the same, the only difference being that the amendment cured a defect in the description of the parties. Plaintiffs, co-partners, conducted their business under the firm name of B. H. Tyrrel. The bringing in of the two remaining partners only operated to bring all of the parties in interest before the court in a cause of action which had accrued to the partnership of B. H. Tyrrel." Tyrrel v. Milliken, 135 Mo. App. 293, 115 S. W. 512.

Other Beneficiaries of Action for Death by Wrongful Act.

It seems to be the more prevalent rule that an action to recover damages for death by wrongful act may be amended by adding parties plaintiff. Hougland v. Avery Coal, etc. Co. 152 Ill. App. 573, *affirmed* 246 Ill. 609, 93 N. E. 40; Chicago, etc. R. Co. v. La Porte, 33 Ind. App. 691, 71 N. E. 166; Silva v. New England Brick Co. 185 Mass. 151, 69 N. E. 1054; Crockett v. St. Louis Transfer Co. 52 Mo. 457; Mostenbocker v. Shawnee Gas, etc. Co. (Okla.) 152 Pac. 82; McArdle v. Pittsburg R. Co. 41 Pa. Super. Ct. 162; East Line, etc. R. Co. v. Culberson, 72 Tex. 375, 10 S. W. 706, 13 Am. St. Rep. 805, 3 L.R.A. 567; International, etc. R. Co. v. Howell, 105 S. W. 560, *affirmed* 101 Tex. 603, 111 S. W. 142. See also Hodges v. Kimball, 91 Fed. 845, *reversing* Lusk v. Kimball, 87 Fed. 545; Leman v. Baltimore, etc. R. Co. 128 Fed. 191; St. Louis, etc. R. Co. v. Block, 79 Ark. 179, 95 S. W. 155; Atchison v. Twine, 9 Kan. 350; Weber v. Hannibal, 83 Mo. 262; International, etc. R. Co. v. Boykin, 32 Tex. Civ. App. 72, 74 S. W. 93. *Compare* Staunton Coal Co. v. Fischer, 119 Ill. App. 284; Johnson v. Phœnix Bridge Co. 197 N. Y. 317, 90 N. E. 953, *modifying* 133 App. Div. 807, 118 N. Y. S. 88; Paris, etc. R. Co. v. Robinson (Tex.) 127 S. W. 294; East Line, etc. R. Co. v. Culberson, 72 Tex. 375, 10 S. W. 706, 13 Am. St. Rep. 805, 3 L.R.A. 567. In Chicago, etc. R. Co. v. La Porte, supra, the court in discussing the right to amend the complaint in an action for damages for death by wrongful act said: "The right of action is given to the personal representative alone, and because he does not sue for the benefit of the decedent's estate, but sues for the recovery of damages which, when recovered, shall inure to the benefit of the widow and next of kin of the decedent, it is necessary that he show in his complaint the existence of some person or persons who have suffered pecuniary injury through the death of his intestate. If upon the trial . . . it should appear in evidence that there is some person not named in the complaint who suffers such loss,

in addition to those named as the injured persons in the complaint or who is entitled exclusively to the damages recovered, we are of the opinion that the complaint might be amended to correspond with such proof." In Mostenbocker v. Shawnee Gas, etc. Co. (Okla.) 152 Pac. 82, it was said: "The amended petition purports to have been filed on behalf of the mother and brothers and sisters, and is a joint petition, and was evidently so considered by the court. . . . With reference to the third proposition of defendants in error, that the petition sought to change the cause of action from one under general statutes declaratory of the common law to one under the death by wrongful act statute, it appears that the action was originally brought by plaintiff Sarah E. Mostenbocker, in her own right, upon the theory that she was entitled to all of the damages which might be recovered in the action, and aside from the fact that the action was brought in her individual name, there is no substantial difference between the allegations of the petition as to the alleged acts of negligence upon which the case was tried in the former action and the amended petition in the present appeal. . . . It is true that in the former appeal counsel urged plaintiff's right to maintain the suit for her exclusive benefit under sections 2881, 2882, Comp. Laws 1909, which contention was overruled. The facts alleged, however, are the same so far as the cause of the injuries resulting in the death of deceased are concerned, out of which the cause of action accrued; and it is what the pleadings state by which we must be governed, instead of the argument and theories of counsel, put forward in a futile effort to sustain plaintiff's exclusive right to a recovery contrary to the provisions of the statute. The right of action was given by the statute, based upon the acts of negligence complained of, to the parties therein named, and we therefore hold that there was no change of the cause of action from one law to another." In Crockett v. St. Louis Transfer, Co. 52 Mo. 457, the action was "brought under the Damage Act (1 W. S. sec. 2, p. 519) by the father and mother to recover the sum of five thousand dollars as a forfeiture for the death of their infant child, occasioned by the alleged carelessness of defendant's agent in driving one of their transfer wagons." The father having died and the mother having remained pendente lite it was held that the second husband was properly made a party plaintiff at the trial after the close of the evidence. In Hougland v. Avery Coal, etc. Co. 152 Ill. App. 573, an action brought by two minors to recover damages for the death of their father caused by the default of the defendant, it was held that an amendment of the declaration after verdict by adding as a co-plaintiff an adult son of the deceased was proper. The court in Houghland v. Avery Coal, etc. Co. 246 Ill. 609, 93 N. E. 40, said: "The cause of action was the death of William Hougland under the circumstances alleged in the declaration and shown by the proofs, and the right to bring suit on the cause of action was given by the statute to his children. The suit was begun within one year from the time the cause of action accrued, and the addition of a necessary party plaintiff afterwards was not the commencement of a new suit or the statement of a new cause of action. The first section of the act in relation to amendments and jeofails provides that the court in which an action is pending "shall have power to permit amendments in any process, pleading or proceeding in such action, either in form or substance, for the furtherance of justice, on such terms as shall be just, at any time before judgment rendered therein.' The 39th section of the Practice act authorizes amendments at any time before final judgment, 'introducing any party necessary to be joined as plaintiff or joint defendant, discontinuing as to any joint plaintiff or joint defendant, changing the form of the action, and in any matter either of form or substance, in any process, pleading or proceeding which may enable the plaintiff to sustain the action for the claim for which it was intended to be brought or the defendant to make a legal defense.' These sections of the statutes contain ample authority to sustain the ruling of the court in permitting the amendment." Silva v. Brich Co. 185 Mass. 151, 69 N. E. 1054, was an action of tort under an employers' liability act brought by the plaintiff as administrator of the estate of a decedent who was killed by the negligence of his employer. The declaration alleged that the deceased was instantly killed, and at the trial it appeared that such was the case. Thereupon the defendant moved that a verdict should be directed for it on the ground that the action could not be maintained by the administrator. The plaintiff moved to amend his writ, by inserting as plaintiffs the names of the widow and children, and alleging that they were dependent on his wages for support, and that the action was brought for their benefit. The court in holding that the amendment could be allowed said: "We think that the court had power to allow the amendment. The declaration alleges in so many words 'that said deceased left no widow but three children for whose use and benefit this action is brought.' This, taken in connection with the further allegation that the deceased was instantly killed, shows, it seems to us, that the cause of action intended to be relied on was the right of recovery given by the statute to the next of kin in cases of instant

death. The fact that the death is alleged to have been instant shows that the cause of action intended to be relied on could not have been the right that is given to the administrator to recover for death in cases where the death is not instantaneous, or where it is preceded by a period of conscious suffering. The mistake arose, not in regard to the nature of the cause of action, but in supposing that the administrator was the party in whose name the action should be brought. And in such a case it is plain that the court has power to allow an amendment bringing in the proper parties." In McArdle v. Pittsburg R. Co. 41 Pa. Super. Ct. 162, it was held that an action by a husband to recover damages for the death of his wife was properly amended by adding as plaintiffs the names of their children although the statutory period for bringing an action had expired.

But in East Line, etc. R. Co. v. Culberson, 72 Tex. 375, 10 S. W. 706, 13 Am. St. Rep. 805, 3 L.R.A. 567, it was held that an action brought by a wife for the benefit of herself and her children to recover damages for the death of the husband and father could not be amended after the statutory period for bringing the action had passed by adding as a party plaintiff the mother of the deceased. In Johnson v. Phœnix Bridge Co. 197 N. Y. 316, 90 N. E. 953, *modifying* 133 App. Div. 807, 118 N. Y. S. 88, it appeared that an action was brought in New York, by the widow of the deceased as his administratrix to recover damages for the death of her husband under the Civil Code of lower Canada. The right given by that code was "not representative, but individual and personal" and but one action could be brought in behalf of those who were entitled to the indemnity. It was held that the action could not be amended by adding as parties plaintiff the father and children of the deceased after the period given by the statute for bringing the action had passed.

It seems to be fairly well settled that an action by a parent to recover damages for the death of a child may be amended by adding as a party plaintiff the other parent. Cytron v. St. Louis Transit Co. 205 Mo. 692, 104 S. W. 109; Waltz v. Pennsylvania R. Co. 31 Pa. Super. Ct. 286, *affirmed* in 216 Pa. St. 165, 65 Atl. 401; Bracken v. Pennsylvania R. Co. 32 Pa. Super. Ct. 22; Weaver v. Iselin, 161 Pa. St. 386, 29 Atl. 49; Holmes v. Pennsylvania R. Co. 220 Pa. St. 189, 69 Atl. 597, 123 Am. St. Rep. 685; Sontum v. Mahoning, etc. R. Co. 226 Pa. St. 230, 75 Atl. 189. See also Buel v. St. Louis Transfer Co. 45 Mo. 562, "The right to add the name of a husband, or of a wife, by way of amendment after the expiration of the statutory period, if either one had properly brought suit within the time limited, is no longer an open question." Sontum v. Mahoning, etc. R. Co. supra. In Cytron v. St. Louis Transit Co. 205 Mo. 692, 104 S. W. 109, it was said: "The cause was heard below on an amended petition. As originally brought, the father, Meyer Cytron, alone sued. The child was the son of Meyer and Rosie Cytron, husband and wife. Presently, but after one year had elapsed, an amended petition was filed, the amendment consisting in making Rosie Cytron a party plaintiff. Thereupon defendant lodged a demurrer—the force thereof spent on facts disclosed by that amendment, to-wit, the existence of a living mother as well as a father and a failure to join that mother as a plaintiff in the first petition. . . . . At the close of the case defendant asked and the court refused to give a peremptory instruction. At the beginning of the case defendant objected to the introduction of any testimony because the petition did not state facts sufficient to constitute a cause of action. This objection was overruled—defendant saving timely exceptions to both said rulings. As we see it, it is one or the other of them that defendant now assigns as reversible error, in that by joining Rosie Cytron in the amended petition, the plaintiffs, in effect, instituted a new suit more than one year after the cause of action accrued—all this (it is said) in the teeth of the statute then existing, to-wit, Revised Statutes 1899, section 2868, reading: 'Limitation of Actions.—Every action instituted by virtue of the preceding sections of this chapter [chapter 17 on Damages, etc.] shall be commenced within one year after the cause of such action shall accrue.' . . . The statute in hand is not a span more or a whit less than one of limitation and repose. Its passport as such statute is stamped on its very face, because it is written there that it is a statute with an honest purpose of limitation and repose only. The legislature, intending it to fill that office, said so in so many words—the subhead of the section reading, 'Limitation of Actions.' We ought not to allow that obvious legislative intent to perish by construction; and by repeated adjudications we have so construed the statute as to preserve its life. . . . Indeed, it is only by the grace of allowing the averment of the answer, now under exposition, to be taken as a plea of the one-year Statute of Limitations that any life is left in it—or that it has place in an answer. And this is so because, strictissimi juris, in so far as the amendment may be claimed to constitute a departure, that departure, as such, was waived by answering over . . . and, being waived, the right to object to it is gone unless we interpret the plea as a plea of the Statute of Limitations, and, hence, a substantive defense. Being a statute of limitation, and the question under

consideration in final analysis involving the right of amendment after the limitation has run, at the threshold lies the inquiry: 'What is the proper judicial attitude toward amendments with reference to the Statute of Limitations?' As said in Walker v. Wabash R. Co. [103 Mo. l. c. 474] supra: 'The answer in the language of Napton, J., in Lottman v. Barnett, 62 Mo. l. c. 170, is: "Amendments are allowed expressly to save the cause from the Statute of Limitations, and courts have been liberal in allowing them, when the cause of action is not totally different."' The rule thus announced is steadily applied. . . . The cause of action under the amended petition was the identical cause of action counted on in the original. It substantially required the same quantum and quality of evidence. The measure of damages was the same under each. The amendment did not substantially change the claim or defense. Hence the general identity of the transaction was preserved, and we conclude there is no substance in the assignment of error in hand."

Limitations of Rule.

An action cannot be amended by adding new parties plaintiff where the effect of the proposed amendment would be to introduce a new cause of action.

United States.—Royal Ins. Co. v. Miller, 199 U. S. 353, 26 S. Ct. 46, 50 U. S. (L. ed.) 226.

Alabama.—Bolman v. Lohman, 74 Ala. 507. See also Berry v. Ferguson, 58 Ala. 314.

California.—Bradley v. Parker, 34 Pac. 234.

Georgia.—Neal v. Robertson, 18 Ga. 399; Dawty v. Hansell, 20 Ga. 659.

Kentucky.—Powers v. Sutherland, 1 Duv. 151; Globe Bank, etc. Co. v. Rigglesberger, 109 S. W. 333, 33 Ky. L. Rep. 96.

Maine.—Clark v. Anderson, 103 Me. 134, 68 Atl. 633.

New York.—Dutcher v. Slack, 3 How. Pr. 322, 1 Code. Rep. 113. See also Bostwick v. Menck, 4 Daly 68.

North Carolina.—Merrill v. Merrill, 92 N. C. 657; Kron v. Smith, 96 N. C. 389, 2 S. E. 532; State v. Turner, 96 N. C. 416, 2 S. E. 51. See also Mills v. Callahan, 126 N. C. 756, 36 S. E. 164.

Pennsylvania.—Holmes v. Pennsylvania R. Co. 220 Pa. St. 189, 69 Atl. 597, 123 Am. St. Rep. 685.

Oregon.—Hume v. Kelly, 28 Ore. 398, 43 Pac. 380.

Texas.—East Line, etc. R. Co. v. Culberson, 72 Tex. 375, 10 S. W. 706, 13 Am. St. Rep. 805, 3 L.R.A. 567. See also Lanes v. Squyres, 45 Tex. 382; Roberson v. McIlhenny, 59 Tex. 615; Laughlin v. Tips, 8 Tex. Civ. App. 649, 28 S. W. 551.

Vermont.—Vermont Min. etc. Co. v. Windham County Bank, 44 Vt. 480. See also Wyman v. Wilcox, 63 Vt. 487, 21 Atl. 1103.

West Virginia.—Williams v. Grant County Ct. 26 W. Va. 488, 53 Am. Rep. 94.

Canada.—Johnston v. Consumers' Gas Co. 17 Ont. Pr. 297; Parsons v. London, 19 Ont. W. Rep. 998, 3 Ont. W. N. 48; Ritchie v. Canadian Bank of Commerce, 1 West. L. Rep. (Yukon Ter.) 499.

"The court has no authority to convert a pending action that cannot be maintained, into a new one, by admitting a new party plaintiff solely interested, and allowing him to assign a new and different cause of action, if the defendant shall object. The statute allowing necessary additional parties to be made in an action, does not contemplate such an exercise of power. There is neither principle nor statute, nor practice, that allows such a course of procedure; it would certainly lead to endless complications, confusion and injustice. An action separate and distinct from a pending one, must be begun according to the ordinary course of procedure." Merrill v. Merrill, 92 N. C. 657. "As soon as an action is brought and the complaint is filed, it takes on and has a distinctiveness and integrity of nature as to the parties to it, and that may come or be brought into it, and the cause or causes of action sued, that permeate and go with it to its end. It is not subject to the arbitrary control of the parties or of the court—it must be proceeded in according to law, and only such amendments as to parties or the cause of action, may be made as its nature and scope warrant. Amendments in this respect must be such, and only such, as are necessary to promote the completion of the action begun—all parties necessary for that purpose may come or be brought into it, and so also, any and all such amendments may be made as to the cause of action, as may be necessary to its completeness in all respects. But neither general principles of practice, nor the statute providing for amendments, authorize amendments that reach beyond these purposes. Especially, the court has no authority to allow such amendments as to parties, or as to the cause of action, as make a new, or substantially a new action, unless by the consent of the parties. Indeed, this would not be to amend, in any proper sense, but to substitute a new action by order, for and in place of a pending one, which the court cannot do. General principles of procedure, and, as well, the statutory regulations upon the subject, contemplate and intend that an action shall embrace but one litigation or matter, and only such parties, matters and things as are necessary, germain, and incident to it, except that several causes of action may be united in the same action, as specially provided by

statute. Any other rule or method would certainly be subversive of orderly and intelligent procedure, and lead to intolerable confusion, as well as injustice to litigants. . . . Now, in the case before us, the action was brought by the second guardian against the first one and the sureties to his guardian bond, to compel him to account, etc. The plaintiff died pending the action. Afterwards, his administrator became a party plaintiff and filed his complaint, alleging a new, distinct and entirely different cause of action, that arose since the action began. To this there was a demurrer, which was sustained, and the court allowed the plaintiff to make new parties plaintiff, who, putting aside the complaint and all prior pleadings, filed a new complaint, alleging a new, distinct and different cause of action, substituted for the original plaintiff and the original cause of action alleged. This was undertaking substantially to make a new action out of a pending one. The court therefore properly decided that the plaintiffs could not maintain the present action." State v. Turner, 96 N. C. 416, 2 S. E. 51. In Smith v. Boyd, 18 Ont. Pr. 296, *reversing* 18 Ont. Pr. 76, Macleman, J. A. in holding that an amendment adding a new party plaintiff was properly refused said: "I am of opinion that the learned Chief Justice exercised a sound discretion at the trial in refusing the amendments then asked for. So far as the action was one for damages personal to the plaintiff by reason of the alleged fraud on the part of the defendants, the plaintiff had the opportunity of proceeding with it and trying it out, which he declined to do, and it was properly dismissed; nothing else could be done upon the evidence before the court. The amendments sought were for the purpose of recovering the money, not for the plaintiff himself, for that would have involved the taking of the partnership accounts, but for the benefit of the creditors of the firm, a cause of action, if any, which admittedly belonged to Clarkson, and which it may be doubtful whether the plaintiff could compel the creditors, or Mr. Clarkson on their behalf, to litigate. But, however that may be, the application at the trial was substantially an application for leave to bring a new action by or on behalf of a new plaintiff, which involved an amendment of the writ of summons, a new statement of claim, and other pleadings, as well as a new trial. That being so, I think, with great respect, it was the more convenient and proper course, to do as the learned Chief Justice did, to put an end to the existing action and to leave the plaintiff and Mr. Clarkson to bring such new action as they might be advised." In Peek v. Spencer, L. R. 5 Ch. (Eng.) 548, 39 L. J. Ch. 538, 18 W. R. 558, 22 L. T. N. S. 459, it was said: "As regards the merits of the case, there was certainly a knowledge by the plaintiff of the existence of enfranchised copyholders at the time when his original bill was filed. Then the answer was put in, and the original plaintiff's title was as distinctly put in issue, and as distinctly controverted as it is possible that a plaintiff's title can be; and the only allegations in the affidavit made on the application for leave to amend are, in effect, that the bill is defective for want of parties. I do not object to his amending as to the persons on whose behalf he sues, but what I do object to is the introduction of a new plaintiff with a new and distinct title. I do not think it would be just towards the defendant. The Master of the Rolls seems to have thought that the cases were very nearly identical, but I do not consider that the cases are identical, where the right of each depends upon totally different and distinct proofs, and upon totally different and distinct titles; in fact, Mr. Peek may possibly fail in the proof of everything, and yet Mr. Huntingford, because his name is added to the bill, may sustain it. Under those circumstances, I do not think it right that the name of a new plaintiff should be added." In Merrill v. Merrill, 92 N. C. 657, it was held that a suit for an accounting against an administrator brought by the next of kin of the decedent could not be amended by adding as a party plaintiff the administrator *de bonis non*.

As a corollary of the rule that a new cause of action may not be introduced by the addition of parties plaintiff, if the original plaintiff has no cause of action he cannot by an amendment adding parties plaintiff show a good cause of action. Clowes v. Hilliard, 4 Ch. D. (Eng.) 414, 46 L. J. Ch. 271, 25 W. R. 224; Walcott v. Lyons, 29 Ch. D. (Eng.) 584, 54 L. J. Ch. 847, 52 L. T. N. S. 399; State v. Rottaken, 34 Ark. 144; Anderson v. Superior Ct. 122 Cal. 216, 54 Pac. 829; Sillings v. Bumgardner, 9 Grat. (Va.) 273; Coffman v. Sangston, 21 Grat. (Va.) 263; Keyser v. Renner, 87 Va. 249, 12 S. E. 406; Franklin v. Hays, 2 Swan (Tenn.) 521. See also Matthews v. Bloodworth, 111 Ark. 545, 165 S. W. 263; Zukowski v. Armour, 107 Ill. App. 663; Davis v. New York, 14 N. Y. 506, 67 Am. Dec. 186, 3 Duer 119; Doyle v. Carney, 190 N. Y. 386, 83 N. E. 37, *reversing* 115 App. Div. 921, 101 N. Y. S. 1119. In Anderson v. Superior Ct. supra, it was held, under a statute requiring that in a suit by a creditors' bill five creditors must unite and must hold claims to the amount of five hundred dollars, that where a petition did not fulfil those requirements it could not be amended by adding new parties plaintiff.

In Lewis v. Alston, 176 Ala. 271, 58 So. 278, it was held that a bill could not be amended by adding a person as a party com-

plainant one who was a necessary party to the suit but who should be a party respondent.

A cause of action cannot be amended by adding as plaintiff persons who have no interest in the suit. Riely v. Kinzel, 85 Va. 480, 7 S. E. 907; Cass v. McCutcheon, 15 Manitoba 667, 669. See also Cinsini v. Zambarano, 36 R. I. 122, 89 Atl. 295, wherein it was said: "Rulings permitting amendments and changes of parties are subject to review by this court, if the cause comes here upon exception. The amendment permitted by the superior court was to make the allegation of the declaration conform to what we have called a meaningless condition of the bond that the plaintiff in replevin should pay such damages and costs as the plaintiff in replevin should recover against him. According to the opinion which we have hereinbefore stated concerning this condition the amendment was a needless one; but in no view of the matter did the amendment harm the defendant. The action of the superior court in adding Antonio Liberatore as a party plaintiff was erroneous, not because the court was without power to add parties at the time the change was made, but because upon the evidence Liberatore was not properly a party to the action."

It seems that an action cannot be amended by adding a party as plaintiff without his consent. Matthews v. Bloodworth, 111 Ark. 545, 165 S. W. 263; Watt v. Popple, 16 Manitoba 348; Hill v. Hambly, 12 British Columbia 233; Hogan v. Bacts, 1 West. L. Rep. (Yukon Ter.) 393. *Compare* Harris v. Swanson, 62 Ala. 299; Union Naval Stores Co. v. Pugh, 156 Ala. 369, 47 So. 48. In several jurisdictions the written consent of the party to be added as a plaintiff is necessary. Major v. Mackenzie, 17 Ont. Pr. 18; Winnifrith v. Finkelman, 25 Ont. W. Rep. 692, 5 Ont. W. N. 781; Fricker v. Van Grutten [1896] 2 Ch. (Eng.) 649, 65 L. J. Ch. 823, 75 L. T. N. S. 117, 45 W. R. 53; Frampton v. Williams, 2 F. & F. (Eng.) 603; Tryon v. National Provident Inst. 16 Q. B. D. (Eng.) 678, 54 L. T. N. S. 167, 34 W. R. 398, 55 L. J. Q. B. 236. See also Cox v. James, 19 Ch. D. 55, 51 L. J. Ch. 184, 30 W. R. 228, 45 L. T. N. S. 471. In Fricker v. Van Grutten supra, it appeared that the solicitors for the party to be added, in his presence and with his authority, signed a written consent to add him as a plaintiff. Notwithstanding that, the court held that he was improperly added as he had not signed the consent with his own hand.

It seems that where the jurisdiction of a federal court is dependent on the diversity of citizenship of the parties, an amendment adding an indispensable party plaintiff will not be permitted where the effect of the amendment would be to destroy the jurisdiction of the court. Delaware, etc. R. Co. v. Jersey City, 168 Fed. 128.

HEISEMAN ET AL.
v.
LOWENSTEIN ET AL.

Arkansas Supreme Court—June 15, 1914.

113 Ark. 404; 169 S. W. 224.

Wills — Jurisdiction of Equity to Construe.

A court of equity has jurisdiction to construe a will creating a trust.

[See 13 Ann. Cas. 2; 129 Am. St. Rep. 79.]

Rules of Construction — Intent of Testator.

The court in construing a will must ascertain the intention of testator as gathered from his entire will, and give effect to it, when not in conflict with recognized rules of law.

Trusts — Creation.

A testator owning chiefly real estate and some personal property of speculative value, who directs his executors to pay specified sums to trust companies, to pay specified sums in instalments to beneficiaries named, with gift over on their death, and who directs the executors to close up the estate as speedily as possible, creates a trust for the benefit of the beneficiaries named.

Executors — Power to Sell Lands.

An executor has no power to sell the land of his testator, unless directed to do so by the will, either expressly or by necessary implication.

[See 78 Am. St. Rep. 178.]

Same.

A testator, who directs his executor to dispose of his real estate, thereby confers on the executive power to execute the requisite deeds of conveyance.

Same.

Any words in a will which show an intention to confer on the executor power to sell real estate and execute the requisite deeds, or any form of a will which imposes duties which cannot be performed without a sale, necessarily creates a power of sale.

Power to Mortgage.

Where the bulk of the estate of a testator, who directs his executors to deposit specified sums with trust companies to pay to named beneficiaries, is real estate, and the testator directs the executors to close up the estate as speedily as possible, so that the creditors and beneficiaries may promptly receive what is due them, the executors have power to sell, but not to mortgage, the estate.

[See note at end of this case.]

Same.

A mere power of sale of real estate conferred on executors by will does not include a power to mortgage.

[See note at end of this case.]

Same.

The court, in construing the provisions of a will conferring power on the executor, must seek to give effect to the intention of testa-

tor, and, where the will merely authorizes by implication the executor to sell real estate, the court may not construe the provisions to authorize a mortgage.

[See note at end of this case.]

Sale by Executor — Rights of Lessee.

Where an executor authorized by will to sell real estate exercises the power of sale of land encumbered by a lease made by testator, the sale must be made subject to the rights of the lessee.

Appeal from Chancery Court, Pulaski county: MARTINEAU, Chancellor.

Action to construe will. A. M. Heiseman et al., executors, plaintiffs, and Emilie Lowenstein et al., defendants. Judgment for defendants. Plaintiffs appeal. REVERSED.

[405] Appellants, as executors of the will of Abe Stiewel, deceased, instituted this action in the chancery court against appellees, who are devisees and legatees under the will. The object of the complaint is to have a construction of the will and the directions of this court as to the duty and power of the executors in selling, mortgaging, and leasing the lands of their testator. Abe Stiewel died in Little Rock, Pulaski County, Arkansas, on the 25th day of August, 1913, and the will was duly admitted to probate and appellants qualified as executors under the will. The will is as follows:

"1. I desire that all of my debts shall be paid in full.

"2. It is my desire that my sister, Mrs. Emilie Lowenstein, in addition to insurance for one thousand ($1,000) dollars in the order of B'nai B'rith, which she holds on my life and money she has on deposit with me, shall receive from my estate the sum of twenty thousand ($20,000) dollars and interest in the manner herein provided for, as follows, towit: That is to say, the executors of my will shall cause to be deposited in a proper and solvent trust company the sum of twenty thousand ($20,000) dollars at the best rate of interest they can obtain therefor to the credit of said Emilie Lowenstein, conditioned that she shall not draw exceeding the sum of two hundred ($200) dollars per month as long as she may live, or the said fund may last; said money to be so deposited as soon as an order, if required, can be obtained from the probate court having jurisdiction of my estate to do so.

"2. Should my said sister die before the said sum is exhausted, then her son, Julius Frank, if living, shall receive five thousand ($5,000) dollars of said sum so remaining [406] to be paid to him in like manner, that is, at the rate of two hundred ($200) dollars per month by said trust company, and the remainder of said sum of twenty thousand ($20,000) dollars shall be disposed of as hereinafter set forth.

"3. It is my desire that my sister, Mrs. Fannie Shield, shall receive from my estate the sum of fifteen thousand ($15,000) dollars, and interest, in the following manner, to wit: That is to say, the executors of my will shall cause to be deposited in a proper and solvent trust company the sum of fifteen thousand ($15,000) dollars, at the best rate of interest they can obtain therefor, to the credit of said Fannie Shield, conditioned that she shall not draw exceeding the sum of two hundred ($200) dollars per month so long as she may live, or the said fund may last, said money to be deposited as aforesaid as soon as an order, if required, can be obtained from the probate court having jurisdiction of my estate to do so, and if any part of said fund shall remain on hand at my sister's death, it shall be disposed of as hereinafter set forth.

"4. It is my desire that my sister, Mrs. Julius Meyer, shall receive from my estate the sum of fifteen thousand ($15,000) dollars free from the claims or control of her husband or her sons; said sum to be forwarded by my said executors to Rudolph Richard, of Selma, Alabama, son-in-law of said Mrs. Julius Meyer, as soon as the order, if required, of said probate court can be obtained so to do, conditioned that said Rudolph Richard shall deposit said money in some solvent trust company at a fair rate of interest, and that my sister, Mrs. Julius Meyer, shall not draw exceeding the sum of two hundred and fifty ($250) dollars per month so long as she may live or the said fund may last. Should my sister die before the said sum is exhausted, then her four (4) daughters named Lillian, Sadie, Gertie and Hulda, are to be the recipients of the two hundred and fifty ($250) dollars per month in lieu of their mother, until their death, or the fund is exhausted.

[407] "5. It is my desire that my brother, H. I. Stiewel, in addition to any indebtedness he now owes me (which I hereby remit), shall receive from my estate the sum of ten thousand ($10,000) dollars, and interest, to be paid to him by my executors as follows, to wit: That is to say, they shall pay to him the sum of five hundred ($500) dollars in cash and the sum of nine thousand, five hundred ($9,500) dollars shall cause to be deposited in a proper and solvent trust company at the best rate of interest they can procure therefor, to the credit of said H. I. Stiewel, conditioned that he shall not draw exceeding the sum of one hundred and fifty ($150) dollars per month so long as he may live or the said fund may last; said sum to be so deposited as soon as the order, if required, of said probate court can be obtained so to do.

Should any of the said sum of nine thousand five hundred ($9,500) dollars and interest remain on hand on the date of his death, it shall be disposed of as hereinafter set forth.

"6. It is my desire that my nephew, Julius Frank, shall receive from my estate in addition to the legacy referred to in the second paragraph of this will the sum of one thousand ($1,000) dollars from my said executors as soon as an order, if required, can be obtained from said probate court to do so.

"7. It is my desire that my nephew, Albert Shield, and my niece, Carrie Shield, shall respectively receive from my estate the following sums, to wit: Albert Shield, one thousand ($1,000) and Carrie Shield, two thousand five hundred ($2,500) dollars, from my executors as soon as an order, if required, can be obtained from said probate court to do so.

"8. It is my desire that my executors shall pay the following amounts respectively to my nephews and nieces hereinafter named in this paragraph as soon as the order, if required, of said probate court can be obtained to do so, to wit: One hundred ($100) dollars each to my niece, Edna Shield, my nephew, Julius Shield, my nephew, Morris M. Meyer, my nephew, Arthur Meyer, my niece, Elsie Richard (*nee* Meyer).

[408] "9. I desire that my executors shall pay over to my niece, Elsie Richard (*nee* Meyer) for her three (3) children the sum of five hundred ($500) dollars as soon as they obtain the order, if required, of said probate court to do so.

"10. It is my desire that my nieces, Gertie Meyer, Lillian Meyer, Sadie Meyer, and Hulda Meyer, shall each receive from my estate the sum of twenty-five hundred ($2,500) dollars to be paid by my executors to Rudolph Richard, of Selma, Alabama, in trust for them, conditioned that he shall pay over said sum in such installments or manner as to him may seem best calculated to meet their needs. But in any event to be paid over on the marriage of each of them; in the event either of said nieces shall die before the said legacy shall be paid to her, the same shall go to the surviving ones among my said nieces. In the event of the marriage of any of said nieces, their husband shall have no control over said amount; should any of said nieces die before me, the sum so devised shall go as hereinafter provided.

"11. It is my desire that my niece, Carrie Mothner (*nee* Richard), shall receive from my estate the sum of twenty-five hundred ($2,500) dollars and interest in manner following, to wit: My executors shall, as soon as an order, if required, of said probate court shall be obtained so to do, cause to be deposited in a proper and solvent trust company to her credit at the best rate of interest they can obtain the said sum conditioned that she may draw not exceeding one hundred ($100) dollars per month thereof so long as she may live or said fund shall last, and her husband shall have no control over the same, and if any of said amount is still on hand at her death, it shall be given to her children as if she was living.

"12. To my nephew, Morris S. Richard, I bequeath fifteen hundred ($1,500) dollars in addition to the indebtedness he now owes me (which I remit), and to my nephew, Sidney Richard, I also bequeath fifteen hundred ($1,500) dollars, which said sums my executors, as soon as an order can be obtained, if required so to do, shall cause to be deposited in some proper and solvent trust [409] company at the best rate of interest they can obtain in the names of said nephews, respectively, conditioned that neither of said nephews shall draw exceeding fifty ($50) dollars per month of said fund, so long as they may respectively live or said fund may last. Should any part of either of said sums remain on hand at the death of either of my said nephews, it shall be disposed of as hereinafter set forth.

"13. My executors shall cause to be paid out of my estate to my sister-in-law, Mrs. Hattie Stiewel, in trust for her three children, the sum of twenty-five hundred ($2,500) dollars as soon as they can get an order, if required, of the said probate court so to do; in addition to said sum they shall cause to be deposited in some proper and solvent trust company the sum of ten thousand ($10,000) dollars at the best rate of interest they can obtain, and the said sum shall be paid *pro rata* to my nieces, Theresa and Sadie Stiewel, and my nephew, Morris Stiewel, so that each shall receive a third thereof when they shall become of age or marry; and if either before date of distribution shall die one before the other, the share of such one shall go to the others, the interest, however, accumulating on said amount may be used to defray expenses of the support and education of such children and may be paid over to their guardian or mother for this purpose.

"14. My executors shall, as soon as an order, if required, of said probate court can be obtained so to do pay to my four nephews, Harry Vernon Stiewel, Robert Stiewel, Louis Stiewel, and Roy Julian Stiewel, two hundred and fifty ($250) dollars each.

"15. If any legatee shall die before me the legacy left him or her by this will shall lapse.

"16. All sums or amounts not required to pay debts, cost of administration, executors and other expenses and all amounts or parts of my estate not above specifically devised, shall go to my heirs to correspond in the distribution thereof to the proportion which

the several legacies above given bears to the entire value of my estate.

[410] "17. I nominate as executors of this will and testament, A. M. Heiseman, Jacob Niemeyer and Morris M. Cohn, and in case of death, or other disqualification or refusal of either of said persons to act as such, then the remaining two may act, and selecting a third person to act with them as such executor, or two may act, but not less than two executors shall act, and the sum of $5,000 is hereby set apart to be and constitute full compensation for all services performed by said parties *as such* executors; if they desire to charge that sum or any part thereof. I desire that the said persons may act as such executors without being required to give bond as such as it is my desire that said executors shall close up the estate committed to their charge as speedily as possible, so that the creditors of my estate, if there are any, and my legatees may promptly receive what is due to them.

"18. Should my estate be insufficient in amount to pay all of the legacies above mentioned after payment of expenses, debts, and executors and costs, the legacies shall be proportionately reduced."

The following facts were proved: The appraised value of the estate left by the testator is about two hundred thousand dollars. The debts owed by the estate amount to about one hundred thousand dollars. The testator left very little cash, and his estate comprised both real and personal property, but consisted chiefly of real estate. His personal property consisted chiefly of stocks in certain corporations. He owned 3,150 shares of Arkansas and Arizona Copper Company stock; 326½ shares of stock in the National Copper Mining Company; 70 shares of stock in the Ozark Diamond Company; and 310 shares of stock in the Southern Trust Company of Little Rock. The evidence shows that this stock could not be disposed of to advantage by public sale, as required by statute. Part of the real estate owned by the testator is situated on Second and Main streets, in the city of Little Rock, for which he paid seventy-five thousand dollars. The present value of it is estimated at one hundred and thirty-five thousand dollars. On the day Mr. Stiewel [411] died, he made an agreement with the Bankers' Trust Company, whereby he agreed to give it a lease of that property for a period of thirty years at a rental of 6 per cent.; on a one hundred and fifty thousand dollar valuation for the first ten years, 6 per cent.; on a valuation of one hundred and sixty thousand dollars for the next ten years; and 6 per cent. on a valuation of one hundred and seventy thousand dollars for the third ten years. By the same document he gave the bank an option to buy the property for the sum of one hundred and fifty thousand dollars, provided it exercise the option within one year. It was also provided that Stiewel should have the right to sell to any other purchaser if he desired to do so, with the privilege to lessee of having the right to buy at the same price. After Stiewel's death, his heirs and legatees named in his will, who are appellees in this action, executed a document whereby they ratified and carried into effect the said agreement. The evidence shows that this property cannot be sold to advantage at public sale. It also shows that the other real estate mentioned in the will cannot be sold to advantage at public sale.

The chancellor sustained a demurrer to the complaint of appellants, and the case is here on appeal.

Morris M. & Louis M. Cohn for appellants.

[413] HART, J. (*after stating the facts*).—In the case of Williamson v. Grider, 97 Ark. 588, 135 S. W. 361, the court said:

"Where a trust is created by a will, a court of equity has jurisdiction to construe the will. The power is incident to the jurisdiction which courts of chancery have over trusts. And this upon the theory that as chancery will compel the performance of trusts, so it will assist trustees and protect them in the due performance of the trusts, whenever they seek the aid and discretion of [414] the court as to its establishment, management, and execution."

So, also, in the case of Davis v. Whittaker, 38 Ark. 435, the court said:

"Such suits are within the ordinary jurisdiction of courts of equity. They are commonly entertained as the suits of the trustees or executors seeking the aid, advice, and protection of the court in the execution of the trust," etc.

In regard to the construction of wills, in the case of Parker v. Wilson, 98 Ark. 553, 136 S. W. 981, the court said:

"The power of one, legally competent to make a will, to dispose of his property as he sees fit, subject to the restrictions provided by the statutes, is a legal incident to ownership. In construing the provisions of a will, the intention of the maker is first to be ascertained, and, when not at variance with recognized rules of law, must govern. The intention of the testator must be gathered from all parts of the will, and such construction be given as best comports with the purposes and objects of the testator, and as will least conflict." See, also, Gregory v. Welch, 90 Ark. 152, 118 S. W. 404.

Tested by these principles, we think the will in question created a trust. The testator was a business man of long experience and

knew the extent of his indebtedness and the amount and kind of property held by him. He knew that he had very little cash on hand, and that his estate consisted for the most part of real property, and the balance of personal property of speculative value. After the payment of his debts, he directed that legacies should be paid by his executors to certain of his relatives; that these legacies should be paid in cash, and the amount thereof should be deposited in trust companies to be paid to the legatees in the manner directed by the will. The seventeenth clause of his will provided that his executors "shall close up the estate committed to their charge as speedily as possible so that the creditors of my estate, if there are any, and my legatees may promptly receive what is due to them." The testator also recognized that his whole estate might be insufficient for the purpose of [415] paying his debts and the specific legacies provided in the will; for the last clause of his will provides: "Should my estate be insufficient in amount to pay all of the legacies above mentioned after payment of expenses, debts, and executors and costs, the legacies shall be proportionately reduced." This brings us to the question of whether the executors were given the power in the will to sell, mortgage or lease the property. It is well settled that an executor has no power to sell the land of his testator unless directed to do so by the will either expressly or by necessary implication. In this case the will does not give the executors express authority to sell the real estate. It is equally well settled that, because the testator has a right to dispose of his real estate as he sees fit, if he directs that to be done by his executors, which necessarily implies that the estate is first to be sold, a power is given by implication to the executors to make such sale and execute the requisite deeds of conveyance. Going v. Emery, 16 Pick. (Mass.) 107, 26 Am. Dec. 645; Lippincott v. Lippincott, 19 N. J. Eq. 121. In the latter case the court held:

"The appointment of one as executor of a will that directs lands to be sold, does not, of itself, confer on him the power to sell. But if the executor is directed by the will, or bound by law, to see to the application of the proceeds of the sale, or if the proceeds, in the disposition of them, are mixed up and blended with the personalty—which it is the duty of the executor to dispose of and pay over—then a power of sale is conferred on the executor by implication." See, also, May v. Brewester, 187 Mass. 524, 73 N. E. 546.

In 2 Perry on Trusts (4 ed.) § 776, the author says:

"No particular form of words is necessary to create a power of sale. Any words which show an intention to create such power, or any form of instrument which imposes duties upon the trustee that he cannot perform without a sale, will necessarily create a power of sale in the trustee."

[416] Tested by these legal principles, we think the will conferred upon the executors the power to sell the lands of the testator. As we have already seen, the bulk of his estate consisted of real property, and several legacies were left which the testator directed to be paid in cash. His directions in this respect could not be complied with unless the executors had the power to sell the real estate left by him. He directed his executors to close up the estate committed to their charge as speedily as possible, so that his creditors might be promptly paid and the legatees promptly receive what is due them.

We now come to the question as to whether a power of sale includes a power to mortgage. There is some conflict in the authorities on this question, but we believe that the better reasoning, if not the weight of authority, is to the effect that a mere power of sale does not include a power to mortgage. Stokes v. Payne, 58 Miss. 614, 38 Am. Rep. 340; Bloomer v. Waldron, 3 Hill (N. Y.) 361; Ferry v. Laible, 31 N. J. Eq. 566; Willis v. Smith, 66 Tex. 31, 17 S. W. 247; Hubbard v. German Catholic Congregation, 34 Ia. 34; Cumming v. Williamson, 1 Sandf. Ch. (N. Y.) 17. This results from the fact that a mortgage is regarded as a security for debt rather than a conditional estate, and hence its execution is regarded as creating an encumbrance rather than as transferring the title. That is to say, a mortgage is treated as a mere security for a debt, and the legal estate can only be used for the purpose of enforcing the payment of the debt secured. The cardinal principle that governs in the construction of powers is to effectuate the intention of the donor; but we cannot gather from the terms of the will any intention on the part of the testator looking to a mortgage of his estate. The will does not in express terms authorize the executors either to borrow money or to mortgage the real estate. By the terms of the will, the executors were directed to close up the estate as speedily as possible, and to pay the debts of the testator and the legacies named in the will promptly. The testator anticipated that the whole estate might be necessary to pay all the legacies and to pay his debts. Therefore, [417] in the last clause of his will he provided that if his estate was not sufficient to pay all the legacies after the payment of his debts, the legacies should be proportionately reduced. All this precludes the supposition that a mortgage was ever within the intention of the testator. See Williamson v. Grider, supra. And, as we have already seen, a

power of sale does not include the power to mortgage except in those States where a mortgage is characterized as a conditional sale instead of being regarded as a security for a debt.

We do not deem it necessary to decide whether or not the executors have the power to make a lease for a long term of years as it does not seem to us that it will be necessary for the executors to do this. It appears from the allegations of the complaint that before his death, Stiewel executed a lease for the term of thirty years to the Bankers' Trust Company on the property at the corner of Second and Main streets in the city of Little Rock, and, of course, any sale of that property by the executors will be made subject to the rights of the lessee under the lease. It may be said, however, that the will places the control and management of the estate in the hands of the executors, and they will have power to make leases for such length of time as may be necessary until they exercise the authority to sell and dispose of the land. It follows that the decree will be reversed and the cause remanded with directions to the chancellor to enter a decree in accordance with this opinion.

Kirby, J., did not participate.

NOTE.

Power of Trustee to Mortgage Trust Property.

The reported case adheres to the general rule laid down in Stump v. Warfield, 104 Md. 530, 10 Ann. Cas. 255, that a mere power given to a trustee to sell the trust property does not include a power to mortgage it. So in the recent case of Sanger v. Farnham, 220 Mass. 34, 107 N. E. 359, it was held that the trustees who were authorized to sell the trust property for the purpose of making a division of the estate did not have power to mortgage it. Similarly in Warren v. Pazolt, 203 Mass. 328, 89 N. E. 381, it was said that the borrowing of money on mortgage was not a necessary incident of a trustee's power to sell the trust property and to change investments. Likewise in Snyder v. Collier, 85 Neb. 552, 123 N. W. 1023, 133 Am. St. Rep. 682, it was said that ordinarily a legal presumption exists that a trustee has no power to mortgage the trust estate, and that a prospecting mortgagee should therefore exercise reasonable diligence to ascertain whether the trustee has authority to encumber the trust property. And see Hamilton v. Hamilton, 149 Ia. 321, 128 N. W. 380.

The court in the reported case, however, alludes to the cardinal principle that in construing a power the intention of the donor is of paramount importance. This principle has been applied in several recent cases. Thus in Dewein v. Hoose, 237 Mo. 23, 139 S. W. 195, it appeared that by a will the widow of the decedent was made executrix and was given "full power and absolute authority" to dispose of his property, and the testator directed that this clause should be "so construed as to give her absolute title to and in the whole of my estate, ... to enable her to dispose of the same at her option, and that she may make a good title to the purchaser or purchasers." It was held that a power to encumber the property by a deed of trust existed, especially in view of the fact that the decedent indicated clearly by his will that his widow was the chief object of his bounty and that it was his foremost wish that she should be cared for after he should die. Likewise in Hamilton v. Hamilton, 149 Ia. 321, 128 N. W. 380, it was held that where the power was testamentary in character the intent of the testator was the central question, and that under a will which read "all the rest, residue and remainder of my estate, . . . I will, devise and bequeath to my beloved husband, . . . to have and to hold . . . . during his life with full power to sell, transfer and dispose of the same or as much thereof as may from time to time be needed for his support and maintenance during his said lifetime," the power to mortgage, for the purpose mentioned in the will, was given.

It has been held that though the power to mortgage is expressly given, a trustee does not have a broad power to mortgage for any purpose. Williamson v. Grider, 97 Ark. 588, 135 S. W. 361; Andrews v. Guayaquil, etc. R. Co. 75 N. J. Eq. 535, 72 Atl. 355; Smith v. Peyrot, 201 N. Y. 210, 94 N. E. 662, *reversing judgment* 134 App. Div. 954, 118 N. Y. S. 1143, which *affirmed judgment* in 116 N. Y. S. 543. Thus where a testatrix empowered the trustees named in her will to "mortgage, sell or lease the lands belonging to me and to apply the proceeds of such rents to the payment of my debts, and should they deem it expedient to mortgage said lands for the purposes above mentioned, then their mortgage of same so given shall bind my children, and the lands are subject to said mortgage," it was held that no power was given to the trustees to mortgage crops and personal property, rents, etc., for securing advances to operate a plantation. Williamson v. Grider, 97 Ark. 588, 135 S. W. 361. Likewise it has been held that under a will which gave the executors full power in their discretion to sell, convey and mortgage any or all of the testator's real estate "for the purpose of carrying out the provisions of this instrument" the executors had no power to mortgage the estate for the purpose of raising funds to loan or advance to the heirs,

where it appeared that at the time the attempt to mortgage was made the debts and specific legacies had all been paid. Smith v. Peyrot, 201 N. Y. 210, 94 N. E. 662, *reversing judgment* 134 App. Div. 954, 118 N. Y. S. 1143, which *affirmed judgment* in 116 N. Y. S. 543. So where an association by deed of trust conveyed certain securities to trustees with the power to dispose of them only for single purpose, namely, that of raising money in order to enable the association to perform its obligations under a construction contract, it was held that a pledge of the securities by the trustees to secure advances made for purposes other than the construction work, was invalid. Andrews v. Guayaquil, etc. R. Co. 75 N. J. Eq. 535, 72 Atl. 355.

In several recent cases an order authorizing a mortgage of the trust property has been granted on an application by the trustee to the court. In Butler v. Badger, 128 Minn. 99, 150 N. W. 233, it was said that a court, on application, clearly has the right to authorize a trustee to raise a temporary loan secured by a mortgage on the trust property. And in New York L. Ins. etc. Co. v. Conkling, 159 App. Div. 337, 144 N. Y. S. 638, it was said that a testamentary trustee may be authorized by the court to mortgage real property held by him for the purposes of paying off taxes thereon.

Where it appears that contemplated permanent improvements to trust property will increase the rental and market value thereof the trustee, on application to the court, may be authorized to mortgage the premises to raise money to effect the improvements. Matter of Windsor Trust Co. 142 App. Div. 772, 127 N. Y. S. 586. And it has been held that a court in the exercise of its general chancery jurisdiction may authorize a trustee to mortgage the trust property to the extent of the interest of the life tenants, for the purpose of securing a loan to pay a collateral inheritance tax and for making necessary repairs on the trust property, where the estate is held in trust as a home for the joint use and benefit, support, and maintenance out of the proceeds, of a husband and wife and his infant children during the lives of the parents, with remainder in fee simple to the children. Shirkey v. Kirby, 110 Va. 455, 66 S. E. 40, 135 Am. St. Rep. 949.

In Lyddane v. Lyddane, 144 Ky. 159, 137 S. W. 838, it appeared that a testator devised all of his property to his widow in trust for the benefit of herself and her children, to be managed by her as she might think best until his youngest child attained the age of twenty years, at which time, if a majority of his heirs consented, the estate might be divided. The estate, at the time of the testator's death, was in debt to a considerable sum which had been reduced by the widow's management to about $9500. When the creditors pressed for payment she applied to the circuit court for authority to borrow money on the security of a mortgage to pay off the outstanding indebtedness, and it was held that under the facts as disclosed a proper case had been made out for allowing a mortgage of the property.

In Long v. Simmons Female College, 218 Mass. 135, 105 N. E. 553, it appeared that real estate had been devised to trustees in trust to pay the income "or so much thereof as said trustees shall see fit" to the testator's daughter, "and so much of said remainder as shall not be paid, applied or used" the trustees were directed to hold subject to certain provisions in the will which established a trust in certain property, the income of which was to be paid to the testator's granddaughter and her issue. The trustees were given no power to mortgage the real estate. Under a statute which provided that "probate courts . . . may authorize any trustee or trustees appointed under any will, trust, deed or indenture, and having the control or managment of any real estate, to mortgage the same for the purpose of paying the sums assessed thereon for betterments, or the expenses of repairs and improvements thereon made necessary by such betterments," it was held that the probate court had jurisdiction to empower the trustees to mortgage the land whereon buildings stood which were destroyed by the great Boston fire of 1872 and to order a certain portion of the income from the property to be set aside as a fund for the payment of the principal of the debt.

In Shepard v. Shepard, 20 Ont. W. Rep. 810, 3 Ont. W. N. 469, it was held that an act which conferred on a court the power to make an order authorizing trustees to mortgage trust property should not be construed as giving the court power to compel the trustees to mortgage.

It has been held that where a deed of trust authorized and gave trustee the power to mortgage "all or any portion of the property," the trustee was liable personally where he bound himself by a personal covenant in a mortgage deed, even though he described himself as covenanting as a trustee, provided there was nothing in the case to show that both parties did not intend to relieve the trustee from personal liability, or to indicate that the mortgagee intended to rely solely on the mortgaged property for his security Knipp v. Bagby, 126 Md. 461, 95 Atl. 60.

CRANDALL ET AL.

v.

TROWBRIDGE ET AL.

Iowa Supreme Court—January 20, 1915.

170 Iowa 155; 150 N. W. 669.

Process — Service Procured by Fraud.

Service upon a defendant, whose presence within the state was procured by the fraud or trickery of the plaintiffs or those acting in their behalf, does not give the court jurisdiction.

[See note at end of this case.]

Same.

Where all the plaintiffs were joint makers of the notes, to cancel which the suit was brought, and were investigating the facts together, they are chargeable with the acts of each other, or of their attorney, by which a defendant was fraudulently induced to enter the state, so that he could be served.

[See note at end of this case.]

Same.

A fraudulent intent to induce a defendant to come into the state, so that process could be served upon him, may be inferred from the acts and representations of the parties and the other facts and circumstances.

[See note at end of this case.]

Same.

Unless the facts and circumstances show that a defendant was fraudulently induced to enter the state, so that he could be served, honesty of intent on the part of plaintiffs will be presumed.

[See note at end of this case.]

Same.

On a motion to set aside the return of service upon a defendant, evidence held not to show that plaintiffs fraudulently induced defendant to come into the state, so that process could be served upon him.

[See note at end of this case.]

Appeal from District Court, Clay county: LEE, Judge.

Action to cancel notes. W. G. Crandall et al., plaintiffs, and E. E. Trowbridge et al., defendants. From judgment rendered, defendant Swenson appeals. AFFIRMED.

[155] Action in equity to cancel notes given by the plaintiffs, one of which was for $1,200.00 and endorsed to defendant Swenson, the other for $2,500.00, endorsed by Swenson to Gillespie, and by him endorsed to the Peoples Savings Bank, of Spencer, Iowa. Defendants were not all served, and there was no appearance for some of them. Defendant Swenson, who is the appellant, is a resident of Nebraska. Service of original notice was made upon him by the sheriff of Clay County on October 28, 1912, at Spencer, Iowa. He appeared specially for the purpose of objecting to the jurisdiction of the court and moved to set aside the return and service on the ground that he was induced by the fraud of plaintiffs to come to Spencer for the purpose of enabling plaintiffs to serve the notice upon him there. The hearing was had upon affidavits and oral examination of some of the persons making affidavits. Appellant's motion was overruled, and he appeals.

Alvin F. Johnson and *Helsell & Helsell* for appellant.

Fawille & Whitney for plaintiffs and appellees.

W. W. Cornbill for defendants First National Bank and Peoples Savings Bank.

[156] PRESTON, J.—With the merits of the controversy between plaintiffs and defendants, we have nothing to do on this appeal. There has been no general appearance, or plea to, or trial upon the merits, except that the Savings Bank has filed an answer. The appearance by defendant Swenson was under Par. 4, Chap. 162, Acts of the Thirty-Fourth General Assembly. The question is, whether plaintiffs practiced a fraud upon appellant, as alleged. It is almost entirely a question of fact. The fraud alleged is, that the presence of appellant in Clay County, Iowa, was procured by plaintiffs upon the representation that if he would come to Spencer, Iowa, he would there have delivered to him an automobile as payment of the $1,200 note of plaintiffs which Swenson held, and by plaintiffs' concealing from him certain facts which, if he had known, would have caused him not to come within the jurisdiction. Appellant says his presence in Iowa was not voluntary; that plaintiffs' purpose was unknown to him. If the presence of appellant in Iowa was procured by trickery, deceit, or the fraudulent and wrongful acts of plaintiffs, or those acting in their behalf, the court did not obtain jurisdiction, and in that case the motion to quash should have been sustained. Appellant cites upon this point: Dunlap v. Cody, 31 Ia. 250, 7 Am. Rep. 129; Mooney v. Union Pac. R. Co. 60 Ia. 346, 14 N. W. 343; Toof v. Foley, 87 Ia. 8, 54 N. W. 59; Mahoney v. State Ins. Co. 133 Ia. 570, 110 N. W. 1041, 9 L.R.A.(N.S.) 490; Allen v. Wharton, 59 Hun 622, 13 N. Y. S. 38; Townsend v. Smith, 47 Wis. 623, 3 N. W. 439, 32 Am. Rep. 793; Van Horn v. Great Western Mfg. Co. 37 Kan. 523, 15 Pac. 562; Wood v. Wood, 78 Ky. 624; Chubbuck v. Cleveland, 37 Minn. 466, 35 N. W. 362, 5 Am. St. Rep. 864; Wanzer v. Bright, 52 Ill. 35; Heston v. Heston, 52 N. J. Eq. 91, 28 Atl. 8; Battelle v. Youngstown Rolling Mill Co. 16 Lea (Tenn.) 355; Frawley v. Pennsylvania Casu-

alty Co. 124 Fed. 259; Cavanaugh v. Manhattan Transit Co. 133 Fed. 818.

Plaintiffs both signed the notes and were interested in [157] the California land deal, and were investigating the facts to make defense. They are each chargeable with the acts of the other, or their attorney, as to the service of notice in the action by plaintiffs. Toof v. Foley, supra.

It is the claim of appellant that plaintiffs had been planning to have Swenson come to Iowa in order to serve him with notice, and that they concealed such purpose from him. There is no other claim of concealment. If such was not their purpose, then, of course, there was no concealment of it. The evidence, which will be later pointed out, shows that until after Crandall had the conversation with Gillespie on the morning of October 28, and when Crandall supposed Swenson had already started to Spencer, there was no intention to sue Swenson, consequently no fraud or concealment.

Fraud and fraudulent intent and purpose may be inferred from the acts and representations of the parties and all the facts and circumstances shown. Bean Chamberlain Mfg. Co. v. Standard Spoke, etc. Co. 131 Fed. 215, 65 C. C. A. 201. But as between honest and dishonest motives and purposes, we should presume honesty of intent and purpose unless the facts and circumstances are such as to satisfy the mind that the acts and statements relied upon are fraudulent or dishonest.

The legal propositions seem to be settled, so that it is unnecessary to discuss the cases. We do not understand counsel for appellees to controvert the legal propositions in appellant's authorities before cited. They contend, however, that under the evidence there was no fraud or unfairness, and that appellant came voluntarily to Spencer, Iowa. After a careful examination of the record, we are of opinion that the position of appellees ought to be sustained.

Without going too much into detail, we shall state the more important facts appearing in the record. Although the hearing was of a motion, supported by affidavits, with counter-affidavits, the record is voluminous for such a case, and there is necessarily more or less repetition. The facts are, in the main, without substantial dispute, although there [158] is some conflict as to some of the details which we shall endeavor to point out. To better understand the situation, we shall briefly state the claim of plaintiffs in the action. It is, in substance, that about May 25, 1912, plaintiffs and another contracted for the purchase of land in California; that thereunder $8,700.00 would be due August 1, 1912; plaintiffs were unable to meet the payment, and in August, defendant Trowbridge represented that defendant Swenson would advance that amount of money if plaintiffs and Trowbridge would execute their note for that amount, which plaintiffs agreed to, and did, do. The note was delivered to Trowbridge for Swenson as security for the money to be furnished by Swenson; that later, in August, 1912, Trowbridge and Swenson represented to plaintiffs that Swenson had forwarded $8,700.00 to the person in California, to whom it was due, and had accepted as security therefor the note of plaintiffs and Trowbridge, but informed plaintiffs that the note was too large for Swenson to handle and that Swenson desired to have smaller notes given in lieu thereof; that this was done at the request of Swenson, and three new notes of $5,000.00, $2,500.00 and $1,200.00 were given; that Trowbridge, Swenson and one George Gillespie conspired together to induce plaintiff to execute the $8,700.00 note; that Swenson had not agreed to furnish the money; that Swenson had not sent any money to California, and that the statement that it had been done was false. The $1,200.00 note, endorsed by Trowbridge to Swenson, and still held by him at the time this suit was brought, and the negotiations for its payment, are involved in this appeal. The $2,500.00 note is held by defendant Savings Bank, and it has answered, claiming to be an innocent holder.

We shall state the substance of the affidavits and testimony bearing upon the alleged fraud by which appellant claims plaintiffs induced him to come to Iowa. October 4, 1912, plaintiff, Crandall, sent appellant a telegram making inquiry whether he would be at home the next day. Appellant replied by telegraph from Nebraska that he would be at home. [159] The next day, Mr. Heald, of Spencer, Iowa, an attorney for plaintiffs, saw Swenson at his home in Nebraska. It is shown by the affidavit of appellant, and not disputed by appellees, that at this time Mr. Heald maintained a friendly attitude towards appellant and stated that plaintiffs might have some financial difficulty in meeting some of the notes on the date of their maturity, and that Crandall had recently purchased an automobile, which he desired to sell to appellant and have the purchase price apply as a payment of the $1,200 note held by apellant; appellant stated to Heald that he would consider Crandall's proposition and requested Heald to have Crandall send a detailed description of the automobile; that Heald also stated that plaintiffs desired to enlist appellant's services in disposing of the land for which the notes had been given. October 15th, Crandall wrote a letter to appellant referring to the conversation between appellant and Heald in regard to procuring appellant's assistance to sell the land

and in regard to the sale of the automobile, stating further that he expected to go to Council Bluffs the next Saturday night, and suggesting that appellant meet him Sunday to go over the matters. October 18th, appellant answered by letter and wire that he would be unable to meet Crandall as suggested, but in the letter stated that he would be glad to meet him at any time in Council Bluffs or Omaha, and that he would be pleased to be of service in helping dispose of the California land; he again asked for a detailed description of the automobile. October 22nd, Crandall wrote appellant a second letter, again referring to the land and requesting appellant to meet him in Omaha to discuss the matter. On the same date, Crandall also wrote appellant a letter giving a description of the automobile and stating that he would sell the same, fully equipped, for $1,275.00, adding that he (Crandall) would drive the car to Omaha and turn it over to appellant if appellant would meet him the following Sunday. On the same day, Swenson wired Crandall, addressed to Spencer, Iowa, that he would pay $1,200.00 for the automobile if [160] Crandall would drive the car to Omaha. October 25th, Crandall wired Swenson that he would meet him at the Hinshaw Hotel in Omaha Sunday morning. On Sunday, October 27th, appellant went to Omaha and met Crandall and Heald pursuant to the arrangement, and he says that he expected to receive the automobile at Omaha and surrender the $1,200 note; he testifies by affidavit that at this time Crandall stated that he had decided definitely to sell the car for $1,200.00 and take the note. Crandall did not take the car to Omaha, and appellant says that Crandall requested appellant to go to Spencer and get the car. Appellant says that Heald and Crandall stated to him that they had started with it from Spencer, but were compelled to turn back and go by rail because it was windy and appellant's eyes were weak. Crandall and Heald qualify this statement somewhat and deny that they said they had started with the car, but Crandall says that he did not drive the car because it was a big undertaking for him on account of his eyes and the wind, and further, that he did not feel justified in driving it so far, not knowing whether he could make the deal for the car. As to this matter there is a flat contradiction, by both Crandall and Heald, of appellant's affidavit, that they had agreed to exchange the car at $1,200.00 for the note. Their testimony is to the effect that Crandall wanted $1,275.00 for the car and that he never told appellant that he had decided definitely to sell the car for $1,200.00; that Crandall told Swenson that he could go to Spencer and look at it, and Crandall would arrange with Heald to turn the car over at any price that Swenson and Heald might agree upon; that Crandall told Swenson that he was going to California the next day and that Mr. Heald was going back to Spencer that night and asked him to go back with Heald, but that Swenson said he could not go to Spencer before the next morning; that he told Swenson that any deal he made with Heald would be satisfactory, and that Swenson said he would go up and look at the car. He says that, as he understood it, the train that Swenson would [161] leave on the next morning would leave Omaha at 7:45. Appellant states that he told Crandall on the 27th that he would leave for Spencer on an afternoon train the next day, but that in fact he did start from Omaha at 10:55 the next morning; that he arrived in Spencer about 8:00 o'clock P. M., October 28th, and says he immediately telephoned to Heald that he had arrived, and requested Heald to come down to the garage and instruct those in possession of the automobile to deliver the same and that the note would be delivered to Heald; that Heald replied it was too late to close the deal that night and stated that he would come down in the morning; that about thirty minutes after this conversation the notice was served upon appellant. The car was not delivered. Appellant says that his purpose in going to Spencer was to exchange the note for the automobile; that he had no other business to transact at Spencer or anywhere in the state; that he would not have gone to Spencer or into the state except for the misrepresentations and deceit. He says that since said time he has learned that for some time prior thereto Crandall and Heald had been making inquiries and investigations in regard to the transfer of the notes to him and that the friendly attitude towards him assumed by them was feigned and for the purpose of deceiving him and procuring his presence within the jurisdiction.

An important feature of the case is a conversation had between Heald and defendant, George Gillespie, at Omaha on the morning of October 28th, shown by the affidavit and examination of Crandall, and there is no dispute in the testimony either as to the conversation itself having taken place or as to what Gillespie told Crandall, so that this must be taken as true. As to this matter, Mr. Crandall says that he was then on his way to California and had purchased his ticket; that on the morning of the 28th he interviewed Gillespie in Omaha and questioned him regarding the trip of Mr. Swenson and Mr. Johnson to Spencer, Iowa, at the time of procuring the notes in controversy, and that Gillespie told [162] him that he (Gillespie) was at Spencer at the time Mr. Swenson and Mr. Johnson, who is Swenson's

attorney, were at Spencer; that Mr. Johnson went to Spencer with Mr. Swenson as Swenson's attorney, and that the purpose of the trip was to get the notes from him (Crandall) in exchange for the note of $8,700.00 which Barber and Crandall had given Swenson some time before; that Gillespie also told Crandall that the purpose of getting the new notes for the larger note was to get one for $2,500.00 for him (Gillespie), which amount Trowbridge was owing him and which should be turned over in payment of the debt; that Gillespie also told him that Swenson had not advanced any money on account of the $8,700.00 note, or on the notes in controversy, to Trowbridge; that both Johnson and Swenson while at Spencer appeared to be very uneasy and when they left town with their automobile they picked him (Gillespie) up at the hotel and, instead of going down the main street, they went out of town on a back street; that when he was informed of these matters by Swenson he came to the conclusion that they had been guilty of dishonesty in procuring the notes, as Swenson had told him at the time the notes in controversy were given that he had advanced the money on the $8,700.00 note and turned the same in at Trowbridge's office in Omaha. He says that when informed of these matters by Gillespie, he concluded that neither Swenson nor Johnson were acting honestly in the matter and that the transfer of the notes was for the purpose of putting Swenson and Gillespie in the position of innocent purchasers of negotiable paper. He also says that Gillespie told him that he would help him and would state all the facts.

It appears in the record that Gillespie had negotiated the $2,500.00 note to the defendant Savings Bank about September 10, 1912. This note had been indorsed by Trowbridge to Swenson, and by Swenson to Gillespie.

Crandall also states that after the conversation with Gillespie he concluded for the first time to bring suit against Swenson to recover the notes; that he went to the telegraph [163] office at about 9:35 o'clock in the morning, which was soon after the conversation with Gillespie, and telegraphed Mr. Heald as follows: "Auto deal off—Don't deliver car—Starting suit to recover notes." He also telegraphed to F. F. Faville to start suit against Swenson to recover notes and see Heald; that at 9:45 that morning he took the train for California. He says that he did not have time to look Swenson up after the conversation with Gillespie, and that he supposed Swenson had already started for Spencer.

These are the main facts. There may be some others which will be referred to later. We are satisfied from the record that up to the time of the conversation between Crandall and Gillespie there was no bad faith on the part of plaintiffs or their attorney in the negotiations with Swenson; neither was there any bad faith after that time. Crandall testifies that up to that time, and at the time of the conversation with Swenson on the 27th of October, he fully intended to let Swenson have the car, the price to be agreed upon between Swenson and Heald. The $1,200.00 note did not become due until December 26, 1912, and it is argued by appellant that the negotiation in regard to trading the automobile for the note not yet due was unusual, but the evidence shows that Crandall had ordered an automobile some time before and was having trouble to get it; that both plaintiffs were hard pressed for funds and their credit had become impaired because of the California deal and they were anxious to turn the automobile on the note; Swenson lived in another state, and it would take some time for the parties to make the turn.

It is argued by appellant that the plaintiffs and their attorney, Heald, assumed a friendly attitude towards Swenson for the purpose of misleading him. The record shows that, while plaintiffs believed that Swenson was concerned in the fraud, they had no proof of that fact up to the time of the conversation with Gillespie. As some of the witnesses put it, they concluded that Swenson, Trowbridge and Gillespie would all stand together.

[164] Appellees admit that they were investigating the matter and that they went to Swenson and his attorney; that they questioned Swenson at different times about there being anything crooked in connection with his holding the note, and that Swenson admitted that it was a crooked transaction, but as the witnesses put it, he did not admit that he was crooked about it. Swenson was assuring them all the time that he had been acting in good faith and was an innocent purchaser of the notes. There was nothing underhanded or concealed about what plaintiffs did. They went directly to Swenson's attorney, Johnson, and told him that a fraud had been perpetrated upon them and inquired of him regarding Swenson's knowledge of Trowbridge's failure to send the money, and as to whether Swenson had paid any money to Trowbridge. Johnson himself says in his affidavit that Crandall and Heald stated to him that they were out investigating the whole transaction and asked for the address of Swenson, which Johnson gave them. Both Swenson and Johnson led plaintiffs to believe that Swenson was an innocent purchaser and had gotten the notes from Trowbridge for a large sum of money he had loaned him previous thereto.

It is urged by appellees that when Crandall had the conversation with Gillespie on the morning of October 28th, this was the

first time they had any tangible proof to substantiate their suspicions of Swenson's participation in the fraudulent transaction of the notes. Swenson and Johnson both filed their affidavits on this hearing, but neither of them deny Gillespie's statement to Crandall that they acted as Gillespie described while in Spencer. The matters referred to by Gillespie have a bearing on the question as to whether Swenson was an innocent holder of the $1,200.00 note and as to whether he participated in the fraud alleged to have been perpetrated upon plaintiffs by Trowbridge and Gillespie.

Counsel for appellant place stress on the fact that some of the earlier letters from Crandall to Swenson suggest that Swenson assist them in disposing of the California land, but [165] this was after Swenson and Johnson had assured Crandall of Swenson's entire innocence in connection with the alleged fraud. Plaintiffs had become considerably involved by attempting to handle the California land. Swenson was, it appears, a person who was loaning money and was engaged in such transactions, and he was perfectly willing to assist them. Plaintiffs seem to have believed that if they could handle the California land and secure the title they could save the land and their loss would be less and they could make a profit on the land. It is contended by the appellant that plaintiffs and Heald had been scheming for some three weeks to induce him to go to Spencer, but there is nothing in the record anywhere that plaintiffs or their attorney at any time made a suggestion even that appellant go to Iowa until the evening of October 27th. As already stated, the evidence of Crandall and Heald is, that the parties had not agreed upon the price of the automobile. Crandall was then on his way to California, and, if they had not agreed upon the price, there was nothing Crandall could do except to leave the matter of price for further negotiations between Swenson and Heald. Crandall says that at that time he fully intended to deliver the machine to Swenson when the price should be agreed upon. Appellant's theory is, that the sole purpose of his going to Spencer was to get the car and surrender the note; that the terms had already been agreed upon, and the only thing to do was to make the exchange. If this be true, there was no necessity for Swenson going to Spencer. He could have sent someone else for the car, or he could have had the car shipped to him, or Swenson could have refused to deal for the car unless it was brought to Omaha, so that in this way appellant could have frustrated any such scheme by any of the methods just suggested.

Other circumstances are referred to in argument at considerable length, but the opinion is already too long, and we shall not pursue the subject further. Our conclusion is that it has not been shown that appellant was fraudulently induced [166] to come into the jurisdiction, but that his appearance in Iowa was voluntary. The trial court so held, and the ruling is, therefore,

Affirmed.

Deemer, C. J., Evans, Weaver and Ladd, JJ., concur.

Rehearing denied May 7, 1915.

NOTE.

Validity of Personal Service of Process Procured by Fraud or Force.

Service on Nonresident:
General Rule, 612.
Application of Rule:
Generally, 612.
Service Procured by Abuse of Criminal Process, 615.
Service Procured by Force, 615.
Service on Resident, 616.

Service on Nonresident.

GENERAL RULE.

Proceeding on the fundamental principle that no man can be allowed to profit by his own fraud, the decisions are apparently unanimous in holding that where a person, residing in another district is inveigled, enticed or induced to come into the district where the plaintiff resides by false representations or deceptive contrivances for the purpose of serving legal process on him, process served through such improper means is invalid.

United States.—Blair v. Turtle, 1 McCrary 372; Union Sugar Refinery v. Mathiesson, 2 Cliff. 304, 24 Fed. Cas. No. 14,397; Fitzgerald, etc. Const. Co. v. Fitzgerald, 137 U. S. 98, 11 S. Ct. 36, 34 U. S. (L. ed.) 608; Commercial Mut. Acc. Co. v. Davis, 213 U. S. 245, 29 S. Ct. 445, 53 U. S. (L. ed.) 782; Frawley v. Pennsylvania Casualty Co. 124 Fed. 259; Cavanagh v. Manhattan Transit Co. 133 Fed. 818. See also Case v. Smith, 152 Fed. 730.

Connecticut.—Hill v. Goodrich, 32 Conn. 588.

Illinois.—McNab v. Bennett, 66 Ill. 157; Nichols v. Goodheart, 5 Ill. App. 574.

Indiana.—See also Duringer v. Moschino, 93 Ind. 495.

Iowa.—Dunlap v. Cody, 31 Ia. 260, 7 Am. Rep. 129; Toof v. Foley, 87 Ia. 8, 54 N. W. 59. And see the reported case.

Kansas.—Van Horn v. Great Western Mfg. Co. 37 Kan. 523, 15 Pac. 562. See also Wells

v. Patton, 50 Kan. 732, 33 Pac. 15. *Compare* Carney v. Taylor, 4 Kan. 178.

Kentucky.—Wood v. Wood, 78 Ky. 624.

Michigan.—See Copas v. Anglo-American Provision Co. 73 Mich. 541, 41 N. W. 690.

Minnesota.—Chubbuck v. Cleveland, 37 Minn. 466, 35 N. W. 362, 5 Am. St. Rep. 864; Columbia Placer Co. v. Bucyrus Steam Shovel, etc. Co. 60 Minn. 142, 62 N. W. 115.

Missouri.—Vastine v. Bast, 41 Mo. 493; Byler v. Jones, 79 Mo. 261; Christian v. Williams, 111 Mo. 429, 20 S. W. 96.

New Jersey.—Heston v. Heston, 52 N. J. Eq. 91, 28 Atl. 8; Reed v. Williams, 29 N. J. L. 385.

New York.—Olean St. R. Co. v. Fairmount Const. Co. 55 App. Div. 292, 67 N. Y. S. 165; Olson v. McConihe, 54 Misc. 48, 105 N. Y. S. 386; Goupil v. Simonson, 3 Abb. Pr. 474; Baker v. Wales, 14 Abb. Pr. N. S. 331, 35 Super. Ct. 403; Bulkley v. Bulkley, 6 Abb. Pr. 307; Wyckoff v. Packard, 20 Abb. N. Cas. 420; Metcalf v. Clark, 41 Barb. 45; Steiger v. Bonn, 59 How. Pr. 496; Allen v. Wharton, 59 Hun 622, 20 Civ. Pro. 121, 13 N. Y. S. 38; Carpenter v. Spooner, 2 Sandf. 717; Dunham v. Cressy, 51 Hun 641 mem. 4 N. Y. S. 13; Higgins v. Dewey, 13 N. Y. S. 570, *affirmed* 27 Abb. N. Cas. 81, 14 N. Y. S. 894; Graves v. Graham, 18 Misc. 752 mem. 43 N. Y. S. 510, *affirmed* 19 Misc. 618, 44 N. Y. S. 415; Bell v. Lawrence, 140 N. Y. S. 1106. See also Atlantic, etc. Tel. Co. v. Baltimore, etc. R. Co. 46 Super. Ct. 377.

Ohio.—Miami Powder Co. v. Griswold, 5 Ohio Dec. (Reprint) 532, 6 Am. L. Rec. 464; Pilcher v. Graham, 9 Ohio Cir. Dec. 825, 18 Ohio Cir. Ct. 5. See also Ex p. Everts, 2 Disney 33.

Oregon.—*Compare* Commercial Nat. Bank v. Davidson, 18 Ore. 57, 22 Pac. 517.

Pennsylvania.—Hevener v. Heist, 9 Phila. 274, 30 Leg. Int. 46; Trattner v. Forman, 10 Pa. Dist. 566; Sloan v. Green, 7 W. N. C. 408. See also Hostetter v. Hirsch, 14 Lanc. L. Rev. 110; Fry v. Gheen, 14 Lanc. L. Rev. 112. *Compare* Luckenbach v. Anderson, 47 Pa. St. 123 (holding that where a man was sued on a judgment, which he had confessed, it was not a sufficient defense to allege that he was decoyed into the jurisdiction where the original suit was brought); Fearl v. Hanna, 129 Pa. St. 588, 18 Atl. 556.

Rhode Island.—Ex p. Taylor, 29 R. I. 129, 69 Atl. 553.

Vermont.—See Steele v. Bates, 2 Aik. 338, 16 Am. Dec. 720.

Wisconsin.—Townsend v. Smith, 47 Wis. 623, 3 N. W. 439, 32 Am. Rep. 793.

Canada.—*Compare* Hyde v. Boswell, 10 Quebec Pr. 388.

In Townsend v. Smith, 47 Wis. 623, 3 N. W. 439, 32 Am. Rep. 793, wherein it appeared that the defendant had been inveigled into the jurisdiction by artifice and falsehood the court said: "The means by which the service of the summons was obtained, being fraudulent, were unlawful. The remedy which the law affords in such a case is to set aside the process. This remedy is not given upon the ground that, by reason of the fraud, the court did not get jurisdiction of the person of the defendant by the service, but upon the ground that the court will not exercise its jurisdiction in favor of the plaintiff who has obtained service of his summons by unlawful means. When that fact is made to appear—especially if the defendant has been guilty of no laches,—the court should vindicate the integrity of its process by setting aside the service and turning the plaintiff out of court as a punishment for his gross fraud." And in Saveland v. Connors, 121 Wis. 28, 98 N. W. 933, the court said: "The power and duty of the courts to refuse jurisdiction in such cases rest not so much on the rights of the defendant as upon a duty to themselves to preserve the purity of judicial proceedings."

The service of process will be set aside if the fraud is accomplished by an agent, or by someone acting in behalf of the real party in interest, as readily as if the fraudulent acts are those of the party personally. Union Sugar Refinery v. Mathiesson, 2 Cliff. 304, 24 Fed. Cas. No. 14,397; Frawley v. Pennsylvania Casualty Co. 124 Fed. 259; Hill v. Goodrich, 32 Conn. 588; Chubbuck v. Cleveland, 37 Minn. 466, 35 N. W. 362, 5 Am. St. Rep. 864; Wyckoff v. Packard, 20 Abb. N. Cas. (N. Y.) 420; Metcalf v. Clark, 41 Barb. (N. Y.) 45; Steiger v. Bonn, 59 How. Pr. (N. Y.) 496; Carpenter v. Spooner, 2 Sandf. (N. Y.) 717; Hevener v. Heist, 9 Phila. (Pa.) 274, 30 Leg. Int. 46. See also Byler v. Jones, 79 Mo. 261; Allen v. Wharton, 59 Hun 622, 20 Civ. Pro. 121, 13 N. Y. S. 38. *Compare* Ex p. Taylor, 29 R. I. 129, 69 Atl. 553. In Chubbuck v. Cleveland, supra, it appeared that the plaintiff made certain fraudulent representations to a third person with the expectation that they would be communicated to the defendant and cause him to come within the jurisdiction of the court. The defendant so acted on the representations and was served with process. The court held the service to be invalid.

Application of Rule.

Generally.

In Dunlap v. Cody, 31 Ia. 260, 7 Am. Rep. 129, the court, in holding that fraud in obtaining jurisdiction of a party was a good defense to an action on the judgment procured thereby said: "The false statement was made to defendant by plaintiffs' attorney

that [plaintiff] and others were about to erect an elevator in Hancock county, Illinois, to cost between thirty thousand dollars and forty thousand dollars; and the defendant, being a carpenter, was induced to go to Illinois to look at the site of the proposed structure. The truth, that the object in getting defendant into the state of Illinois, was to obtain jurisdiction of his person in an action against him, and avoid the bar of the statute of limitations of the state of Iowa, was suppressed. It cannot be supposed that if the real facts and purpose had been made known to defendant he would voluntarily have gone to Illinois, and subjected himself to an action upon this demand, long since barred by the statute of limitations of the state in which he resides. Counsel representing plaintiff in this court, and who, it is but justice to say, were not concerned in obtaining the judgment in Illinois, do not seriously controvert the position, that the mode of obtaining jurisdiction was fraudulent. They concede that it 'smells somewhat of fraud.' The only palliation which they are able to offer is the suggestion of a doubt whether it may not be considered a 'pious fraud' in which 'the end justifies the means.' We do not think that it is entitled even to that small measure of charity. An enlightened and just administration of the law, no less than sound public morals, condemns such practices, and demands that the client whose cupidity could sanction, and the attorney whose venality could execute, such a purpose, should alike be disgraced." So in Pilcher v. Graham, 9 Ohio Cir. Dec. 825, 18 Ohio Cir. Ct. 5, and again in Miami Powder Co. v. Griswold, 5 Ohio Dec. (Reprint) 532, 6 Am. L. Rec. 464, it was held that where a defendant has been induced to come within the jurisdiction of the court for the purpose of adjusting a dispute between the parties, he cannot be legally served with process until a reasonable time to depart the jurisdiction has elapsed, after the final conclusion of the business on which he was invited to come. In Toof v. Foley, 87 Ia. 8, 54 N. W. 59, the court held that the evidence of fraud need not be conclusive but that it is sufficient that a conclusion that fraud was used to induce the defendant to come within the jurisdiction of the court for the purpose of serving him with process, is a fair finding from all the evidence. So in Heston v. Heston, 52 N. J. Eq. 91, 28 Atl. 8, the court held the service of process to be invalid, where the following facts appeared: The defendant was living in Pennsylvania with her father-in-law, and the petitioner, having filed his petition for divorce, wrote her asking her to meet him at a certain place in the city of Trenton. She came into the state and attended at the place designated by the petitioner in his letter. The petitioner did not meet her, as was implied in his letter that he would, but the sheriff was there in attendance and served a process of citation and copy of the petition on her. In Graves v. Graham, 43 N. Y. S. 510, *affirmed* 19 Misc. 618, 44 N. Y. S. 415, it appeared that the defendant voluntarily submitted himself to the jurisdiction of the court with the understanding that he should have a trial without a jury and on a day certain. The plaintiff refused to carry out the agreement, demanded a jury trial and the case was set for later day. A motion was made to vacate and set aside the order of arrest, which had been served on the defendant when he appeared. The court granted the motion and discharged the defendant. In Cavanagh v. Manhattan Transit Co. 133 Fed. 818, it appeared that the plaintiff had invited the secretary of the defendant company to come within the jurisdiction of the court for the purpose of examining certain machinery, and that as he was leaving, he was served with process by a deputy sheriff who had been waiting outside of the building. It appeared that the process was dated the same day on which the secretary had signified his intention of coming within the state. The court held that the evidence of fraud was sufficient to warrant the quashing of the service. However, in Union Sugar Refinery v. Mathiesson, 2 Cliff. 304, 24 Fed. Cas. No. 14,397, ~~wherein~~ It appeared that the plaintiff or someone acting in his behalf had written letters and invited the defendant to come within the jurisdiction of the court for the purpose of adjusting the controversy, and there was no further proof, the court held that the evidence was not sufficient to set the service aside. In MacLain v. Parker, 88 Kan. 717, 129 Pac. 1140, it appeared that the plaintiff's attorney had informed the defendant that the suit in question was to be brought in Kansas. Depending on that statement, the defendant went to Missouri and a short time thereafter was served with a summons to answer the action in Missouri. The court held that the facts did not constitute a sufficient foundation for the claim that the defendant was inveigled into another jurisdiction. Likewise in Volz v. Tutt, 12 Ky. L. Rep. 506, service of process was held to be valid where the defendant came within the jurisdiction of the court on business of his own although the officer who served him had previously sent him a message stating that he had important business to transact with him. In Gilbert v. Burg, 91 Wis. 358, 64 N. W. 996, the court held the service of process to be valid where the evidence failed to establish the fact of a fraudulent contrivance, or that the presence of the defendant within the state was procured by the fraudulent contrivance. In Jaster v. Currie, 198 U. S. 144, 25

S. Ct. 614, 49 U. S. (L. ed.) 988, *reversing* 69 Neb. 4, 94 N. W. 995, it was held that, where the defendant came into the jurisdiction of the court for the purpose of being present at the taking of a deposition and was served with process, the service was valid although it was shown that notice of the taking of the deposition was served on him for the express purpose of enticing him within the court's jurisdiction. And in MacKenzie v. MacKenzie, 238 Ill. 616, 87 N. E. 848, the court said: "It was also urged in defense of the contempt proceeding that the defendant came from Idaho to Chicago just before the attachment writ issued, pursuant to an agreement between his solicitor and the solicitor for appellee, for the purpose of negotiating with a view to ending the litigation between the parties hereto, and that having, by her solicitor, so induced him to come into the state, appellee had him arrested for contempt. The appellant failed to show that he was brought into the state by any fraud, artifice or trick for the purpose of enabling appellee to have him arrested in the contempt proceeding, and in that respect he has failed to bring himself within the rule laid down by the authorities upon which he relies. So far as appears, neither appellee nor her solicitor had any thought, at any time before appellant came into the state, of proceeding against him for contempt." In Case v. Smith, 152 Fed. 730, wherein it appeared that the defendant came within the jurisdiction of the court of his own volition and was served by the plaintiff the service was held to be valid although the plaintiff had arranged to be notified of his coming.

Service Procured by Abuse of Criminal Process.

Where criminal process is issued against a defendant not in good faith but solely for the purpose of getting him within the jurisdiction of the court and he is then served with civil process, the service is invalid. Barlow v. Hall, 2 Anstr. (Eng.) 461; Wells v. Gurney, 8 B. & C. 769, 15 E. C. L. 336; Loveridge v. Plaistow, 2 H. Bl. (Eng.) 29; Blair v. Turtle, 1 McCrary (U. S.) 372; McNab v. Bennett, 66 Ill. 157; Byler v. Jones, 79 Mo. 261; Christian v. Williams, 111 Mo. 429, 20 S. W. 96; Benninghoff v. Oswell, 37 How. Pr. (N. Y.) 235; Compton v. Wilder, 40 Ohio St. 130; Addicks v. Bush, 1 Phila. (Pa.) 19, 7 Leg. Int. 7. See also Underwood v. Fetter, 6 N. Y. Leg. Obs. 66; Com. v. Daniel, 4 Pa. L. J. Rep. 49, 6 Pa. L. J. 330. In Compton v. Wilder, supra, it appeared that the plaintiffs had procured a writ of extradition by which the defendant was taken from Pennsylvania into Ohio to answer a criminal charge. While thus in Ohio he was served with process in a civil action brought by the plaintiffs. In setting aside the service as illegal the court said: "To secure a service of summons, in a civil action like the one we are considering, is not one of the objects intended to be accomplished by this grant of power [extradition]. In a country like ours this power is useful and indispensable. It was intended, however, to subserve great public interests. When otherwise used it becomes an evil. The temptation to make it subservient to private interests is great. This weapon, intended alone to secure the punishment of crime, is frequently resorted to, to enforce the collection of private debts or to remove a citizen from his home into a foreign jurisdiction that he may there be served in a civil action. This growing evil has been seen and appreciated by the chief executives of many states, and to guard against it rules and regulations are being adopted, which may make the extradition of an alleged fugitive, in a proper case, extremely difficult. It has been recognized by both the executive and legislative branches of our government, as is shown by their former action. The judicial should be as swift in putting the seal of condemnation upon this abuse as have been the other branches of the government. The certain remedy to prevent its growth is, to deprive all persons who participate in the misuse of the power to extradite persons, alleged to be fugitives from justice, of the fruits resulting from such participation."

However, it has been held that where the party instituting a civil action is in no way connected with the criminal proceeding by which the defendant is brought within the jurisdiction, the service is valid. Nichols v. Goodheart, 5 Ill. App. 574; Lagrave's Case, 14 Abb. Pr. N. S. (N. Y.) 333 (note). Thus in Nichols v. Goodheart, supra, the court said: "The law permits civil suits to be commenced and prosecuted against persons who may be brought unwillingly into this state, where the creditor has nothing to do, directly or indirectly, with bringing such debtor within the jurisdiction of the court."

Service Procured by Force.

The courts will set aside a service of process procured by force. Blair v. Turtle, 1 McCrary (U. S.) 372; State v. Simmons, 39 Kan. 362, 18 Pac. 177; Ziporkes v. Chmelniker, 15 N. Y. St. Rep. 215; Davison v. Baker, 24 How. Pr. (N. Y.) 39. See also Duringer v. Moschino, 93 Ind. 495; Reed v. Williams, 29 N. J. L. 385; Olson v. McConihe, 54 Misc. 48, 105 N. Y. S. 386; Mason v. Libbey, 1 Abb. N. Cas. (N. Y.) 354; Ex p. Everts, 2 Disney (Ohio) 33. In Blair v. Turtle, supra, the defendants moved to quash

the service of process on them on the ground that they "were forced from their own state, and were forcibly brought into this state, by the fraud and procurement of this plaintiff, for the purpose of forcing them within the jurisdiction of said court, so that a summons might then be served upon them, which was done accordingly." To this plea the plaintiffs demurred. The court held that the facts stated in the plea were sufficient to warrant the quashing of the service of process, and said in part: "That where a plaintiff in a suit brings by force a defendant within the jurisdiction of a court, or induces him by deceitful or fraudulent practices to come within the jurisdiction, for the purpose of having him served with process, the courts will interfere by quashing the summons or service thereof to prevent the fraudulent and improper use of the process. This is a proper case for the exercise of such authority." In State v. Simmons, 39 Kan. 262, 18 Pac. 177, it appeared that the defendants had been brought from one state to another by means of force and threats for the purpose of testifying in a criminal action, and while they were awaiting the trial of the case they were served with process in an action charging them with contempt of court for their previous refusal to obey a subpœna. The court said: "It would not be proper for the courts of this state to favor, or even to tolerate, breaches of the peace committed by their own officers in a sister state, by sustaining a service of judicial process procured only by such a breach of the peace. Indeed, it would not be proper for any court in any state to sustain a service of any judicial process, either civil or criminal, where the service of such process was obtained only by the infraction of some law, or in violation of some well-recognized rule of honesty or fair dealing, as by force or fraud. Such a service would not only be a special wrong against the individual upon whom the service was made, but it would also be a general wrong against society itself—a violation of those fundamental principles of mutual trust and confidence which lie at the very foundation of all organized society, and which are necessary in the very nature of things to hold society together." In Ziporkes v. Chmelniker, 15 N. Y. St. Rep. 215, the court, while holding that under the facts involved the service was legal, said: "If the defendant was forced by the officers who had this process for service to come with them into this state, and thus subject himself to its jurisdiction, which he would not otherwise have done, then clearly the whole of the proceedings must be set aside." Likewise in Reed v. Williams, 29 N. J. L. 385, wherein it appeared that the defendant had been induced by fraud to cross from New York to New Jersey and was there served with process, the court in granting the motion to quash the service said: "I can see but little difference in principle between the case, as presented, and the case of seizing a person on the New York side, and carrying him over by force, to be served with process on this side. Surely, we would resist this in behalf of our own citizens, if taken from us and subjected to the expense and inconvenience, if not the peril, of a strange and foreign jurisdiction, whether done by force or by gross fraud or deception; and common justice, as well as common courtesy to our neighbors, requires that we should do to them as we would have them do to us in such cases, and that we should not permit the power of our courts to be successfully invoked to aid in the practice of trickery, dishonesty, or oppression of any kind." In Ex p. Everts, 2 Disney (Ohio) 33, the court said: "The abuse claimed to have occurred must be clearly established, and must involve an act of force, fraud or wrong, on the part of him who has employed the process in a manner technically regular, or a clear violation of some right of the other party, by which an exemption from the process, either generally or under the circumstances, existed."

Service on Resident.

Where the person against whom process is issued is within the jurisdiction and the service is procured by fraud or force, it is generally held to be invalid. Birch v. Prodger, 1 B. & P. N. R. (Eng.) 135; Olson v. McConihe, 54 Misc. 48, 105 N. Y. S. 386; Mason v. Libbey, 1 Abb. N. Cas. (N. Y.) 354; Bulkley v. Bulkley, 6 Abb. Pr. (N. Y.) 307; Davison v. Baker, 24 How. Pr. (N. Y.) 39; Bell v. Lawrence, 140 N. Y. S. 1106. *Compare* Martin v. Raffin, 2 Misc. 588, 23 Civ. Pro. 59, 21 N. Y. S. 1043; Atlantic, etc. Tel. Co. v. Baltimore, etc. R. Co. 46 Super. Ct. (N. Y.) 377. In Davison v. Baker, supra, wherein it appeared that a summons was served by thrusting it into the defendant's bosom accompanied by the remark "you have been too officious, and I will fix you," the court, in setting aside the service said: "I am satisfied the service was irregular, not to say void, having been made by force. It may be asked, what shall be done in case a party will not accept papers offered him with a view to their service upon him? Suppose he reject them and turn away, how is service to be effected? The answer is ready and plain. The officer will inform him of their nature and of his purpose to make service of them, and lay them down at any appropriate place in his presence. This would be good service, undoubtedly, in case the party to be served refuses to receive them. It can-

not be that the officer or person seeking to make service of a summons, must seize the party to be served, and compel him to take it; nor can he justify himself for any personal violence in order to make service. Service may be effected, and in all cases should be, without personal violence or incivility, and in my judgment the dignity of the court, as well as the high privilege of personal immunity, which every individual has a right to insist upon, demand that this rule should be strictly adhered to." But in Martin v. Raffin, 2 Misc. 588, 23 Civ. Pro. 59, 21 N. Y. S. 1043, the court held that the mere laying of a summons on the shoulder of the defendant who was attempting to avoid service by hiding in the "shelter of his wife's petticoats" was not an assault and not a sufficient ground to set aside the service. In Mason v. Libbey, 1 Abb. N. Cas. (N. Y.) 354, it appeared that the plaintiff had sued her mother, and having obtained an order and summons for the examination of the mother before trial and being possessed of a key to the mother's house, she went there, let herself in, and thus effected service of the order and summons to attend and be examined. The court said: "The plaintiff was not justified in entering her mother's house by unlocking the door without her mother's permission, to make the service in question. As against the service of civil process the law throws around the defendant the safeguard of protection to herself and her family. I cannot accept the plaintiff's statement that she carried the key to defendant's house by her permission. There had been long subsisting bitter and protracted litigation between the parties. If the plaintiff did once have the key by defendant's consent, the plaintiff well knew that the right to use it had been withdrawn by the changed relations of the parties, if not by actual words. This service must be set aside." In Olson v. McConihe, 54 Misc. 48, 105 N. Y. S. 386, it appeared that a process server gained admittance to the defendant's house by asking to see a servant therein. After gaining admission she rushed up-stairs, brushed past the butler and ran into the dining room, where the defendant was dining with her family and threw the summons and complaint, inclosed in an envelope, on the table. The court said: "It is uncontradicted that the person who deposes to the service of the summons herein was admitted at the servants' entrance to the house where defendant resided and asked to see one 'Kate,' presumably and apparently not this defendant. Such admission, under the circumstances, might not be said to carry the freedom of the house or to warrant forcible access to the dining-room upstairs for the purpose of service of process. Entry there and in the manner described was wrongful and the service improper." So in Bell v. Lawrence, 140 N. Y. S. 1106, service of a summons was set aside on the ground of fraud where it appeared that the process server had gained admittance to the house of the defendant by falsely representing that he carried a letter to her from a codefendant in the same action. In Bulkley v. Bulkley, 6 Abb. Pr. (N. Y.) 307, it appeared that a summons in an action for divorce was served on the defendant by enclosing it in a sealed package and handing it to the defendant on board a boat just as she was leaving New York for California. It was represented to the defendant by her husband, who was an attorney, that the package contained a present for her mother and a letter for herself which was not to be opened until she arrived. The defendant opened the package when at sea and found the summons. She was unable to get back to New York until the judgment for divorce had been entered. On application to set the judgment aside the court said: "To tolerate, for one moment, an act so flagrant and wicked, to be consummated by one over whom the court can exercise its control, to pass unrebuked, does not comport with the idea of a pure and honest administration of justice. Such a reproach, while in the exercise of the power with which I have been invested, it shall not suffer at my hands. The affidavit of the service of the summons by the clerk of the plaintiff, was made in the city and county of New York. To a grand jury of that county I commit the consideration of that paper. The affidavit of the plaintiff, upon which he obtained the order of reference, in which he coolly states, 'that no copy of an answer to the complaint in this action has been received, nor has the defendant entered any appearance in the action, nor has she, or any one in her behalf, demanded a copy of the complaint, and deponent was personally present and saw the summons herein served on defendant,' was taken before the clerk of Montgomery county, to whose grand jury I recommend the proper attention. To the general term of the supreme court, in whose immediate district this attorney and counsellor conducts his chief practice, I call attention to this officer of the court. The service of the summons, and all subsequent proceedings in this action, including the judgment and decree of divorce, is set aside with costs." In Birch v. Prodger, 1 B. & P. N. R. (Eng.) 135, it appeared that an attachment had been issued against the defendant for the nonpayment of money to the plaintiff. The officer having the process to serve was unable to locate the defendant. The plaintiff met the defendant on the street and forcibly carried him to his lawyer's office where he was detained until the writ was served, and as he was leaving he was arrested by the officer. The court held the arrest to be illegal and discharged the defendant.

STATE
v.
PEOPLE'S ICE COMPANY.

Minnesota Supreme Court—October 30, 1914.

127 Minn. 252; 149 N. W. 286.

Criminal Law — Appeal — Effect of Paying Fine.

The defendant, a foreign corporation, indicted for a violation of the statute prohibiting an unlawful combination in restraint of trade, sought an opportunity to change its plea of not guilty to guilty and receive sentence. The sentence immediately imposed was a fine, which was at once paid. Six months thereafter, lacking a few days, this appeal was taken. Upon the state's motion to dismiss the appeal it is made to appear that appellant paid the fine voluntarily with the intention to abide by and comply with the sentence of the court, and hence the appeal should be dismissed.

[See note at end of this case.]

(Syllabus by court.)

Appeal from District Court, Dakota county: JOHNSON, Judge.

Criminal action. People's Ice Company convicted of violation of statute prohibiting unlawful combination in restraint of trade and appeals. The facts are stated in the opinion. DISMISSED.

John F. Fitzpatrick for appellant.

Lyndon A. Smith and *C. Louis Weeks* for respondent.

[253] HOLT, J.—The state moves to dismiss the appeal for the reason that appellant, subsequent to the judgment and prior to the appeal, voluntarily paid the fine, the only penalty imposed by the judgment.

The appellant contends that it has the statutory right to appeal within six months after the judgment is pronounced; that the satisfaction of the judgment does not affect this right to appeal; that the payment of a fine cannot be held voluntary, since appellant had property subject to execution; and that, since the stay of execution on appeal in a criminal case is a matter of grace and not of right, the payment of the fine should not be held to be in any sense voluntary or an acquiescence in the sentence. There is much force in these contentions fortified by decisions holding that, even in the absence of statutory provisions, a litigant in a civil action, who pays a judgment rendered against him, may still prosecute his appeal and in case of reversal recover back the amount paid in satisfaction of the judgment. The analogy is strong between the right to appeal in a civil action, as affected by the payment of the judgment, and the one to appeal in a criminal case where the sentence has been carried out. [254] Johnson v. State, 172 Ala. 424, 55 So. 226, Ann. Cas. 1913E 296; People v. Marks, 64 Misc. 679, 120 N. Y. S. 1106; Barthelemy v. People, 2 Hill (N. Y.) 248, and the note to State v. Conkling, in 45 Am. St. 271. In Com. v. Fleckner, 167 Mass. 13, 44 N. E. 1053, it is said: "We should be slow to suppose that the legislature meant to take away the right to undo the disgrace and legal discredit of a conviction merely because a wrongly convicted person has paid his fine or served his term. . . . Of course the payment of the fine in accordance with the sentence was not a consent to the sentence but a payment under duress." The authorities which hold to the contrary proceed on the theory that, when the sentence is executed either by imprisonment or payment of the fine, there no longer exists a judgment from which to appeal. The suit is ended. To this effect may be cited: State v. Westfall, 37 Ia. 575; Com. v. Gipner, 118 Pa. St. 379, 12 Atl. 306; People v. Leavitt, 41 Mich. 470, 2 N. W. 812; Madsen v. Kenner, 4 Utah 3, 4 Pac. 992; Washington v. Cleland, 49 Ore. 12, 88 Pac. 305, 124 Am. St. Rep. 1013, and cases cited in note to Johnson v. State, 30 Ann. Cas. 300.

It is not necessary to determine which line of authorities should be followed, for we are persuaded that here appellant voluntarily paid the fine and fully acquiesced in the sentence. There can be no purpose to remove the stigma of conviction by this appeal, for appellant pleaded guilty to the offense charged. The appeal can involve nothing but the propriety of a fine or the amount thereof. The state shows that Mr. Wells, the president of the appellant, a foreign corporation, had been found guilty upon a trial under an indictment charging him, this appellant, and others with an unlawful combination in restraint of trade, an offense under section 8973, G. S. 1913. He had obtained a stay. While the stay was pending he and the attorneys for appellant sought the prosecuting attorney and expressed the desire to have the whole matter settled. To that end they prevailed upon the prosecuting attorney to arrange with the judge who tried the case to come to the county seat of Dakota county, the place of trial, and hold a special term for that purpose. This was done. Wells, or his attorneys, requested that the stay as to him be [255] vacated and sentence imposed. He was fined and paid the fine. He also, as president of appellant, withdrew appellant's plea of not guilty and entered a plea of guilty. The sentence was a fine of $2,000. At once Wells produced the money and paid the fine. This occurred on December 13, 1913. No dissent

to the form of the sentence, or to the amount of the fine was then suggested. Thereafter nothing occurred to indicate that appellant was in any manner aggrieved by the sentence until June 11, 1914, when this appeal was taken. Appellant, in the meantime, acquiesced in the entry of judgment ousting it from doing business in the state, in an action brought by the attorney general, because of its acknowledged violation of the statute. We hold that the whole course of appellant in procuring a special session of court to be held so as to allow it to change its plea to guilty, its payment of the fine without the slightest suggestion that either a fine, or the amount thereof, was not proper, and the long delay in taking the appeal, tends to show that the payment was voluntary, to the end that the whole prosecution should be terminated and settled. The state and prosecuting authorities were led to believe and act on that understanding. And we fully believe that the president of appellant, when he entered the plea of guilty for it and immediately produced the $2,000 in cash and paid the fine imposed, did so with the full intention, acting for appellant, to abide by and satisfy the sentence of the court. This is more of a voluntary payment than the facts disclosed in De Graff v. Ramsey County, 46 Minn. 319, 48 N. W. 1135. This money was at once paid to the proper officers, presumably distributed to the proper funds, and has undoubtedly been used. This is and of itself may not be material, for we may well say that the sense of fairness is so well developed in the public conscience that the legislature would make provision to reimburse one who under legal compulsion has paid into the state treasury or to public funds money which in justice and right should not have been paid; but it is a circumstance to be considered in determining whether the payment of the fine imposed was voluntary, for appellant was represented by a capable officer, and able attorneys and knew that public authorities would receive, distribute and use the money for designated purposes.

The appeal should be and it is dismissed.

NOTE.

Payment of Fine in Criminal Case as Waiver of Right to Appeal.

The earlier cases passing on the question whether the payment of a fine in a criminal suit constitutes a waiver of the defendant's right to appeal are collected in the note to Johnson v. State, Ann. Cas. 1913E 300. The present note reviews the few recent cases discussing that point. As a general rule the voluntary payment of a fine by the defendant in a criminal action, operates as a final disposition of the case and precludes the defendant from prosecuting an appeal or proceeding further with an appeal already commenced. Rex v. Sing, 32 West. L. Rep. (Sask.) 649; Com. v. Konas, 57 Pa. Super. Ct. 629. And see the reported case. In Com. v. Conas, supra, the court said: "When a defendant is convicted in a summary proceeding before a magistrate, of an offense of which the magistrate had jurisdiction and is fined an amount within the limit authorized by the statute or ordinance creating the offense, and voluntarily pays the fine, that is an end of the case. Having voluntarily paid his fine he has satisfied the law, and is no longer in a position to raise any question as to the validity of the payment: Com. v. Gipner, 118 Pa. St. 379, 12 Atl. 306, Com. v. Yoeum, 37 Pa. Super. Ct. 237. When the fine has been thus voluntarily paid any question as to the regularity of the proceedings becomes merely academic, and the state does not maintain her courts of record for the purpose of deciding questions of that character."

In Sibenaler v. State, 11 Okla. Crim. 504, 148 Pac. 678, it was held that a person who, after having been sentenced to serve a term of one year in the penitentiary and to pay a fine of one thousand dollars, accepted a pardon conditioned on his paying five hundred dollars in instalments, could not thereafter prosecute an appeal. But in Com. v. Barbono, 56 Pa. Super. Ct. 637, a defendant who after having been fined for the violation of a liquor regulation was unlawfully sentenced to jail was held not to be precluded by a payment of the fine from having his conviction reviewed by certiorari. The court said: "The act of 1911 provides that the fine or penalty shall 'be recovered, as debts are by law recovered, in an action to be instituted in the name of the commonwealth.' It confers no express authority upon the justice to summarily sentence the defendant to imprisonment in jail, in default of payment, and, therefore, payment of the fine and costs, in order to obtain release from such imprisonment, cannot be regarded as a voluntary act which precludes him from having the lawfulness and regularity of his conviction reviewed by certiorari." In State v. Chicago Great Western R. Co. 125 Minn. 332, 147 N. W. 109, it appeared that a defendant paid his fine under protest, having been refused a stay of proceeding for the purpose of perfecting his appeal. The court said: "The trial court, after hearing the evidence, adjudged defendant guilty of the charge and imposed a fine of $15. Though the record is not quite clear, it is apparent that defendant requested a stay of proceedings to enable it to perfect an appeal. This the court declined to grant, holding that under the statute

creating that court, a stay of proceedings after conviction of a criminal charge is prohibited until the fine imposed has been paid. Defendant thereupon and under protest paid the fine, and thereafter perfected this appeal. We are all agreed that the learned court was in error in applying the provisions of the statute under which the court was organized, namely, section 5, chapter 48, p. 624, Sp. Laws 1887, for that statute, properly construed, applies only to prosecutions for municipal offenses, and not to violations of the state laws. But this is unimportant, since the majority hold that by reason of the refusal of the court to grant the stay of proceedings the payment was not voluntary within the rule holding that such a payment precludes the right of appeal from the judgment so paid." Substantially to the same effect see State v. Swikert, 65 Ore. 286, 132 Pac. 709.

SWEETSER ET AL.

v.

FOX ET AL.

Utah Supreme Court—May 9, 1913.

43 Utah 40; 134 Pac. 599.

Appeal — Harmless Error — Striking Out Parties.

A judgment will not be reversed for technical error in striking out the names of certain plaintiffs where no prejudice results to defendant therefrom.

Partnership — Action — Continuation in Name of Survivors.

It was not error to strike out the names of two deceased partners as plaintiffs and permit the action to proceed to judgment under the names of the surviving partners.

Judgments — Time to Sue — When Statute Begins to Run.

Comp. Laws 1907, § 3490, provides that an action is pending from its commencement until final determination upon appeal, "or until the time for appeal has passed, unless the judgment is sooner satisfied;" section 3307 provides that an appeal from a judgment or order directing the payment of money does not stay execution, unless a written undertaking be given; and section 3320 provides for restitution in case judgment is reversed or modified on appeal after its enforcement. Held, that a judgment became final so as to start the eight-year limitation against an action thereon from the time it was rendered, where no appeal was taken, and not from expiration of the six months within which an appeal might have been taken; actions remaining pending after judgment only for the purpose of enforcing them or to institute proceedings to review.

[See note at end of this case.]

Action — When Deemed Pending.

An action is deemed to be pending at common law so long as a judgment remains unsatisfied.

Judgment — When Enforceable.

A judgment may be enforced either by execution or action, immediately after rendition, unless execution be stayed.

Action on Judgment — Effect of Right to Appeal from Judgment.

When the purpose of an action is merely to enforce a judgment, the plea of another action pending cannot be interposed in the action upon the judgment merely because the time to appeal has not passed; the only plea available being that the judgment has been suspended by supersedeas bond.

When Full Faith and Credit Attaches.

The full faith and credit clause of the federal Constitution applies as soon as a judgment is enforceable and not merely after the time to appeal has elapsed.

When Statute of Limitation Begins to Run.

Comp. Laws 1907, § 2874, requiring an action on a judgment to be commenced within eight years, means eight years from the time the cause of action has arisen.

[See note at end of this case.]

Same.

A cause of action arises the moment an action may be maintained to enforce the legal right so that the statute of limitation then begins to run.

[See note at end of this case.]

Same.

For the purpose of its enforcement, a judgment is evidence of its own existence immediately on rendition and entry as provided by law.

[See note at end of this case.]

Appeal from District Court, Salt Lake county: RITCHIE, Judge.

Action by George B. Sweetser et al., plaintiffs, against Jesse W. Fox, Jr. et al., defendants. Judgment for plaintiffs. Defendants appeal. The facts are stated in the opinion. REVERSED.

Burton & Johnson for appellants.
Dey & Hoppaugh for respondents.

[42] FRICK, J.—On the 29th day of December, 1897, all of the plaintiffs above named, as partners doing business as such, obtained judgment in the circuit Court of the United States in and for the district of Utah against all of the defendants above named. On the 12th day of June, 1906, an action in the name of all of the plaintiffs as partners was commenced on the judgment aforesaid against

all of the defendants. Separate demurrers were filed by the defendants, which were overruled, and they then filed separate answers in which the only defense that is material here was that the action was barred by the provisions of Comp. Laws 1907, section 2874, which provides:

An action upon a judgment or decree of any court of the United States, or of any state or territory within the United States," must be commenced "within eight years." Plaintiffs replied that the defendant Christopherson was absent from the state of Utah for "more than one year after said cause of action had accrued and prior to the commencement of this action."

Nearly two years after this action was commenced all of the plaintiffs above named, except George D. Sweetser and J. Howard Sweetser, filed an application in which they set forth that at and prior to the time the judgment upon which this action is based was obtained all of the plaintiffs were copartners and were doing business as such, and that thereafter, and before this action was commenced, the said George D. Sweetser and J. Howard Sweetser died leaving the other four as the surviving members of the said copartnership, and further alleged that the four named are the sole owners of said judgment as surviving partners as aforesaid. Pursuant [43] to the foregoing application they asked that the names of the first two be stricken out and that the action proceed in the name of the four surviving partners as plaintiffs. The court granted the application and permitted the action to proceed in the name of the four surviving partners, who, the court found, were the real and only parties in interest. Notwithstanding that order, all of the names of the original plaintiffs are retained in the title of the action, even in this court.

The defendants insist that the district court erred in allowing the application aforesaid. Nothing is made to appear wherein the defendants are in any way prejudiced by striking out the two names as aforesaid. If it were assumed, therefore, that the court had committed technical error in striking out the names, yet, as there is no claim nor evidence of prejudice, the judgment cannot be reversed upon the ground just stated.

But we can see no reason whatever why, under the facts disclosed by this record, the district court was not justified in striking out the names of the two deceased partners as plaintiffs and in permitting the action to proceed to judgment in the names of the other surviving partners. This assignment, therefore, must be overruled.

Proceeding now to a consideration of the only serious question in the case, namely, the defense that the action is barred by our statute of limitations, we remark that the court found that the action in question was commenced 8 years and 165 days after the entry of the judgment upon which it is based, and that the defendant Christopherson was absent from the state of Utah during that time for "a period of not more than 164 days." The court, however, held that the action was not barred and entered judgment against all of the defendants for the full amount of the judgment, including interest. The defendants appeal and insist that the district court erred in holding that the action upon the judgment was not barred by the provisions of the statute we have referred to and in rendering judgment against them. Upon the other hand, plaintiffs contend that the action is not [44] barred because of what is contained in Comp. Laws 1907, section 3490, which provides:

"An action is deemed to be pending from the time of its commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied."

That section has been in force in this state continuously since some time prior to 1888. It constituted section 3706 of Comp. Law 1888, and was thereafter carried into the Revised Statutes of 1898 as section 3490. The section is an exact copy of section 1049 of the California Code of Civil Procedure.

It is conceded that the judgment in question was not appealed and that no motion for a new trial was ever filed. In other words, it is conceded that the judgment was never assailed in any way by any one. Plaintiffs contend that notwithstanding that fact the judgment did not become final until the time for an appeal had passed, namely, until six months from the time of its entry, while the defendants insist that the judgment became a final and enforceable judgment immediately upon being rendered and entered as provided by law, and hence 8 years, plus 165 days, had elapsed when this action was commenced. The question that we must determine, therefore, is, When did the statute of limitations begin to run on the judgment in question?

Counsel for plaintiffs contend that the foregoing question is determined in their favor by the Supreme Court of California in the case of Feeney v. Hinckley, 134 Cal. 467, 66 Pac. 580, 86 Am. St. Rep. 290, and that in view that our statute (section 3490, supra) is a copy of the California statute upon which the California Supreme Court bases its decision in the case just referred to we should follow that decision. If the case just referred to is to be followed, then this opinion should end right here, since no distinction can be drawn between the principle involved in this case and in the California case referred to. The case

of Feeney v. Hinckley, supra, was decided in November, 1901, many years after section 3490, supra, was in force in Utah. We are therefore [45] not confronted with a situation where a statute from another state is adopted after the same had been authoritatively construed and applied by the courts of the latter. Notwithstanding this fact, we were lothe to disagree with the conclusion reached by the Supreme Court of California and have done so only upon mature deliberation and after having carefully considered both the reasoning and authorities upon which the decision in Feeney v. Hinckley is said to be based. In our judgment the decision in that case is based upon what is assumed to be the law rather than upon what the law actually is.

The decision seems to be based upon the conception that because the statute (section 3490) provides that an action should be deemed pending until the appeal, if one is taken, be determined, or, if no appeal be taken, then until the time for an appeal has expired, for that reason a judgment is not to be deemed final for the purpose of setting in motion the statute of limitations until the time has elapsed within which an appeal can be taken, and that if it were held otherwise the judgment creditor would not have the full time given by the statute of limitations in which to bring an action upon a judgment. In arriving at such a conclusion, the California Supreme Court, we think, committed at least two errors. The first one consisted in assuming that section 3490 in some way greatly changed or affected the rule prevailing at common law with regard to when actions were deemed pending.

The rule in that regard in force at common law is well stated by the Court of Appeals of New York in the case of Wegman v. Childs, 41 N. Y. 159, where it is stated thus:

"An action is pending in a court, though judgment has been recovered therein, as long as such judgment remains unsatisfied."

To the same effect are Gates v. Newman, 18 Ind. App. 398, 46 N. E. 654; Ulshafer v. Stewart, 71 Pa. St. 174; Wright v. Nostrand, 94 N. Y. 45; Chapin v. James, 11 R. I. 89, 23 Am. Rep. 412; Ex p. Howland, 3 Okla. Crim. 142, 104 Pac. 927, Ann. Cas. 1912A 840; Day v. Holland, 15 Ore. 464, [46] 15 Pac. 855; Shirley v. Birch, 16 Ore. 13, 18 Pac. 344; 6 Words and Phrases, 5277.

Section 3490, supra, therefore, belongs to that class of statutes wherein it was sought to declare and make certain an existing rule of practice or procedure rather than to create a new one. Moreover, when other provisions of the Code, which have a bearing upon the subject, are kept in mind and are given proper force, it, in our judgment, is conclusive that neither in adopting the rule at common law nor by what is said in the statute was it intended to declare that, although actions be pending after judgment, they are necessarily pending for all purposes. In our judgment actions remain pending after judgment only for the purpose of enforcing them and to institute the proceeding provided by law to reverse or to modify them. For the purpose of enforcing the judgment, it is just as much final immediately after its rendition and entry in the court of original jurisdiction, unless it is expressly otherwise provided by some statute, as it is after an appeal is terminated. For the purpose of *res judicata* or estoppel this may, however, not be so. If this distinction be kept in mind, no difficulty will be encountered in applying the remedies incident to the enforcement of judgments.

It is certainly elementary law that a judgment may be enforced either by execution or by an action immediately after rendition, unless execution be stayed and the judgment suspended in accordance with law or some fixed rule of practice or procedure. The law in this respect is clearly stated by the author of Freeman on Judgments (4th ed.) sec. 432, in the following words:

"The right to bring an action upon a judgment at any time after its rendition, until it is barred by some statute of limitations, though the plaintiff retains the power to collect it, if he can, by execution, is almost universally conceded, and such concession has not, so far as we are aware, been attended by any such abuse of the privilege conceded as calls for legislative interposition."

The abuse here referred to is the one sometimes alluded to of bringing successive actions upon the same judgment. To the same effect is 2 Black on Judgments, sec. 958.

[47] The cases supporting the foregoing doctrine are very numerous. We shall refer to a few only, namely: Morse v. Pearl, 67 N. H. 317, 36 Atl. 255, 68 Am. St. Rep. 672; Citizens' Nat. Bank v. Lucas, 26 Wash. 417, 67 Pac. 252, 56 L.R.A. 812, 90 Am. St. Rep. 748 (see the editor's note to this case, page 755); Schuyler County Bank v. Bradbury, 56 Kan. 355, 43 Pac. 254; Snyder v. Hitchcock, 94 Mich. 313, 54 N. W. 43; Cain v. Williams, 16 Nev. 426; Gilmore v. H. W. Baker Co. 14 Wash. 52, 44 Pac. 101; Suydam v. Hoyt, 25 N. J. L. 230; Union Trust Co. v. Rochester, etc. R. Co. 29 Fed. 609–611; Johnson v. Foran, 59 Md. 460.

But, entirely apart from these authorities, our statute (Comp. Laws 1907, sec. 3307) clearly contemplates the enforcement of judgments given for the payment of money immediately after they are entered, since it is there provided that an appeal from a "judgment or order directing the payment of money does not stay the execution of the same

unless a written undertaking be executed on the part of the appellant by two or more sureties to the effect," etc. Again, section 3320 provides for restitution in case a judgment is reversed or modified on appeal after its enforcement, and also affords protection to the purchaser under execution sales in such cases. It is idle, therefore, to contend that in this state the enforcement of judgments is or was intended to be held in abeyance by what is said in section 3490, since it manifestly was not intended that the provisions of that section are alone controlling simply because they in some respects are contrary to other statutory provisions relating to the enforcement of judgments. A judgment in this state is therefore not suspended or superseded unless and until that is accomplished in accordance with our statute relating to that subject.

In connection with the question just considered it must also be kept in mind that the courts are practically unanimous in holding that, where the purpose of the action is merely to enforce the judgment, a plea of another action pending cannot successfully be interposed in the [48] action commenced upon a judgment before the time for appeal has expired. The only plea that is of any avail in such an action is that the judgment has been suspended by the execution of a supersedeas bond as provided by law or some other statutory method. From among the numerous cases that might be cited in support of the foregoing doctrine, we refer to the following: Rogers v. Odell, 39 N. H. 417; Steers v. Shaw, 53 N. J. L. 358, 21 Atl. 940; Merritt v. Fowler, 76 Hun 424, 27 N. Y. S. 1047; Litchfield v. Brooklyn, 13 Misc. 693, 34 N. Y. S. 1090; Oneida County Bank v. Bonney, 101 N. Y. 173, 4 N. E. 332; North Muskegon v. Clark, 62 Fed. 694, 22 U. S. App. 522, 10 C. C. A. 591; Gordon v. Gilfoil, 99 U. S. 168, 25 U. S. (L. ed.) 383. Moreover, in all of the cases to which we have referred so far, where the question was raised, it is expressly held that the statute of limitations begins to run upon a judgment immediately after its rendition if under the local law it is then enforceable. We shall therefore not cite the cases upon that question again.

The full faith and credit clause of the federal Constitution also applies as soon as the judgment is enforceable and is not held in abeyance until the time for appeal has elapsed. How can any one doubt that the plaintiffs here could have maintained an action upon the judgment in question in the courts of this state or of any other state in the Union at any time after it was rendered in the United States Circuit Court? If any one entertains any doubt upon that question, a mere cursory reading of the numerous authorities upon that subject will at once dispel it.

Our statute provides that an action upon a judgment must be commenced within eight years. Eight years from what time? Clearly from the time a cause of action has arisen.

It is a rule of universal application that a cause or right of action arises the moment an action may be maintained to enforce it and that the statute of limitations is then set in motion. The test, therefore, is, Can an action be maintained upon the particular cause of action in question? [49] If it can, the statute begins to run. This test is not questioned in Feeney v. Hinckley, but it is actually invoked in that case. It is there held, however, that a cause of action does not arise upon a judgment until an appeal, if one is taken, is determined, or, if none is taken, until the time for an appeal has elapsed. That conclusion, as we have seen, is, however, contrary to the overwhelming weight of authority, and in our judgment is the second error into which the Supreme Court of California has fallen in the Feeney Case. That court, however, seeks to sustain its conclusion upon the ground that a judgment may not be considered final until the time for an appeal has elapsed. It has accordingly repeatedly been held in that state that a judgment roll may not be used as evidence for the purpose of establishing pleas of estoppel or *res judicata* pending an appeal during the time an appeal can be taken. The correctness of that doctrine may be conceded, and yet it in no way militates against the fact that a judgment may nevertheless be used as evidence for some purpose other than estoppel and *res judicata*. The reason why a judgment roll pending an appeal or during the time when one may be taken may not be used as evidence of an estoppel or *res judicata* of any particular fact or facts involved in the litigation which terminated in the judgment evidenced by the judgment roll is palpably obvious. So long as the judgment may be modified or reversed upon a direct proceeding on appeal or otherwise, the facts that were involved in the litigation cannot be said to be *res judicata*. That is, they are not finally fixed and determined, but are still subject to be changed or entirely overthrown. But this in no way affects the right of the judgment creditor to enforce his judgment either by execution or by another action. This right he had at common law and is continued in force by our statute. If the judgment debtor desires to prevent the immediate exercise of the right, he may appeal and supersede or suspend the judgment as provided by the statute. It is clear, therefore, that, although a judgment may not be used as evidence for all purposes, it may nevertheless [50] be used as evidence to prove its own existence. For the latter purpose the judgment may, and in the very nature of

things must, be used as evidence, even in case of an appeal. If this were not so, no appeal could be prosecuted, since there could be no evidence to establish the judgment which is the subject of the appeal. At common law as well as under our statute a judgment may also be used as evidence of its own existence when it is sought to be enforced either upon execution or by bringing an action upon it. This is inevitable, and the Supreme Court of California has clearly demonstrated that such is the case.

In a much later case than Feeney v. Hinckley, namely, McKannay v. Horton, 151 Cal. 711, 91 Pac. 598, 13 L.R.A.(N.S.) 661, 121 Am. St. Rep. 146, that court enforced a judgment immediately after its rendition notwithstanding the objection made that such could not be done because the time for appeal in that case had not yet expired. It may well be asked, How was it possible for the Supreme Court of California to sustain the enforcement of the judgment of the lower court unless it regarded the same as final and enforceable and received it as evidence to prove its own existence? The judgment in that case at least was enforced, although an appeal was permissible at the time it was enforced. If, therefor, a judgment may be enforced before the time for an appeal has elapsed, it must be done upon the theory that it exists as a final and enforceable judgment and that its existence may be established by the production of the judgment roll. In other words, the judgment may thus be used as evidence to prove its own existence. It may be contended, however, that in the later California case the judgment was by a statute made enforceable forthwith. But such, as we have shown, is in legal effect also the case under our statute. There is no difference in principle between the right of immediate enforcement of a judgment and its actual enforcement. There is therefore no difference in principle between the later California case and the one at bar, or, for that matter, between the judgment in the California case [51] and any judgment entered in the courts of this state which is enforceable under our statute.

But it is further contended by the plaintiffs that this court is committed to the doctrine laid down in the case of Feeney v. Hinckley by the results reached in Howe v. Sears, 30 Utah 344, 84 Pac. 1107, and in Vance v. Heath, 42 Utah 148, 129 Pac. 365. There is absolutely nothing in Howe v. Sears that in any way supports the California doctrine. Indeed, if the facts in Howe v. Sears are kept in mind, the decision is at least negative authority in favor of the defendants. For example, if in that case this court had intended to follow the doctrine laid down in Feeney v. Hinckley, then no argument was required to show that the statute of limitations had not run in that case for the reason that confessedly the action would not have been barred for nearly, if not quite, six months after its commencement in any event. Nor is there anything said in the case of Vance v. Heath contrary to the conclusions reached here. Indeed, the latter case is in perfect harmony with our present conclusions. What is held in the Vance Case is that a judgment may not be used as evidence of estoppel or *res judicata* with regard to any particular fact or facts involved in the litigation pending an appeal or so long as the time for one has not expired. There is nothing said or intimated in that case that a judgment is not a final and enforceable judgment immediately after it is rendered, nor that it cannot be used as evidence to prove its own existence so long as it is not sought to use the judgment as evidence to establish an estoppel or *res judicata*.

There can be no doubt that for the purpose of enforcing it a judgment is evidence of its own existence immediately upon being rendered and entered as provided by law. Nor is there any doubt whatever that an action may be maintained upon such a judgment in any court of competent jurisdiction in any state in the Union, including the one in which it is rendered, just as soon as it is rendered and entered as aforesaid. The cause of action upon a [52] judgment, whether of a federal or a state court, therefore, arises as soon as the judgment has a legal existence, which is immediately upon its rendition in the court from which it emanates, or, if the law requires that it be entered in some book before it is enforceable, then from the time of such entry. In other words, a cause of action arises from the time a judgment is legally enforceable by execution or by action. In this state this may be done immediately after the judgment is or ought to have been entered. The statute of limitations is set in motion at that time, and unless an action is commenced within eight years thereafter the cause of action is barred. The fact that in this state a judgment may be enforced by execution during the full period of eight years in no way affects the question involved here. A party has the right to commence an action upon a judgment notwithstanding the fact that he can also enforce it by execution. Besides, he may desire to bring an action in a foreign state, and this he may do as soon as the judgment is called into existence in the manner authorized by law, unless there is some express statute to the contrary. The right to commence an action upon the judgment in question, therefore, expired eight years from and after the 30th day of December, 1897, or on December 30, 1905, unless the statute, for some legal reason, was suspended

during that time. It is contended, and the court so found, that as against the defendant Christopherson it was suspended for a period of 164 days and no more. If it be assumed that under the evidence in this case plaintiffs were entitled to add the entire period of 164 days to be eight years against the defendant Christopher, yet, for the reasons hereinbefore stated, the action was not commenced in time even as against him.

In view of what has been said, therefore, the court erred in its conclusion of law and in entering judgment against the defendants. Under the undisputed evidence the action was not commenced until eight years and 165 days had elapsed, and therefore the right to maintain it was barred when the present action was commenced.

[53] The judgment is therefore reversed, and the cause is remanded to the district court, with directions to grant a new trial. Costs to appellant.

McCarty, C. J., and Stroup, J., concur.

NOTE.

When Statute of Limitations Begins to Run against Action on Judgment.

Generally, 625.
Deficiency Judgment, 627.
Judgment Revived by Scire Facias, 627.

Generally.

The statute of limitations begins to run against an action on a judgment from the date of its rendition and entry.

United States.—Powell v. Oregonian R. Co. 38 Fed. 187. See also Beall v. Leavenworth, 34 Fed. 113; McAleer v. Clay County, 38 Fed. 707. *Compare* Borer v. Chapman, 119 U. S. 587, 7 S. Ct. 342, 30 U. S. (L. ed.) 532.

Alabama.—Field v. Sims, 96 Ala. 540, 11 So. 763; Kaufman v. Richardson, 142 Ala. 429, 4 Ann. Cas. 168, 37 So. 673, 110 Am. St. Rep. 40. See also McConnico v. Stallworth, 43 Ala. 389.

Arkansas.—Brearly v. Norris, 23 Ark. 169. See also Burr v. Engles, 24 Ark. 283. *Compare* Brown v. Hanauer, 48 Ark. 277, 3 S. W. 27.

District of Columbia.—Galt v. Todd, 5 App. Cas. 350.

Idaho.—Bashor v. Beloit, 20 Idaho 592, 119 Pac. 55.

Illinois.—Epling v. Dickson, 170 Ill. 329, 48 N. E. 1001, *reversing* 61 Ill. App. 78; Barnes v. Maring, 23 Ill. App. 68; American Ins. Co. v. Arbuckle, 32 Ill. App. 369. See also Bemis v. Stanley, 93 Ill. 230; Eaton v. Henagan, 17 Ill. App. 156; Stelle v. Lovejoy, 23 Ill. App. 575.

Indiana.—King v. Manville, 29 Ind. 134. See also Root v. Moriarty, 39 Ind. 85; Niblack v. Goodman, 67 Ind. 174.

Iowa.—Meek v. Meek, 45 Ia. 294; Weiser v. McDowell, 93 Ia. 772, 61 N. W. 1094; Cassady v. Grimmelman, 108 Ia. 695, 77 N. W. 1067; Norris v. Tripp, 111 Ia. 115, 82 N. W. 610; Wooster v. Batemen, 126 Ia. 552, 102 N. W. 521; Haugen v. Oldford, 129 Ia. 156, 105 N. W. 393; Citizens' Nat. Bank v. Harris, 95 N. W. 272. See also Smith v. Shawhan, 37 Ia. 533; Parks v. Norton, 114 Ia. 732, 87 N. W. 698; Miller v. Rosebrook, 136 Ia. 158, 113 N. W. 771.

Kansas.—Schuyler County Bank v. Bradbury, 56 Kan. 355, 43 Pac. 254. See also Smalley v. Bowling, 64 Kan. 818, 68 Pac. 630. *Compare* Gaumer v. Terrel, 65 Kan. 15, 68 Pac. 1071.

Kentucky.—Norton v. Marksberry, 5 S. W. 482. See also Williams v. Preston, 3 J. J. Marsh. 600, 20 Am. Dec. 179; McArthur v. Goddin, 12 Bush 274; People's Bank v. Barbour, 124 Ky. 539, 99 S. W. 608, 30 Ky. L. Rep. 712; H. A. Thierman Co. v. Wolff, 125 Ky. 832, 102 S. W. 843, 31 Ky. L. Rep. 376; Due v. Bankhardt, 151 Ky. 624, 152 S. W. 786; Hoerter v. Garrity, 155 Ky. 260, 159 S. W. 815.

Louisiana.—Beckham's Succession, 16 La. Ann. 352; Payne v. Furlow, 29 La. Ann. 160; Walling v. Howell, 34 La. Ann. 1104. See also Kemp v. Cornelius, 14 La. Ann. 301; Rice's Succession, 15 La. Ann. 649.

Maryland.—Johnson v. Foran, 59 Md. 460; Johnson v. Hines, 61 Md. 127. See also Mullikin v. Duvall, 7 Gill & J. 355.

Massachusetts.—Bannegan v. Murphy, 13 Metc. 251; Mead v. Bowker, 168 Mass. 234, 46 N. E. 625. See also Smith v. Morrison, 22 Pick. 430; Mowry v. Cheesman, 6 Gray 515.

Michigan.—Warren v. Slade, 23 Mich. 1, 9 Am. Rep. 70; Snyder v. Hitchcock, 94 Mich. 313, 54 N. W. 43; Wilcox v. Lantz, 107 Mich. 1, 64 N. W. 735.

Minnesota.—Olson v. Dahl, 99 Minn. 433, 9 Ann. Cas. 252, 109 N. W. 1001, 116 Am. St. Rep. 435, 8 L.R.A.(N.S.) 444; Gaines v. Grunewald, 102 Minn. 245, 113 N. W. 450. See also Brown v. Dooley, 95 Minn. 146, 103 N. W. 894.

Mississippi.—Stith v. Parham, 57 Miss. 289; Berkson v. Cox, 73 Miss. 339, 18 So. 934, 55 Am. St. Rep. 539. See also Kennard v. Alston, 62 Miss. 763.

Missouri.—Coomes v. Moore, 57 Mo. 338; St. Louis Type Foundry Co. v. Jackson, 128 Mo. 119, 30 S. W. 521; Davis v. Carp, 258 Mo. 686, 167 S. W. 1042; Chittenden v. Graves, 148 Mo. App. 537, 128 S. W. 522. See also Sublett v. Nelson, 38 Mo. 487; Berkley v. Tootle, 163 Mo. 584, 63 S. W. 681, 81

Am. St. Rep. 587; Reinhold v. Kerrigan, 85 Mo. App. 256.

Montana.—See Haupt v. Burton, 21 Mont. 572, 55 Pac. 110, 69 Am. St. Rep. 698.

Nebraska.—Armstrong v. Patterson, 97 Neb. 229, 149 N. W. 408, judgment *reversed* on rehearing 97 Neb. 871, 152 N. W. 311; Holmes v. Webster, 98 Neb. 105, 152 N. W. 312. See also Snell v. Rue, 72 Neb. 571, 101 N. W. 10, 117 Am. St. Rep. 813.

New York.—Millard v. Whitaker, 5 Hill 408; Fairbanks v. Wood, 17 Wend. 329; Dieffenbach v. Roch, 112 N. Y. 621, 20 N. E. 560, 2 L.R.A. 829; Connecticut Nat. Bank v. Bayles, 17 App. Div. 596, 45 N. Y. S. 305; Hofferberth v. Nash, 117 App. Div. 284, 102 N. Y. S. 317, *affirmed* 191 N. Y. 446, 84 N. E. 400; Warner v. Bartle, 22 Misc. 488, 2 Gibbons 374, 50 N. Y. S. 940, *affirmed* 39 App. Div. 91, 56 N. Y. S. 585; Newman v. Basch, 89 Misc. 622, 152 N. Y. S. 456. See also Delavan v. Florence, 9 Abb. Pr. 277 note; Conger v. Vandewater, 1 Abb. Pr. N. S. 126; Waltermire v. Westover, 14 N. Y. 16; Davidson v. Horn, 47 Hun 51, 14 N. Y. St. Rep. 89; Brush v. Hoar, 48 Hun 618, 14 Civ. Pro. 297, 1 N. Y. S. 112; Gray v. Seeber, 53 Hun 611, 17 Civ. Pro. 327, 6 N. Y. S. 802, 917.

North Carolina.—Broyles v. Young, 81 N. C. 315; McDonald v. Dickson, 85 N. C. 248; Daniel v. Laughlin, 87 N. C. 433; Cook v. Moore, 95 N. C. 1; Smith v. Brown, 99 N. C. 377, 6 S. E. 667; McCaskill v. McKinnon, 121 N. C. 192, 28 S. E. 265, 61 Am. St. Rep. 659; Matthews v. Peterson, 152 N. C. 168, 67 S. E. 340; Adams v. Guy, 10 S. E. 1102. See also Taylor v. Harrison, 13 N. C. 374; Gaither v. Sain, 91 N. C. 304; Rogers v. Kimsey, 101 N. C. 559, 8 S. E. 159; Salmon v. McLean, 116 N. C. 209, 21 S. E. 178; Arrington v. Arrington, 127 N. C. 190, 37 S. E. 212, 80 Am. St. Rep. 791, 52 L.R.A. 201.

North Dakota.—Osborne v. Lindstrom, 9 N. D. 1, 81 N. W. 72, 81 Am. St. Rep. 516, 64 L.R.A. 715.

Ohio.—See Doyle v. West, 60 Ohio St. 438, 54 N. E. 469.

Tennessee.—See Epperson v. Robertson, 91 Tenn. 407, 19 S. W. 230.

Utah.—See the reported case.

Washington.—See Citizens' Nat. Bank v. Lucas, 26 Wash. 417, 67 Pac. 252, 90 Am. St. Rep. 748, 56 L.R.A. 812; Burman v. Douglas, 78 Wash. 394, 139 Pac. 41.

Wisconsin.—Waterman v. Waterloo, 69 Wis. 260, 34 N. W. 137; Sullivan v. Miles, 117 Wis. 576, 94 N. W. 298; J. C. Lewis Co. v. Adamski, 131 Wis. 311, 111 N. W. 495.

Canada.—Blanchard v. Muir, 13 Manitoba 8. See also Boice v. O'Loane, 3 Ont. App. 167; McMahon v. Spencer, 13 Ont. App. 430; Mason v. Johnston, 20 Ont. App. 412; Butler v. McMicken, 32 Ont. 422; Doull v. Keefe, 34 Nova Scotia 15; In re Ling, 43 Nova Scotia 60; Rateau v. Ball, 47 Nova Scotia 488, 14 East L. Rep. 10, 15 Dominion L. Rep. 574; Camp v. Danielle, 6 Newfoundland L. Rep. 491.

In Gaumer v. Terrel, 65 Kan. 15, 68 Pac. 1071, it was held in the case of a foreign judgment that the statute did not start running until eighteen months after its rendition. And in Miller v. Rosebrook, 136 Ia. 158, 113 N. W. 771, it was held that the statute began to run against the judgment of a justice of the peace, transferred to the district court, not from its rendition but from the date of entry by the clerk of the district court. In Peoria County v. Gordon, 82 Ill. 435, the court said that the statute ran from the last day of the term of the circuit court at which the judgment was rendered. See also Johnson v. Hines, 61 Md. 122. In Salmon v. McLean, 116 N. C. 209, 21 S. E. 178, wherein it appeared that a judgment was vacated on rehearing by the same court and a subsequent judgment was granted, the court held that the statute ran from the date of the second judgment. And in Barnes v. Maring, 23 Ill. App. 68, it was held that a widow's award was a judgment, when allowed, and the statute commenced to run from the allowance thereof. In Brown v. Hanauer, 48 Ark. 277, 3 S. W. 27, it was held that a probate allowance was a judgment within the statute fixing the period of limitation at ten years and while the statute might not run while the estate was in course of administration, it would run from the time of the discharge of the administrator. In Borer v. Chapman, 119 U. S. 587, 7 S. Ct. 342, 30 U. S. (L. ed.) 532, the court said that the statute ran from the date of the order of the entry of a judgment nunc pro tunc and not from the day as of which the judgment was ordered to take effect.

In some jurisdictions limitations run from the rendition of a judgment only in case no execution is issued thereon. Wilcox v. Austin First Nat. Bank, 52 S. W. 560, *affirmed* 93 Tex. 322, 55 S. W. 317; Burns v. Skelton, 68 S. W. 528; Tourtelot v. Booker, 160 S. W. 293. See also Fessenden v. Barrett, 9 Tex. 475; Graves v. Hall, 13 Tex. 379; Wahrenberger v. Horan, 18 Tex. 57; Stevens v. Stone, 94 Tex. 415, 59 S. W. 1122, 60 S. W. 959, 86 Am. St. Rep. 861; Shields v. Stark, 51 S. W. 540; Dabney v. Shelton, 82 Va. 349, 4 S. E. 605. See also Herrington v. Harkins, 1 Rob. 591; Rowe v. Hardy, 97 Va. 674, 34 S. E. 625, 75 Am. St. Rep. 811; Livesay v. Dunn, 33 W. Va. 453, 10 S. E. 808; Fisher v. Hartley, 48 W. Va. 339, 37 S. E. 578, 86 Am. St. Rep. 39, 54 L.R.A. 215. See also Werdenbaugh v. Reid, 20 W. Va. 588. *Compare* Handy v. Smith, 30 W. Va. 195, 3 S. E. 604. In several of these jurisdictions it is said that since the issuance of execution suspends the right of action on

the judgment the statutes does not begin to run until the execution is returned. Thatcher v. Lyons, 70 Vt. 438, 41 Atl. 428, 67 Am. St. Rep. 677; Davis v. Roller, 106 Va. 46, 55 S. E. 4, 117 Am. St. Rep. 977; Shipley v. Pew, 23 W. Va. 487; Handy v. Smith, 30 W. Va. 195, 3 S. E. 604; McEndree v. Morgan, 31 W. Va. 521, 8 S. E. 285. See also Rowe v. Hardy, 97 Va. 674, 34 S. E. 625, 75 Am. St. Rep. 811.

In *Texas* by the terms of a statute an action on a judgment must be brought within a prescribed time after the issuance of the last execution thereon. Fessenden v. Barrett, 9 Tex. 475; Graves v. Hall, 13 Tex. 379; Stevens v. Stone, 59 S. W. 1122, 94 Tex. 415, 60 S. W. 959, 86 Am. St. Rep. 861. See also Shields v. Stark (Tex.) 51 S. W. 540; Wilcox v. Austin First Nat. Bank, 52 S. W. 560, *affirmed* 93 Tex. 322, 55 S. W. 317; Tourtelot v. Booker (Tex.) 160 S. W. 293.

In *England* the rule is that the statute commences to run after the right to receive money on the judgment shall have accrued to some person capable of giving a discharge for or release thereof. Hebblethwaite v. Peever [1892] 1 Q. B. 124; Jay v. Johnstone [1893] 1 Q. B. 25, 189. See also Watson v. Birch, 15 Sim. 523; Ex p. Tynte, 15 Ch. D. 125.

In *California* it is said that the statute of limitations begins to run against an action on a judgment from the time it is complete and final. Hills v. Sherwood, 33 Cal. 474, 479; Trenouth v. Farrington, 54 Cal. 273; Crim v. Kessing, 89 Cal. 478, 26 Pac. 1074, 23 Am. St. Rep. 491; Herrlich v. McDonald, 104 Cal. 551, 38 Pac. 360; Harrier v. Bassford, 145 Cal. 529, 78 Pac. 1038; Feeney v. Hinckley, 64 Pac. 408, *reversed* 134 Cal. 467, 66 Pac. 580, 86 Am. St. Rep. 290; Damon v. Webber, 111 Me. 473, 89 Atl. 734. See also Mason v. Cronise, 20 Cal. 211; Edwards v. Hellings, 103 Cal. 204, 37 Pac. 218; John Heinlen Co. v. Cadwell, 3 Cal. App. 80, 84 Pac. 443. *Compare* De Uprey v. De Uprey, 23 Cal. 352; Hobbs v. Duff, 23 Cal. 596; Simpson v. Simpson, 21 Cal. App. 150, 131 Pac. 99. While the decisions are in substantial agreement as to the running of the statute from the finality of the judgment, still there has been considerable conflict as to when a judgment is final. Thus in Herrlich v. McDonald, supra, the court held the judgment final from the entry thereof. And in Trenouth v. Farrington, supra, the court said: "The judgment here spoken of is a complete judgment, one that has been reduced to a tangible form—a record. In the case at bar it will be observed that the court did not itself enter judgment. It only ordered that judgment be entered. This was not in fact done until five days afterward, when for the first time the judgment became a matter of record, and a complete and final judgment. In our opinion it was from this date that the statute began to run." See to the same effect Crim v. Kessing, supra. However, in Feeney v. Hinckley, supra, the court held that the statute did not run from the entry of the judgment, but from one year thereafter if no appeal was taken. And in Harrier v. Bassford, supra, it was held that the statute started to run six months after entry. In De Uprey v. De Uprey, 23 Cal. 352, the court held that in the case of a judgment rendered, payable in instalments, the statute ran from the period fixed for payment of each installment as it became due.

Deficiency Judgment.

Against a deficiency judgment the statute of limitations begins to run from the time the amount of the deficiency is determined. Stoddard v. Van Bussum, 57 N. J. Eq. 34, 40 Atl. 29; Thompson v. Cheesman, 15 Utah 43, 48 Pac. 477; Howe v. Sears, 30 Utah 344, 84 Pac. 1107.

In Parratt v. Hartsuff, 75 Neb. 706, 106 N. W. 966, it was held that the statute commenced to run from the report of the sale. And in Bignold v. Carr, 24 Wash. 413, 64 Pac. 519, it was held that the statute ran from the entry of the deficiency judgment. However in Smith v. Pegg, 111 Mich. 232, 69 N. W. 488, the statute was held to run from the entry of the decree of foreclosure.

Judgment Revived by Scire Facias.

A revived judgment by scire facias constitutes a new cause of action and the statute of limitations starts to run from its rendition and not from the rendition of the original judgment. Digges v. Eliason, 4 Cranch (C. C.) 619, 7 Fed. Cas. No. 3,904; Mann v. Cooper, 2 App. Cas. (D. C.) 226; Thomas v. Lully (Cal.) 152 Pac. 53; Fagan v. Bently, 32 Ga. 534; Walsh v. Bosse, 16 Mo. App. 231. See also Morton v. Valentine, 15 La. Ann. 153; Mullikin v. Duvall, 7 Gill & J. (Md.) 355. *Compare* Marx v. Sanders, 98 Ala. 500, 11 So. 764.

STATE

v.

SHAFT.

North Carolina Supreme Court—May 20, 1914.

166 N. Car. 407; 81 S. E. 932.

Abortion — Admission of Evidence — Harmless Error.

Where, on a trial for procuring a pregnant woman to take a drug with intent to procure

a miscarriage, the pregnancy of the woman is undisputed, evidence as to sexual intercourse on her part is immaterial and its admission is harmless.

Expert Evidence — Effect of Abortifacient — Basis for Testimony.

On a trial for procuring a pregnant woman to take a drug with intent to procure a miscarriage, where there is evidence that a capsule, some of which was administered, contained aloes, experts are properly permitted to testify as to the effect of such drug on pregnancy, when administered in large doses.

Criminal Law — Competency of Accomplice Testimony.

On a criminal trial, the testimony of an accomplice is competent.

Necessity of Corroboration.

A person may be convicted upon the unsupported testimony of an accomplice, though the jury should be cautious, in so convicting.

Victim of Abortion as Accomplice.

A pregnant woman, procured by defendant to take a drug with intent to procure a miscarriage, is not an accomplice in a legal sense.

[See note at end of this case.]

Abortion — Administering Harmless Drug.

Under Revisal 1905, § 3619, specifying the punishment for procuring a pregnant woman to take a drug with intent to procure a miscarriage, where a drug is furnished for the purpose of producing a miscarriage, it is immaterial that it is not noxious or capable of producing the intended effect.

[See 1 R. C. L. tit. *Abortion*, p. 73.]

Criminal Law — Abortion — Sentence not Excessive.

Under Revisal 1905, § 3618, providing that any person who shall administer or procure any woman pregnant or quick with child to take any drug with intent to destroy the child shall be imprisoned not less than one nor more than ten years, and fined at the court's discretion, and section 3619 providing that any person who shall administer or procure any pregnant woman to take any drug with intent to procure a miscarriage, or injure the woman, shall be imprisoned not less than one nor more than five years, and fined at the court's discretion, imprisonment for three years and a fine of $1,000 for procuring a pregnant woman to take a drug with intent to procure a miscarriage was not a cruel and unusual punishment.

Appeal from Superior Court, Buncombe county: CARTER, Judge.

Criminal action. Elizabeth Shaft convicted of violation of statute and appeals. AFFIRMED.

[408] This is an indictment for a violation of sections 3618 and 3619, Revisal.

The bill of indictment charged that the defendant "did unlawfully and wilfully and feloniously advise and procure a certain woman, called Annie Kraft, to take a certain noxious drug, the name of which is to the grand jurors unknown, with intent thereby to procure the miscarriage of her, the said Annie Kraft, she being at the time pregnant."

From the judgment sentencing the defendant to imprisonment in the State's Prison for three years, and to pay a fine of $1,000, she appealed.

R. S. McCall and *Mark W. Brown* for appellant.

Attorney-General Bickett and *Assistant Attorney-General Calvert* for appellee.

[409] BROWN, J.—The first and second assignments of error relate to the admission of testimony tending to prove sexual intercourse upon the part of the girl, Annie Kraft. This testimony was wholly immaterial, and certainly harmless as to the defendant.

There was no dispute as to the pregnancy of the girl, and the only question to be determined was whether or not the defendant had administered to her medicine for the purpose of procuring an abortion.

Exceptions 3, 4, 5, and 6 relate to the competency of certain witnesses to testify as experts, and to their qualifications as such. A previous witness had testified that the capsule offered in evidence, and some of which had been administered to the girl, contained aloes, and these witnesses as experts were permitted to testify as to the effect of this drug upon pregnancy, when administered in large doses.

We see no objection to the competency of this evidence.

Exceptions 7, 9, and 11 were taken to the sufficiency of the evidence to go to the jury, and seem to rest upon two grounds:

First. It seems to be contended by the defendant that a conviction cannot be had in such cases on the uncorroborated testimony of the woman, as she is said to be an accomplice in the alleged offense.

Assuming that the girl, Kraft, was an accomplice, the testimony of an accomplice is competent in this State, and a person may be convicted upon the unsupported testimony of an accomplice, though the jury should be cautious in so doing. While Annie Kraft may be, in one sense, an accomplice of the defendant, it is only in a moral and not in a legal sense.

In a note to 12 Ann. Cas. 1009, there is a full discussion of the cases showing that the victim of an abortion or attempted abortion, whether or not she consents thereto, is not in law an accomplice in the commission of the offense nor within the meaning of the statute providing that there shall be

no conviction of a person upon the uncorroborated testimony of an accomplice.

Second. A further contention of the defendant under these exceptions seems to be that the testimony does not show that the defendant advised and procured the prosecuting witness to take or did not administer to her a noxious drug.

[410] There is abundant evidence that the defendant, at the solicitation of Annie Kraft, gave her the capsules containing aloes for the purpose of producing a miscarriage. While there is evidence that the drug furnished her would produce such an effect when administered in very large doses, yet it is not necessary that the State should prove that aloes are a noxious drug and capable of producing the intended effect.

The language of the statute of the different States describing this offense varies, but they nearly all provide that whoever, with the intent to produce a miscarriage of any pregnant woman, unlawfully administers, or causes to be given to her, any drug of noxious substance whatever, with such intent, shall be guilty of the offense.

Under this statute it has been generally held that the offense may be committed by administering any substance with intent to produce an abortion, whether such substance be noxious or not, and whether it be capable of producing the intended effect or not.

There is a full discussion of this subject in the notes to Abrams v. Foshee, 66 Am. Dec. 82, where all of the authorities are collated.

The defendant excepts to the judgment of the court on the ground that it imposes a cruel and an unusual punishment, and relies upon the case of State v. Lee, 166 N. C. 250, 80 S. E. 977. That case is no authority in support of the defendant's contention. The statute in this case limits the punishment to not less than one year nor more than ten years, and a fine in the discretion of the court. The sentence in this case is within the limitation prescribed by law.

Upon the review of the whole record, we find

No error.

NOTE.

Woman Upon Whom Abortion Is Committed as Accomplice.

It is the intention of this note to review the recent cases discussing the question whether a woman on whom an abortion is committed is an accomplice. The earlier cases are discussed in the notes to Thompson v. U. S. 12 Ann. Cas. 1004, and Stone v. State, 98 Am. St. Rep. 145.

The rule has been affirmed, under various statutory definitions of the offense of abortion, that the victim of an abortion, whether or not she consents thereto, is not, in law, an accomplice in the commission of the offense. Gullatt v. State, 14 Ga. App. 53, 80 S. E. 340; State v. Stafford, 145 Ia. 285, 123 N. W. 167; Meno v. State, 117 Md. 435, 83 Atl. 759; Shaw v. State, 73 Tex. Crim. 337, 165 S. W. 930; Fondren v. State (Tex.) 169 S. W. 411; Gray v. State (Tex.) 178 S. W. 337. And see the reported case.

In the reported case it is held that while the woman is not strictly an accomplice she is, according to a moral point of view, implicated in the transaction, and it is proper for the jury to consider that circumstance and its bearing on her credibility as a witness. To the same effect is Meno v. State, 117 Md. 435, 83 Atl. 759, wherein the court said: "A woman on whom an abortion has been performed is regarded as a victim rather than an accomplice, and even if she is deemed an accomplice, she is competent as a witness for the prosecution of the accused, and her evidence does not require corroboration when it established satisfactory proof of guilt, though in all such cases the credibility of it is to be passed upon by the jury under proper caution from the court, as to the amount of credence to be placed in it."

In Greenwood v. State, 3 Okla. Crim. 247, 105 Pac. 371, the court said that while it was not unmindful of the rule that the defendant in a felony case could not be convicted on the uncorroborated testimony of an accomplice, in the case at bar it was not necessary to determine whether a woman on whom an abortion had been committed was an accomplice.

SIMS ET AL.

v.

EVERETT ET AL.

Arkansas Supreme Court—June 1, 1914.

113 Ark. 198; 168 S. W. 559.

Trial — Request by Both Parties for Direction of Verdict — Effect.

Where both parties requested peremptory instructions and the court directed verdict in favor of defendants, the case stands on appeal as if the jury, upon correct instructions, had returned a verdict in defendants' favor, and the sole question is that of the legal sufficiency of the evidence.

[See Ann. Cas. 1913C 1342.]

Bills and Notes — Right of Assignee to Sue — Consideration of Assignment.

Where there is a valid written assignment of a note, the assignee is authorized to sue, and the makers and sureties cannot question the consideration for the assignment.

Principal and Surety — Notice by Surety to Sue — Sufficiency.

Kirby's Dig. § 7921, declares that a surety may, by written notice, require the creditor to sue the principal debtor, and that if he fail to do so within 30 days after notice, the surety shall be exonerated. A surety upon a note verbally requested the creditor to sue before the maker became insolvent, but the creditor failed to sue, and the maker became insolvent. Held, that the surety was not discharged by the creditor's failure to comply with his verbal request.

[See note at end of this case.]

Appeal from Circuit Court, Independence county: JEFFERY, Judge.

Action on promissory notes. Albert Sims et al., plaintiffs, and J. M. Everett, et al., defendants. Judgment for defendants. Plaintiffs appeal. The facts are stated in the opinion. REVERSED.

Samuel M. Casey for appellants.
Dene H. Coleman for appellees.

[200] MCCULLOCH, C. J.—This is an action to recover from appellees, J. M. Everett and W. A. Halliburton, the amount of two negotiable promissory notes executed by them as sureties for J. T. Halliburton to O. B. Edmondson, now deceased. Edmondson, by written endorsement on the back of each of the notes, assigned the same to the Union Bank & Trust Company and the latter in turn assigned same to appellant, Albert Sims, who instituted this action; but subsequent to its institution said Union Bank & Trust Company, as the executor of Edmondson's estate (he having died), was joined as plaintiff.

The case originated before a justice of the peace, and there were no written pleadings; but the two appellees, as sureties, defended on the ground that they requested the payee of the note to sue, and that he failed to do so, and by reason thereof the principal had become insolvent so that his liability could not be enforced.

The only evidence tending to support that defense, if it be held to be a good defense, is that of witness Christopher, who stated that he heard a conversation between Edmondson and one of the sureties, in which the latter told Edmondson "to collect his money, that it was due and that he didn't want to have to pay it."

The only testimony which it is claimed tended to establish the solvency of the principal debtor at or about the time the request was made was that of a witness who stated that he heard a conversation between Edmondson and the principal debtor, in which the latter said that if required he would sell his wagon and team to pay the notes and that Edmondson told him that he didn't want him to do so, as the sureties on the notes were good.

[201] The court was requested by the parties on both sides of the controversy to give a peremptory instruction, and the court refused to grant appellant's request, but instructed the jury to return a verdict in favor of appellees, the defendants.

The case, therefore, stands here as if the jury had, upon correct instructions, returned a verdict in appellees' favor, and the sole question is that of the legal sufficiency of the evidence. St. Louis Southwestern R. Co. v. Mulkey, 100 Ark. 71, Ann. Cas. 1913C 1339, 139 S. W. 643.

There was testimony tending to qualify the interest of appellant Sims in the notes and to show that the original payee had an interest therein; but inasmuch as there was a valid assignment in writing he was authorized to sue, and appellees can not question the consideration upon which the assignment is based. Moreover, the executor of the original holder is made party, and that eliminates any question of the relative interests of the parties in the recovery.

The statutes of this State provide that "any person bound as surety for another in any bond, bill or note, . . . may, at any time after action hath accrued thereon, by notice in writing, require the person having such right of action forthwith to commence suit against the principal debtor," and that "if such suit be not commenced within thirty days after the service of such notice, and proceeded in with due diligence, in the ordinary course of law, to judgment and execution, such surety shall be exonerated from liability to the person notified." Kirby's Digest, §§ 7921, 7922.

It is not shown that the terms of the statute were complied with, but it is contended that noncompliance with the verbal request was sufficient to exonerate the sureties if the principal was solvent at the time the request was made and afterward became insolvent.

The trial court evidently based the decision upon that view of the law.

It is said that the law has been so declared in three of the decisions of this court. Hempstead v. Watkins, [202] 6 Ark. 317, 42 Am. Dec. 696; Thompson v. Robinson, 34 Ark. 44; King v. Haynes, 35 Ark. 463.

There are statements to that effect in the opinions in the two cases last cited, but in each case it was mere *dictum*, for the reason that the point was not involved and the court did not decide it.

The case of Hempstead v. Watkins, supra, was cited in each of those cases as supporting the statement; but the point was not decided in that case.

In the case last referred to notice had been given in the manner provided by statute, but had not been complied with, the suit brought within the time specified in the statute having been instituted by the plaintiff in the wrong capacity. After the expiration of the statutory time for complying with the notice another suit was instituted, and judgment was rendered against the principal and sureties; and subsequently the sureties filed a bill in the chancery court to restrain the enforcement of said judgment against them. The point of the case was whether or not the sureties had any remedy in a court of equity which was not barred by the judgment at law, and the court decided that the judgment at law did not bar the sureties of their equitable remedies and that the chancery court had jurisdiction to grant relief to the sureties against the enforcement of said judgment and following the decision of the New York court in the case of Pain v. Packard, 13 Johns. 174, 7 Am. Dec. 369, said that "the statute is but declaratory and an extension of an existing and an originally equitable remedy, and which has been adopted and converted by courts of law into a subject of legal cognizance."

In Thompson v. Robinson the surety requested the payee in the note to sue the principal debtor and attach the property of the principal, and, after judgment, instituted action in chancery to restrain the enforcement. The court held that no ground for relief was shown, for the reason that there appeared no ground for attachment of the property of the principal debtor. The court said that mere delay or neglect to sue, without notice, would [203] not discharge the surety, but that "if, after the debt was due, the surety, verbally, or in writing, request the creditor to sue the principal, who is then solvent, and the creditor fail to do so, and the principal afterward becomes insolvent, the surety is thereby discharged."

King v. Haynes was a suit in equity to enjoin the enforcement of a judgment against a surety on the ground that the creditor had extended the time of payment without his consent; but this court held that there had been no extension for a definite period upon a valid consideration and the surety was not discharged. Mr. Justice Eakin in the opinion of the court stated the rule announced in Hempstead v. Watkins, supra, but held that the proof was not sufficient to bring the case within that rule.

So, it will be seen that in each of those cases the announcement of that rule was *dictum*.

It is clearly against the great weight of authority, and we think it also inconsistent with other decisions of this court.

We have held that the statute on the subject is in derogation of the common law and of the contractual rights of the parties to such instrument and should be strictly construed. Cummins v. Garretson, 15 Ark. 132; Thompson v. Treller, 82 Ark. 247, 101 S. W. 174.

An examination of the authorities discloses the fact that there was no such rule at the common law and that in the absence of a statute the surety cannot compel the creditor to bring suit against the principal and is not discharged by the failure of the principal to do so.

Mr. Brandt calls attention to the few cases holding to the rule above announced, but says that it is contrary to the great weight of authority, and cites numerous cases in support of that statement. "The great majority of cases on the subject hold," he says, "in the absence of any statutory provision, that if after the debt is due the surety request the creditor to sue the principal, who is then solvent, and the creditor fails to do so, and the principal afterward becomes insolvent, the surety is not [204] thereby discharged. The ground upon which these decisions rest is, that the principal and surety are both equally bound to the creditor, who may have taken a surety in order that he might not have to sue the principal. If the surety desires a suit brought against the principal, he may himself pay the debt, and immediately sue the principal. The contrary doctrine is an innovation, and was unknown to the common law." 1 Brandt on Surety & Guaranty, § 265.

The doctrine seems to have originated with the case of Pain v. Packard, supra, decided by the New York Court of Errors in 1816. Chancellor Kent, in the case of King v. Baldwin, 2 Johns. Ch. 554, refused to follow the rule announced in Pain v. Packard, and on appeal the Court of Errors reversed his decision by a divided court, the deciding vote being cast by the Lieutenant Governor, who was a layman.

The New York courts, in later decisions, have recognized the rule announced in Pain v. Packard, but almost invariably have done so with protest against its correctness.

The case has been condemned by nearly all the courts which have had occasion to discuss the law on the subject.

Chief Justice Parker, speaking for the Massachusetts court in Frye v. Barker, 4 Pick. 382, said:

"We never have adopted the law stated to be settled by the New York case of Pain v. Packard, that a surety may discharge himself, if upon request the creditor does not sue the principal. . . . The cases cited of a discharge to the surety, where the principal may still be holden, are chiefly cases of obligation to perform some duty other than the payment of money, where the terms of the contract are changed by the obligee without the consent of the surety. . . . There seems to be no reason, in the case of money contracts, for discharging the surety because the promisee neglects to sue the principal, for the surety may pay the debt and then bring an action himself."

[205] In the case of Inkster v. Marshall, First Nat. Bank, 30 Mich. 143, Mr. Justice Christiancy, speaking for the court, said:

"The case of Pain v. Packard, 13 Johns. 174, 7 Am. Dec. 369 (which has been followed in New York, not without some vigorous protest, and to some extent in some other States), was, we think, a clear departure from the common law; and we find nothing in the English decisions to warrant the qualifications of a surety's liabilities there recognized."

Many other decisions discuss the doctrine laid down in Pain v. Packard, and expressly decline to follow it, declaring it to be an innovation. Davis v. Huggins, 3 N. H. 231; Dane v. Corduan, 24 Cal. 157, 85 Am. Dec. 53; Langdon v. Markle, 48 Mo. 357; Hickok v. Farmers', etc. Bank, 35 Vt. 476; Jenkins v. Clarkson, 7 Ohio 72, pt. 1; Stout v. Ashton, 5 T. B. Mon. (Ky.) 251; Nichols v. McDowell, 14 B. Mon. (Ky.) 6; Gage v. Mechanics' Nat. Bank, 79 Ill. 62; Huff v. Slife, 25 Neb. 448, 41 N. W. 289, 13 Am. St. Rep. 497.

Those cases hold, in effect, that, in the absence of statute, the surety has no right to require the creditor to proceed against the principal and that a failure to sue upon request does not discharge the surety.

In Stout v. Ashton, supra, where it was proved that the surety, who had requested the payee to sue the principal, insisted upon suit being brought, the court said:

"We cannot concur with the court below, by supposing the surety to be released by the mere laches, or neglect, of the obligee to bring suit. No case which has come under our notice goes that far. On the contrary, it is well settled that mere delay in bringing suit, by the obligee, though urged to do so by the surety, does not discharge the surety; and for a good reason. The surety has undertaken positively to pay the debt. If his obligee will not sue, and he is in danger, he can relieve himself by fulfilling his obligation; that is, by paying his debt, and taking the whip into his own hands, and pursuing his principal."

[206] In the other case cited above from the Kentucky Court of Appeals it was said:

"If he (referring to the surety) has an equitable right to require the creditor to sue and coerce the debt out of the principal, the extent of that right, and the manner in which he can avail himself of it, have been defined and prescribed by statute, and he cannot avail himself of it in any other mode."

In Ohio there is a statute on the subject similar to ours, and the Supreme Court of that State in the case above cited said:

"Since this statute was passed, the common law rule has not been in force in this State; and it is unnecessary to inquire what its provisions are, for it has given place to the statute, and is repealed by it, if any such rule existed as that which would discharge a surety who gave the creditor notice to sue the principal, *by parol*, if the creditor did not proceed accordingly. The statute of Ohio requires the notice to be *in writing*."

We are convinced, therefore, that the *dicta* contained in the three decisions referred to in the beginning are erroneous and should not be allowed to control in the decision of this case on the question presented. They are, therefore, disapproved, and the rule is announced that the statute on this subject controls, and unless complied with the surety is not discharged by mere inactivity on the part of the creditor or failure or refusal to sue the principal.

The question, whether or not the creditor may waive the form of the notice and accept verbal notice, is not raised in the present case, and it is left for decision in some case in which it is directly raised.

The judgment of the circuit court is therefore reversed and judgment will be entered here in favor of appellants for the amount of the notes sued on with interest. It is so ordered.

NOTE.

Sufficiency as to Form of Notice to Creditor to Sue Principal in Order to Discharge Surety.

Introductory, 633.
Necessity of Written Notice, 633.
General Sufficiency of Notice, 633.
Particular Allegations:
As to Suretyship, 634.
As to Commanding Suit, 634.
As to Persons to be Sued, 636.

Introductory.

The earlier cases considering the sufficiency of the form of a notice by a surety to the principal to sue the debtor, in order to release the surety from his liability, in the event of a failure to sue are collated in the notes to Edmondson v. Potts, 21 Ann. Cas. 1365 and Davenport v. State Banking Co. 115 Am. St. Rep. 68. The present note reviews the recent cases on that point.

Necessity of Written Notice.

As a general rule, a statute directing that the notice shall be in writing, is deemed to be mandatory. Timmons v. Butler, 138 Ga. 69, 74 S. E. 784; Farmer v. Butler, 138 Ga. 72, 74 S. E. 785; Johnson v. Longley, 142 Ga. 814, 83 S. E. 952. And see the reported case. In Johnson v. Longley, supra, it was contended by the surety, that, about May 1, he informed the creditor and the latter's attorney that he did not wish to give the written notice to sue the principal debtor, as provided by a statute, in order not to offend the principal debtor, but wished them to bring suit, which they agreed to do; that he would have given the written notice except for this promise; that they did not bring suit at the next July term of court, as could have been done, but delayed to do so until March, that, had suit been brought, a judgment could have been obtained at the October term of court; that the principal debtor was in possession of a sawmill and gristmill and cotton gin on a small lot; that the gin was burned in November, just after the superior court adjourned; that, had judgment been obtained at the October term the property could have been levied on and have been in the hands of the sheriff; and that the surety was informed that the gin was worth four or five hundred dollars. The court said: "By section 3546 of the Civil Code (1910), a surety is authorized, at any time after the debt is due, to give notice in writing to the creditor to proceed to collect the debt out of the principal; and if the creditor refuses or fails to commence an action for three months after such notice, if the principal is within the jurisdiction, it is declared that the surety shall be discharged; but no notice is a sufficient compliance with this section which does not state the county of the principal's residence. A notice in parol to sue, however urgent, will not be a compliance with the statute, so as to work a discharge of the surety." In Brooks v. Stevens (Tex.) 178 S. W. 30, it was said: "It is unnecessary to pass upon the second and third propositions under the first assignment to the effect that the surety, Richardson, orally, and before maturity of the note, insisted that the note be not again extended and that suit be filed on the note when it matured, and the insistence not acted on by Brooks, as the facts stated will not have the effect to release Richardson as surety from his liability. Under the Revised Civil Statutes of this state, art. 6329, any person bound as surety upon any contract, when the right of action has accrued, may require, by notice in writing, the creditor or obligee forthwith to institute suit upon such contract, and a failure to conform to the demand would release the surety. But there is neither pleading by appellee, nor fact found by the trial court to suggest such defense, but the defense made here is that Richardson was an endorser in its limited and restricted sense. However, the propositions of appellant correctly state the law. A verbal notice by the surety, not acted on by the creditor, will not release the surety from liability."

The reported case, is based on a statute providing that: "any person bound as surety for another in any bond, bill or note, . . . may, at any time after action hath accrued thereon, by notice in writing, require the person having such right of action forthwith to commence suit against the principal debtor" and that "if such suit be not commenced within thirty days after the service of such notice, and proceeded in with due diligence, in the ordinary course of law, to judgment and execution, such surety shall be exonerated from liability to the person notified." It is held that a verbal request by one of the sureties to sue the principal does not exonerate the sureties, as the right to such exoneration is dependent on compliance with the statute.

In Benge v. Eversole, 156 Ky. 131, 160 S. W. 911, the court, referring to a statute (Kentucky Statutes § 4668) said: "But in the case at bar the statute above quoted expressly requires that the notice shall not only be in writing, but that it must be served upon the creditor, in person."

General Sufficiency of Notice.

While the general rule is that a notice following the language of the statute is sufficient, it has also been held that a substantial as distinguished from a literal compliance with the requirements of the statute, is sufficient. Thus in W. P. Brown, etc. Lumber Co. v. Steele (Ala.) 70 So. 161, it appeared that the written notice was as follows: "I hereby notify C. M. Hunter to sue, that I will not stay on note for G. S. Mussetter any longer. (Signed) J. B. Steele." The court said: "While the notice is lacking in technical precision, we think it substantially conforms to the requirements of the statute. Code, sec. 5396."

Particular Allegations.

As to Suretyship.

A notice given by the administrator of a deceased surety need not assert unequivocally the status of his interstate as a surety. Hammond v. McHargue, 170 Mo. App. 497, 156 S. W. 725, wherein the court said: "It has been decided that an administrator of a deceased surety may properly give notice to sue. . . . But conceding that to be the law, yet plaintiff insists that the notice was insufficient in that it fails to state definitely that Jesse George was a surety on the note, in that it used the expression: 'if Jesse George signed said note, he did so as surety,' etc. Plaintiff says, and so the law is, that the notice must be clear and explicit. . . . Notwithstanding the strict construction which like statutes are thus shown to have received, we think the notice in controversy is not made null by the expression 'if Jesse George signed said notes, he did so as surety,' etc. It is the administrator speaking through the notice, and being aware that he had no right or authority to make an admission binding the estate, he put the statement in the form which the law would have given it had he omitted the word 'if.'"

As to Commanding Suit.

It is well settled that the notice should clearly command or direct the creditor to bring suit. Frye v. Eisenbiess, 56 Ind. App. 123, 104 N. E. 995; Benge v. Ebersole, 156 Ky. 131, 160 S. W. 911; Hammond v. McHargue, 170 Mo. 497, 156 S. W. 725; National Bank of Commerce v. Gilvin (Tex.) 152 S. W. 652; Naylor v. Anderson (Tex.) 178 S. W. 620. In the case first cited the following notice from the surety was held to be insufficient: "Elkhart, Ind., U. S. A., Oct. 5, 1908. First State Bank, City. Gentlemen—The writer having disposed of his holdings in the Valley Paper Company begs to advise you that you do not extend any further credit on the strength of his endorsement and on notes given by Valley Paper Company. These notes fall due on demand and I want you to enforce collection or consider my endorsement cancelled. Kindly acknowledge receipt of this notice and oblige. Your very truly, Cyrus E. Frye." The court said: "In our view of the case a determination of the first question raised by appellant's brief, viz., the sufficiency of such notice as a compliance with sec. 1267, supra, 'any person bound as surety upon any contract in writing for the payment of money or the performance of any act, when the right of action has accrued, may require, by notice in writing, the creditor or obligee forthwith to institute an action upon the contract,' will dispose of the appeal. This statute abridges the common law right of the creditor to indulge the principal debtor by delay, and the surety's right thereunder can be acquired only by proceeding according to the method wherein provided. It should be stated, however, in this connection, that 'the statute is remedial, and all that can be required of the surety to effectuate his discharge is to bring his act within the meaning of the statute.' . . . Appellant in effect concedes that the statute in question should be construed as indicated, but insists that under such construction his notice is sufficient. In considering the effect to be given to the word 'forthwith' as used in the section, this court in McMillin v. Deardorff, 18 Ind. App. 428, 48 N. E. 233, said, 'The word "forthwith" adds something to the meaning of the words with which it is used in the statute. It is not enough, therefore simply to require the creditor, in the notice, "to institute an action upon the contract," but some form of words must be used which will be equivalent to the requirement "forthwith to institute an action on the contract."' . . . In Haskell v. Beers, 16 Ohio Dec. 368, in considering the sufficiency of a notice under a similar statute, the court said: 'It is not necessary that the notice contain the exact language of the statute. It is sufficient if the notice substantially complies with the requirements of the statute. But the notice must contain the following essentials, to wit: (1) It must be peremptory. It must "require" the (2) "Commencement of an action;" (3) "Forthwith;" (4) It must be unconditional, and (5) It must not be misleading, but should be easily understood. . . . The statute says "forthwith," and unless that term or some similar language, such as "at once" is used, to indicate that prompt action is demanded, or something in the notice shows it to be adversary, it is not sufficient.' The first sentence of the notice under consideration is not peremptory in tone but advisory only and relates to the bank's extension of credit generally to the 'Valley Paper Company' on the strength of appellant's endorsement. This sentence adds little if anything to the force or effect of the writing as a notice under the statute in question. The second sentence expresses a desire only that the bank enforce collection or consider appellant's endorsement, as canceled. This language indicates that the appellant labored under the mistaken idea that the bank might, at its option, on receipt of the notice either sue or cancel appellant's obligation as surety on such note, when, in fact, his release under statute could only result after the expiration of a reasonable time after the receipt of such notice within which the obligee might bring a suit, and as a result of the failure of the

obligee without legal excuse to bring such suit within such time. . . . The language used indicates no demand or notice to bring suit forthwith, or at any time, but only a desire that collection be enforced or that appellant's endorsement be considered canceled. The notice in McMillin v. Deardoff, supra, reads: 'Jan. 31, 1896. Mr. ——: Sue the note which I signed as surety for Rue, or I will not continue to be responsible as surety. A. B. McMillin.' This language is more emphatic than that in the notice under consideration. That case was decided in 1897, and has not been criticised or overruled and seems to be supported by the weight of authority in this and other jurisdictions." In Naylor v. Anderson (Tex.) 178 S. W. 620, it was said: "Articles 6329, 6330, Vernon's Sayles' Tex. Civ. Stat., provide that a surety by notice in writing may require the holder of a contract for the payment of money forthwith to file suit thereon, and a failure of such creditor to institute suit thereon, at the first terms of court convening thereafter, or at the second term, with a showing of good cause why suit was not filed at the first term, will discharge the surety. But the notice to the creditor contemplated by the statutes must be equivalent to an explicit and peremptory demand that suit be instituted forthwith. The letter which Anderson addressed to Homer Lee, as found by the court, did not constitute such notice."

In Benge v. Eversoll, 156 Ky. 131, 160 S. W. 911, it appeared that letters had been written by a surety to his principal, in which the surety suggested that the notes on which he was liable should be sent to some attorney for collection, as he could then, owing to his acquaintanceship with the debtor's affairs, consult with the attorney with respect to their collection, and that he was desirous of terminating his liability as surety before a certain date. One of the letters was missing. The controlling statute (Kentucky Statutes, § 4668) read as follows: "A surety, co-obligor, or cocontractor, or one of several defendants to a judgment, may, by notice in writing served in person within the state on the creditor or plaintiff, or if the plaintiff be a nonresident or absent from the place of his residence for the period of thirty days consecutively, upon his agent or his attorney, require him to sue or issue execution, and if the creditor shall not sue to the next term thereafter at which he can obtain judgment, and in good faith prosecute the suit with reasonable diligence, such cosurety, co-obligor, co-contractor, or defendant, shall be discharged from all liability as such." It was held that the letters did not constitute sufficient notice to relieve the surety of his liability. The court said: "It is practically conceded in the argument, and we think it clear beyond question, that neither of the three letters written by Eversole constituted a sufficient notice under the statute to exonerate him as surety; and we do not think that his oral testimony as to the contents of the missing letter is any stronger, since he says he merely requested her to send the note to Rader, or some other attorney, for collection," and after reviewing the authorities as to the necessity of a command to sue in the notice, further stated: "It will be noticed, however, that in none of the letters in this record is there a peremptory direction to collect this note in that way. Each of the three letters is in answer to a letter from Miss Benge, and they are all merely advisory and solicitous, at most. And, in view of the fact that during this correspondence Eversole collected for himself more than four thousand dollars from Garrison, it is but natural that he should not have been so peremptory in his desire for Miss Benge to get her money as to require her to sue, since that might have interfered with his own arrangements. While it was competent for the plaintiff to introduce the three letters which she admitted she had received from Eversole, for the purpose of showing what notice had been given her, the court should have instructed the jury that they did not constitute a sufficient notice under the statute, and that the jury should disregard them in making their verdict." In National Bank of Commerce v. Gilvin (Tex.) 152 S. W. 652, the court, after holding that a statute (Revised Statutes, art. 3811) did not clothe a surety with power to require a creditor to proceed against the estate of an insane principal under guardianship at the hazard of discharging the surety by failing so to proceed, said: "We are of the opinion that if article 3811, Revised Statutes, can be applied to such case as this (and we think it has no application), the notice as shown by the evidence, as given by appellee to appellant, both in the guardianship and in the administration, was clearly insufficient to impose upon appellant any duty or action or active diligence, because such notice, in order to be effective, must be a full, explicit, and peremptory demand that suit be brought forthwith, with the further statement that the surety will not be bound any further if such is not done. The notice in question, after the administratrix had been appointed, was as follows: 'Amarillo, Texas, Nov. 17, 1908. Amarillo National Bank of Commerce, Mr. J. L. Smith, President, City. The note of J. T. McKinstry, on which I am surety, dated in December, 1906, for something over five hundred dollars. You will please file your claim with the probate court for payment. The estate of said J. T. McKinstry is now being represented in said court

by Mrs. Ella E. McKinstry, as administratrix, and there is plenty of property or funds there to pay you. Please kindly see to this matter at once and oblige, Yours very truly, D. Gilvin.' The notice given during the pendency of the guardianship was similar and in substance like the above."

"Notice 'to collect' may be sufficient if the language used indicates that the collection must be made by suit if necessary. Stevens v. Chorn, 8 Ky. Opinions 680; Wier v. Dickers, 11 Ky. L. Rep. 523." Benge v. Eversole, 156 Ky. 131, 160 S. W. 911.

AS TO PERSONS TO BE SUED.

In W. P. Brown, etc. Lumber Co. v. Steele (Ala.) 70 So. 161, wherein it appeared that the payee of a note delivered it to a bank in escrow, to be delivered to the plaintiffs in part payment for land purchased of them, on their delivery of a satisfactory deed to the bank, it was held that the plaintiffs were not owners of the note in such a sense as entitled them to maintain a suit thereon, and that as the statutory notice should manifestly be given to the person who could sue at the time, it was properly given to the original payee. The court said: "A demand for suit on the note necessarily means against the makers of the note; and it was long since held that a notice to bring suit 'against the parties' to a note is a sufficient designation of the persons to be sued. . . . . This meets the rule declared of Shehan v. Hampton, 8 Ala. 942, 946, that: 'When a statute requires an individual to be designated to another, there must be sufficient information given to enable the person to be ascertained with certainty.' Here there was but one note, and the payee knew who was the principal debtor, and who was the surety, and the exact nature of the demand could not be mistaken."

TAX LIEN COMPANY OF NEW YORK

v.

SCHULTZE ET AL.

New York Court of Appeals—November 10, 1914.

213 N. Y. 9; 106 N. E. 751.

Taxation — Valuation of Property — Effect of Easement.

When an easement is carved out of one property for the benefit of another, the market value of the servient estate is thereby lessened, and that of the dominant increased, practically by just the value of the easement, and the respective tenements should be assessed accordingly.

Easements — Extinguishment — Tax Sale.

The foreclosure of a tax lien and a sale of the premises pursuant to Greater New York Charter (Laws 1901, c. 466, §§ 1035–1039, as amended by Laws 1908, c. 490, and Laws 1911, c. 65) do not extinguish private easements of light, air, and access of adjoining owners over the land sold, which were excluded from an assessment on the land, since that would be a taking of property without due process of law.

[See note at end of this case.]

Taxes — Foreclosure — Necessary Parties.

In an action under Greater New York Charter (Laws 1901, c. 466, §§ 1035–1039, as amended by Laws 1908, c. 490, and Laws 1911, c. 65) to foreclose a tax lien, the owners of property adjoining the property described at the tax sale, including the easements over the property so described, are not necessary parties.

Res Judicata — Matters Concluded.

A judgment is conclusive between the parties and their privies upon all matters embraced within the issues in the action which were or might have been litigated therein, and it is immaterial whether issues are joined by an answer to the complaint or tendered by the plaintiff and left unanswered.

[See 15 Am. St. Rep. 142.]

Same.

Such rule applies as well to a judgment by default, when the facts stated warrant the relief sought, as to one rendered after contest.

Taxation — Tax Lien — Effect on Easement.

Prior easements of light, air, and access appurtenant to adjoining lands were not subject to a tax lien on the servient estate.

Res Judicata — Matters Concluded — Scope of Issues.

In an action Pursuant to Greater New York Charter (Laws 1901, c. 466, §§ 1035–1039, as amended by Laws 1908, c. 490, and Laws 1911, c. 65) to foreclose a tax lien, where the complaint alleged that owners of adjoining lands, not necessary parties defendant, but made parties defendant, had or might have, and the plaintiff believed that they had or might have, an interest in or claim upon the described premises by way of easement, etc., there is no issue as to whether such defendants had prior easements in the premises superior to the tax lien; and hence, as to such easements, they are not concluded by the judgment therein.

Taxation — Sale — Duty of Purchaser to Accept Encumbered Title.

Easements of light, air, and access in the premises sold on the foreclosure of a tax lien appurtenant to adjoining lands materially affected its value, and the purchaser was not bound to accept title thereto.

Tax Lien Co. v. Schultze, 161 N. Y. App. Div. 693, reversed.

Appeal from Appellate Division of Supreme Court, First Judicial Department.

Action to foreclose tax lien. Tax Lien Company of New York, plaintiff, and Catherine E. Schultze et al., defendants. Judgment rendered at Special Term of Supreme Court reversed by Appellate Division of Supreme Court. Wesley E. Barker appeals. REVERSED.

[10] The action was brought pursuant to sections 1035–1039 of the Greater New York charter (Laws of 1901, chapter 466, as amended by chapter 490 of the Laws of 1908 and chapter 65 of the Laws of 1911) to foreclose a tax lien upon premises described in the judgment as follows:

"Borough of the Bronx.

"New Description, Section 9.

"Block 2277, Lot 50.

"Location, East 132nd Street, between Willis Avenue and Brown place; assessed to unknown owner; on the land and tax map, City of New York, Borough of Bronx."

Upon the sale pursuant to the judgment the appellant Wesley E. Barker bid the sum of $5,000 therefor and the property was struck off to him. He signed the terms of sale and paid $500 on account thereof. He subsequently refused to complete his purchase for the alleged reason that the premises are affected by easements of light, air and access in favor of adjoining owners which are not cut off by the foreclosure of the tax lien, and which said liens were in no way referred to by the terms of sale. The plaintiff so far as appears from the record does not deny that there were easements of light, air and access in favor of adjoining owners, but alleges that all of the adjoining owners were made parties defendant in the action to foreclose the tax lien and that some of them appeared in the action and others defaulted after being duly served with process and that the judgment in the action provides "That each and all of the defendants in the action who have been served with a summons and all persons claiming under them or any of them after the filing of the notice of pendency of action be and they are hereby forever barred and foreclosed of all right, claim, lien, title, interest, easement and equity of redemption [11] in the premises affected by the said transfer of tax lien and each and every part thereof." The motions were made at the Special Term and were heard together, one by the plaintiff to compel the appellant Barker to complete his purchase, and one by the appellant Barker to be relieved from his purchase.

Edward Miehling for appellant.
August Weymann for respondent.

CHASE, J.—When an easement is carved out of one property for the benefit of another the market value of the servient estate is thereby lessened, and that of the dominant increased practically by just the value of the easement; the respective tenements should therefore be assessed accordingly. (People v. Wells, 139 App. Div. 83, 87, 124 N. Y. S. 36, *affirmed* on opinion below, 200 N. Y. 518, 93 N. E. 1129, 1253. See Blenis v. Utica Knitting Co. 73 Misc. 61, 130 N. Y. S. 740, *affirmed* 149 App. Div. 936, 134 N. Y. S. 1126, *affirmed* 210 N. Y. 561, 104 N. E. 1127; Smith v. [12] New York, 68 N. Y. 552, 557; People v. Purdy, 143 App. Div. 389, 128 N. Y. S. 569; *affirmed* 202 N. Y. 550, 95 N. E. 1137; Matter of Hall, 116 App. Div. 729, 102 N. Y. S. 5, *affirmed* 189 N. Y. 552, 82 N. E. 1127.)

The assessment of the lot described in the judgment did not include the easements appurtenant to the adjoining real property. The assessment of the servient estate was subject to the easements included in the assessments of the dominant estate. As a necessary consequence it has been held that on the foreclosure of a tax lien and a sale of the premises pursuant to sections 1035–1039 of the Greater New York charter, private easements of light, air and access of adjoining owners over the land sold are not extinguished. If property rights which are excluded from an assessment are sold or extinguished by a tax sale, there would be a taking of property without due process of law. (Jackson v. Smith, 153 App. Div. 724, 138 N. Y. S. 654; *affirmed* on opinion below by decision handed down herewith, 213 N. Y. 630, 107 N. E. 1079.)

The owners of the property adjoining the property described at the tax sale including the easements over the property so described were not necessary parties to the action to foreclose the tax lien. They were made parties to the action and the question now arises whether the easements of those who made default in appearing in the action are cut off by the judgment taken against them by such default.

We are not in this case considering the propriety of making a person who claims in hostility to a tax lien a party defendant in an action to foreclose such lien. The question before the court is as to the effect of making a person claiming an interest superior to a tax lien a party in a case where the propriety of making such a person a party defendant is not in any way presented in the action.

It is a general rule that a judgment is conclusive between the parties and their privies upon all matters embraced within the issues in the action which were or might have been litigated therein. It is immaterial

[13] whether issues are joined by an answer to the complaint or tendered by the plaintiff and left unanswered. The rule applies as well to a judgment by default when the facts stated warrant the relief sought as to one rendered after contest. (Goebel v. Iffla, 111 N. Y. 170, 18 N. E. 649.) Was the question whether the defendants had easements in the property described that are superior to the tax lien an issue in the action? The answer to the question should be determined from the judgment roll.

The judgment roll was referred to in the notices of motion, but it is not a part of the record. In one of the affidavits upon which the plaintiff's motion is founded it is stated that certain defendants were named as such to cut off possible easements or rights of way. The statement, we assume, is that of the affiant and not a quotation from the complaint.

It is in one of the affidavits stated that the complaint alleges "That all of the defendants have or may have and the plaintiff believes that such defendants have or may have an interest in or claim upon the real property hereinafter described by way of lien, mortgage, devise, dower right, purchase, easement, operation of law, inheritance from or marriage with any of the above named defendants or otherwise."

It is not disputed that the defendants were the owners of easements appurtenant to adjoining lands. Such easements were acquired prior to the tax lien and were not subject to it.

If a plaintiff in any foreclosure action chooses to make a person who claims that he holds a lien upon or interest in the property sought to be foreclosed that is prior and superior to the claim of the plaintiff, a party defendant, either for the purpose of determining the amount of the claim and paying it from the proceeds of sale or of having the same declared to be subject and subordinate to his lien, such claim should be clearly stated in the complaint.

When a plaintiff so clearly states his claim in a complaint [14] the defendant must appear in the action and present his claim by appropriate pleading or pleadings, and if necessary by proof or suffer the ordinary consequences of a default.

If the plaintiff's claim is not so clearly stated in the complaint, but some general allegations are used therein to the effect that a claim is made by the defendant "as subsequent purchaser or encumbrancer or otherwise," it will not bar the defendant of rights that are superior and paramount to that of the plaintiff if he default therein. (Lewis v. Smith, 9 N. Y. 502, 61 Am. Dec. 706; Merchants' Bank v. Thomson, 55 N. Y. 7; Emigrant Industrial Sav. Bank v. Goldman, 75 N. Y. 127; Goebel v. Iffla, supra; Nelson v. Brown, 144 N. Y. 384, 39 N. E. 355; Anderson v. McNeely, 120 App. Div. 676, 105 N. Y. S. 278; Fern v. Osterhout, 11 App. Div. 319, 42 N. Y. S. 450; Barker v. Burton, 67 Barb. (N. Y.) 458.)

Applying the rule stated to this case, it does not appear from the record that there was anything in the complaint to show the defendants that the plaintiff disputed or sought to bar their prior and superior easement of light, air and access over the property which it sought to sell in the action.

As the question of the defendants' having prior and superior easements to the tax lien was not tendered as an issue in the foreclosure action, the defendants are not bound by the judgment therein.

The easements over the real property bid off by the appellant at the foreclosure sale materially affected its value and he was not tendered a title to such real property that he was bound to accept.

The order of the Appellate Division should be reversed and that of the Special Term affirmed, with costs in both courts.

Willard Bartlett, Ch. J., Werner, Hiscock, Hogan, Miller and Cardozo, JJ., concur.

Order reversed, etc.

NOTE.

Sale of Land for Taxes as Extinguishing Private Easement.

The more prevalent rule seems to be that a sale of land for taxes does not extinguish a private easement to which the land is subject. Harris v. Curtis, 139 App. Div. 393, 124 N. Y. S. 263; Jackson v. Smith, 153 App. Div. 724, 138 N. Y. S. 654, *affirmed* 213 N. Y. 630, 107 N. E. 1079; Stansell v. American Radiator Co. 163 Mich. 528, 128 N. W. 789, 17 Detroit Leg. N. 970; Blenis v. Utica Knitting Co. 73 Misc. 61, 130 N. Y. S. 740, *affirmed* 149 App. Div. 936, 136 N. Y. S. 1126, *affirmed* 210 N. Y. 561, 104 N. E. 1127, motion for reargument denied, 210 N. Y. 614, 104 N. E. 1127; Essery v. Bell, 18 Ont. L. Rep. 76, 13 Ont. W. Rep. 395. And see the reported case.

"It would be an extraordinary state of the law if, by the sale of the servient lot, the title to the easement could be extinguished, and that without any notice to the person who uses it, or any opportunity given for him to exonerate the land by the payment of taxes, with right of resort in cases where he is not the proper person to pay." Essery v. Bell, supra. In Blenis v. Utica Knitting Co. supra, the court, in discussing the effect of a statute providing that the purchaser at a tax sale obtains an absolute title free from all incumbrances, said: "The statutes relat-

ing to tax sales in the county of Oneida, which provide that the purchaser at such sales obtains an absolute title free from all incumbrances, cannot, in my opinion, go further than to invest the purchaser with the title that the owner of the property had, free from liens by the way of incumbrances placed thereon. In other words, it cannot divest a party, situated as the plaintiff is here, from a property right, such as a servitude or easement lawfully acquired prior to the levying of the tax under which the sale was made; and this, especially, when he was not made a party to the proceeding. Indeed, to so divest him would, in my opinion, infringe his constitutional rights, in that it would deprive him of property rights without due process of law. . . . The claim that the tax deeds of both the conveyed and unconveyed lots in block 2, other than those of the plaintiff and defendant, destroyed the easement or servitude imposed upon them, I think cannot be maintained by authority. The purchasers at the tax sales, the county in the one case and Frank H. Clark in the other, could acquire no better title than their immediate grantors or Mathews had or could give; nor, indeed, could Mathews' assignee, by allowing the property to go to tax sale and by subsequent purchase by him, enlarge his title. All such purchasers took title burdened as the premises were; for, if they did not have actual notice of the situation (of which it must be said the assignee did have), they had constructive notice, as the recording acts clearly apply. . . . The prior deeds of Mathews and the map made by him and delivered to his assignee and on file prior to the time of the tax sales were all sufficient notice to purchasers of the servitude or easement in question. To say that the alleyway could thus be destroyed would be to say, with nearly equal propriety, that Mathews avenue to its center could also be destroyed, as conveyances of these lots carried the title to the center of the avenue." In Harris v. Curtis, 139 App. Div. 393, 124 N. Y. S. 263, it appeared that a right to draw water for the purpose of power was reserved in the conveyance of a mill property. It was held that the fact that the purchasers at a foreclosure sale of the mill property permitted the land to be sold for the nonpayment of taxes did not relieve the land of the easement or destroy the servitude which the original grantor had placed on it. In Essery v. Bell, 18 Ont. L. Rep. 76, 13 Ont. W. Rep. 395, it appeared that the purchaser of land subject to an easement and which was sold for taxes was the mortgagee of the land. The court, in holding that the sale did not extinguish the easement, said: "In this case . . . the purchaser appears to have been the mortgagee of the servient tenement, over whose soil the easement ran, and whose duty it was to pay the taxes. It would be a piece of strategy not to be encouraged if he let the taxes go into arrear and bought for the purpose of extinguishing the easement subject to which he acquired his mortgage." In Stensell v. American Radiator Co. 163 Mich. 528, 128 N. W. 789, 17 Detroit Leg. N. 970, it appeared that the owner of the servient land was also the owner of a part of the dominant lands. The servient land was sold for taxes and was bought in the name of a third person for the benefit of the owner who also secured a tax lease for ninety-nine years. It was held that the acquisition of the title through the tax sale and tax lease was a mere discharge of the owner's duty and did not destroy the easement of the other dominant owners.

In some jurisdictions the rule is followed that a valid sale of land for taxes extinguishes a private easement to which the land is subject on the ground that the purchaser at a tax sale is clothed with a new and complete title in the land. Hill v. Williams, 104 Md. 595, 65 Atl. 413; Hanson v. Carr, 66 Wash. 81, 118 Pac. 927. In the case first cited, it was said: "Assuming that the strip of ground 12 feet 6 inches wide which runs back from Pennsylvania avenue a depth of 87 feet to a four-foot alley in the rear of the three lots owned by Mrs. Hill under the Slingluff deed is an alleyway; can it be assessed for purposes of taxation? It is not a public street or alley. It was designed for the use of the occupants of the three lots conveyed by the Slingluff deed to Mrs. Hill, and the only interest or estate acquired by the grantee under that deed in that strip of ground was a right of way from Pennsylvania avenue to the four-foot alley in the rear of her three lots. As the fee-simple title remained in the Slingluff estate, the land was properly assessed to that estate. . . . The antecedent creation of a private easement in this strip of land could not, under any known legal principle, exempt it from taxation. It therefore continued to be taxable after the creation of the easement just as it had been before, and, if the taxes were not paid it was liable to be sold, even though by such a sale the easement would be destroyed, because the purchaser at a tax sale, when the proceedings were regular, is clothed with a new and complete title in the land, under an independent grant from the sovereign authority, which bars or extinguishes all titles and incumbrances of private persons, and all equities arising out of them." In Hanson v. Carr, 66 Wash. 81, 118 Pac. 927, it was said: "The tax lien is paramount to all other liens or claims. When foreclosure of such lien is made and real estate is sold thereunder, the fee passes to the purchaser, and all grants

made by the owner of the fee must, of course, fall with the foreclosure. . . . This must be the rule. Otherwise the owner of real estate may grant an easement . . . and surrender possession of the real estate to such grantee, and, upon foreclosure of the tax lien by the state, the purchaser would acquire only the fee, subject to the easement . . . which would destroy the priority of the tax lien. . . . No doubt the defendants, prior to the foreclosure proceedings, might have had the land upon which their easement was located segregated, and a pro tanto reduction of the tax, under Rem. & Bal. Code, § 9258. Coolidge v. Pierce County, 28 Wash. 95, 68 Pac. 391. But having neglected that remedy, it is too late to say that the easement did not go with the land to the purchaser at the tax sale."

In Smith v. Griffin, 14 Colo. 429, 23 Pac. 905, it appeared that the owner of a tract of land subdivided it into lots and left an alleyway in the rear of the lots. No statutory dedication to the city for public purposes of this strip was made, and it was not conveyed by deed in the sale of the lots. It was held that a sale of the strip of land for taxes barred the right of the original owner to maintain a suit brought on the ground that the closing of the alley by the purchaser under the tax sale constituted a nuisance which he was entitled to have abated.

HAWKINS

v.

MELLIS, PIRIE AND COMPANY.

Minnesota Supreme Court—November 27, 1914.

127 Minn. 393; 149 N. W. 663.

Corporations — Proof of Value of Assets.

1. Where the assets of a corporation are shown to include various items of property, a witness should not give an opinion as to the aggregate value, until he has shown qualification to estimate the value of the several items.

[See Ann. Cas. 1915C 64, as to evidence of value of stock.]

Trover — Conversion of Corporate Stock — Measure of Damages.

While the par value of stock is presumptively the measure of damages for its conversion, if it appears that the corporation has been in existence but a short time, that there have been no sales of stock, and that the assets are depleted, an instruction that the damages are to be determined by the amount which a person wishing to buy the stock would expect to pay is not error.

[See note at end of this case.]

Appeal from District Court, Hennepin county: WAITE, Judge.

Action for conversion of stock. Herbert Hawkins, plaintiff, and Mellis, Pirie and Company, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. AFFIRMED.

H. W. Volk for appellant.
Edwin S. Slater for respondent.

[393] HOLT, J.—The action is against the corporation for the conversion of 220 shares of its capital stock, issued to plaintiff and fully paid for. The corporation denied the conversion and counterclaimed for [394] $1,000, the price of 100 additional shares issued to plaintiff but not paid for. The defendant recovered a verdict for $71.15. Plaintiff appeals from the order denying a new trial.

The verdict must be based upon the conclusion that defendant had converted 220 shares of the 320 belonging to plaintiff and also that he had not paid for the 100 shares not converted. The first proposition is of course in accord with plaintiff's contention and of the latter he does not complain. The errors assigned relate wholly to the ascertainment of the damages for the shares converted; and include a ruling touching the admissibility of evidence bearing upon value, an instruction to guide the jury in the determination thereof, and their estimate of the value or damages.

Only one ruling on the reception of evidence is questioned. Plaintiff, who had been the secretary of the corporation from its inception until about a month prior to the alleged conversion, when on the witness stand, was asked this question in regard to the assets: "Now, kindly state what was the value in dollars and cents as near as you can state, on November 22, 1910?" An objection that no foundation was laid was interposed and sustained. The court then reminded counsel that the witness would not be permitted to give a blanket value before he had first shown some qualification to testify as to the value of the various items composing the assets. Thereupon appellant's counsel said "I will excuse him from answering more at present, and try to get the matter in better shape." No further attempt was made to elicit estimates of the value of the assets from the witness. It is clear that no reversible error is found in the ruling of the court.

The substance of the part of the charge upon which error is predicated stated: That

in case the conversion was proven the measure of the damages would be the actual value of the stock converted; that ordinarily that would be the measure, but it appeared that the stock had no market value since it was not listed, quoted or offered for sale; that evidence had been introduced tending to show the condition of the business of the company; that the par value of the stock was to be considered by the jury, but was not to be taken, as contended by plaintiff, to be the measure of recovery in the [395] absence of absolute proof by defendant that it was not worth that amount. The court then continued: "I am of the opinion that the par value of the stock is one of the things to be considered by you, and in doing so you should take into account the financial condition of the company, the nature of the business and all other things which will enable you to form an opinion as to the actual value of the stock. I am aware of the fact that when I say value of the stock I am using an ambiguous term, because we have to have some kind of yard stick to measure the value, as the ordinary standard does not apply in this case. I know of no better rule for you to adopt, if you get that far in the case, than to ascertain and determine from the evidence what a person who wanted to buy stock in this corporation would reasonably expect to pay for this block of 220 shares." There were no instructions requested, and no corrections or modifications asked when the case was submitted to the jury. As the evidence stood we believe the substance of the charge pertinent and proper. It is true that the par value of the shares of corporate stock may be taken as the actual value in the absence of other evidence bearing on the question. Thompson, Corporations, § 3496; Harris's Appeal (Pa.) 12 Atl. 743; Brinkerhoff-Farris Trust, etc. Co. v. Home Lumber Co. 118 Mo. 447, 24 S. W. 129; Moffitt v. Hereford, 132 Mo. 513, 34 S. W. 252. In the case at bar it was shown that after the corporation had been in operation a little over a year its original capital of $10,000 had dwindled to $6,846.69 in book assets. This is adequate reason for saying that the par value was not presumptively the actual value of the stock. In Uncle Sam Oil Co. v. Forrester, 79 Kan. 611, 100 Pac. 512, it was held that, where in an action for conversion the complaint alleged the value to be less than par, the introduction of the share certificate of stock showing its par value, was not sufficient evidence to permit a recovery for the damages alleged. The rule given by the court that the jury was "to ascertain and determine from the evidence what a person who wanted to buy stock in this corporation would reasonably expect to pay for this block of 220 shares," may not have furnished a great deal of assistance. But in view of the evidence we are not prepared to say it was misleading. When stock in a corporation [396] has not figured in the markets, and there have been no sales or dealings therein, its actual value must be determined at the fair price which a person who desires to buy would be willing to pay, taking into consideration the original capital, how far there has been profit or loss in the business carried on, the assets and liabilities, the future prospects, and everything that goes to affect the value of the shares of stock. It is also claimed that the verdict is perverse, or demonstrably wrong. The record is very meager as to the nature of the business undertaken by this corporation. It would seem, however, that three or four men formed the corporation presumably to examine, audit or open books of account. They agreed upon the salary each was to draw. Some real estate was held, but whether this was in part payment for stock or a side issue in the business does not appear; also furniture and fittings were acquired; and some loans made or credits given. There is no evidence as to the actual value of these items, save the value as carried on the corporation books on March 31, 1911, at which time there was cash on hand or in bank of $5,327.57. The books also show that during less than a year while plaintiff was connected with defendant, there was an impairment of the capital of more than $2,000 and, as stated above, five months later an impairment of more than $3,000. No dividend was ever declared, but the salaries of the officers were speedily depleting the capital. We have looked in vain for any earnings from the business carried on. Under these circumstances we are not prepared to hold that the verdict of the jury, fixing the value of the 220 shares of stock converted at $71 less than the price plaintiff agreed to pay for the 100 shares, is not fairly supported by the evidence.

Order affirmed.

NOTE.

Measure of Damages for Conversion of Shares of Stock.

The measure damages for the conversion of shares of stock is the fair value of the stock at the time of the conversion. Goodall v. Clarke, 21 Ont. L. R. 614, 18 Ann. Cas. 608 (*appeals dismissed* 23 Ont. L. Rep. 57, 18 Ont. W. Rep. 185, and 44 Can. Supp. Ct. 284). The reported case holds that the value of corporate stock for the purpose of awarding damages for its conversion, where it has no market value, must be determined by considering the fair price at which a purchaser would buy the stock in view of the original

capital of the company, its assets and liabilities, its profit and loss account, its future prospects, and all other factors which tend to affect the value of the shares. The recent case of Hetrick v. Smith, 67 Wash. 664, 122 Pac. 363, supports, to a certain extent, the doctrine of the reported case. It appeared therein that a trustee had wrongfully converted to his own use the stock of a company as well as its business, goods, fixtures and earnings. In an action by the beneficiary, who was also the manager of the company, for converting the stock it was held that as the shares had no market value their value for the purpose of assessing damages should be ascertained by showing the value of the property and business of the corporation at the date of the conversion and deducting therefrom its liabilities at that time. It was further held in that case, that as the trustee had notified the beneficiary not to collect the accounts receivable they should be figured at their face value, and that an inventory of the merchandise on hand made by two witnesses at a time near the date of the conversion should be accepted to establish its value where the cestui que trust herself offered no evidence as to its worth. In Central Trust Co. v. West India Imp. Co. 144 App. Div. 560, 129 N. Y. S. 730, it appeared that securities consisting of corporate stocks and bonds which had no market value had been sold at auction by a trust company with which they had been pledged. In an action for their value by a person who proved his prior equitable right to the securities, the court said: "Under those circumstances, the court will seek, by such evidence as is available, to ascertain, as nearly as possible the amount of damages which plaintiff has suffered, and will not halt because the situation is novel, and the ordinary methods proving values are not available, but will resort to some practical means that will be just to both parties.' . . . On March 1, 1898, the defendant Trust Company undertook to deal with the securities pledged to it, all of which were covered by plaintiff's prior mortgage, by selling them at auction for the sum of two hundred thousand dollars, thereby substituting that sum for the securities themselves. This sum must be taken as representing the value of the securities on the day of the sale, and the defendant surely can have no just cause of complaint if it be now held chargeable with the price received for the securities at a sale conducted by its order, at a time selected by itself. It is of no moment that the securities were sold in a single lot so that it cannot be determined how much was bid for the stock, how much for the second mortgage bonds, and how much for the chance of procuring first mortgage bonds. All of these securities were subject to plaintiff's prior lien, and the manner of their sale was of defendant's own choosing. Nor does it affect the price bid as an evidence of value that the securities were bid in by McDonald, who was liable upon the notes intended to be secured by the pledge of the securities to defendant Trust Company, or that notes were turned in, instead of cash, for a portion of the purchase price. All this was with defendant's assent, which by so assenting applied to the payment of the notes the securities which it had been warned were claimed by plaintiff. The case is precisely the same as if the defendant Trust Company had sold the securities for cash and had turned that cash over to the holders of the notes. As the plaintiff had the right at all times to possession of the securities, that right at once attached to the proceeds, when the defendant Trust Company had consummated the conversion of the securities by selling them. It then became a trustee de son tort for the benefit of plaintiff, if the latter ultimately succeeded, as it has done, in establishing its preferential right to the securities. From that moment the plaintiff became entitled, at the very least, to the price realized. Upon the undisputed evidence in the case, therefore, it becomes possible to estimate the plaintiff's damages at the sum of two hundred thousand dollars, with interest from March 1, 1898."

It has been held that the measure of damages for the conversion of shares of stock is the market value on the day of the conversion, that is, the time when the owner, being entitled to the immediate possession of the stock, demands it and his demand is refused. Grimes v. Barndollar, 58 Colo. 421, 148 Pac. 256; Burns v. Shoemaker, 172 Ill. App. 290; Robinson Min. Co. v. Riepe, 37 Nev. 27, 138 Pac. 910. See also Hetrick v. Smith, 67 Wash. 664, 122 Pac. 363. Under this rule the owner of the shares is entitled to an additional amount equal to any dividends paid on the converted stocks up to the date of his demand for them. Grimes v. Barndollar, 58 Colo. 421, 148 Pac. 256. And he is also entitled to interest on the entire amount from the date of the conversion to the time of the verdict. Grimes v. Barndollar, 58 Colo. 421, 148 Pac. 256; Burns v. Shoemaker, 172 Ill. App. 290; Robinson Min. Co. v. Riepe, 37 Nev. 27, 138 Pac. 910.

Where corporate stocks have been converted by a malicious wrongdoer the owner may recover an amount equal to the highest prices reached by the stocks to the time of trial, provided it appears that the owner has brought his action promptly after the conversion and that he has pressed the suit with reasonable celerity, and also that the stocks made their top prices during the time when the action was being so pressed. Kavanaugh v. McIntyre, 74 Misc. 222, 133 N. Y.

S. 679, *judgment affirmed* 151 App. Div. 910, 135 N. Y. S. 1120. In that case it was also held that, under such circumstances, the owner was not entitled to interest.

In *California* the measure of damages for the conversion of shares of stock is regulated by statute which declares as follows: "The detriment caused by the wrongful conversion of personal property is presumed to be: First. The value of the property at the time of the conversion, with the interest from that time, or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party." See Myers v. Chittyna Exploration Co. 20 Cal. App. 418, 129 Pac. 469; Potts v. Paxton (Cal.) 153 Pac. 957.

In Shewalter v. Wood (Mo.) 183 S. W. 1127, it was held that where the certificate of a share of stock which was alleged to have been converted was not indorsed, and there was no proof that the owner thereof had lost the share which it represented and had not therefore been deprived of his status as a shareholder, he should recover nothing beyond what it would cost him to procure a substituted certificate. In that case it was said obiter that where shares of stock have been converted the measure of damages, in the absence of proof to the contrary, is the face value of the stock. The same statement is made in the reported case.

TOWNSLEY

v.

HARTSFIELD.

Arkansas Supreme Court—June 1, 1914.

113 Ark. 253; 168 S. W. 140.

Public Officers — Vacancy — Death before Commencement of Term.

Where an officer elected to succeed himself dies before the commencement of his second term, a vacancy is thereby created for the first term, but not in the second term, and one duly appointed and qualified to fill the vacancy in the first term holds during the unexpired term of the deceased officer and until his successor has been elected or appointed and qualified as provided by law.

[See 17 Ann. Cas. 86.]

"Otherwise" — Meaning of Term.

Under Sp. Laws 1911, p. 1026, providing that, when any vacancy in the office of road overseer shall occur from any cause whatever or upon failure to elect by a tie vote or otherwise, the county court or judge thereof in vacation shall appoint an overseer for such district or to fill such vacancy, where a road overseer elected to succeed himself died before the commencement of his second term, the county judge, upon his failure to qualify for the second term, had power to appoint an overseer, since the phrase "or otherwise" should be given its broadest and most comprehensive meaning, "in a different manner, in any other way," it being the intention of the legislature to authorize the county judge to appoint where there is no election or where the person elected for any reason fails to qualify.

[See note at end of this case.]

Appeal from Circuit Court, Sebastian county, Greenwood District: HON, Judge.

Action to try title to office. Virgil Townsley, plaintiff, and W. A. Hartsfield, defendant. Judgment for defendant. Plaintiff appeals. AFFIRMED.

[253] At the general election in 1910, Frank Irvin was elected road overseer of Center Township in the Greenwood District of Sebastian County, Arkansas. The statute provides that his term of office shall be the same as that for township and county officers. See Act No. 177, Acts 1905, approved April 18, 1905. Irvin entered upon the discharge of his duties as such road overseer, and continued in said office until his death, some time in October, 1912. At the general election held in 1912, he was again elected to the office of road overseer. He died before his first term expired, and on the 29th day of October, 1912, the county judge of Sebastian County appointed Virgil Townsley to fill the vacancy caused by his death. In November, 1912, a new county judge having come into office, W. A. Hartsfield was appointed road overseer for said township; and the latter qualified and entered upon the discharge of the duties of said office. This is a proceeding by Virgil Townsley against W. A. Hartsfield to [254] try the title to said office. The decision of the lower court was in favor of Hartsfield, and Townsley has appealed.

Jesse A. Harp for appellant.
Pryor & Miles for appellee.

[255] HART, J. (*after stating the facts*).—It will be noted from the statement of facts that Irvin died while he was serving his first term, and before his new term had commenced. The general rule is that if the deceased was himself the incumbent of the office and was elected to succeed himself, a vacancy is created in the first term by his death; but, by the weight of authority, at the commencement of the second term, no

new vacancy arises, and the appointee for the balance of the first term holds over until the election and qualification of his successor. State v. Speidel, 62 Ohio St. 156, 56 N. E. 871; State v. Elliott, 13 Utah 471, 45 Pac. 346. See, also, People v. Lord, 9 Mich. 227. That is to say, when one who is holding an office, and who has been elected to succeed himself, dies before entering upon the new term, a vacancy is thereby created in the term in which he was serving, but not in the new term for which he has been elected, and upon which he has not entered. Therefore, the one who is duly appointed and qualified to fill the vacancy thus created will hold the office for and during the unexpired term of the predecessor and until his successor has been elected or appointed and qualified in the manner provided by law.

It is not disputed by counsel for Hartsfield that Townsley's appointment was valid, but it is claimed that his term ended when Hartsfield was appointed in November, pursuant to the act of 1911, which provides for the filling of vacancies that may occur in the office of road overseer, and which, so far as relates to the question at issue in this appeal, is as follows:

"That when any vacancy in the office of road overseer shall occur from any cause whatever, or upon failure to elect by a tie vote or otherwise, the county court or judge thereof in vacation shall appoint an overseer for such district or fill such vacancy, as the case may be, whose term of service shall expire at the time designated for all county and township offices to expire. Such judge [256] shall make or cause to be made a true record of appointment."

The office of road overseer was created by statute, and it may be filled by election or by appointment, just as the statute may prescribe. It is manifest from the clause of the act just quoted that when Irvin died, the vacancy caused by his death should be filled by the county court. The section likewise provides that upon the failure to elect by a tie vote or otherwise, the county court, or judge thereof in vacation, shall appoint, etc. The words "or otherwise," in law, when used as a general phrase following an enumeration of particulars, are commonly interpreted in a restricted sense as referring to such other matters as are kindred to the classes before mentioned. Century Dictionary. The author says the phrase "or otherwise," when following an enumeration, should receive an *ejusdem generis* interpretation. Otherwise is also defined by Century Dictionary, the Standard Dictionary and by Webster, as meaning, "In a different manner; in any other way." We think the phrase "or otherwise" in the act under consideration was intended to be used in its broadest and most comprehensive sense. The phrase "or otherwise" is not used in the statute as a general phrase following an enumeration of particulars; but it follows the words "upon failure to elect by tie vote," and is placed in juxtaposition to these words. When the whole clause "upon failure to elect by tie vote or otherwise," is considered together with reference to the purpose and object of the act, it is evident that the Legislature intended to give the county judge the power to appoint where no one was elected or where the person elected failed for any reason to qualify when the time for entering upon the new term arrived. In short, we think the Legislature meant by the clause under consideration to give the county judge the power to appoint where there was no election or where the person elected for any reason failed to qualify. The county judge, pursuant to this section, exercised his power to appoint, and when he did so, the person appointed had a right to the office, and [257] having qualified and entered upon the discharge of the duties of the office of road overseer, he was the lawful incumbent of that office. It follows that the judgment of the lower court must be affirmed.

NOTE.

Legal Meaning of "Otherwise."

Generally, 644.
With Other Words:
Limitation to Things Ejusdem Generis, 645.
Construction According to Intent, 649.

Generally.

"Otherwise" is always a relative word, meaning, in general, different from that to which it relates. Black v. Delaware, etc. Canal Co. 22 N. J. Eq. 400; People v. Feitner, 71 App. Div. 479, 75 N. Y. S. 738; Philadelphia v. Fidelity, etc. Co. of Maryland, 46 Pa. Super. Ct. 313. In the case first cited it appeared that by an act of the legislature the United Railroad and Canal Companies of New Jersey were authorized "to consolidate their respective capital stocks; or to consolidate with any other railroad or canal company or companies, in this state or otherwise, with which they are or may be identified in interest, or whose works shall form with their own connected or continuous lines; or to make such other arrangements for connection or consolidation of business with any such company or companies, by agreement, contract, lease, or otherwise, as to the directors of said United Companies shall seem expedient." It was contended

that the act did not authorize the consolidation or connection of business with any railroad of another state. The court said: "The question depends upon the meaning and effect of the word otherwise. 'This is certainly an inapt word to designate companies out of the state, by being placed in opposition to the words 'in this state.' It is inapt, because its proper use is to express difference of means or manner, and not of place. The word is used here in a way that admits of no change of place in the sentence, even if such change can ever be permitted. 'Companies in this state' are one subject of the provision; the word "or" plainly denotes that some subject is to be indicated. If the word elsewhere or otherwhere had been used, it would have appropriately expressed the meaning intended. . . . It means companies different from or other than companies in this state." In Thompson v. Highland Park, 187 Ill. 265, 58 N. E. 328, the court said: "'Otherwise' is defined by the Standard Dictionary as meaning 'in a different manner;' 'in another way;' 'differently;' 'in other respects.' By Webster, 'in a different manner;' 'in different respects;' and by the Century Dictionary, 'in a different manner or way;' 'differently;' 'in other respects.'"

In People v. Greenwall, 115 N. Y. 520, 22 N. E. 180, it was held that the word "otherwise" was not used in the sense of "another." That case involved the construction of a statute providing that the killing of a human being "without design to effect death, by a person engaged in the commission of or in an attempt to commit a felony, either upon or affecting the person killed or otherwise," was murder in the first degree. It was contended that the words "or otherwise" meant "or another" and that murder in the first degree was not charged by an indictment alleging that the defendant killed the deceased "while engaged in the commission of or attempt to commit a felony either upon or affecting him or some other person." The court said: "We think it is entirely clear that it was intended to make the killing of any human being, while engaged in the commission of any felony, murder in the first degree, whether the felony was committed upon or affected any person or concerned property only." See also People v. Miles, 143 N. Y. 383, 38 N. E. 456. In Galveston County v. Gorham, 49 Tex. 279, it was held that the word "otherwise" meant "by like means." In that case an occupation tax law was discussed and the court said that a traveling agent or drummer was within a provision relating to persons who sold goods by sample, card, "or otherwise." See also Fleming v. Rome, 130 Ga. 383, 61 S. E. 5. In Contra Costa Water Co. v. Breed, 139 Cal. 432, 73 Pac. 189, the court construed an article of the state constitution imposing on a municipality the duty to establish the rates to be charged for water, and declaring that "any person or company collecting water rates 'otherwise than as so established' shall forfeit its franchises and water-works." The court said that the language of the provision was "obviously susceptible of the construction that it refers to a case where the rates had been established by the governing body, and that the word 'otherwise' is to be given one of its usual meanings,—namely, 'contrarily,'—in violation of the established rates." See also Lynch v. Murphy, 119 Mo. 163, 24 S. W. 774. But in King v. De Coursey, 8 Colo. 463, 9 Pac. 31, the court said: "The form of the answer, that defendant was not indebted to the plaintiff as alleged in the complaint, 'or otherwise,' must be considered as a denial that the defendant was in any manner indebted to the plaintiff on account of the subject-matter of the complaint, whether in the precise form as stated or not." In Territory v. Albright, 12 N. M. 293, 78 Pac. 204, it was said: "We do not hesitate to say that wherever the word otherwise is used, following specific terms, that no authority can be found that will give it its broad significance when used by itself, but that they restrict it to the meaning of the specific words and terms preceding it." And in Bosworth v. Smith, 9 R. I. 67, the court said: "Indeed, . . . we deem it doubtful if the phrase, 'whether barred by the statute of limitations or otherwise,' covers anything except the statute of limitations. The phrase may mean, as in the discussion of the case it has been considered to mean, whether barred by the statute of limitations or barred otherwise, and it may mean whether barred or otherwise, (that is, whether barred or not barred) by the statute of limitations. If the phrase had been 'whether outlawed or otherwise,' it would have been taken to mean whether outlawed or not outlawed."

With Other Words.

LIMITATION TO THINGS EJUSDEM GENERIS.

"Otherwise," when following an enumeration, is generally confined to matters or things of the same kind or nature as those enumerated.

England.—Portsmouth v. Smith, 13 Q. B. D. 184; Morgan v. London General Omnibus Co. 13 Q. B. D. 832, 53 L. J. Q. B. 352; Cook v. North Metropolitan Tramways Co. 18 Q. B. D. 684; Crusoe v. Bugby, W. Bl. 766, 3 Wils. C. Pl. 234.

Canada.—Rawlinson v. Wells, 13 Can. L. T. 120.

United States.—U. S. v. Sheldon, 2 Wheat. 119, 4 U. S. (L. ed.) 199; Ham v.

Missouri, 18 How. 126, 15 U. S. (L. ed.) 334; U. S. v. Dalcour, 203 U. S. 408, 27 S. Ct. 58, 51 U. S. (L. ed.) 248; U. S. v. Bettilini, 1 Woods 654, 24 Fed. Cas. No. 14,587; Riley v. Hartford Life, etc. Ins. Co. 25 Fed. 315; Lowenstein v. Fidelity, etc. Co. of New York, 88 Fed. 474; Pennsylvania Steel Co. v. Washington, etc. Bridge Co. 194 Fed. 1011.

Alabama.—Nesbitt v. Drew, 17 Ala. 379; Roberson v. State, 100 Ala. 37, 14 So. 554; Maxwell v. State, 140 Ala. 131, 37 So. 266; Reid v. Greene, 156 Ala. 640, 47 So. 195; O'Brien v. State, 3 Ala. App. 173, 57 So. 1028.

California.—Hambleton v. Duhin, 71 Cal. 136, 11 Pac. 865; Daniels v. Gualala Mill Co. 77 Cal. 300, 19 Pac. 519.

Colorado.—Post v. Lang, 27 Colo. App. 270, 148 Pac. 377.

Connecticut.—State v. Meehan, 62 Conn. 126, 25 Atl. 476.

Florida.—Roessler v. Armstrong (Fla.) 67 So. 229.

Georgia.—Conley v. State, 85 Ga. 348, 11 S. E. 659; Coker v. Atlanta, etc. R. Co. 123 Ga. 483, 51 S. E. 481; Fleming v. Rome, 130 Ga. 383, 61 S. E. 5. See also Polhill v. Battle, 124 Ga. 111, 52 S. E. 87; Rose v. State, 1 Ga. App. 600, 58 S. E. 20.

Kansas.—Methodist Episcopal Church v. Wyandotte, 31 Kan. 721, 3 Pac. 527.

Kentucky.—Chesapeake, etc. R. Co. v. Hanmer, 66 S. W. 375.

Louisiana.—State v. West, 106 La. 274, 30 So. 848.

Maine.—Loring v. Proctor, 26 Me. 18.

Massachusetts.—Com. v. Rice, 9 Metc. (Mass.) 253; Johnson v. Massachusetts Mut. Fire Ins. Co. 23 Pick. 418, 34 Am. Dec. 69; Jordan v. Swasey, 203 Mass. 48, 89 N. E. 108.

Michigan.—Hawkins v. Great Western R. Co. 17 Mich. 57, 97 Am. Dec. 179; People v. State Land Office Com'r, 23 Mich. 270; Jacobs v. Bement, 161 Mich. 415, 126 N. W. 1043.

Minnesota.—Ramsey County v. Stryker, 52 Minn. 144, 53 N. W. 1133; Smith v. Minneapolis Library Board, 58 Minn. 108, 59 N. W. 979, 25 L.R.A. 280; State v. Scott, 87 Minn. 213, 91 N. W. 1101.

Missouri.—New York L. Ins. Co. v. McDearmon, 133 Mo. App. 671, 114 S. W. 57.

Montana.—Forrester v. Butte, etc. Consol. Copper, etc. Min. Co. 21 Mont. 544, 55 Pac. 229, 353; Silver Bow County v. Davies, 40 Mont. 418, 107 Pac. 81.

New Jersey.—State v. Fuller, 40 N. J. L. 330.

New York.—People v. Elfenbein, 65 Hun 434, 20 N. Y. S. 364; Lewis v. Smith, 9 N. Y. 502, 61 Am. Dec. 706; Penfold v. Universal L. Ins. Co. 85 N. Y. 317, 39 Am. Rep. 660; Sims v. United States Trust Co. 103 N. Y. 472, 9 N. E. 605; In re Rapid Transit R. Com'rs, 147 N. Y. 260, 41 N. E. 575; People v. Feitner, 71 App. Div. 479, 75 N. Y. S. 738; Wallace v. Jones, 83 App. Div. 152, 82 N. Y. S. 449; Weinberg v. Savitzky, 47 Misc. 132, 93 N. Y. S. 485; Lloyd v. Kilpatrick, 71 Misc. 19, 127 N. Y. S. 1096.

Ohio.—Donley v. Bank, 40 Ohio St. 47; Myers v. Seaberger, 45 Ohio St. 232, 12 N. E. 796; Foeller v. Voight, 5 Ohio Dec. (Reprint) 349, 5 Am. L. Rec. 1.

Pennsylvania.—Daughters of American Revolution v. Schenley, 204 Pa. St. 572, 54 Atl. 366.

Tennessee.—Towls v. Rains, 2 Heisk. 357; Roberts v. Jackson, 4 Yerg. 308; Hoover v. Gregory, 10 Yerg. 451.

Texas.—Galveston County v. Gorham, 49 Tex. 279; Starke v. J. M. Guffey Petroleum Co. 98 Tex. 542, 4 Ann. Cas. 1057, 86 S. W. 1; Robberson v. State, 3 Tex. App. 502.

Wisconsin.—McCaffrey v. Shields, 54 Wis. 645, 12 N. W. 54; State v. Wood County, 72 Wis. 637, 40 N. W. 381.

In Com. v. Rice, 9 Metc. (Mass.) 253, it was held that a by-law of a city relating to the vending of farm articles "with cart, wagon, sleigh or otherwise," included a box. The court said: "The purpose of the by-law was, to prohibit the use of a part of the market as a stand for the sale of provisions, with a receptacle capable of holding and displaying such provisions. Cart, wagon and sleigh, are specified, but it is cart, wagon or sleigh, with the horse removed, and used only for the time being as such receptacle. We believe that the species of sleigh commonly used for carrying provisions to market is usually called a lumber-box. Now the point of likeness to be regarded is, not the capacity of being moved by a horse, but the capacity of being used to hold and display provisions for sale. A box, therefore, of suitable dimensions to hold and display provisions for sale, is an article ejusdem generis, within the clause of the by-law. The same rule, we think, would apply to a bench, stall, or table, used for the like purpose." See to the same effect U. S. v. Sheldon, 2 Wheat. 119, 4 U. S. (L. ed.) 199.

In Rawlinson v. Wells, 13 Can. L. T. 120, an order was made by consent consolidating two actions and referring all matters in question to arbitration. It contained a provision that if a party disputed the correctness or validity of the award "by reason of evidence improperly received or rejected or otherwise," he might appeal. The defendant served notice of appeal after the award specifying grounds which did not refer to the reception or rejection of evidence or to the evidence at all. The court said: "But the word "otherwise" in the clause of the order defining the right of appeal was to be given an ejusdem generis interpretation, as meaning "by reason of any other improper evidence;" and, therefore, the appeal as framed in the notice could not be entertained."

In Nesbitt v. Drew, 17 Ala. 379, wherein it appeared that a contract for the hiring of slaves provided that the owner should deduct for time lost "by sickness or otherwise" the court said: "We must . . . understand by the term "otherwise" in this contract, time lost by the death of the slaves, or by their disability to render service arising from any cause unmixed with the fault of the parties to the contract."

In State v. Fuller, 40 N. J. L. 330, the court said: "In construing the words, 'for the purposes of their road, or otherwise,' in that clause, reference must be had to the object and purpose of the act, and to the artificial character and limited capacity of the persons to be affected by it. In contemplation of the legislature, the property to be occupied, used or owned by these persons for the purposes of the road or otherwise, is only such as may be necessary or convenient for their legitimate purposes, to accomplish the end which the legislature had in view at the time of the enactment of the charter."

Under an act for the protection of the owners of bottles whose name, mark or device was "branded, stamped, engraved, etched, blown, impressed or otherwise produced" on them, it has been held that a conviction of a violation of the act by using a lithographic label of another who was engaged in the bottling business could not stand, as a label was not a cut or stamp on the bottle and did not come within the expression "or otherwise produced." People v. Elfenbein, 85 Hun 434, 20 N. Y. S. 364.

It has been held that a provision in an accident policy that "this insurance does not cover injuries resulting from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled," did not relieve the company from liability where death was caused by the accidental inhalation of illuminating gas while the insured was asleep. Lowenstein v. Fidelity, etc. Co. of New York, 88 Fed. 474. The court said that "the addition of the words 'or otherwise' cannot by any technical or natural construction qualify the act of inhaling. '"Or otherwise," in law, when used as a general phrase following an enumeration of particulars, is commonly interpreted in a restricted sense, as referring to such other matters as are kindred to the clause before mentioned.' . . . It is to be read in connection with the preceding word, 'accidental,' and means an injury of a kindred character, and would cover an intentional taking as well as an accidental taking."

In Riley v. Hartford L. etc. Ins. Co. 25 Fed. 315, it was held that a life insurance policy with a provision that it would be void if the insured died by "self destruction, felonious or otherwise" included all cases of voluntary self destruction, whether the insured was sane or not. See also Penfold v. Universal L. Ins. Co. 85 N. Y. 317, 39 Am. Rep. 660.

A rule of a fire insurance company rendering void a policy in case of alienation "by sale on otherwise" is not applicable to a conveyance by way of mortgage while possession remains in the mortgagor and no entry for foreclosure has been made. Jackson v. Massachusetts Mut. F. Ins. Co. 23 Pick. (Mass.) 418, 34 Am. Dec. 69. In Roberts v. Jackson, 4 Yerg. (Tenn.) 308, under an act providing that "real estate actually purchased or otherwise acquired, by any intestate, are to descend to the father, if living, but if dead, then to the mother of such intestate and her heirs," the court held that the words "otherwise acquired" did not include lands descended from either parent. See to the same effect Hoover v. Gregory, 10 Yerg. (Tenn.) 451; Towls v. Rains, 2 Heisk. (Tenn.) 357.

Construing a statute providing that "if any person shall, by the exhibition of any false sample, or by means of any false representation or device or by collusion with any officer of the revenue, or otherwise," knowingly effect an entry of goods, etc., at less than the true weight, etc., such person shall be fined, etc., the court said in U. S. v. Bettilini, 1 Woods 654, 24 Fed. Cas. No. 14,587: "The words, 'or otherwise,' must be interpreted to mean, or by any other fraudulent means whatsoever, or they mean nothing and are mere surplusage."

In Wallace v. Jones, 83 App. Div. 152, 82 N. Y. S. 449, the court said: "If Mr. Jones presented his own fraudulent or illegal bills, that does not establish that an audit thereof by the board of which he was a member was 'by collusion or otherwise.' The word 'otherwise,' as used in the statute, 'by collusion or otherwise, contracting,' etc., is to be interpreted by the rule of ejusdem generis. . . . It does not mean any audit, but an audit due to some sinister or improper motive and in violation of the public trust." See to the same effect Foeller v. Voight, 5 Ohio Dec. (Reprint) 349, 5 Am. L. Rec. 1.

In Smith v. Minneapolis Library Board, 58 Minn. 108, 59 N. W. 979, the court said that the right of a Library Board to take personal property in some other way than by gift, grant, purchase, devise, or bequest "is evident from the words 'or otherwise,' which are added to those mentioned."

In Loring v. Proctor, 26 Me. 18, the court said of a disposition of a cause "by nonsuit default or otherwise," that the word otherwise "must necessarily have reference to a disposition of the cause equivalent to what would be effected by a nonsuit or default."

In Myers v. Seaberger, 45 Ohio St. 232, 12 N. E. 796, it appeared that a statute provided as follows: "Every person of full age and

sound mind is required to list for taxation 'all moneys invested, loaned, or otherwise, controlled by him, as agent or attorney, or on account of any other person or persons.'" The court said: "The phrase 'or otherwise controlled by him,' must be construed to mean, in a manner similar to the loaning and investing of money."

In a case wherein the issue was as to the interpretation of the words "arising otherwise" in a statute providing for the certifying of the name of a candidate, to be placed on a ballot, by a campaign committee in case of a vacancy, the court said: "We construe this language by applying the general rule that, where there are general words following particular and specific words, the former must be confined to things of the same nature and kind as the latter. In other words, applying the doctrine of ejusdem generis, the expression . . . refers only to vacancies of a like nature to those which may occur through the death, removal, or resignation of a candidate,—such, for illustration, as insanity, conviction of a felony, etc." State v. Scott, 87 Minn. 313, 91 N. W. 1101.

In McCaffrey v. Shields, 54 Wis. 645, 12 N. W. 54, it was held that a statute providing for the care of a nonresident pauper, who should be "taken sick, lame, or otherwise disabled," meant bodily or mental disability to procure a livelihood. In Forrester v. Butte, etc. Consol. Copper, etc. Min. Co. 21 Mont. 544, 55 Pac. 229, 353, it was held that a provision of the compiled statutes that officers of a mining corporation "shall not have power to sell, lease, mortgage or otherwise dispose of the whole or any part of the mining ground, quartz mills, smelters, concentrators or reduction works of such corporation, unless they shall have first called a meeting of the stockholders of such corporation in the manner prescribed in section 468 of said article . . . for the purpose of submitting to the stockholders of such corporation the proposition so to sell, lease or mortgage or otherwise dispose of the property of such corporation or some portion thereof," operated as a restriction of corporate power and did not authorize two-thirds of the stockholders of a prosperous corporation to sell all of its property if any other stockholder protested. See also Conley v. State, 85 Ga. 348, 11 S. E. 659.

In a case wherein it appeared that Congress granted to the state for the use of schools the sixteenth section of every township in the state which had not been sold "or otherwise disposed of," It was held that an imperfect title which had been rejected by the board of commissioners did not come within the expression "otherwise disposed of." Ham v. Missouri, 18 How. 126, 15 U. S. (L. ed.) 334, wherein the court said: "The language and plain import of the 6th section of the act of the 3d of March, 1820, confer a clear and positive and unconditional donation of the sixteenth section in every township; and, when these have been sold or otherwise disposed of, other and equivalent lands are granted. Sale, necessarily signifying a legal sale by a competent authority, is a disposition, final and irrevocable, of the land. The phrase 'or otherwise disposed of' must signify some disposition of the property equally efficient, and equally incompatible with any right in the state, present or potential, as deducible from the act of 1820, and the ordinance of the same year." See also Roberson v. State, 100 Ala. 37, 14 So. 554; People v. State Land Office Com'r, 23 Mich. 270; Robberson v. State, 3 Tex. App. 502.

In Crusoe v. Bugby, W. Bl. (Eng.) 766, 3 Wis. C. Pl. 234, the court said that "otherwise do or put away" signified any other mode of getting rid of the premises entirely and could not be confined to the making of an underlease.

In Chesapeake, etc. R. Co. v. Hanner (Ky.) 66 S. W. 375, it appeared that the appellee was injured when a passenger on a train which fell through a trestle. It was alleged that he was "thereby severely injured, cut and bruised upon his body, arms, and legs, two of his ribs were broken, and he was otherwise greatly hurt and wounded." Approving the action of the lower court in overruling the appellant's motion to make the petition more specific as to how he was "otherwise hurt" the court said: "The words 'and otherwise greatly hurt and wounded,' when coupled with such specific allegations, may be treated as surplusage, and consequently ignored."

In a case wherein it appeared that an owner under a contract took all risks of loss, etc., "in loading, unloading, conveyance, and otherwise" it was held that the railroad company was not exempted from a loss when the bottom of the carriage gave way. Hawkins v. Great Western R. Co. 17 Mich. 57, 97 Am. Dec. 179. Wherein the court said: "While there is in one clause of the contract an exception of every default, the fair inference is, that this language was used as referring to defaults in the particulars specified in the previous articles, viz.: 'Loading, unloading, conveyance, and otherwise,' and in matters of a like kind. The rule is usually applicable, that where no intention to the contrary appears, general words used after specific terms are to be confined to things ejusdem generis with the things previously specified."

In Lewis v. Smith, 9 N. Y. 502, 61 Am. Dec. 706, it appeared that a husband gave a mortgage in which his wife was not made a party.

It was held that a decree of foreclosure, in an action instituted after his death in which the widow was a defendant, as having an interest in the property "as subsequent purchasers or incumbrancers, or otherwise" did not bar her right of dower. The court said: "The word otherwise, according to the rule of construction adopted in all analogous cases, means in some other like capacity, and does not embrace a claim like that which is set up in this case."

In People v. Feitner, 71 App. Div. 479, 75 N. Y. S. 738, the court held that the phrase "or otherwise" should receive an ejusdem generis interpretation. Jenks, J., said: "Section 1, . . . relates to the original assessment and provides for the discharge thereof by partial payment, and as to such act, when done, it provides: 'No further proceedings shall ever be had to levy or collect any sum on account of the expense of such improvement against such property by instalment or otherwise.' . . . I think . . . that we appreciate this expression if we read therein the legislative intent that so far as any assessment existed against such property by virtue of the assessment proceedings of 1891, and the subsequent statutes applicable thereto, provided the owner took advantage of the reduction of such assessment and paid in her one-third, such payment canceled such assessment, and that it could not be collected either in instalments, . . . or in any other manner. The collection by instalments plainly refers to the original assessment, to which alone this section relates, and the additional words 'or otherwise' are to be limited as relating to such assessment."

In State v. West, 106 La. 274, 30 So. 848, it was held that an attempt to rob by violently snatching away property from the hands of another, was included within a statute which read as follows: "Whoever shall be found guilty of attempting to rob, from the person of another, money or other property by cutting or tearing the clothes, thrusting the hand into the pockets, or otherwise, though he do not succeed in such attempted robbery, shall, on conviction, be 'punished as set forth in the statute.'" The court said: "The manner of the attempt was as wrongful and as much against common right as if he had made the attempt by cutting or tearing the clothes or thrusting the hand in the pocket of the one he was attempting to rob, using the words of the statute. The 'snatching' is denounced as having been forcible and violent. The law is directed against the taking of property from the person of another against the person's will. The intent of the word 'otherwise' as used evidently was to include all similar acts to those denounced, resorted to in the attempt to 'rob.'" It has been held that an omnibus conductor was not within the purview of a statute enumerating certain classes of persons as follows: "Laborer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labor." Morgan v. London General Omnibus Co. 13 Q. B. D. (Eng.) 832, 53 L. J. Q. B. 352. See to the same effect Cook v. North Metropolitan Tramways Co. 18 Q. B. D. (Eng.) 684.

CONSTRUCTION ACCORDING TO INTENT.

Where the intent so requires, the word "otherwise" may be construed without reference to the ejusdem generis rule, and may be given such a scope as the context seems to require.

England.—Archer v. James, 2 B. & S. 67, 110 E. C. L. 67, 8 Jur. N. S. 166, 31 L. J. Q. B. 152, 6 L. T. N. S. 167, 10 W. R. 489; Skinner v. Shew [1893] 1 Ch. 413; Taylor v. Oldham, 4 Ch. D. 395; In re Crawley, 28 Ch. D. 431; In re Leicester Club, etc. Co. 30 Ch. D. 629; Duffield, etc. Pure Linseed Cake Co. v. Waterloo Mills Cake, etc. Co. 31 Ch. D. 638; In re Terry, 32 Ch. D. 14; Swift v. Swift, 1 De G. F. & J. 160, 29 L. J. Ch. 121; Morant v. Taylor, 1 Ex. D. 188; Monck v. Hilton, 2 Ex. D. 268, 46 L. J. M. C. 163; Shelford v. Louth, etc. R. Co. 4 Ex. D. 319; Lowther v. Bentinck, L. R. 19 Eq. 167; Cheese v. Lovejoy, 2 P. D. 251; Fellowes v. Clay, 4 Q. B. 313, 340, 45 E. C. L. 313, 340; Irwin v. Farrer, 19 Ves. Jr. 86.

Canada.—St. Phillips Church v. Glasgow, etc. Ins. Co. 17 Ont. 95; Meagher v. Meagher, 34 Ont. L. Rep. 33, 22 Dominion L. Rep. 733, 8 O. W. N. 357; Paulin v. Windsor, 36 Nova Scotia 446.

United States.—Collector v. Hubbard, 12 Wall. 1, 20 U. S. (L. ed.) 272; Thayer v. Wendell, 1 Gall. 37, 23 Fed. Cas. No. 13,873; Marbury v. Kentucky Union Land Co. 62 Fed. 335, 22 U. S. App. 267, 10 C. C. A. 393; Fuller v. Aylesworth, 75 Fed. 701, 43 U. S. App. 657, 21 C. C. A. 505; Franklin Sugar Refin. Co. v. U. S. 137 Fed. 655; Gartner v. U. S. 154 Fed. 957.

Arkansas.—See the reported case.

California.—Contra Costa Water Co. v. Breed, 139 Cal. 432, 73 Pac. 189.

Colorado.—King v. DeCoursey, 8 Colo. 463, 9 Pac. 31.

Connecticut.—Rawson v. State, 19 Conn. 299.

Illinois.—Carpenter v. Mitchell, 54 Ill. 126; Haight v. McVeagh, 69 Ill. 624; Wilson v. Chicago Sanitary Dist. 133 Ill. 443, 27 N. E. 203; West Chicago St. R. Co. v. Morrison, etc. Co. 160 Ill. 288, 43 N. E. 393; Thompson v. Highland Park, 187 Ill. 265, 58 N. E. 328; Clark v. Patterson, 214 Ill. 533, 73 N. E. 806, 105 Am. St. Rep. 127; Chicago v. Brede, 218 Ill. 528, 75 N. E. 1044.

Indiana.—Pittsburgh, etc. R. Co. v. Mahoney, 148 Ind. 196, 46 N. E. 917, 47 N. E. 464, 62 Am. St. Rep. 503, 40 L.R.A. 101.

Iowa.—McClanahan v. McClanahan, 129 Ia. 411, 105 N. W. 833; Stiles v. Breed, 151 Ia. 86, 130 N. W. 376.

Kansas.—See State v. Boies, 68 Kan. 167, 1 Ann. Cas. 491, 74 Pac. 630

Kentucky.—Mutual Benefit Life Ins. Co. v. Com. 128 Ky. 174, 107 S. W. 802.

Louisiana.—Sibley v. Pierson, 125 La. 478, 51 So. 502.

Michigan.—Radley v. Seider, 99 Mich. 431, 58 N. W. 366.

Mississippi.—Swanzy v. Kolb, 94 Miss. 10, 18 Ann. Cas. 1089, 46 So. 549, 136 Am. St. Rep. 568.

Missouri.—Lynch v. Murphy, 119 Mo. 163, 24 S. W. 774; Scott v. Marshall, 110 Mo. App. 178, 85 S. W. 98; Webb v. Missouri State L. Ins. Co. 134 Mo. App. 576, 115 S. W. 481.

Nebraska.—State v. Moores, 58 Neb. 285, 78 N. W. 529; State v. Dennison, 60 Neb. 157, 82 N. W. 383.

New Hampshire.—Backus v. Lebanon, 11 N. H. 19, 35 Am. Dec. 466; Meredith Mechanic Ass'n v. American Twist Drill Co. 66 N. H. 267, 20 Atl. 330; Atty.-Gen. v. Taggart, 66 N. H. 362, 29 Atl. 1027, 25 L.R.A. 613.

New Jersey.—Black v. Delaware, etc. Canal Co. 22 N. J. Eq. 400.

New Mexico.—Territory v. Gutierrez, 12 N. M. 254, 78 Pac. 139; Territory v. Albright, 12 N. M. 293, 78 Pac. 204.

New York.—Downing v. Marshall, 23 N. Y. 366, 80 Am. Dec. 290; New York State Loan, etc. Co. v. Helmer, 77 N. Y. 64; People v. Greenwall, 115 N. Y. 523, 22 N. E. 180; People v. Miles, 143 N. Y. 383, 38 N. E. 456; Carpenter v. Romer, etc. Steamboat Co. 48 App. Div. 363, 63 N. Y. S. 274; VanSlooten v. Fidelity, etc. Co. 78 App. Div. 527, 79 N. Y. S. 608; People v. Abeel, 45 Misc. 86, 91 N. Y. S. 699. See also Martens v. O'Neill, 131 App. Div. 123, 115 N. Y. S. 260.

North Carolina.—State v. Jennings, 104 N. C. 774, 10 S. E. 249; State v. Shade, 115 N. C. 759, 20 S. E. 537.

North Dakota.—Bank of Park River v. Norton, 14 N. D. 143, 104 N. W. 525.

Ohio.—State v. Kelly, 32 Ohio St. 421; Nagle v. Brown, 37 Ohio St. 7; Chisholm v. Shields, 67 Ohio St. 374, 66 N. E. 93.

Pennsylvania.—Whelen's Appeal, 70 Pa. St. 410; Com. v. Dickert, 195 Pa. St. 234, 45 Atl. 1058; Philadelphia v. Fidelity, etc. Co. of Maryland, 46 Pa. Super. Ct. 313.

Rhode Island.—See Bosworth v. Smith, 9 R. I. 67.

South Carolina.—Pope v. Mathews, 18 S. C. 444; Davis v. Milady, 92 S. C. 135, Ann. Cas. 1914B 267, 75 S. E. 368.

Tennessee.—Ransome v. State, 91 Tenn. 716, 20 S. W. 310; State v. Runnels, 92 Tenn. 320, 21 S. W. 665; State v. Yardley, 95 Tenn. 546, 32 S. W. 481, 34 L.R.A. 656; Shelton v. State, 96 Tenn. 521, 32 S. W. 967; Memphis St. R. Co. v. State, 110 Tenn. 598, 75 S. W. 730.

Texas.—Trenton v. North American Acc. Ins. Co. 89 S. W. 276. See also Neaves v. Griffin, 80 S. W. 420.

West Virginia.—Trough v. Trough, 59 W. Va. 464, 8 Ann. Cas. 837, 53 S. E. 630, 115 Am. St. Rep. 940, 4 L.R.A.(N.S.) 1185.

In Meagher v. Meagher, 34 Ont. Rep. 33, 22 Dominion L. Rep. 733, 8 O. W. N. 357, it appeared that a clause in a will stated that the trust was "to hold . . . for my said daughters Mary Ann Meagher and Margaret Ellen Meagher for themselves and to make such disposition thereof from time to time among my children or otherwise as my said daughters decide to make, they my said daughters in the meantime to have all the rents and profits therefrom." The court said: "If the clause had ended with the names of the daughters, it would of course be clear that they took the whole beneficial interest in the property, and the words which follow may mean either that the two daughters, individually and not as trustees, are to make the disposition, or that the trustees are to make it in accordance with the directions of the two daughters as individuals and not as trustees. The daughters are to have the property for themselves and to make such disposition of it from time to time among the children of the testator or otherwise as they may decide to make; and the former is, I think, the meaning of this provision; but it is immaterial which of these two views is the correct one, for in either case the disposition is to be made in accordance with the directions of the two daughters."

In Lowther v. Dentinck, L. R. 19 Eq. (Eng.) 167, the court in construing a will said: "It seems to me that the words 'or otherwise for his benefit' are evidently put in for the purpose of not confining the trustees to preferment or advancement; and therefore, so far from finding any context which restricts the words, I think the context shows that the words could not mean something of the same kind. I must decide the case upon the words as they stand uncontrolled by any context." See to the same effect Whelen's Appeal, 70 Pa. St. 410; Pope v. Mathews, 18 S. C. 444.

It has been held that a provision of a statute for the filling of any vacancy in the office of poor director "whether such vacancy occur by the expiration of the term of office, or otherwise," did not abrogate a provision of an earlier statute for the election of such officers by the people. Com. v. Dickert, 195 Pa. St. 234, 45 Atl. 1058, wherein the court

said: "Looking at the words of the supplement, we find that the vacancies to be filled may occur by expiration of the term of office or otherwise. According to the original act, the vacancies would occur 'by death, resignation or otherwise.' The word 'otherwise' in the supplement is broad enough to cover vacancies by death and resignation. It also covers vacancies by removal of the incumbent from the district and by failure of a director elect to assume the duties of his office. But how can there be a vacancy caused by the expiration of the term? We know of only one way and that is, the failure of the electors of any particular district to elect a poor director at a proper time."

In Monck v. Hilton, 2 Ex. D. (Eng.) 268, 46 L. J. M. C. 163, the court had under consideration a statute providing that "every person pretending or professing to tell fortunes, or using any subtle craft, means, or device by palmistry or otherwise to deceive and impose on any of His Majesty's subjects" should be punished as a rogue and vagabond. The plaintiff pretending to have supernatural faculties in obtaining from the dead manifestations of power, noises, raps, etc. was convicted under the statute. Sustaining the conviction the court said that the means used by the plaintiff came within the words "by palmistry or otherwise." In Pittsburgh, etc. St. L. R. Co. v. Mahoney, 148 Ind. 196, 46 N. E. 917, 47 N. E. 464, 62 Am. St. Rep. 503, 40 L.R.A. 101, it appeared that an employee of an express company had released the company from all liability on account of his injury or death from negligence "or otherwise." It was held the release precluded an action against a railroad for his death caused by being caught between two cars as he was passing between them in the course of his employment. The court said: "The word 'otherwise,' as it is twice employed in Romick's contract, must be deemed to include some liability not expressly mentioned or such as might arise out of the relations of the parties and within the general scope of his service and connection with them. Giving the word such force, it would reach liabilities beyond those expressly mentioned, and beyond those claims for damages, injuries, or death arising from the ordinary hazards of the service, for such claims present no liability. It would include 'all the risks involved,' ordinary, as well as extraordinary; and it would include the assumption by the express company in favor of the appellant."

In State v. Kelly, 32 Ohio St. 421, a statute providing that a county treasurer should be liable in an action on his bond "if he receives any further money out of the treasury for fees, clerk hire, or otherwise," the court said: "We conceive that these words 'or otherwise' mean something. They comprehend every case of getting money out of the treasury other than that which the preceding section had provided should be the legitimate one."

It has been held that a provision in a private improvement act that nothing therein contained should affect any right which the corporation might have" under the Municipal Corporation Acts, or otherwise independently of this act," extended to all acts. Taylor v. Oldham, 4 Ch. D. (Eng.) 395.

In Swift v. Swift, 1 De G. F. & J. (Eng.) 160, 29 L. J. Ch. 121, it was held that a gift of real estate to hold "forever or otherwise, according to the several and respective natures and tenures thereof" included leaseholds for years.

In Shelford v. Louth, etc. R. Co. 4 Ex. D. (Eng.) 319, it was held that satisfying the court of any matter "by affidavit or otherwise" meant "by affidavit or by any other sufficient means."

In Wilson v. Chicago Sanitary Dist. 133 Ill. 443, 27 N. E. 203, it appeared that an article of the constitution provided as follows: "The General Assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessment, or by special taxation of contiguous property, or otherwise." The court said: "It is most probable that the words 'or otherwise' were used to exclude the possibility of misapprehension that because only cities, towns and villages could be authorized to make local improvements 'by special assessment,' 'or by special taxation of contiguous property,' they could not be authorized to make them by general taxation." In Morant v. Taylor, 1 Ex. D. (Eng.) 188, the court said that the words of a statute, "order for the payment of money or otherwise" included orders of every kind which a justice of the peace had authority to make.

In a case wherein the issue was as to who should under the provisions of a will bear the cost of some drainage work on a leasehold house the word "otherwise" was given a comprehensive interpretation. In re Crawley, 28 Ch. D. (Eng.) 431. Pearson, J., said: "It seems to me, . . . that when the testator has said that all that his wife is to receive is the rent that remains after paying 'all ordinary outgoings for ground rent, repairs, taxes, expenses of insurance, or otherwise' at all events, the word 'otherwise' is sufficient to cover this if the word 'taxes' is not sufficient, but looking to the form of the original lease of this house, I must come to the conclusion that the deduction will include whatever has been paid under that lease, and, under all these circumstances, though with some difficulty, I come to the

conclusion that the tenant for life ought to bear these expenses."

Under a statute providing that a debt due to a member of a company, in such capacity, "by way of dividends, profits, or otherwise" should be postponed to debts of the creditors of the company it has been held that a director's unpaid fees came within this provision. In re Leicester Club, etc. Co. 30 Ch. D. (Eng.) 629.

In Downing v. Marshall, 23 N. Y. 366, 80 Am. Dec. 290, it was held that authority to take "by direct purchase or otherwise" was authority to take by devise.

In Fellowes v. Clay, 4 Q. B. 313, 45 E. C. L. 313, the court said: "With respect to exemption or discharge, it speaks not of them generally, but, 'by composition real or otherwise,' that is, by some other means then known to the law, as by the lands having been abbey lands and held discharged. The word 'otherwise' cannot surely be construed to introduce an entirely new ground of exemption wholly unknown to the law; but the only legitimate meaning of the words must be that exemption from or discharge of tithes on any legal ground shall be sustained and deemed good and valid and indefeasible upon evidence of nonpayment for a certain length of time, instead of the length of time formerly required. Still the claim must be such as the law recognizes when shown to have been acted on for the specified length of time; that is, it must be shown to have reference to composition real or some known legal ground of exemption or discharge."

In Paulin v. Windsor, 36 Nova Scotia 446, it appeared that a testator directed his executors to pay to a town twenty thousand dollars to assist in building and maintaining a hospital as soon as a corresponding sum "should be procured by the corporation, by a tax on the citizens, or from private donations, or otherwise, to be added to the said bequest." It was held that the words "or otherwise" in the will covered the obtaining of the sum from the Province. The court said: "The obvious design of the testator was to benefit his native town by assisting to found an hospital, and I can find nothing in the clause to indicate that he made it conditional on the balance being raised or procured out of the pockets of the citizens of Windsor only. There would only be two ways of accomplishing that, viz., by private donations, or by taxation. These are both specified in the clause, and then the words 'or otherwise' added. . . . It is plain that the testator, so far from limiting the sources from which the money might be procured, by the language used, extended the right or privilege of getting the additional money in other ways than those partially specified."

Construing a statute providing that if any person or persons, except taverners, "by agent or otherwise," should keep any house, etc., they should be guilty of an offense, it has been said that the word "otherwise" was not incautiously introduced in the statute and was necessary to carry out the intent of the legislature. Rawson v. State, 19 Conn. 299. It was urged in that case that the word had no meaning but the court said: "No man can read this statute without learning from its entire perusal, that the controlling purpose of the legislature was, to suppress tipling-houses, under whatever pretence or name established; and thus to prevent the facilities to intemperate and ruinous dram-drinking. To reject the word otherwise, from the law, and thus to legalize the evil which it was the object of the statute to prevent, if perpetrated in person, and not by agent, would be, not only absurd, but it would involve a judicial repeal of an important part of the law itself."

In Fuller v. Aylesworth, 75 Fed. 701, 43 U. S. App. 657, 21 C. C. A. 505, it appeared that by a rule of the supreme court a supersedeas bond, conditioned that the plaintiff in error or appellant should prosecute his writ or appeal to effect, was required. Where the judgment or decree was for the recovery of money "not otherwise secured," it was stipulated that the indemnity must be for the whole amount of the judgment or decree, including just damages for delays, costs and interest. It was held that "otherwise secured" meant "otherwise than by mere force of the judgment." The court said: "The meaning of 'otherwise secured' is sufficiently explained by that language in the rule which points out the instances in which a bond for the payment of a judgment is not required. They are all cases in which the court has, by reason of a lien on property secured to plaintiff otherwise than by the judgment or by reason of actual custody of property liable to satisfy the claim asserted, the means of making the claim of the plaintiff by subjecting specific property."

In Thayer v. Wendell, 1 Gall. 37, 23 Fed. Cas. No. 13,873, Story, J., said that an executor's covenant, contained in a deed of conveyance of land of his testator, given in his capacity as executor "but not otherwise" was not binding on him personally even though it might not be binding on the estate of the testator.

Construing a statute providing that "the action and proceedings as to the mode of proving claims, and otherwise, shall be conducted as actions and proceedings for the settlement of the estates of deceased persons are now required to be conducted, so far as the same are applicable," the court said in Marbury v. Kentucky Union Land Co. 62

Fed. 335, 22 U. S. App. 267, 10 C. C. A. 393, that they did "not think it a strained construction to hold that the general words 'or otherwise' . . . include 'mode of distribution.'"

In New York State Loan, etc. Co. v. Helmer, 77 N. Y. 64, wherein it appeared that the charter of a trust company authorized it to grant, bargain, sell, etc. all kinds of property, or to hold the same in trust, "or otherwise" and to advance moneys, etc., on property, the court held that the charter did not confer banking powers or authorize it to discount commercial paper.

In Collector v. Hubbard, 12 Wall. 1, 20 U. S. (L. ed.) 272, it was held that an Internal Revenue Act, requiring a stockholder in a company to return as income all profits accruing to him therefrom whether the same were "divided or otherwise" embraced not only dividends but profits not divided.

It has been held that the words "by assignment or otherwise" were intended "to embrace and cover every and all means and manner of success or devolution, in addition to that by assignment." Carpenter v. Romer, etc. Steamboat Co. 48 App. Div. 363, 63 N. Y. S. 274.

In West Chicago St. R. Co. v. Morrison, etc. Co. 160 Ill. 288, 43 N. E. 393, it was said of a provision of a lease allowing the landlord a certain time for the repairing of machinery injured "through accident or otherwise:" "The expression 'through accident or otherwise,' is broad enough to include wear and tear, breakage from inherent defects, or even simple negligence or the torts of others. But these provisions did not contemplate a wilful trespass by the landlord and destruction of property and business."

In State v. Shade, 115 N. C. 759, 20 S. E. 537, it was held that a statute relating to assaults committed in a secret manner "by waylaying or otherwise" included every assault committed in a secret manner. The court said: "If it may be said to be the general rule that the word 'otherwise' following an enumeration should be interpreted by supplying after it the words 'ejusdem generis,' this statute, like the famous section 9 of 27 Henry VIII. constitutes a very clear exception, because it is not indefinite, but must be construed as meaning 'otherwise in a secret manner.'" See to the same effect State v. Jennings, 104 N. C. 774, 10 S. E. 249.

In Skinner v. Shew [1893] 1 Ch. (Eng.) 413, the issue was as to the interpretation of a section of an act which read as follows: "Where any person claiming to be the patentee of any invention, by circulars, advertisements or otherwise threatens any other person with any legal proceedings." The court said that the words "or otherwise" were to be read as prohibiting any threats whatever of legal proceedings unless the person making them commenced and prosecuted an action for infringement of his patent. See also Driffield, etc. Pure Linseed Cake Co. v. Waterloo Mills Cake, etc. Co. 31 Ch. D. (Eng.) 638.

In Carpenter v. Mitchell, 54 Ill. 126, the court said: "This provision contemplates the acquisition of property in different modes by married women, and a fair interpretation of the language employed embraces a purchase by her. It names the acquisition by descent and devise, and instead of limiting it to that mode, enlarges the power by recognizing other unenumerated modes, by the expression, 'or otherwise,' which is broad enough to embrace a purchase." See to the same effect Haight v. McVeagh, 69 Ill. 624.

In Territory v. Gutierrez, 12 N. M. 254, 78 Pac. 139, it was held that the words "or otherwise" used in an act providing for the filling of a vacancy in any county office should be given a comprehensive interpretation. The court said: "The language of this act discloses that the legislature intended the word 'otherwise' to refer to vacancies occasioned otherwise than by death and resignation. Any other view would seem to make it absolutely meaningless, and this we cannot believe the legislature intended." See to the same effect State v. Moores, 58 Neb. 285, 78 N. W. 529; Atty.-Gen. v. Taggart, 66 N. H. 362, 29 Atl. 1027, 25 L.R.A. 613; Territory v. Albright, 12 N. M. 293, 78 Pac. 204.

It has been said: "The language of the constitution is that the title or substance of the act to be amended must appear in the amending act, either in its caption or otherwise. The term 'otherwise' can only mean the preamble or body of the act, as contradistinguished from the title or caption." See to the same effect Ransome v. State, 91 Tenn. 716, 20 S. W. 310; State v. Runnels, 92 Tenn. 320, 21 S. W. 665; State v. Yardley, 95 Tenn. 546, 32 S. W. 481, 34 L.R.A. 656; Shelton v. State, 96 Tenn. 521, 32 S. W. 967.

In Thompson v. Highland Park, 187 Ill. 265, 58 N. E. 328, wherein it appeared that an ordinance provided "for the grading, draining, paving and otherwise improving" of an avenue, it was held that the provision authorized the making of parkways in the center thereof. The court said: "The phrase 'otherwise improving' is a broad and comprehensive phrase, sufficient to include almost any improvement of the street. . . . And is not rendered uncertain by reason of the caption failing to state that its purpose was, in part, to provide for a parkway." See also Scott v. Marshall, 110 Mo. App. 178, 85 S. W. 98.

W. T. SMITH LUMBER COMPANY

v.

JERNIGAN ET AL.

Alabama Supreme Court—January 22, 1914.

185 Ala. 125; 64 So. 300.

Timber — Definition.

The word "timber" has a well-defined meaning and includes such trees as are suitable for building and allied purposes but does not include fruit trees.

Usage — Local Significance of Word.

Complainant conveyed certain land to defendant's predecessors in title by deed, reserving all timber suitable for sawlogs, 12 inches and over in diameter three feet above ground. Held that, while the word "timber suitable for sawlogs," standing alone, included any and every sort of sawlog, without reference to the character of the wood, yet, the contract having been made 20 years before, defendants were entitled to show that, according to the custom of the locality when the deed was made, "sawlogs" had a well-defined local meaning which was limited to pine logs.

[See note at end of this case.]

Same.

When the usage of a locality in which an instrument is executed has given certain words therein a peculiar signification, the parties to the instrument will be presumed to have used the words in their peculiar local sense.

[See note at end of this case.]

Equity — Jurisdiction — Title to Property.

Where defendants are in adverse possession of certain standing timber claimed by complainant, complainant's right to the timber should be determined in an action at law.

Appeal from Chancery Court, Butler county: GARDNER, Judge.

Action for injunction. W. T. Smith Lumber Company, plaintiff, and J. T. Jernigan et al., defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. AFFIRMED.

Lane & Lane for appellant.
Powell & Hamilton for appellees.

[126] DE GRAFFENRIED, J.—On the 11th of June, 1896, the appellant executed and delivered, to those through whom the appellees claim the land upon which the timber hereinafter referred to is situated, a deed conveying said land. In the deed there is the following clause: "The W. T. Smith Lumber Company reserves all the timber suitable for sawlogs that is and will be 12 inches and over in diameter three feet above the ground, or at the top of the stump, at the time said timber is cut, together with the rights of way for carts, drays, trams, [127] tramways, and railroads on and through the above-described lands, also the right to use dead pine to generate steam for its locomotive engines; said timber to be removed at the option of the W. T. Smith Lumber Company, its successors or assigns."

It seems that the W. T. Smith Lumber Company has cut and removed all pine timber suitable for sawlogs, 12 inches and up, etc., from the premises, and the bill of complaint in this case was filed for the purpose of testing, in a court of equity, the right of the said Lumber Company, against the wishes of the appellees, who own the land, to go upon the land and remove therefrom the poplar, white oak, gum, etc., trees, which are 12 inches and up, from the said land.

In the first place the appellees claim that they are in the adverse possession of said trees, denying that the appellant has any claim upon them, and that therefore appellant must pursue its remedy of ejectment for said trees; and in the second place appellees maintain that by the above reservation the appellant only reserved title to the pine trees on the said lands. Appellees maintain that, at the time of the execution and delivery of the said deed, the word "sawlogs" had, in Butler county, where the lands are situated, a well-defined meaning; that the word "sawlogs" meant, at that time, "pine logs," and only "pine logs;" that no other kind of trees had, in that section of the state, up to that time, been used or known as "sawlogs;" and that, since the execution and delivery of the conveyance, the parties in interest had so construed the said words because since that time the appellant had paid the owners of the land for all trees taken from the land except the pine trees. Appellees say that the appellant, at the time it executed the said conveyance, was the owner of a large sawmill plant situated at Chapman, Ala., and that said [128] mill was engaged exclusively in the manufacture of pine trees into lumber, and that, up to that time, there had never been in that section of Alabama a mill which manufactured any other sort of trees into lumber, and that, at the present time, said mill is manufacturing only pine trees into lumber.

1. The word "timber" has a well-defined meaning and includes such trees as are suitable for building and allied purposes.—Gulf Yellow Pine Lumber Co. v. Monk, 159 Ala. 318, 49 So. 248. The word, however, does not include fruit trees.—Bullen v. Denning, 5 B. & C. 842, 847, 12 E. C. L. 383, 386; 8 Words and Phrases, p. 6973.

2. Standing alone and unexplained, we would unhesitatingly say that the words

"timber suitable for sawlogs" meant any sort of sawlogs, whether of oak, chestnut, hickory, poplar, or ash. This deed was made, however, nearly 20 years ago, and it may be that in the section in which this timber was situated the word "sawlogs" had at that time a well-understood local meaning, and that this local meaning was well understood by the parties when the deed was made and delivered. The written reservation in the deed is but the memorial of the contract, the thing upon which the minds of the parties met, and, of course, the thing which they agreed to was the contract between them. If "sawlogs," then had a restricted meaning and the parties used that word in that restricted meaning, the fact that, since that time, the meaning of that word has been broadened does not broaden the rights of appellant. As an illustration: Many years ago it was the universal custom for cotton to be picked from the fields and placed in baskets. These baskets were used by the laborers to carry the cotton from the field to the cotton house. These baskets were made from a particular character of white oak. The words "basket timber" then had, in [129] the cotton sections of the state, a particular local meaning. They meant white oak suitable for making cotton baskets. If a man then sold to a maker of cotton baskets all his "basket timber," his plain meaning would have been to sell that part of his white oak timber which was suitable for making cotton baskets, and only that timber.

In this case the contention is that, when the reservation in the deed was made, the word "sawlogs" had, in the section of Alabama in which the lands in question were situated, a local, well-defined meaning, and that these words meant pine trees or logs suitable to be manufactured into lumber. If this is true, we see no reason why appellees have not the right, by evidence, to show it. In making this proof, the construction which the parties themselves have placed upon the contract may be shown.—Kaul v. Weed, 203 Pa. St. 586, 53 Atl. 489.

"When the usage of the locality in which the instrument is executed has given certain words therein a peculiar signification," the parties to the instrument will be presumed to have used such words in their peculiar local sense.—17 Am. & Eng. Enc. of Law (2d ed.) 12, subd. 3, and authorities there cited.

3. In this case the appellees are in possession of the land upon which the trees which appellant claims title to are situated. The appellees deny that the trees belong to appellant, and assert that they themselves own the trees. In other words, appellees are in the adverse possession of the trees claimed by appellant. The appellant can test its right and title to the trees in an action at law.—Inglis v. Freeman, 137 Ala. 298, 34 So. 394.

It is therefore evident that the chancellor was correct in holding that the title to the trees should be tested in [130] an action at law, where the disputed questions of fact can be settled by a jury. The decree of the court below is therefore affirmed.

Affirmed.

Anderson, C. J., and McClellan and Somerville, JJ., concur.

NOTE.

Admissibility of Evidence of Peculiar Signification of Word in Locality Where Instrument Was Executed.

General Rule, 655.
Application of Rule, 657.
Limitation of Rule, 660.

General Rule.

Although the words used by the parties to a contract or other instrument are usually to be construed in their ordinary sense, nevertheless, where they appear to be ambiguous or uncertain in that a technical, special or local sense has been established in that locality by custom or trade, evidence of the peculiar meaning thus acquired is admissible, not for the purpose of adding to, altering or contradicting the language of the instrument, but for the purpose of expounding the language so used, so that the court may interpret it according to the intent of the parties.

England.—Smith v. Wilson, 3 B. & Ad. 728, 23 E. C. L. 169, 110 Eng. Rep. (Reprint) 266, 1 L. J. K. B. 194; Mallan v. May, 13 M. & W. 511, 153 Eng. Rep. (Reprint) 213; Studdy v. Sanders, 5 B. & C. 628, 12 E. C. L. 336, 108 Eng. Rep. (Reprint) 234.

Alabama.—See the reported case (saw logs).

Arkansas.—Taylor v. Union Sawmill Co. 105 Ark. 518, 152 S. W. 150 (white oak timber); Davis v. Martin Stave Co. 113 Ark. 325, 168 S. W. 553 (all the oak timber suitable to make staves or stave bolts).

California.—Callahan v. Stanley, 57 Cal. 476 (stubble); Corey v. Struve, 16 Cal. App. 310, 116 Pac. 975 (crop of beets).

District of Columbia.—Bragg v. Bletz, 7 D. C. 105 ("a thousand" of shingles).

Florida.—Hinote v. Brigman, 44 Fla. 589, 33 So. 303 ("saw logs" to be converted into "squared timbers").

Illinois.—Myers v. Walker, 24 Ill. 133 (season); Chicago Portland Cement Co. v. Hofman, 169 Ill. App. 71 (standard quality).

Indiana.—Rastetter v. Reynolds, 160 Ind. 133, 66 N. E. 612 (sawing of elm strips). *Compare* Harper v. Pound, 10 Ind. 32.

Iowa.—Pilmer v. Branch of State Bank, 16 Ia. 321 (in currency); Steyer v. Dwyer, 31 Ia. 20 (town); Wood v. Allen, 111 Ia. 97, 82 N. W. 451 (dry goods).

Kentucky.—Rochester German Ins. Co. v. Peaslee-Gaulbert Co. 120 Ky. 752, 9 Ann. Cas. 324, 87 S. W. 1115, 89 S. W. 3, 1 L.R.A. (N.S.) 364, 27 Ky. L. Rep. 1155 (noon).

Massachusetts.—Eaton v. Smith, 20 Pick. (Mass.) 150 (operate); Page v. Cole, 120 Mass. 37 (right and good will of supplying custom).

Missouri.—Soutier v. Kellerman, 18 Mo. 509 ("a thousand" of shingles); Sroqualmi Realty Co. v. Moynihan, 179 Mo. 629, 78 S. W. 1014 (San Domingo mahogany); Long v. J. K. Armsby Co. 43 Mo. App. 253 (strictly choice).

Montana.—Newell v. Nicholson, 17 Mont. 389, 43 Pac. 180 ("don't sell; we to exchange any goods that don't sell; credit for same; sales guaranteed").

New York.—Thompson v. Sloan, 23 Wend. (N. Y.) 71, 35 Am. Dec. 546 (Canada money); Brunold v. Glasser, 25 Misc. 285, 53 N. Y. S. 1021 ("a thousand" of brick). And see Collender v. Dinsmore, 55 N. Y. 200, 14 Am. Rep. 224 (C. O. D.); Atkinson v. Truesdell, 127 N. Y. 230, 27 N. E. 844.

Ohio.—Lowe v. Lehman, 15 Ohio St. 179 ("a thousand" of bricks).

Pennsylvania.—Phœnix Iron Co. v. Samuel, 13 W. N. C. 50 (early spring); Brown v. Brooks, 25 Pa. St. 210 (1000 feet in each raft).

Texas.—Parks v. O'Connor, 70 Tex. 377, 8 S. W. 104 (yearlings).

"The meaning of terms at the place where the parties use them, or to which they look as the seat of the contract may also control their interpretation. It is proper, therefore, to receive evidence of the particular sense which any word of the contract has acquired by usage in any special locality. . . . The reason for resorting to such testimony is that, in the hurry of trade and the multitude of contracts, brevity and condensation are absolutely essential. Words to the layman of meaningless or of limited force have, in the minds of those familiar with them, a comprehensive and intelligent definition. Accordingly, it has been settled that parties engaged in a particular trade, and who use a mercantile term having a fixed meaning in the trade, are conclusively bound to use it in that sense. They can no more be heard to say that they did not know the meaning or did not use it in that sense than a party in ordinary cases can escape a contract by saying that he did not understand the effect of the words used. Where two in a particular trade deal with each other in the language of their trade, they are presumed to speak the mercantile meaning of words of that trade." Long v. J. K. Armsby Co. 43 Mo. App. 253. In Eaton v. Smith, 20 Pick. (Mass.) 150, the court said: "The court are of opinion, that when a new and unusual word is used in a contract, or when a word is used in a technical or peculiar sense, as applicable to any trade or branch of business, or to any particular class of people, it is proper to receive evidence of usage, to explain and illustrate it, and that evidence is to be considered by the jury; and the province of the court will then be, to instruct the jury what will be the legal effect of the contract or instrument, as they shall find the meaning of the word, modified or explained by the usage. But when no new word is used, or when an old word, having an established place in the language, is not apparently used in any new, technical or peculiar sense, it is the province of the court to put a construction upon the written contracts and agreements of parties, according to the established use of language, as applied to the subject matter, and modified by the whole instrument, or by existing circumstances. This was the course adopted on the present trial. The defendants offered evidence of usage which was resisted by the plaintiff, and although at first received, was ultimately rejected, as the plaintiff desired that it might be. Had the verdict been the other way, and had the defendants excepted, it would have presented a different question. But the plaintiff objected to the admission of evidence aliunde, evidence of peculiar usage, and the objection was sustained. There being then no evidence of usage or other evidence aliunde, to affect the ordinary meaning of the contract and agreement of the parties, the court are of opinion that it was the duty and province of the court to put a construction upon this contract, and that there was nothing to leave to the jury, in regard to the meaning and effect of the written agreement. On the other part of the case, the court instructed the jury that they were not to regard the evidence as to the meaning of the word 'operate,' but were to take it in its common and established meaning, and that it did include selling the growing timber, as well as cutting and sending it to market at the owner's expense. This is the direction alleged to be wrong, and the plaintiff contends that in its true meaning and acceptation, it intended only, cutting timber or clearing the land, or performing other labor or making other improvements thereon at the owner's expense. This question is not without difficulty, especially to be decided as the plaintiff contends that it must be, not in reference to any local usage of Maine, but as it must have been understood by the plaintiff

residing here in Massachusetts, and according to its known use, as a part of the English language. On the whole, and in view of all the circumstances, the court are of opinion that the direction was right." In Steyer v. Dwyer, 81 Ia. 20, which was an action to restrain the defendant from carrying on the business of stone cutting, in violation of his agreement, the court said: "The terms of every written instrument are to be understood in their plain, ordinary and popular sense. . . . This rule, however, is subject to the exception that parol evidence is admissible for the purpose of showing that, in the place where the contract is made the words employed have, by known and established usage, acquired a signification different from the general and popular sense. And parties, in making their contracts, are supposed to refer to this usage, just as they are presumed to employ words in their usual and ordinary signification. . . . The record does not contain the evidence upon which the court below acted. It was competent for the plaintiff to prove that, where this contract was made, the word town had, by known and general usage, acquired a local and peculiar signification extending it beyond the mere idea of a collection of houses. This court will not presume, as against the judgment of the court below, that such evidence was not introduced."

Application of Rule.

In Thompson v. Sloan, 23 Wend. (N. Y.) 71, 35 Am. Dec. 546, in holding that evidence of the meaning of "Canada money" in which a note was payable, was admissible, the court said: "In the case at bar, extrinsic evidence of the kind offered by the defendants was, I think, admissible to prove that Canada money meant in general, mercantile understanding at Buffalo and in its vicinity, Canadian bank bills, and not specie, whether we regard the words used in the note as prima facie importing current Canadian coin, or as ambiguous on their face; in other words leaving it doubtful whether they mean current Canadian coin or bank notes."

In Pilmer v. Branch of State Bank, 16 Ia. 321, it appeared that a draft in suit was payable "in currency." The court said: "What 'currency' means in a note or bill is not very clear without some reference to the circulating medium at the time, or without knowing what meaning is attached to the word generally, by those who use it, or rather without knowing what specific idea the word is used to express. . . . The word currency is, as we have seen, far from having a settled, fixed and precise meaning. And, even if it had such a meaning in general, it might acquire in certain localities, or among certain classes, a different signification. Suppose, in consequences of a depreciation in the issue of banks generally, the word 'currency' is set apart by general popular use, to indicate these issues, and to distinguish them from coin. If under these circumstances, the parties make a contract, and use the word currency in its local or popular sense, will the court close its eyes to the situation of the parties, and enforce the contract in a different sense from that which was intended?"

In Corey v. Struve, 16 Cal. App. 310, 116 Pac. 975, construing a lease of a farm for the growing of beets, the court said: "Assuming that the provision as to the reservation of 'one-fourth of the crop of beets' introduces an element of uncertainty, it is entirely eliminated by the due consideration of the agreement to farm said beet lands in accordance with the customs and directions of the Spreckels Sugar Company or its field superintendent. It is manifest that there is a distinction between 'customs' and 'directions.' They are familiar terms, and it is not necessary to define them. One of the customs, or, in other words, the common practice of the Spreckles Company was to leave the beet tops upon the ground to be plowed under as a fertilizer. The evidence shows this without conflict. In fact, the said James Struve testified that he knew 'that in this valley the Spreckles Sugar Company required the beet tops to be left on the land.' If this custom is to be considered a part of the 'farming,' it would seem to follow that defendants had promised to thus leave the tops."

In Studdy v. Sanders, 5 B. & C. 628, 12 E. C. L. 336, 108 Eng. Rep. (Reprint) 234, it was held that parol evidence was admissible to explain the meaning of the term "cider" in Devonshire.

In Wood v. Allen, 111 Ia. 97, 82 N. W. 451, in construing the term "dry goods" in a contract of sale, it was held that evidence of the local meaning was admissible. The court said: "At the trial defendant offered witnesses to prove what the term 'dry goods' meant to merchants and business men in the community where the stock was located. He proposed to prove that 'dry goods' meant shelf goods, bolt goods, dress goods, calicos, and flannels,—in other words, all piece goods,—and that notions, clothing, hats, and caps were not included in that term, according to the ordinary usages of the community. Objections to these questions were sustained, on the ground that answers thereto would tend to contradict and vary the terms of a written contract, and that it was for the court to determine from the language of the contract what was and what was not included in the terms used by the parties. These rulings were manifestly erroneous. In the construction of mercantile contracts, parol evidence

is admissible to show that terms used therein have acquired, by the custom of the locality or by the usage of trade, a peculiar significance; and this is true, although the terms used do not in themselves appear to be ambiguous. Such evidence does not contradict the terms of the contract, but simply applies them to the subject matter." . . .

In Page v. Cole, 120 Mass. 37, the court said: "The evidence offered by the plaintiff was competent to show that in stipulating to convey 'the right and good will of supplying twenty-six full eight-quart cans of custom situated as above,' the defendant undertook to sell, and the plaintiff supposed he was buying, the good will of a business in which the customers at the time of the sale, 'situated as aforesaid,' (that is to say, included in the milk route in question) were in the habit of taking milk to the extent of twenty-six cans of eight quarts each. If he succeeded in proving the alleged usage, he might well claim that the defendant had not delivered and pointed out what he had undertaken to sell and had been paid for."

In Phœnix Iron Co. v. Samuel, 13 W. N. C. (Pa.) 50, it was said: "It is undoubtedly true as a general rule, that a written contract must be construed by the court. Sometimes, however, the meaning and sense in which a certain expression therein is used may be submitted to the jury. Here the language was: 'Shipment early spring,' and 'time of shipment early spring of the year.' No month by name was mentioned. The contract was made in London. The old rails were to be shipped from Europe. The object is to arrive at the understanding of the parties to the contract. Presumably, they understood it as it is understood at the place where made and where the vendors were to perform their part of the agreement. This view tends to prove the assent of both minds and give effect to the joint understanding of the parties. It follows that evidence of the meaning of the word 'spring' as there understood was properly received."

Parol evidence has been held to be admissible to show that by custom of the place "noon" meant 12 o'clock midday "standard time" and not 12 o'clock midday "sun time." Rochester German Ins. Co. v. Peaslee-Gaulbert Co. 120 Ky. 752, 9 Ann. Cas. 324, 87 S. W. 1115, 89 S. W. 3, 1 L.R.A.(N.S.) 364, 27 Ky. L. Rep. 1155.

In Taylor v. Union Sawmill Co. 105 Ark. 518, 152 S. W. 150, construing a deed granting the right to cut and remove "white oak timber," it was held that parol evidence was admissible to show that in the locality where the timber was situated, the term had a popular and well understood meaning and did not include overcup, cow oak and post oak.

In Dauss v. Martin Stove Co. 113 Ark. 325, 168 S. W. 553, holding that evidence was admissible to show that a deed conveying "all the oak timber suitable to make staves and stave bolts," did not convey red oak timber as being unsuitable, the court said: "According to a preponderance of the testimony, it was not thought or understood in that community at the time the timber deed was executed that red oak timber was suitable for making staves and stave bolts. Moreover, the undisputed testimony shows that the plaintiff and the agent of the defendant who bought the timber for it both understood that red oak timber was not suitable for making staves and stave bolts and that only white oak timber and its species was suitable for that purpose."

In Snoqualmi Realty Co. v. Moynihan, 179 Mo. 629, 78 S. W. 1014, holding that evidence as to the meaning of the phrase "San Domingo mahogany" as used in a building contract, was admissible, the court said: "Such evidence is received on the theory that the parties knew of the usage or custom and contracted in reference to it, and in such cases the evidence does not add to or contradict the language used, but simply interprets and explains its meaning.' Applying this rule to the facts in the case at bar, there is no room left for doubt that the term San Domingo mahogany, when used in specifications, in St. Louis, is a trade term and that it does not mean mahogany that was grown on the island of San Domingo, but means a good figured mahogany, equal in density to that known as San Domingo mahogany."

In Rastetter v. Reynolds, 160 Ind. 133, 66 N. E. 612, it appeared that a custom had grown up among those who sawed elm strips and those who purchased the same that the dimensions of the strips were to be taken at the time of sawing; and that orders therefor were given with the understanding that the same would be sawed in the green to the size as ordered, and with the knowledge that such strips would shrink after they were dried. The court said: "It is perfectly well settled that when parties enter into a contract with reference to a particular business or trade they are presumed to have contracted with reference to any usages of that business or trade, and their contracts are to be interpreted consistently with such usage. Peculiar expressions are to be given that meaning which they have acquired in such business by common usage, unless, by the express terms of the contract, the usage is excluded, or is inconsistent with the contract." In Hinote v. Brigman, 44 Fla. 589, 33 So. 303, wherein in appeared that the plaintiffs agreed to "square three thousand pine saw logs" at the rate of two cents per cubic foot, the court said: "The term 'saw logs' seems by the evidence adduced to have a well understood meaning among those habitually dealing in that commodity, and 'saw logs,' designed, as

provided by this contract, to be converted into 'squared' timbers, seems also by the evidence to be understood among lumber dealers as calling for a log that will square out at least eighteen cubic feet to the log, though upon this latter point there was conflict in the evidence, some of the witnesses contending that a saw log designed for squared timber to be merchantable must contain at least twenty-five cubic feet. The rule in such cases is that where words or phrases used in a contract have acquired a definite meaning generally or by local usage, or when used in reference to certain things, or commodities, have acquired a definite meaning among those dealing with such things or commodities, and the language used in the writing is such that the court does not understand it, oral testimony is admissible to explain the meaning of such words or phrases."

In Callahan v. Stanley, 57 Cal. 476, wherein it was held that evidence was admissible to prove that, by the custom of the locality the word "stubble," used in the agreement in suit included and designated whatever was left on the ground after the harvest time, the court said: "If there was an existing usage among farmers as to the meaning of the word 'stubble,' when this contract was made, it must be inferred that the contracting parties, being farmers, contracted with reference to it, and that they used the word in the broader meaning which was given to it by that usage, and not in the ordinary or popular sense. Evidence of such usage and meaning was, therefore, admissible to define and explain the peculiar or local meaning of the word as it was used in the contract, and the court below should have overruled the objection to the offer made by the plaintiff."

In Chicago Portland Cement Co. v. Hofman, 168 Ill. App. 71, it was held that a contract for the sale of cement of "standard quality" was controlled by the meaning attached by local usage to those words. . . . The court said: "Defendant in error had been using cement in construction work for years, and admits that the words standard quality have a certain and definite meaning among cement men, and that the words had been used in many contracts by him for the purchase of cement. He did not undertake to dispute the evidence of plaintiff in error's witnesses as to its meaning. We think, therefore, no evidence should have been considered by the court as to oral statements made previous to the signing of the contract. When parties adopt a contract containing trade words of well-known meaning to them, they should not be heard to say that there was an oral agreement that they were intended to mean an entirely different thing from their trade use."

In Smith v. Wilson, 3 B. & Ad. 728, 23 E. C. L. 769; 1 L. J. K. B. 194, it was held that parol evidence was admissible to show that by the custom of the place where the lease of a rabbit warren was made, the term "thousand" as used therein and as applied to rabbits, meant twelve hundred, not a thousand.

In Newell v. Nicholson, 17 Mont. 389, 43 Pac. 180, the court applied a statute (Code Civil Procedure §§ 632, 633), providing as follows: "For the proper construction of an instrument, the circumstances under which it was made, including the situation of the subject of the instrument and of the parties to it, may also be shown; so that the judge be placed in the position of those whose language he is to interpret. The terms of a writing are presumed to have been used in their primary and general acceptation, but evidence is, nevertheless, admissible that they have a local, technical, or otherwise peculiar signification, and were so used and understood in the particular instance, in which case the agreement must be construed accordingly." Holding that evidence of the meaning of the phrases "Don't sell; we to exchange any goods that don't sell; credit for same," "Sales guaranteed" was properly admitted, the court said: "By the authority of the sections of the Code of Civil Procedure above quoted, the court took evidence to show that the words had a technical or peculiar signification, and were so used and understood in the particular instance before the court. There was also a conflict in the testimony of the mercantile gentlemen who testified as to the meaning of these words, but there was ample evidence introduced showing that the words meant that, if the goods were not sold, or if they proved to be, as one witness said, not good sellers, the defendant might return them and have credit for their value."

In Parks v. O'Connor, 70 Tex. 377, 8 S. W. 104, referring to the admission of testimony that by the custom of the country, in the term "yearlings," cattle from ten to fifteen months old were included, provided their average age was one year, the court said: "In the admission of the evidence we think there was no error. It is apparent that it would be impracticable for any one to deliver, on a day certain, a thousand or more cattle, each one of which should be precisely twelve months old, and that therefore, in a contract of this character, the term yearlings cannot be literally applied. Some deviation must be allowed from the literal import of the word, and, if the limits are not prescribed in the contract itself, the custom of the country and trade, when such custom exists, may be appropriately resorted to in order to define its meaning. Such a custom is reasonable and is usual in most branches of commerce. The objections to the testimony were, first, because the word was not ambiguous; second, 'because parol evidence of custom was

not admissible to vary a written contract,' and third, 'because proof of such custom as was alleged in the petition would add the word "average" to the written contract.' These objections were not well taken. The court's charge upon this subject was in accordance with the views we have expressed, and, in our opinion, was not erroneous."

In contracts to lay brick at so much "a thousand," it has been held that evidence is admissible to show what the custom in the business and locality is, and that it means the estimation by the measurement of the walls, in a uniform rule, based on the average size of the brick, with additions for extra work and wastage, and deducting for opening, etc. Brunold v. Glasser, 25 Misc. 285, 53 N. Y. S. 1021; Long v. Davidson, 101 N. C. 170, 7 S. E. 758; Lowe v. Lehman, 15 Ohio St. 179. Likewise, in the purchase of shingles, it has been held that evidence may be adduced showing that, in the purchase of shingles by the thousand, packs of shingles of certain dimensions are regarded as a certain, fixed and definite number, regardless of the quantity numerically. Bragg v. Bletz, 7 D. C. 105; Soutier v. Kellerman, 18 Mo. 509. And in Walls v. Bailey, 49 N. Y. 464, 10 Am. Rep. 407, wherein the question was as to the manner of estimating the number of square yards of plastering, it was held that evidence of usage was admissible. The court said: "Every legal contract is to be interpreted in accordance with the intention of the parties making it. And usage . . . when it is reasonable, uniform, well settled not in opposition to fixed rules of law, not in contradiction of the express terms of the contract, is deemed to form a part of the contract, and to enter into the intention of the parties. . . . Parties are held to contract in reference to the law of the state in which they reside. For all men, being bound to know the law, are presumed beyond dispute, to contract in reference to it. And so they are presumed to contract in reference to the usage of the particular place or trade in or as to which they enter into agreement . . . when it is so far established and so far known to the parties that it must be supposed that their contract was made in reference to it. . . . Evidence of usage is received, as is any other parol evidence, when a written contract is under consideration. It is to apply the written contract to the subject-matter, to explain expressions used in a particular sense, by particular persons, as to particular subjects, to give effect to language in a contract as it was understood by those who made use of it." To the same effect see Ford v. Tirrell, 9 Gray (Mass.) 401, 69 Am. Dec. 297.

Where a word is employed which has no definite and specific general meaning, its local meaning may be proved. Thus in reference to the term "season," when employed to limit the time in which grain should be shipped, the court said in Myers v. Walker, 24 Ill. 133: "Meaning of terms of art, of science, technical phrases and words of local meaning, may, undoubtedly, when employed in an agreement, be proved by extrinsic evidence; and, by so doing, the rule is not violated which prohibits the introduction of evidence to alter, vary or explain an agreement, or that a written contract cannot exist partly in parol and partly in writing. By receiving such evidence, the court does no more than when it refers to a lexicon to ascertain the meaning of a word. This has no tendency to vary the contract, but is the only means of ascertaining the intention of the parties when they entered into the agreement, and when this can be ascertained, it must govern. When local terms or phrases are employed where they are in use, the presumption is, that the parties understood their meaning, and employed them according to their local signification. And to give effect to the agreement, the court must know the sense in which they were employed. The word 'season,' as employed in this agreement, must have had reference to the period within which it was customary to purchase corn at that point, on the Illinois River, and the presumption is, that the meaning of the term was well known and understood, in the locality in which the contract was entered into, by the parties. The court below, therefore, committed no error in receiving evidence to show the local meaning of this term."

Limitation of Rule.

Evidence showing that by local usage a term possesses a special commercial sense is inadmissible where both parties to the contract in which the term is employed are not of the same trade or kind of business. In such a case, there is no presumption that both parties contract with reference to the local usage and make it a part of their agreement. Long v. J. K. Armsby Co. 43 Mo. App. 253; Walls v. Bailey, 49 N. Y. 464, 10 Am. Rep. 407.

Likewise, in Cook v. Loew, 34 Misc. 276, 69 N. Y. S. 614, wherein it appeared that insurance was placed on lumber, etc., "in yard," which, by common and current acceptation, was "an inclosure within which any work or business is carried on," the court said: "The agreement was entered into in this city, with the meaning ordinarily attaching to such expression, for the fair import of the words and the intention of the parties as expressed in the terms of their agreement must guide our construction. To hold that 'yard' is a clearing in a forest, and was so

used and understood by the parties to this contract, is apparently not discoverable from the agreement itself. It would seem that this brief expression, to the common understanding, and when used in connection with an insurance against fire, conveys quite unmistakably the meaning expressed, within the intention of the contracting parties. But the plaintiffs contend that the expression has other and more comprehensive meaning in the locality where the property destroyed was situated, and, with the introduction of extrinsic evidence, urge that there it may and does mean a clearing in a forest. 'It would seem, however, that upon principle, for a party to be bound by a local usage, . . . he must be shown to have knowledge or notice of its existence. . . . Usage is engrafted upon a contract or invoked to give it a meaning, on the assumption that the parties contracted in reference to it; that is to say, that it was their intention that it should be a part of their contract wherever their contract in that regard was silent or obscure. But could intention run in that way unless there was knowledge of the way to guide it? No usage is admissible to influence the construction of a contract unless it appears that it be so well settled, so uniformly acted upon, and so long continued, as to raise a fair presumption that it was known to both contracting parties, and that they contracted in reference thereto. There must be some proof that the contract had reference to it, or proof arising out of the position of the parties, their knowledge of the course of business, or other circumstance from which it may be inferred or presumed that they had reference to it.'"

In Smith v. Clayton, 29 N. J. L. 357, the court, holding that evidence of the meaning of the word "grain" as used in a lease, was inadmissible, said: "As to the remaining question, whether evidence was properly received to show the meaning of the word grain, what has already been said would render a decision on this point unnecessary, if it had not been certified to this court. The word is not a technical term, the signification of which is only known to those of the trade. In such a case parol evidence is admitted of necessity for the same reason that an interpreter must be employed to translate a paper written in an unknown tongue, and it has always been admitted. . . . An usage may be shown by parol evidence, and some of the cases go so far as to permit evidence that an English word, not a term of art or peculiar to a particular trade or occupation, has a peculiar provincial signification different from its natural meaning, as that a dozen means thirteen. The evidence was not offered for any such purpose. It was to show the meaning of a common English word, in common use among all classes, as understood by all classes in common conversation. If the evidence was competent, the effect of its reception would have been to draw to the jury the settlement of the question of law. Such a doctrine would, in almost every case, take the question of law from the court and give it to the jury. The evidence was incompetent, and should not have been received."

NICOLL

v.

SWEET ET AL.

Iowa Supreme Court—December 13, 1913.

163 Iowa 683; 144 N. W. 615.

Death by Wrongful Act — Proximate Cause of Death — Antecedent Disease.

Where plaintiff's intestate died of traumatic pneumonia, caused by being struck by a falling cornice of defendant's building, the fact that deceased was predisposed to disease will not excuse defendant from liability for negligence.

[See Ann. Cas. 1912A 965.]

Negligence — Res Ipsa Loquitur.

Where a pedestrian is struck by a falling cornice, the doctrine of res ipsa loquitur places upon the owner of the building the burden of establishing his freedom from negligence.

[See Ann. Cas. 1914D 908; 113 Am. St. Rep. 987.]

Instructions — Requests Covered by General Charge.

The refusal of instructions fully covered by those given is not error.

Death by Wrongful Act — Measure of Damages.

The measure of damages for wrongful death is the value of decedent's life to his estate, had he not perished.

[See 12 Am. St. Rep. 375; 8 R. C. L. tit. *Death*, p. 822.]

Evidence of Domestic Relations of Deceased.

In an action for wrongful death, evidence of the number of children of deceased is admissible, just as the fact of his marriage, to show an incentive to thrift and accumulation.

[See note at end of this case.]

Same.

In an action for wrongful death, where the court admitted evidence of the number and ages of decedent's children, an instruction that the amount of damages could not be increased by reason of decedent's having left children, and that the evidence was admitted

only upon the question of incentive to industry, is not contradictory or misleading.

[See note at end of this case.]

Proof of Ill Health — Inability to Obtain Insurance.

In an action for wrongful death, evidence that deceased could not obtain life insurance because of his health is admissible as a circumstance bearing on the value of his life, though not of great importance.

Harmless Error — Exclusion of Evidence.

In an action for wrongful death, the erroneous exclusion of evidence that deceased could not obtain life insurance is harmless.

Death by Wrongful Act — Evidence — Complaints of Suffering.

In an action for wrongful death, while the administrator is not entitled to recover for deceased's conscious suffering, evidence of complaints made by deceased of pain and suffering soon after the injury is admissible as bearing on the extent and location of his injuries.

Damages Not Excessive.

An award of $8,000 in favor of the administrator of a deceased boiler maker, who was earning from $56 to $108 per month at the time defendant's negligence caused his death, is not excessive, even though he was not a man of robust health; it appearing that he was not incapacitated at the time of the fatality.

[See Ann. Cas. 1915C 449.]

Appeal from District Court, Benton county: BRADSHAW, Judge.

Action for death by wrongful act. Edna E. Nicoll, plaintiff, and Emma R. Sweet, administratrix, et al., defendants. Judgment for plaintiff. Defendants appeal. The facts are stated in the opinion. AFFIRMED.

Dawley & Wheeler and *Tom H. Milner* for appellants.

D. L. Johnson and *O. W. E. Snyder* for appellee.

[684] WEAVER, C. J.—McNulty was injured by the falling of a cornice into the public street from a building owned by Sweet. Eight days after the accident, McNulty died of pneumonia, which plaintiff alleges was caused by the injuries so received, and the claim of damages is based upon that theory.

It is strongly contended upon the part of the appellant that the record shows no evidence from which this fact could be found in favor of plaintiff. It is true that the testimony tends to show that McNulty was not in robust health at the time of his injury, that he had recently suffered from bronchitis and had some indications of weakness of the lungs; but the [685] fact of ill health or physical weakness, if established or conceded, is by no means inconsistent with plaintiff's theory that the pneumonia which was the immediate cause of death was the direct result of the blow received from the falling brick. Indeed, such weakened condition, if it existed, may have rendered the deceased an easier victim of the fatal disease; yet if there was evidence for the jury that pneumonia was the direct result of the injury, and such injury was fairly chargeable to the negligence of Sweet, the state of the deceased's health would in no manner affect the right of action on the part of his administratrix, though it may have bearing on the amount of the recovery. That there was evidence to go to the jury on both questions is scarcely open to doubt. On the matter of the alleged negligence, the fall of the cornice doubtless presented a case for applying the doctrine of *res ipsa loquitur*, to say nothing of other evidence bearing upon the situation. Concerning the relation of cause and effect between the injury received and the disease of which the intestate died, it may be said that the medical testimony on the part of plaintiff tended to show that the pneumonia was of traumatic origin; that is, pneumonia, the inciting cause of which was some physical violence or bodily injury. It is also shown that, from such an injury as the deceased suffered, pneumonia is likely to follow as a natural consequence. No other injury or efficient cause for the disease is suggested, and the question thus presented is one of fact and not of law. Brownfield v. Chicago, etc. R. Co. 107 Ia. 254, 77 N. W. 1038; Lehmann v. Minneapolis, etc. R. Co. 153 Ia. 124, 133 N. W. 327.

The jury was fairly and correctly instructed upon this proposition. The defendant's request for an instruction that the burden was upon the plaintiff to show that the injuries to McNulty did cause pneumonia, and if she failed in this respect she could not recover, stated a correct legal proposition, but it was fully covered and stated in the instructions which the court gave upon its own motion.

[686] The principal debatable question upon this appeal is the following: The surviving wife of McNulty, testifying as a witness, was permitted to say, over the objection of defendant, that the deceased left a family consisting of a wife and four children ranging from one to ten years of age. Referring to this feature of the evidence, the court told the jury that, if they found the plaintiff entitled to recover, the amount of damage to be assessed in favor of the estate of the deceased "is not to be increased by reason of his having children which he left surviving him; evidence of his children and the number thereof being admitted by the court as having bearing upon the question of

inducement or incentive to habits of industry in case the deceased had lived."

Error is assigned upon the admission of the testimony and upon the instruction to which we have referred. It is to be admitted that authority is to be found for the position of the appellant, and cases are not wanting in which recoveries in actions for damages sustained by reason of the death of a person have been set aside because of admission of proof that the deceased left wife and children surviving him. It is a matter, however, on which the precedents are not in harmony, and a majority of this court, after quite careful deliberation, is of the opinion that the better reason is with the rule holding the evidence competent. Practically the only objection of any plausibility to its admission is that its tendency is to excite the sympathies of the jurors and induce undue liberality in the assessment of damages. But, as is well known to all persons who have observed the course of litigation in matters of this kind, it is utterly futile to hope to keep the fact from the knowledge of the jury. More often than otherwise the widow and children are in the courtroom. If not, the facts concerning the victim of a fatal accident, his family, and their circumstances are public property, upon every tongue; they are mentioned in public print, talked about on the street corners and places where men meet and [687] congregate; they crop out incidentally in the court room; and, even though the evidence be rigidly excluded on the trial, no juror enters upon the consideration of his verdict in ignorance of the actual situation in this respect. Even as a mere matter of protection of the interests of the defendant, it is at least an open question whether it is not better that the testimony of all these conditions surrounding the deceased at the time of his injury should be admitted under the sanction of an oath and its bearing and effect regulated and controlled by appropriate instructions. If it be said that a juror's sympathies may control his actions even to the extent of disregarding the court's instructions, that suggestion, if sound, is no less applicable where the influencing fact comes to the juror's knowledge from sources other than the testimony, or by absorption from the atmosphere in which the case has been tried. But the average jury is not made up of weaklings. Its members as a rule have an intelligent conception of their duties and obligations.

It is correct to say, as does the appellant, that the only true measure of recovery for the death of an individual is the value of his life to his estate, had he not come to such untimely end. It is hardly too much to say that this rule is vague, uncertain, and speculative, if not conjectural, but it is the best which judicial wisdom and experience have yet been able to formulate. No evidence is possible of the time which deceased would have lived but for the injury complained of. Had he avoided this injury, death may have met him the next day, week, or year in some other form. In business he might have become a phenominal success and accumulated millions, or he might have lived to old age and died a pauper. From being a man of good habits and prudence and industry, he might have become a spendthrift or a tramp, or if a man of dissolute habits he might have reformed into an efficient and prosperous citizen. But the demands of justice will not tolerate the idea that human life may be extinguished by the tort of another without the wrongdoer being held to answer [688] therefor in damages, and the rule we have stated is the one which has been devised for this purpose. The principle which underlies it is of unquestionable soundness, but the difficulty which besets its practical application is in the fact that it calls for an estimate or conclusion which must be arrived at by a balancing of mere probabilities and possibilities which we deduce by way of inference from the age, character, habits, condition, education, employment, surroundings, and apparent capacity of the deceased. Fairness to the beneficiaries of the estate on the one hand and of the defendant on the other require that the jury be put in possession of all the facts having the slightest legitimate bearing upon this intricate problem. It is concededly the law of this state that in such case the plaintiff may show that the deceased was a married man. Wheelan v. Chicago, etc. R. Co. 85 Ia. 178, 52 N. W. 119. This is said to be competent because "it may fairly be assumed that a married man will be more frugal and industrious and hence will accumulate a larger estate than a single man." Beems v. Chicago, etc. R. Co. 58 Ia. 158, 12 N. W. 222.

In Donaldson v. Mississippi, etc. R. Co. 18 Ia. 290, 87 Am. Dec. 391, the question presented in the case now before us was raised in the following manner. The action like the one at bar was brought by the administrator to recover damages for the death of his intestate. Plaintiff offered testimony showing the family of the deceased and their respective ages, as well as his occupation, earnings, and accumulations. The defendant objected thereto on the ground that the inquiries were improper, immaterial, and not the correct method for the ascertainment of the damages. The trial court instructed the jury that, if plaintiff was found entitled to recover, he would be entitled to recover such damages as the estate of deceased had suffered by reason of his death, and nothing should be allowed on account of his pain and

suffering before death or for the grief and distress of the family or for their loss of his society. Passing upon the defendant's assignment of error in this respect, this court then said: "When a jury is thus guarded [689] against the allowance of damages for improper causes, it would seem that no prejudice would result if the jury should be fully advised of the exact situation of the deceased, his occupation, annual earnings, age, health, habits, family, and estate. Many of these, and possibly other facts, may have just influence in determining the pecuniary damage to the estate. We would not be understood, however, as determining that evidence as to the number and ages of his children is strictly proper." It would seem from this quotation that, while the statement of facts and argument indulged in by the court indicated its view that the testimony was admissible, yet, as in any event its admission was not prejudicial, the question whether it was technically or "strictly proper" was left undecided.

In the later case of Beems v. Chicago, etc. R. Co. 58 Ia. 150, 12 N. W. 222, three members of the court held to the view that such evidence was inadmissible, while the other two, Beck and Rothrock, JJ., reached the opposite conclusion. Somewhat singularly the Donaldson case was not referred to and was apparently overlooked. Indeed, there was no discussion of authorities except a brief mention of Simonson v. Chicago, etc. R. Co. 49 Ia. 87, where it was held generally that the jury was entitled to know all the circumstances surrounding the deceased affecting his capacity and disposition for earning a living. Since that time the Beems case has been cited in a criminal case (State v. Rutledge, 135 Ia. 581, 113 N. W. 461) and a bastardy case (State v. Wangler, 151 Ia. 555, 132 N. W. 22), but under circumstances so foreign to those with which we are now dealing that they cannot be said to be in point. As applied to the question before us, we think it must be said that the authority of that precedent has not only been discredited but abandoned.

Bearing upon that proposition, let us first notice that in Hunt v. Chicago, etc. R. Co. 26 Ia. 363, Simonson v. Chicago, etc. R. Co. 49 Ia. 87, and Moore v. Central R. Co. 47 Ia. 692, we held it competent for the plaintiff in a personal injury case [690] to prove that the injured person was a poor man and had a family dependent upon him for support. In the Simonson case it was said: "The jury was entitled to see the deceased as he was viewed with reference to his prospective capacity and disposition for earning and saving money. No data could be given them for a computation. Taking deceased as he was shown to them, it was for them to say, from their knowledge of business life and all its contingencies, . . . what was the pecuniary injury sustained . . . with reference to his prospective estate." In this connection it is further said that either party might have shown his habits in regard to the use of intoxicating liquor "and in regard to anything else which affected his prospective savings and earnings."

In Stafford v. Oskaloosa, 64 Ia. 258, 20 N. W. 174, the question was against raised, and, after citing approvingly the Hunt, Moore, and Simonson cases, the court proceeds to notice the Beems case as follows: "But in the subsequent case of Beems v. Chicago, etc. R. Co. 58 Ia. 150, 12 N. W. 222, it was held by a majority of the court that evidence of the number of the intestate's family, though offered simply as a circumstance tending to stimulate his industry and economy, was incompetent. The majority of the court, as now constituted, are now content to adhere to the holding in Hunt v. Chicago, etc. R. Co. and Moore v. Central R. Co. and the grounds on which the holding is placed."

In the later case of Fish v. Illinois Cent. R. Co. 96 Ia. 707, 65 N. W. 995, where question was raised upon the competency of evidence showing accumulations of the deceased, reliance was placed by the defendant upon the Beems case, where the majority seems to class proof of this character with proof of the family relations of the deceased and holds both incompetent. Upon this objection the court again remarks: "All that can be said of that case is that it denies the right of showing accumulations with a view to enhance damages because of it, but the case recognizes the right to show that deceased was dependent on his earnings, and had no money, as a probable inducement [691] to industry. . . . It is not intended by what is said in this opinion to commit this court, as now organized, to an approval or disapproval of the rule of Beems v. Chicago, etc. R. Co. should the question therein as to such evidence hereinafter arise."

In Lowe v. Chicago, etc. R. Co. 89 Ia. 420, 56 N. W. 519, evidence was admitted apparently without question that the deceased was married, left no estate, and that his earnings had been applied to the support of his wife and family; and the court in its opinion cites these facts as circmstances to be considered in estimating the value of his life to his estate.

In Wheelan v. Chicago, etc. R. Co. 85 Ia. 167, 52 N. W. 119, the court cites the Beems case is support of the proposition that, in finding the value of the life of a man to his estate, evidence of his age, habits, health, means, business, and his married or single estate is admissible.

In Dufree v. Wabash R. Co. 155 Ia. 544, 136 N. W. 695, the plaintiff having shown the wages earned by the deceased, it was developed on cross-examination that he was saving none of his earnings and had no property. On redirect examination plaintiff was permitted to show that deceased was supporting a wife and three children. The defendant assigned error upon this ruling and cited Beems v. Chicago, etc. R. Co. in support of its position. The authority of that precedent was not discussed by the court, for we held that the evidence was admissible in any event as an explanation of the fact that deceased was not making any savings. It is difficult, however, to understand upon what theory the explanation would be material or pertinent if the rule of the Beems case is sound or if the fact itself has no legitimate bearing on the question of the value of the life of the deceased to his estate.

It is evident from the foregoing that this court has never directly or distinctly reaffirmed Beems v. Chicago, etc. R. Co. so far as it relates to this question but, on the contrary, has shown a distinct disinclination to do so, and that taking our cases along this line as a whole, and the reasoning upon [692] which they have been decided, they may fairly be said to affirm the competency of the evidence admitted by the trial court.

For reasons already suggested, most of the adjudicated cases from other states are not specially helpful in this discussion, but there are some in which principles quite analogous to those we here approve have been applied. For example, in Perry v. Lansing, 17 Hun (N. Y.) 34, it was held proper to admit such evidence on the theory that it was proper for the jury to be advised in a general way of the situation and condition in life of the party injured. In Missouri, contrary perhaps to the general trend of cases in that state, it was held admissible to show the existence of wife and family, not as in itself a ground of damage, but to inform the jury of the person's condition and situation in life. Winters v. Hannibal, etc. R. Co. 39 Mo. 468.

The state of Alabama has a statute which its courts have so interpreted that, if it appear that the deceased consumed his wages in support of his family and was making no accumulations, the measure of recovery is limited to the loss so occasioned, but, if he was making any savings, then the administrator may recover, as in this state, the entire present value of the estate which the deceased would probably have accumulated had he lived. Alabama Mineral R. Co. v. Jones, 114 Ala. 519, 21 So. 507, 62 Am. St. Rep. 121, and cases there cited. Applying this statute, the court in the cited case says: "As a circumstance aiding the solution of this question, it was competent to show how many and what dependents there were and their ages."

The Nebraska statute is unlike our own in that the right of action is given for injury to the support of dependent relatives, but the reasoning of that court upon the competency of evidence tending to show the extent of such loss is very applicable in cases like the one at bar. There, in an action by a father for the death of a son, the court says that the fact of the existence of a mother and other children was entirely [693] admissible, "not as a direct ground for the jury's action, but as showing what the deceased was doing and likely to do to make his life pecuniarily valuable to plaintiff." If such fact is evidence of what the deceased was doing or likely to do to make his life of pecuniary value to the parent, it is no less competent to show the pecuniary value of his life to his estate, where the right of recovery is for its benefit.

It is held in Wisconsin that in an action by the widow of the deceased or for her benefit, although she is entitled to recover only for the pecuniary damage resulting to herself, she may prove the number and ages of her children. Hamann v. Milwaukee Bridge Co. 136 Wis. 39, 116 N. W. 854.

It is to be said also that the precedents from other states relied upon by the appellant holding it incompetent to show the fact that the deceased left a family of children are equally unanimous in holding it improper to show that he was a married man or otherwise show to the jury the facts as to his domestic or family relations. Louisville, etc. R. Co. v. Collinsworth, 45 Fla. 403, 33 So. 513; Stockton v. Frey, 4 Gill (Md.) 406, 45 Am. Dec. 138; Baltimore, etc. R. Co. v. Camp, 81 Fed. 808, 54 U. S. App. 110, 26 C. C. A. 626; Sesler v. Rolfe Coal, etc. Co. 51 W. Va. 327, 41 S. E. 216. The majority opinion in the Beems case departs from this rule so far as relates to the married condition of the deceased, and we have committed ourselves to the same view in several cases, as already noted.

But it is scarcely possible to conceive of any good reason for admitting proof that defendant had a wife, which does not equally apply to the fact that he had children. In the Beems case both majority and minority justified the admission of the former upon the sufficient ground that "from observation and experience it may fairly be assumed that a married man will be more frugal and industrious and hence will accumulate a larger estate than a single man;" but, having said this, the opinion proceeds with palpable disregard of the logic of the situation and of its own concession to hold it improper to show

the existence of children and state as a [694] reason therefor that "observation and experience do not teach that one's income is likely to increase in the same ratio as the number of his children." It would have been scarcely less pertinent to have said that observation and experience do not show that, other things being equal, a married man lives longer than a single man. It is sufficient answer to either to say that no one contends otherwise, and the quip with which the competency of the testimony is there turned aside does not partake of the character of argument. If it be true (and it stands admitted in this court) that proof that deceased was a married man is of some probative force in estimating the probable value of his life to his estate because the responsibilities of wedlock tend to stimulate him to industry, prudence, and economy, shall the court shut its eyes to the equally patent fact that a child or children in the family, whether one or many, has an equal, if not greater, influence in the same direction? It may be said that the dependent members of a man's household may be so numerous as to exhaust his earnings and decrease rather than increase the likelihood of his accumulating estate. This is true, and in such case the defense is in no position to complain of the admission of the testimony. The writer has been unable to find that any court in any other jurisdiction has drawn any distinction between the admissibility of proof that the deceased in such cases was a married man and proof that he left children.

We have already called attention to the peculiar difficulties surrounding the presentation and trial of these cases and to the fact that, when all is said, the issue goes to the jury for what we have called a balancing of the probabilities and possibilities of the extent of that financial success, if any, which would have attended the life of the deceased, had his career not been prematurely arrested by the negligence complained of. We think that no impartial arbitrator, to whom that question might be submitted, would fail to inquire and ascertain, so far as practicable, not only what the deceased had already done or accomplished and the facts as to [695] his age, health, capacity, and earning powers, but also as to his exact situation in life and the surroundings and influences, if any, which, according to common knowledge and observation, tend to the development of industry and thrift. It is to be remembered that actions of this nature were unknown to the common law. The right thereto is a creature of statute, and investigation will show that the provisions made in the different states are of such varying character that decisions thereunder afford few precedents of much value except in the jurisdictions where they have been announced. As the action is not of common law origin and the injury to be compensated for involves investigation into matters not before made the subject of judicial inquiry, it is not surprising that the rules of evidence therein should become involved in apparent confusion, though it is to be said that, when we consider the different statutes of the various states, the confusion is perhaps more apparent than real, a situation to which the compilers and annotators of decisions have not always given due attention. The construction and administration of our own statute is of course a matter for our own courts: and, notwithstanding there has been some uncertainty of expression with reference to the proper limitations upon the introduction of evidence, we think we are fairly committed to principles and rules recognizing the materiality and competency of testimony such as we have now under consideration. We also think them fully sustained by sound reasoning and the teachings of human experience. The assignment of error upon the admission of this testimony is therefore overruled.

It is next said that the court's instruction to the jury that the amount of plaintiff's damage, if any, was not to be increased by reason of the deceased having left children, and that evidence concerning the children had been admitted only as bearing upon the question of inducement or incentive to industry in the deceased, is contradictory and misleading. We find nothing in the [696] instruction of which appellant can complain. The attempt of the court to limit the effect of the testimony was favorable to the defense. It said to the jury in effect that the mere fact that the deceased had children who survived him was not in itself a ground for the recovery of damages, but that if the plaintiff was found otherwise entitled to recover it might be considered for what it was worth as bearing upon deceased's incentives to industry. If we are correct in holding the testimony admissible at all, then the limitation tended to restrict rather than to enlarge the plaintiff's right of recovery, and defendant has suffered no prejudice. Whether such restriction was called for under the record we need not decide.

Error is assigned upon the ruling of the court striking out testimony of a statement by the deceased that he could not obtain life insurance because of his health. We think the testimony should not have been stricken because it was a circumstance, though one of slight importance, bearing upon his condition of health, and consequently upon his expectancy of life and ability to labor; but these circumstances and conditions were quite fully inquired into, and we think the exclusion of this particular item was not a prejudicial error.

The same may be said of one or two other similar rulings. There was no error in admitting complaints made by the deceased of

pain and suffering soon after his injury. It is true the administrator was not entitled to recover for the pain and suffering sustained by the deceased, and the jury were so instructed, but the rule which admits the complaints of the injured person as bearing upon the nature, extent, and location of his injuries is quite elementary. Hamilton v. Mendota Coal, etc. Co. 120 Ia. 149, 94 N. W. 282; 7 Ency. Evidence, 386.

The complaint that the damages allowed ($8,000) are excessive cannot be sustained. The deceased was still a young [697] man, with an expectancy of life of thirty-six years. He was a boiler maker earning from $56 to $108 per month; and, while as we have said he was probably not a man of robust health, he was engaged in labor at his trade and, so far as appears, was in no respect incapacitated to pursue the same, and no circumstances are disclosed rendering it necessarily improbable that he would live out his expectancy maintaining the physical efficiency of the average man.

We find no prejudicial error in the record, and the judgment of the district court is

Affirmed.

Evans, Gaynor, Withrow, and Ladd, J. J., concur.

PRESTON, J. (*dissenting.*)—I regret that I am unable to agree with my Associates in regard to the admissibility of the evidence as to the number of children and instruction No. eleven and one-half on that subject. I shall set out the record more fully than has been done in the majority opinion.

Plaintiff, Mrs. Nicoll, formerly Mrs. McNulty, was permitted to testify over objections as follows: "Q. Did he leave any family other than yourself? Did he have any children? The Court: It is not admitted for the purpose of affecting damages in any way, but it is done for some other purpose. A. Four. Q. What were their ages at the time of his death? A. The oldest was ten, the youngest was a little over a year old." In this connection, the court gave the following instruction: "(Eleven and one-half) You are instructed that there can be no recovery in this case for pain and suffering endured by the deceased resulting from the injury received by him, and you are also instructed that the remarriage of the widow of the deceased is not to be considered by you in diminishing the amount of damages sustained by said estate, if any you find. And on the other hand the amount of damages, if any you find, is not to be increased [698] by reason of the deceased having children that he left surviving him; evidence of his children and the number thereof being admitted by the court solely as bearing upon the question of inducement or incentive to habits of industry in case the deceased had lived."

It is urged by appellant that admitting the evidence, as to the children, was erroneous; that the latter part of the instruction did authorize the jury to enhance the damages by reason of deceased having left children; and that the last two sentences therein are in conflict with each other. It may seem that, even though this evidence was not admissible, the exception taken to its admission was canceled by the instruction of the court that the damages were not to be increased by reason of the fact that deceased left children surviving. It has been held that where the verdict is not excessive, and the court instructed the jury to disregard the evidence, the error in admitting it is not fatal. 13 Cyc. 197, and cases, some of which are to the contrary. But it is claimed by appellant that the verdict is excessive, and that the instruction did not cure the error because the latter part of it did authorize the jury to enhance the damages. The object in introducing this evidence was, no doubt, to inform the jury that deceased had infant children dependent upon him for support. It is impossible to determine how far the assessment of damages was controlled by this evidence as to plaintiff's family of small children. The reasonable inference is that it had some influence upon the verdict. The damages in such cases are more or less uncertain in any event, and the evidence should be limited to legitimate elements of damage. Appellant contends that the question as to the admissibility of such evidence has been settled in the case of Beems v. Chicago, etc. R. Co. 58 Ia. 150, 12 N. W. 222, and that it is not admissible for any purpose in a case of this character. Appellee says that case was a three to two decision; that it is not in harmony with prior holdings, has not been followed since, is unsound; and that it has been an open question in this state for thirty years. It appears [699] to me that the tendency of our former cases is to exclude such evidence. The question as to evidence in regard to children was not involved in the Stafford case, or the Wheelan case, and many of the other cases cited in the majority opinion. It is being now decided for the first time in this jurisdiction, or any other, so far as I am able to discover, that such evidence is competent, under such a statute as ours, where the question is as to damages to the estate.

As stated, some of the cases hold that the evidence is not competent, but that if the court instructs the jury that it must not be considered as affecting damages, and the damages are not excessive, there is no prejudice. Other cases hold that, if such evidence is admitted and the verdict is excessive, it may be cured by remittitur, because the only effect of

the evidence is to enhance the recovery. Chicago, etc. R. v. Batsel, 100 Ark. 526, 140 S. W. 726. Though this is denied in Jones, etc. Co. v. George, 227 Ill. 64, 81 N. E. 4, 10 Ann. Cas. 285, to which I shall again refer.

But the cases all hold that the evidence is incompetent. I am not prepared to say that a reversal should follow in every case where the evidence as to children is admitted. Cases might arise where the court instructed the jury squarely to not consider it as affecting damages and where the evidence is such that it could be fairly said that the verdict is not excessive and that there was no prejudice. But that is not the question being now determined. The question is: Is the evidence competent? The fact that jurors may learn about it on the street corners, or in the public prints, or incidentally in the courtroom is not, as I think, a reason for holding it competent.

As an original proposition, I should be inclined to say that the recovery should be the same whether a man is married or single. Conceding the rule to have been established by this court that evidence that the party is married is competent, I would not extend the rule to include evidence as to children. It occurs to me there are reasons for excluding evidence [700] as to children which would not apply to the question whether the party was married. There is but one wife, who is an adult, but there may be many children, some of tender age. But the question as to whether evidence that a person deceased, or injured, is married is not the question here, and I shall not discuss it. The only question now is whether it is competent to show the number and ages of children.

I concede that it is proper for a jury to be advised, in a general way, of the situation and condition in life of the party injured, as held in the cited New York case of Perry v. Lansing, and other cases, but it seems to me the argument in support of the proposition that the evidence as to the number and ages of children is admissible is on the theory that children would be a greater inducement to earn and save. If it is an inducement for greater effort and stricter economy, the effect would be to increase the value of the estate, and, if that is so, the estate would suffer greater damage; therefore the recovery should be larger. I understand the majority to say this is not the purpose, but the reasoning and cases in support of the proposition are, as I think, based upon the theory that it is for that purpose. For instance, it is said that under the Nebraska statute, authorizing a recovery for the injury to support of dependent relatives, such evidence is competent, and that the reasoning of that court in such a case is applicable here. That such evidence is admissible, "not as a direct ground for the jury's action, but as showing what the deceased was doing, and likely to do, to make his life pecuniarily valuable to plaintiff." If the fact of having children is likely to make his life pecuniarily valuable, it should enhance the damages; if less valuable then the damages should be decreased. It would be one way or the other, depending on the character of the children, whether they were a help or otherwise.

I do not say that the evidence is not competent under the Nebraska statute, where damages do not go to the estate, as in Iowa. What I am trying to show is the false position of [701] the majority when they say it is not admitted for the purpose of increasing or decreasing the damages, when it cannot have any other effect, and is not and cannot be admissible for any other purpose. It seems to be the theory under the Nebraska holding that the fact of having children would make the life more valuable, while in at least one Iowa case (Dufree v. Wabash R. Co. 155 Ia. 544, 136 N. W. 695) the thought seems to be that the life would be less valuable. This is so, or else I do not comprehend the ruling in that case. Here was the situation in that case, as stated in the majority opinion: "The plaintiff having shown the wages earned by the deceased, it was developed on cross-examination that he was saving none of his earnings and had no property. On redirect examination plaintiff was permitted to show that deceased was supporting a wife and three children. The defendant assigned error upon this ruling and cited Beems v. Chicago, etc. R. Co. in support of its position. The authority of that precedent was not discussed by the court, for we held that the evidence was admissible, in any event, as an explanation of the fact that deceased was not making any savings." If he was unable to save anything because of the expense of raising his children, what other effect could it have but to decrease the value of his estate?

It should be kept in mind that this is not a case under the Employers' Liability Act but is an action for damages to the estate of deceased. In State v. Rutledge, 135 Ia. 581, 113 N. W. 461, a criminal case, it was held such evidence was not proper, and in it the Beems case is referred to and approved. In State v. Wangler, 151 Ia. 555, 132 N. W. 22, a bastardy case, the ruling was the same, and the Beems case referred to, but it was held that in such a case there was no prejudice, on the theory, no doubt, that the form of the verdict in a bastardy case is guilty or not guilty, and the jury do not have to do with fixing the amount which shall be allowed for the support of the child. But these two cases do not quite reach the point now under consideration. The question first arose in Donaldson v. Mississippi, etc. R. Co. 18 Ia. 280, 87 Am. Dec. 391, but was not squarely

decided; [702] the court holding that, because the jury were, by the instructions, guarded against allowance of damages for improper causes, there was no prejudice. The court did say: "We would not be understood, however, as determining that evidence as to the number and ages of his children is strictly proper." In Lowe v. Chicago, etc. R. Co. 89 Ia. 420, 433, 56 N. W. 519, decided since the Beems case, it is stated that it was shown by the evidence, among other things, that deceased left a wife and three children, but the question now being considered was not raised in any manner.

Under statutes which provide that the damages for wrongful death inure to the benefit of the family, such evidence is admissible. Baltimore, etc. R. Co. v. Mackey, 157 U. S. 72, 15 S. Ct. 491, 39 U. S. (L. ed.) 624 (2d ed.) In that case the statute excludes the creditors of deceased from any interest in the recovery and declares not only that the judgment shall inure exclusively to the benefit of his family but that the damages shall be assessed with reference to the injury done to the widow and next of kin. This seems to be the distinction running through the cases that, if the damages inure to the benefit of the family, it may be shown what persons compose the family, but not so if the damages go to the estate, as in this case. The question here is: What was the value of the life of the deceased to his estate? The number of his children can have no bearing on that question. The measure of the recovery and the elements to be considered are stated in Grace v. Minneapolis, etc. R. Co. 153 Ia. 418, 432, 133 N. W. 672; and Neal v. Sheffield Brick etc. Co. 151 Ia. 690, 695, 130 N. W. 398.

The thought in the last sentence of instruction eleven and one-half that evidence as to the children is to be considered on the question of inducement or incentive to habits of industry, etc., is on the theory, doubtless, that, as stated by the minority in the Beems case, it "would largely add to the value of his personal services to his own estate." The majority opinion in this case says the purpose is "to stimulate him to industry, prudence, and economy." It would seem [703] that, if this be true, the only effect it could have would be to increase the value of his estate, and thus necessarily to increase the damages, so that the last two clauses in instruction eleven and one half are in conflict and cannot be reconciled.

Some of the cases exclude evidence as to children because its admission is likely to prejudice the jury. It was said by a majority of the court in the Beems case that observation and experience do not teach that one's income is likely to increase in the same ratio as the number of his children. It would seem that there are other reasons for excluding such evidence. If it is thought that children would be an inducement to habits of industry, and thus increase the value of his estate, how long would the inducement continue? Would it continue during the entire expectancy of the person injured or deceased? Would there be other children born after the injury and after the trial? Would some of these die? What is their expectancy? What are their habits? Would their earnings, until they reach their majority, add to the estate, or would it cost more to raise them than they earn? Suppose a man has six minor children, who are dutiful, in good health, industrious, and saving; they would, when old enough, be a great help and aid to the parent in accumulating and saving money. But suppose the children are sickly, requiring medical expense, they are unable to work, or suppose they are lazy and spendthrifts, would they enhance or decrease the value of the estate? We will say that the parent is injured or killed. If proof as to the number of children is competent, then the man with the family of children who are not helpful obtains the same advantage by such proof as the man whose family is an aid to him, unless all these matters are gone into. Would defendant's attorney dare to cross-examine and show that the children are cripples or sickly? For the purpose of argument, I am assuming at this point that the sympathies of the jury would not be aroused, and that they would fairly consider such evidence for the only [704] purpose for which it could be considered, and that is to either enhance or decrease damages. If it be competent to show the number of children composing the family of the person injured or deceased, why would it not be competent to show that the parents or grandchildren of such person were members of his family, if that be the fact? These and other questions naturally arise. It seems to the writer that these matters are too remote, uncertain, speculative, and would involve the investigation of collateral matters. To hold that such evidence is admissible necessarily overrules the Beems case and overturns a precedent of thirty years' standing, is against the overwhelming weight of authority, and establishes a dangerous rule.

If the evidence is properly in the record, it would be legitimate to refer to it in argument to the jury, and hereafter, in personal injury and like cases, we may expect it to be used to the best advantage, and in all probability we will be compelled to reverse cases because of it.

Appellee cites Hamann v. Milwaukee Bridge Co. 136 Wis. 39, 116 N. W. 854, and quotes therefrom as follows: "In an action for negligent death, by decedent's widow, suing as administratrix, she can show the state of her health, and the number of her children;

the jury being properly cautioned that she can recover only for the pecuniary damage resulting to herself from the death." The opinion is brief on this point. It cites two prior decisions of the Wisconsin court, one of which Lawson v. Chicago, etc. R. Co. 64 Wis. 447, 24 N. W. 618, 54 Am. Rep. 634, cites Donaldson v. Mississippi, etc. R. Co. 18 Ia. 280, 87 Am. Dec. 391, as authority; and Abbot v. McCadden, 81 Wis. 563, 51 N. W. 1079, 29 Am. St. Rep. 910, in which the court says: "The court charged the jury, on the subject of damages, that the damages 'must be the money value only to her and her children which the life of the deceased was worth to her and them on the day of his death.' . . . This was error. The fact that there are children left surviving, whose support will be thrown on the plaintiff, is proper to be shown in evidence and to be considered by [705] the jury; but the damages recoverable are those which the widow has suffered, not those which the children have suffered." From this it appears that there is a different statute in Wisconsin from ours by which the damages are for the benefit of the widow and not the estate.

Appellee also cites as being to the same effect as the Hamann case, 7 Enc. of Evidence, 439; but an examination of the text shows that this is the rule in states which by statute allow the right of action for the benefit of the next of kin of deceased. He also cites 8 Am. & Eng. Enc. of Law (2d ed.) 941. But at page 940 of the same volume the same distinction is made which I make. It is there stated that, where the action is brought by the widow for the death of her husband, the ground of the admissibility of such evidence is that by the death of the father the responsibility of supporting and rearing the children is cast upon the plaintiff, their mother, and it is proper to show the extent and character of this responsibility thus cast upon her. Also 13 Cyc. 358, and numerous cases there cited. The text here refers to the number and condition of persons dependent upon deceased. Some of the cases there cited are under statutes such as I have mentioned. In my opinion the rule announced in the Beems case as to evidence in regard to children of a deceased person is correct, and that it is sustained by the weight of authority. In some of the cases the party injured was deceased, in others he survived, but the rule is the same, for in one case he is suing for his own injuries, and in the other his representative is suing for damages to his estate. As sustaining the rule in the Beems case, see 13 Cyc. 196, and cases, also Pennsylvania Co. v. Roy, 102 U. S. 451, 26 U. S. (L. ed.) 141, 145 (2d ed.); Baltimore, etc. Ry. v. Camp, 81 Fed. 808, 26 C. C. A. 626, 54 U. S. App. 111; Louisville, etc. R. Co. v. Binion, 107 Ala. 652, 18 So. 78; Dayharsh v. Hannibal, etc. R. Co. 103 Mo. 577, 15 S. W. 555, 23 Am. St. Rep. 900; Jones, etc. Co. v. George, 227 Ill. 64, 81 N. E. 4, 10 Ann. Cas. 285; Vandalia Coal Co. v. Yemm, 175 Ind. 524, 92 N.E. 49, 94 N. E. 881; [706] Simpson v. Foundation Co. 201 N. Y. 479, 95 N. E. 10, Ann. Cas. 1912B 321; Carlile v. Bentley, 81 Neb. 715, 116 N. W. 772; Maynard v. Oregon R. Co. 46 Ore. 15, 78 Pac. 983, 68 L.R.A. 477; Ft. Worth Iron Works v. Stokes, 33 Tex. Civ. App. 218, 76 S. W. 231; St. Louis, etc. R. Co. v. Adams, 74 Ark. 326, 85 S. W. 768, 86 S. W. 287, 109 Am. St. Rep. 85; Louisville, etc. R. Co. v. Eakins, 103 Ky. 465, 45 S. W. 529, 46 S. W. 496, 47 S. W. 872; Chicago, etc. R. v. Batsel, 100 Ark. 526, 140 S.W. 726; Union Pac. R. Co. v. Hammerland, 70 Kan. 888, 79 Pac. 152; Rio Grande Southern R. Co. v. Campbell, 44 Colo. 1, 96 Pac. 986; Standard Oil Co. v. Tierney, 92 Ky. 367, 17 S. W. 1025, 14 L.R.A. 677, 36 Am. St. Rep. 595; Union Pac. R. v. McMican, 194 Fed. 393, 114 C. C. A. 311. These are not all the cases which might be cited. Many others are cited in some of these. It would unduly extend this dissent to quote at any length from these cases, but I wish to refer to a few of them.

In Pennsylvania Co. v. Roy, supra, a verdict for $10,000 was set aside and the cause reversed solely because of the admission of such evidence.

In the Kansas case (Union Pac. R. Co. v. Hammerland, supra), it was held that the evidence was not competent, and the court said the question is not debatable.

In the Kentucky case of Louisville, etc. R. Co. v. Eakins, supra, the court quotes from the opinion in the case of Chicago v. O'Brennan, 65 Ill. 163, as follows: "Was this evidence admissible? If it was, then it would have been competent to have gone further and shown all the circumstances of the family, such as that the mother was an invalid, that one of the daughters was blind, that one son had accidentally lost a leg, etc., if such had been the case, so as to present a most pitiable picture of a helpless family dependent upon appellee for support as a lecturer, for, as the evidence had no place in the case but as a stimulant to the jury, it would have been just as competent to make the stimulant strong as weak. But was it competent at all? It is an elementary rule that evidence must be confined to the points at issue. There [707] was no point in issue to which this evidence had any relevancy. This sort of attempt to foist irrelevant matters upon the attention of the jury, with a view to creating a personal interest, is too often the secondary resort of a party on the witness stand." The Kentucky case states that this rule has received the approval of that court in a number of recently decided cases, citing them.

In the case of Jones, etc. Co. v. George, 227 Ill. 64, 81 N. E. 4, 10 Ann. Cas. 285, supra, it was said:

On the trial of this case appellee was allowed to prove that he was a married man and had three children. The evidence was objected to, and the objection overruled. The damages recoverable in this case can only be compensatory. The domestic relations, the financial standing of the parties, are therefore irrelevant. . . . Youngblood v. South Carolina, etc. R. Co. 60 S. C. 9, 38 S. E. 232, 85 Am. St. Rep. 835, and note, where many other authorities are collected. . . . The error in admitting this evidence is virtually admitted by appellee and was recognized by the appellate court, but it was thought that the remittitur of $1,500 ought in some way to cure this error. We cannot assent to this view. Evidence of this character not only tends to enhance the damages, but it is calculated to arouse a sympathy for appellee which is liable to unconsciously influence a jury in the decision of other controverted questions of fact in the appellee's favor. It would be a dangerous precedent to hold that a party might introduce irrelevant testimony which would appeal to the sympathy, passions or prejudices of a jury in such a way as to insure him the verdict on all doubtful questions of fact, then permit the trial court to estimate how much of a gross sum awarded as damages was due to such irrelevant testimony, and deduct that from the total verdict and render judgment for the balance, and thus cure an error, but for which the verdict might have been in favor of the other party.

Early New York and Alabama cases are cited in the majority opinion. I have not examined them but the later cases from those states which I cite hold that the evidence is inadmissible.

[708] In my opinion, the evidence as to the number and ages of the children was not admissible in this case for any purpose, and the instruction cannot be sustained because of the conflict therein. I would reverse.

Deemer, J., joins in the dissent.

NOTE.

Admissibility in Action for Death by Wrongful Act of Evidence of Domestic Relations of Deceased.

General Rule, 671.
Application of Rule, 673.
Limitation of Rule, 674.

General Rule.

It is established by the great weight of authority that in an action for death by wrongful act evidence of the domestic relations of the deceased, as that he has a family, etc., is admissible.

United States.—Baltimore, etc. R. Co. v. Mackey, 157 U. S. 72, 15 S. Ct. 491, 39 U. S. (L. ed.) 624; Atchison, etc. R. Co. v. Wilson, 48 Fed. 57, 4 U. S. App. 25, 1 C. C. A. 25; Felton v. Spiro, 78 Fed. 576, 47 U. S. App. 402, 24 C. C. A. 321, *reversing judgment* Spiro v. Felton, 73 Fed. 91.

Alabama.—Alabama, Mineral R. Co. v Jones, 114 Ala. 519, 21 So. 507, 62 Am. St. Rep. 121; Alabama Mineral R. Co. v. Jones, 121 Ala. 113, 25 So. 814; Louisville, etc. R. Co. v. Banks, 132 Ala. 471, 31 So. 573; Louisville, etc. R. Co. v. Young, 168 Ala. 551, 53 So. 213.

Cal.—Kramm v. Stockton Electric R. Co. 22 Cal. App. 737, 136 Pac. 523. See also Simoneau v. Pacific Electric R. Co. 159 Cal. 494, 115 Pac. 320.

Florida.—Escambia County Electric Light, etc. Co. v. Sutherland, 61 Fla. 167, 55 So. 83. See also Florida Cent. etc. R. Co. v. Foxworth, 41 Fla. 1, 25 So. 338, 79 Am. St. Rep. 149.

Illinois.—Chicago, etc. R. Co. v. Moranda, 93 Ill. 302, 34 Am. Rep. 168; Preble v. Wabash R. Co. 243 Ill. 340, 90 N. E. 716, *modifying* Preble v. Wabash R. Co. 149 Ill. App. 584; Cook v. Big Muddy-Carterville Min. Co. 249 Ill. 41, 94 N. E. 90; Claffy v. Chicago Dock etc. Co. 249 Ill. 210, 94 N. E. 551; Beyer v. Peoria, etc. Traction Co. 156 Ill. App. 47; Bonato v. Peabody Coal Co. 156 Ill. App. 196; *judgment affirmed* 248 Ill. 422, 94 N. E. 69; Kulvie v. Bunsen Coal Co. 161 Ill. App. 617; Boyer v. Northwestern El. R. Co. 174 Ill. App. 161; Hughes v. Danville Brick Co. 180 Ill. App. 698.

Iowa.—Donaldson v. Mississippi, etc. R. Co. 18 Ia. 280, 87 Am. Dec. 391 (not prejudicial error); Wheelan v. Chicago, etc. R. Co. 85 Ia. 178, 52 N. W. 119; Lowe v. Chicago, etc. R. Co. 89 Ia. 420, 56 N. W. 519; Dufree v. Wabash R. Co. 155 Ia. 544, 136 N. W. 695. And see the reported case (*overruling* Beems v. Chicago, etc. R. Co. 58 Ia. 158, 12 N. W. 222). See also Moore v. Central R. Co. 47 Ia. 692.

Kansas.—Coffeyville Min. etc. Co. v. Carter, 65 Kan. 565, 70 Pac. 635. See also Union Pac. R. Co. v. Sternberger, 8 Kan. App. 131, 54 Pac. 1101.

Minnesota.—See Boos v. Minneapolis, etc. R. Co. 127 Minn. 381, 149 N. W. 660.

Missouri.—Tetherow v. St. Joseph, etc. R. Co. 98 Mo. 74, 11 S. W. 310, 14 Am. St. Rep. 617; Soeder v. St. Louis, etc. R. Co. 100 Mo. 673, 13 S. W. 714, 18 Am. St. Rep. 724; Schlereth v. Missouri Pac. R. Co. 115 Mo. 87, 21 S. W. 1110; O'Mellia v. Kansas City, etc. R. Co. 115 Mo. 205, 21 S. W. 503; Haehl v. Wabash R. Co. 119 Mo. 325, 24 S. W. 737; Fisher v. Central Lead Co. 156 Mo. 479, 56

S. W. 1107; Ogan v. Missouri Pac. R. Co. 142 Mo. App. 248, 126 S. W. 191; Brinkmann v. Gottenstroeter, 160 Mo. App. 596, 140 S. W. 1194, *adopting opinion* Brinkman v. Gottenstroeter, 153 Mo. App. 351, 134 S. W. 584; Hartnett v. United Rys. Co. 162 Mo. App. 554, 142 S. W. 750; Holmes v. St. Louis, etc. R. Co. (Mo.) 176 S. W. 1041.

Nebraska.—South Omaha Water-Works Co. v. Vocasek, 62 Neb. 710, 87 N. W. 536.

New York.—Harrison v. New York Cent. etc. R. Co. 195 N. Y. 86, 87 N. E. 802; Murphy v. Erie R. Co. 202 N. Y. 242, 95 N. E. 699; Simpson v. Foundation Co. 201 N. Y. 479, Ann. Cas. 1912B 321, 95 N. E. 10, *reversing judgment* 134 App. Div. 930, 118 N. Y. S. 1142; Boyce v. New York City R. Co. 126 App. Div. 248, 110 N. Y. S. 393.

Tennessee.—Illinois Cent. R. Co. v. Davis, 104 Tenn. 442, 58 S. W. 296.

Utah.—Pool v. Southern Pac. Co. 7 Utah 303, 26 Pac. 654; Chilton v. Union Pac. R. Co. 8 Utah 47, 29 Pac. 963; English v. Southern Pac. Co. 13 Utah 407, 45 Pac. 47, 57 Am. St. Rep. 772, 35 L.R.A. 155.

Virginia—Baltimore, etc. R. Co. v. Sherman, 30 Grat. 602.

Wisconsin.—Mulcairns v. Janesville, 67 Wis. 24, 29 N. W. 565; Abbot v. McCadden, 81 Wis. 563, 51 N. W. 1079, 29 Am. St. Rep. 910; Thompson v. Johnston Bros. Co. 86 Wis. 576, 57 N. W. 298; Hamann v. Milwaukee Bridge Co. 136 Wis. 39, 116 N. W. 854.

In Kramm v. Stockton Electric R. Co. 22 Cal. App. 737, 136 Pac. 523, the court said: "It was strictly proper in this case to show that the deceased left a family who had suffered pecuniary loss by reason of his death through the tortious act of the defendant, and to show the extent of such loss with reasonable certainty. In order to determine such loss, the jury were entitled to be informed of whom said family consisted—whether of persons who had never received pecuniary assistance from the deceased or who were not dependent upon him for nurture, care, and support, or of persons who had received such assistance and were so dependent, and would, by reason of their minority and consequent helplessness, have still required and been entitled to such assistance and care from him, had he not lost his life."

In *Michigan* where an action is brought for the benefit of all those who are interested in the estate of the deceased, evidence of the family relations of the decedent is admissible. Breckenfelder v. Lake Shore, etc. R. Co. 79 Mich. 560, 44 N. W. 957; Philip v. Heraty, 135 Mich. 446, 97 N. W. 963, 11 Detroit Leg. N. 171, *rehearing denied* Philips v. Haraty, 135 Mich. 453, 100 N. W. 186, 11 Detroit Leg. N. 174, 100 N. W. 186. But where the suit is to recover the damages sustained by the deceased, evidence that the decedent left a family is immaterial and ought not to be admitted, but its admission is not reversible error where there is no claim for damages based on such evidence. Olivier v. Houghton County St. R. Co. 138 Mich. 242, 101 N. W. 530, 11 Detroit Leg. N. 559.

There is some authority contrary to the majority view. Thus it has been held that the number of persons in the family of the deceased cannot be shown. Kesler v. Smith, 66 N. C. 154. And it was held in Kelepech v. Donald, 4 Wash. 436, 30 Pac. 991, 31 Am. St. Rep. 936, that it was error to allow the plaintiff in an action for death by wrongful act, who was the widow of the deceased, to testify as to her children.

In *Kentucky* it has been held that it is error to admit testimony that the deceased is survived by a wife or a child or children. Louisville, etc. R. Co. v. Eakin, 103 Ky. 465, 45 S. W. 529, 46 S. W. 496, 47 S. W. 872; Chesapeake, etc. R. Co. v. Reeves, 11 S. W. 464, 11 Ky. L. Rep. 14; Southern R. Co. v. Evans, 63 S. W. 445, 23 Ky. L. Rep. 568. *Compare* Louisville, etc. R. Co. v. Mahony's Adm'x, 7 Bush (Ky.) 235. In Louisville, etc. R. Co. v. Eakin, *supra*, the court said: "This instruction is objectionable also for another reason. It directed the jury to find for the plaintiff 'the damages sustained by the widow and children, not exceeding the amount sued for.' They were not parties to the action, and this part of the instruction, when considered in connection with the testimony which was permitted to go to the jury over the objection of appellant,—that decedent was a married man and left three children,—it was extremely prejudicial, as it diverted the attention of the jury from the duty of fixing the actual sum of money which would fairly compensate the estate of decedent for the destruction of his power to earn money and directed it to the affliction which had overtaken the family by reason of his death." In Cincinnati, etc. R. Co. v. Sampson, 97 Ky. 65, 30 S. W. 12, 16 Ky. L. Rep. 819, however, it was held that a judgment should not be reversed because evidence was admitted which showed that the deceased left one child where it appeared that this fact was not made an element of damage in any instruction by the trial court. And in Louisville, etc. R. Co. v. Taaffe, 106 Ky. 535, 50 S. W. 850, 21 Ky. L. Rep. 64, it was held that where testimony is admitted showing that the deceased left a family it will not cause a reversal on appeal if its admission is not prejudicial to any substantial right of the defendant.

It was held in Louisville, etc. R. Co. v. Kelly, 100 Ky. 421, 38 S. W. 852, 40 S. W. 452, that the widow and infant children of the deceased have a right to be present at the

trial. To the same effect see Boyd v. Missouri Pac. R. Co. 236 Mo. 54, 139 S. W. 561.

Application of Rule.

It has been held that evidence may be given that the deceased is survived by a widow. Baltimore, etc. R. Co. v. Mackey, 157 U. S. 72, 15 S. Ct. 491, 39 U. S. (L. ed.) 624; Louisville, etc. R. Co. v. Banks, 132 Ala. 471, 31 So. 573; Kramm v. Stockton Electric R. Co. 22 Cal. App. 737, 136 Pac. 523; Chicago, etc. R. Co. v. Moranda, 93 Ill. 302, 34 Am. Rep. 168; Beyer v. Peoria, etc. Traction Co. 156 Ill. App. 47; Hughes v. Danville Brick Co. 180 Ill. App. 603; Wheelan v. Chicago, etc. R. Co. 85 Ia. 178, 52 N. W. 119; Lowe v. Chicago, etc. R. Co. 89 Ia. 420, 56 N. W. 519; Dufree v. Wabash R. Co. 155 Ia. 544, 136 N. W. 695; Haehl v. Wabash R. Co. 119 Mo. 325, 24 S. W. 737; Simpson v. Foundation Co. 201 N. Y. 479, Ann. Cas. 1912B 321, 95 N. E. 10, *reversing judgment* 134 App. Div. 930, 118 N. Y. S. 1142; Boyce v. New York City R. Co. 126 App. Div. 248, 110 N. Y. S. 333; Baltimore, etc. R. Co. v. Sherman, 30 Grat. (Va.) 602. And see the reported case.

If the deceased abandoned his wife that fact may be shown and taken into consideration in determining the amount of the pecuniary loss suffered by the wife. Holland v. Closs (Tex.) 146 S. W. 671. See also Wood v. Philadelphia, etc. R. Co. 1 Boyce (Del.) 336, 76 Atl. 613.

Likewise it may be shown that the deceased has left a child or children dependent on him for support.

United States.—Baltimore, etc. R. Co. v. Mackey, 157 U. S. 72, 15 S. Ct. 491, 39 U. S. (L. ed.) 624; Atchison, etc. R. Co. v. Wilson, 48 Fed. 57, 4 U. S. App. 25, 1 C. C. A. 25; Felton v. Spiro, 98 Fed. 576, 47 U. S. App. 402, 24 C. C. A. 321, *reversing judgment* Spiro v. Felton, 73 Fed. 91.

Alabama.—Alabama Mineral R. Co. v. Jones, 114 Ala. 519, 21 So. 507, 62 Am. St. Rep. 121; Alabama Mineral R. Co. v. Jones, 121 Ala. 113, 25 So. 814; Louisville, etc. R. Co. v. Bank, 132 Ala. 471, 31 So. 573; Louisville, etc. R. Co. v. Young, 168 Ala. 551, 53 So. 213.

California.—Kramm v. Stockton Electric R. Co. 22 Cal. App. 737, 136 Pac. 523.

Florida.—Escambia County Electric Light, etc. Co. v. Sutherland, 61 Fla. 167, 55 So. 83.

Illinois.—Chicago, etc. R. Co. v. Moranda, 93 Ill. 302, 34 Am. Rep. 168; Cook v. Big Muddy-Carterville Min. Co. 249 Ill. 41, 94 N. E. 90; Claffy v. Chicago Dock, etc. Co. 249 Ill. 210, 94 N. E. 551; Beyer v. Peoria, etc. Traction Co. 156 Ill. App. 47; Bonato v. Peabody Coal Co. 156 Ill. App. 196, *judgment affirmed* 248 Ill. 422, 94 N. E. 69; Kulvie v. Bunsen Coal Co. 161 Ill. App. 617; Boyer v. Northwestern El. R. Co. 174 Ill. App. 161; Hughes v. Danville Brick Co. 180 Ill. App. 603.

Iowa.—Donaldson v. Mississippi, etc. R. Co. 18 Ia. 280, 87 Am. Dec. 391 (not prejudicial error); Lowe v. Chicago, etc. R. Co. 89 Ia. 420, 56 N. W. 519; Dufree v. Wabash R. Co. 155 Ia. 544, 136 N. W. 695. And see the reported case (*overruling* Beems v. Chicago, etc. R. Co. 58 Ia. 150, 12 N. W. 222.

Kansas.—Coffeyville Min. etc. Co. v. Carter, 65 Kan. 565, 70 Pac. 635.

Missouri.—Tetherow v. St. Joseph, etc. R. Co. 98 Mo. 74, 11 S. W. 310; 14 Am. St. Rep. 617; Soeder v. St. Louis, etc. R. Co. 100 Mo. 673, 13 S. W. 714, 18 Am. St. Rep. 724; Schlereth v. Missouri Pac. R. Co. 115 Mo. 87, 21 S. W. 1110; O'Mellia v. Kansas City, etc. R. Co. 115 Mo. 205, 21 S. W. 503; Haehl v. Wabash R. Co. 119 Mo. 325, 24 S. W. 737; Fisher v. Central Lead Co. 156 Mo. 479, 56 S. W. 1107; Ogan v. Missouri Pac. R. Co. 142 Mo. App. 248, 126 S. W. 191; Brinkmann v. Gottenstroeter, 140 S. W. 1194, *adopting opinion* Brinkmann v. Gottenstroeter, 153 Mo. App. 351, 134 S. W. 584; Hartnett v. United Rys. Co. 162 Mo. App. 554, 142 S. W. 750; Holmes v. St. Louis, etc. R. Co. (Mo.) 176 S. W. 1041.

New York.—Harrison v. New York Cent. etc. R. Co. 195 N. Y. 86, 87 N. E. 802; Simpson v. Foundation Co. 201 N. Y. 479, Ann. Cas. 1912B 321, 95 N. E. 10, *reversing judgment* 134 App. Div. 930, 118 N. Y. S. 1142; Boyce v. New York City R. Co. 126 App. Div. 248, 110 N. Y. S. 393.

Tennessee.—Illinois Cent. Co. v. Davis, 104 Tenn. 442, 58 S. W. 296.

Utah.—Pool v. Southern Pac. R. Co. 7 Utah 303, 26 Pac. 654; Chilton v. Union Pac. R. Co. 8 Utah 47, 29 Pac. 963; English v. Southern Pac. Co. 13 Utah 407, 45 Pac. 47, 57 Am. St. Rep. 772, 35 L.R.A. 155.

Virginia.—Baltimore, etc. R. Co. v. Sherman, 30 Grat. 602.

Wisconsin.—Mulcairns v. Janesville, 67 Wis. 24, 29 N. W. 565; Abbot v. McCadden, 81 Wis. 563, 51 N. W. 1079, 29 Am. St. Rep. 910; Hamann v. Milwaukee Bridge Co. 136 Wis. 39, 116 N. W. 854.

It has been held to be competent to prove the ages of the children. Atchison, etc. R. Co. v. Wilson, 48 Fed. 57, 4 U. S. App. 25, 1 C. C. A. 25; Escambia County Electric Light, etc. Co. v. Sutherland, 61 Fla. 167, 55 So. 83; Cook v. Big Muddy-Carterville Min. Co. 249 Ill. 41, 94 N. E. 90; Claffy v. Chicago Dock, etc. Co. 249 Ill. 210, 94 N. E. 551; Bonato v. Peabody Coal Co. 156 Ill. App. 196, *judgment affirmed* 248 Ill. 422, 94 N. E. 69; Hughes v. Danville Brick Co. 180 Ill. App. 603; Donaldson v. Mississippi, etc. R. Co. 18 Ia. 280, 87 Am. Dec. 391 (not prejudicial error); Coffeyville, Min. etc. Co. v. Carter,

65 Kan. 565, 70 Pac. 635; Tetherow v. St. Joseph, etc. R. Co. 98 Mo. 74, 11 S. W. 310, 14 Am. St. Rep. 617; Fisher v. Central Lead Co. 156 Mo. 479, 56 S. W. 1107; Ogan v. Missouri Pac. R. Co. 142 Mo. App. 248, 126 S. W. 191; Hartnett v. United Rys. Co. 162 Mo. App. 554, 142 S. W. 750; Holmes v. St. Louis, etc. R. Co. (Mo.) 176 S. W. 1041; Harrison v. New York Cent. etc. R. Co. 195 N. Y. 86, 87 N. E. 802; Illinois Cent. R. Co. v. Davis, 104 Tenn. 442, 58 S. W. 296; Pool v. Southern Pac. Co. 7 Utah 303, 26 Pac. 654; Chilton v. Union Pac. R. Co. 8 Utah 47, 29 Pac. 963; English v. Southern Pac. Co. 13 Utah 407, 45 Pac. 47, 57 Am. St. Rep. 772, 35 L.R.A. 155; Baltimore, etc. R. Co. v. Sherman, 30 Grat. (Va.) 602. And see the reported case. In Alabama Mineral R. Co. v. Jones, 121 Ala. 113, 25 So. 814, *modifying* 114 Ala. 519, 21 So. 507, 62 Am. St. Rep. 121, however, it was held to be necessary only to prove, where recovery was sought of the amount which the deceased would have expended on the defendants if his expectancy of life had not been disappointed, that he had persons who would have been distributees if he had left an estate, dependent on him for support, and there was no need of showing their ages.

In South Omaha Water Works Co. v. Vocasek, 62 Neb. 710, 87 N. W. 536, it was held that the fact that there were a mother and children who were supported by the deceased's next of kin, his father, to whose support the decedent was contributing, made it competent to show the existence of the mother and children for the purpose of bringing out the fact that he was doing something to make his life pecuniarily valuable to his father.

Where a mother as administratrix sues to recover for the wrongful death of her minor son she may give in evidence the fact that she has children and their number. Thompson v. Johnston Bros. Co. 86 Wis. 576, 57 N. W. 298.

In Galveston, etc. R. Co. v. Contreras, 31 Tex. Civ. App. 489, 72 S. W. 1051, it was held that in an action by a posthumous child of the deceased to recover damages for his death evidence could be introduced by the defendant to show the existence of a widow and other children of the decedent who were also entitled to recover the pecuniary damages which accrued to each for the death of the father.

Where a declaration for death by wrongful act stated that the widow of the deceased was pregnant and it was further alleged therein that the deceased left a widow and unborn child as his next of kin, it was held that it was not error to permit proof of the facts that a child was born and died subsequent to the death of the deceased. Preble v. Wabash R. Co. 243 Ill. 340, 90 N. E. 716, *modifying* Preble v. Wabash R. Co. 149 Ill. App. 584.

In Bromley v. Binningham Mineral R. Co. 95 Ala. 397, 11 So. 341, it was held that an offer of proof by the administrator of the deceased that he left a wife and minor child surviving him who depended on him for support ought to be received if followed by evidence that the decedent expended, in whole or in part, his earnings on them.

Limitation of Rule.

The proof of the domestic relation of the deceased must ordinarily be confined to a showing as to his immediate family, or to proof as to the existence of the relatives who are beneficiaries of the cause of action. In Cook v. Cleveland, etc. R. Co. 143 Ill. App 109, it was held that evidence to show the number, ages and sex of the children of one of the deceased's daughters, and that decedent had supported them for a long period was inadmissible. To the same effect as to the decedent's half sister's children see Murphy v. Erie R. Co. 202 N. Y. 242, 95 N. E 699, wherein the court said: "In the case at bar the plaintiff was permitted to prove the number of her children. These children were not next of kin to the decedent. This evidence was supplemented by proof of specific services and expenditures rendered and made by the decedent for the benefit of these children. This evidence was admitted upon the theory that it tended to prove the pecuniary loss which was sustained by the plaintiff, the mother of these children, in the death of her intestate. That is a theory, however, which is obviously fallacious, for its effect is to place before the jury extraneous facts calculated to excite sympathy and induce a verdict based on elements of loss not contemplated by the statute." *Compare* South Omaha Water Works Co. v. Vocasek, 62 Neb. 710, 87 N. W. 536.

STATE

v.

WARD.

Minnesota Supreme Court—December 18,

127 Minn. 510; 150 N. W. 209.

Malicious Mischief — Indictment Sufficient.

An indictment for malicious injury to property is not bad because it fails to charge that defendant acted "maliciously."

[See 128 Am. St. Rep. 173.]

Expert Evidence — Correspondence of Logs with Stumps.

It is not error to receive as evidence the opinions of qualified witnesses as to whether logs found in defendant's possession came from stumps on the land of the complaining witnesses.

Witnesses — Juror at Former Trial.

Jurors on a former trial may testify on a subsequent trial as to physical facts coming to their knowledge during a view made by them on the former trial. It is not material that the former verdict was set aside because of the misconduct of the jury in conducting unauthorized experiments during the view.

[See note at end of this case.]

Same.

It is not error to permit jurors on the former trial to give their opinions or conclusions derived from and based upon the knowledge acquired on the view.

[See note at end of this case.]

Malicious Mischief — Trial — Rulings Approved.

There was no error in rulings in the admission or rejection of evidence, or in failing to give a requested instruction.

Evidence Sufficient.

The evidence sustains the verdict.

Indictment — Sufficiency — Words Charging Malice.

The words "wilfully and unlawfully" embody the idea of maliciousness.

[See generally 16 Ann. Cas. 336.]

Appeal from District Court, Wright county: GIDDINGS, Judge.

Criminal action. Robert Ward convicted of malicious injury to property and appeals. The facts are stated in the opinion. AFFIRMED.

W. H. Cutting and *James E. Madigan* for appellant.

Lyndon A. Smith, John C. Nethaway and *Stephen A. Johnson* for respondent.

[511] BUNN, J.—Defendant was convicted under an indictment charging malicious injury to property, and appealed from the judgment.

The sufficiency of the indictment is challenged, as are certain rulings in the admission of evidence, and the sufficiency of the evidence to warrant the conviction.

1. The indictment was in the language of the statute, G. S. 1913, § 8934, subd. 1. It charged that defendant on or about March 10, 1912, at the town of Maple Lake in Wright county, wilfully and unlawfully cut down two maple trees then standing and growing upon the lands of others, the owners being named and the lands particularly described. The alleged defect in the indictment is that it did not allege that the cutting was done "maliciously." There is no doubt that to constitute an offense under the statute, there must be an element of malice. Price v. Denison, 95 Minn. 106, 103 N. W. 728. But it is not necessary to use the word malicious in the indictment. The words "wilfully and unlawfully" embody the idea of maliciousness, and they are the words used in the statute. We think the indictment was sufficient.

The rulings on evidence that are complained of may be grouped into two classes: (1) Receiving expert opinion evidence on the [512] question whether two logs found with defendant's name on them came from the stumps on the land of the complaining witnesses; (2) permitting jurors on a former trial to testify as to their observations and experiments on a view they were permitted to take during the trial, and their opinions derived from such observations and experiments.

The facts are as follows: The land involved was timber land owned by certain sisters, and known as the Butler woods. A brother "looked after" it. Two maple trees were found to be cut down and the logs hauled away. Two green maple logs were afterwards found in a nearby mill yard, both marked "R. Ward" on the end. The logs were measured, and then the stumps in the woods and the distances between them and the tree tops on the ground. It was testified that defendant, when asked where he got the logs, replied that he cut them on "our own place," referring to the farm of his father. It was shown that there were no recently cut maple stumps on the Ward land, and no stumps or trees as large as the logs in controversy. The tops of the stumps in the Butler woods and the ends of the two logs were cut off and used as exhibits in the case. It was in evidence that defendant had never asked for permission to cut any logs in the Butler woods. He did not take the stand on this trial, though he did on the former one. It appears that his defense and testimony then was that the logs were cut on his father's land.

2. We think it was a proper case for expert opinion evidence. The opinions of woodsmen who had examined the logs and stumps and measured the distance between the latter and the tree tops, and who had examined the stumps on the Ward land, would naturally be of assistance to the jury in determining whether the logs were from the trees in the Butler woods or from the Ward land. This is the consideration which should in the main govern the admission or exclusion of opinion evidence. We see no abuse of discretion in receiving this testimony.

3. On the former trial the jurors were permitted to go to the woods and view the stumps and tree tops. They conducted ex-

periments, and their verdict of guilty was set aside because of this impropriety. On this trial many of them were called as witnesses [513] by the state, and were permitted over objections not only to testify as to what they observed on the view, and their experiments, but to state their opinions derived from such observations and experiments. It is quite clear upon principle and well established by decided cases that jurors upon a former trial may testify on a subsequent trial as to physical facts coming to their knowledge during a view made by them on the former trial. Hughes v. Chicago, etc. R. Co. 126 Wis. 525, 106 N. W. 526; Cramer v. Burlington, 42 Ia. 315; Woolfolk v. State, 85 Ga. 69, 99, 11 S. E. 814; Hull v. Seaboard Air Line Ry. 76 S. C. 278, 57 S. E. 28, 10 L.R.A.(N.S.) 1213; 40 Cyc. 2236. It is not material that the former verdict was set aside because of the misconduct of the jury in conducting unauthorized experiments. This was not receiving the evidence or affidavits of jurors to impeach their verdict. That verdict had already been set aside.

4. It is a question of more doubt whether the opinions of the jurors, derived from the knowledge acquired on the view, were properly received. The opinions might be influenced by the testimony on the former trial, and not wholly based on the view. But this bears rather on the weight of the evidence than on the question of its admissibility. Holding as we have that opinion evidence was properly received, and that the former jurors were competent witnesses, it would seem to follow that their opinions, based on the facts ascertained on the view were properly received. In Woolfolk v. State, 85 Ga. 69, 11 S. E. 814, cited above, defendant was convicted of the murder of his father, and a new trial was granted. On the first trial certain drawers with blood stains thereon were in evidence and taken to the jury room when the jury retired. On the second trial two of the former jurors were allowed to testify as to their conclusions that there was the blood print of a hand on the drawers. It was contended that it was impossible for the witnesses to say what effect the other testimony on the trial had, in causing their minds to form the conclusions that they saw the print of a hand. It was held that the evidence was admissible, the objection going more against its weight rather than against its admissibility. In the case at bar the jurors declared that their opinions were based [514] upon the facts learned on the view. We cannot say that they were influenced by evidence received on the trial. While for the reasons suggested, we do not approve of the practice, we are unable to hold that it was error to permit the jurors, as well as the other witnesses, to state their conclusions based upon the knowledge acquired on the view. We have no right to say, as counsel for defendant does, that the former jurors were allowed to give generally their conclusions as to defendant's guilt, and the reasons why they convicted him. We must assume as true their sworn statements that they based their opinions wholly on the facts that came to their knowledge while viewing the stumps and logs, and conducting their experiments.

5. We see no error in sustaining objections to cross-examination of these jurors directed to showing their misconduct on the former trial. This appeared clearly enough, if it was material on the question of their credibility, and restricting the cross-examination in this regard was well within the court's discretion. We find no error in any other ruling on evidence, or in failing to give an instruction on the weight to be given circumstantial evidence.

6. Defendant claims that the verdict is not sustained by the evidence. We think that the evidence, though circumstantial, points pretty clearly to the conclusion that defendant cut the logs from the property of the complaining witnesses. The chief claim, and one not wholly without merit, is that the evidence fails to show that defendant cut down the trees "maliciously." The owners of the land did not testify, and there is no separate evidence that defendant was actuated by malice, or an intent to injure the owners. But the malice which is an essential ingredient of the offense need not be proved directly or as a separate fact. When the act is wrongfully and wilfully done, and the necessary result is to injure the property of another, malice may be inferred. Defendant had no permission to cut down trees in the Butler woods. He was not laboring under any belief that he had a right to do so, or under any mistaken impression that the land belonged to himself or his father. He insisted at all times that the logs came from the farm of his father, some distance away. On the whole we are unable to say [515] that the necessary malice was not shown, or that the verdict is not sustained by the evidence. Defendant has been tried twice. The trial that resulted in the judgment from which this appeal was taken was a fair one, and the trial court has approved the verdict. We think it should stand.

Judgment affirmed.

NOTE.

Competency as Witness of Juror on Former Trial.

A witness having personal knowledge of relevant facts is none the less competent to testify thereto because his knowledge was ac-

quired while acting as a juror on a former trial of the case. Thus a member of a former jury may testify to conditions observed by him in the course of a view by the jury. Cramer v. Burlington, 42 Ia. 315; Hull v. Seaboard Air Line Ry. 76 S. C. 278, 57 S. E. 28, 10 L.R.A.(N.S.) 1213; Hughes v. Chicago, etc. R. Co. 126 Wis. 525, 106 N. W. 526. And see the reported case. In Hughes v. Chicago, etc. R. Co. supra, it was said: "We are unable to discover any sound reason why a juror should be precluded from testifying to material, relevant facts coming to his knowledge while making a view of the premises, when called as a witness on a subsequent trial." So in Woolfolk v. State, 85 Ga. 69, 11 S. E. 814, it was held that a juror at a former trial could testify as to the condition of an exhibit introduced at that trial. Similarly in Quattlebaum v. State, 119 Ga. 433, 46 S. E. 677, it was held that on an issue of the sanity of the defendant, a juror on a former trial might testify to his observations during the trial as to the defendant's appearance and conduct.

A juror at a former trial may testify as to what issues were then litigated. State v. Thompson, 19 Ia. 299; People v. Ostrander, 110 Mich. 60, 67 N. W. 1079; Follansbee v. Walker, 74 Pa. St. 306. However, in so doing he cannot contradict the record. Stapleton v. King, 40 Ia. 278; Smith v. Smith, 50 N. H. 212. In Hewitt v. Chapman, 49 Mich. 4, 12 N. W. 888, the court said: "The defendants sought to show by the jurors in the assumpsit case, that in making or arriving at their verdict, they allowed the plaintiff for the full amount of labor claimed by him. This clearly was incompetent and properly rejected by the justice. A juror may be called, like any other witness, to prove any fact pertaining to what took place in open court on the trial of a cause. To this extent he stands as would a third person or stranger to the cause, and if the facts sought to be proven could be shown by third parties present, they may be by the jurors. When, however, the jury retire to deliberate upon their verdict to be given, their conversations and discussions,—their deliberations,—cannot be inquired into. The result of their deliberations is the only material fact; it is the one fact upon which the jury agreed, and that can best be shown by their verdict."

The competency of a juror to testify on a motion for a new trial in impeachment of his verdict is beyond the scope of the present discussion. It has, however, been held that the rule forbidding a juror to impeach the verdict does not exclude testimony by a juror in a subsequent trial that the verdict rendered was, through a mistake, not that agreed on. Hamburg-Breman F. Ins. Co. v. Pelzer, Mfg. Co. 76 Fed. 479, 22 C. C. A. 283. And see Capen v. Stoughton, 16 Gray (Mass.) 364. In the case first cited, it was said: "It is contended that the admission of this testimony violates the rule which excludes the evidence of jurors to impeach a verdict by testimony as to their deliberations, or to show upon what grounds the verdict was rendered, or to show a mistake or misconduct of the jurors in arriving at the verdict. But the testimony objected to only tended to show what the verdict was, not how it had been arrived at, and to prove that the verdict read out in court by the foreman was not their verdict, but the result of an oversight by him in making the announcement. Without weakening at all the strictness of the general rule, testimony to this effect has been sanctioned in well-considered cases, and does not fall within the strong objections which properly exclude the statements of jurors in a different class of cases."

WALL

v.

FOCKE.

Hawaii Supreme Court—January 11, 1913.

21 Hawaii 399.

Tenants in Common — Compensation for Services — Sale of Common Property.

A tenant in common is not entitled to compensation for services in selling the common property in the absence of an agreement therefor, and no agreement to pay compensation will be implied from the fact that his cotenant had knowledge of the efforts to sell, acquiesced therein, and was benefited by the sale.

[See note at end of this case.]

Exceptions from Circuit Court, First Circuit.

Action to recover commissions. Walter E. Wall, plaintiff, and Herman Focke, defendant. Judgment for plaintiff. Defendant alleges exceptions. The facts are stated in the opinion. EXCEPTIONS SUSTAINED.

W. B. Lymer for plaintiff.

I. M. Stainback and *Holmes, Stanley & Olson* for defendant.

[399] PERRY, J.—This is an action of assumpsit for $2700, upon three counts. The plaintiff and the defendant were tenants in

common of a tract of land known as Pilipili, 54 acres in area, the plaintiff having purchased his undivided one-half interest in June, 1903, and the defendant having acquired his interest before that date. [400] After unsuccessful efforts on the plaintiff's part to procure an amicable partition both parties were desirous of selling the common property to the best advantage. In the three counts of the declaration it is alleged that "plaintiff and defendant entered into an oral arrangement whereby it was mutually agreed that plaintiff should become the agent or broker of them both for the sale of said Pilipili tract and as such agent or broker should procure a purchaser or purchasers of said land, either as a whole or in such parcels or lots as plaintiff might in his discretion decide to be most advantageous to their mutual interests." It is also alleged that the plaintiff procured a sale of the land with the consent and approval of the defendant for the sum of $54,000. The first count is on an express promise alleged to have been made by the defendant to pay to the plaintiff for the latter's services in selling the land ten per cent. of all sums received by the defendant from sales of the defendant's interest in the land. The second is to the effect that by reason of the sale the plaintiff is entitled to compensation in a reasonable amount for his services and that $2700 is a reasonable amount. The third is upon an account stated in the sum of $2700. The defendant filed an answer of general denial and a counter-claim for $152.09 for balance of revenue from the land collected by the plaintiff and belonging to the defendant. Trial was had without a jury.

The trial court in its decision made no reference to the third count; there was no evidence in support of it. Lamenting the contradictory nature of the evidence and speaking of the case generally, the court said that it was of the opinion "that the plaintiff has failed to make out his case by that clear preponderance of the evidence which the burden of proof requires." Concerning the first count the court held that it was "from the evidence impossible for the court to say that there was a fair preponderance of evidence showing a contract to pay a ten per cent. commission on the sale of the land." Of the claim in the second count it said, *inter alia*, "There can be no question if a [401] person stands by and sees another acting in good faith working in his behalf and gives no intimation that he does not desire such labor done that the law will imply a promise on his part to pay the reasonable value of such labor. Such it does not appear to the court are the facts in this case. During the entire time that plaintiff was dealing with Desky the defendant was absent from the Territory. The undisputed evidence is that the defendant's attorney in fact knew nothing of the transaction until the deal had been practically completed with Desky and the latter had agreed to enter into a contract, whatever it was, either of sale or to sell. The plaintiff and defendant were co-owners of the land in question and whatever advantage the defendant obtained by the endeavors of the plaintiff the plaintiff obtained an equal advantage. Under such circumstances it seems apparent that it cannot be said as a matter of law that the plaintiff was working for the defendant rather than himself or that the defendant stood by or encouraged him to work in his behalf. It cannot be doubted that the labors of plaintiff did benefit the defendant, but it seems clear to the court that such benefit was incident to the benefit sought for himself and that therefore no case arises where in good conscience the defendant is bound to pay the plaintiff." Judgment was thereupon ordered and entered for the defendant for the amount of the counter-claim. Subsequently the plaintiff filed a motion for a new trial upon the grounds that the decision and judgment were "contrary to the law, to the evidence and to the weight of the evidence" and that the court erred "in finding that no contract for the sale of the property in question was entered into by plaintiff and defendant" and "in finding that said plaintiff was not entitled to account for his services under the *quantum meruit* count," and upon the further ground of errors alleged to have occurred in the admission and rejection of evidence. The motion was granted and a new trial ordered.

In its written opinion on the motion the court, after reciting that it had held "on the hearing of the case in chief that the [402] plaintiff had not shown by a preponderance of the evidence that defendant had entered into a contract with him to pay plaintiff for his services in selling a certain land held by them in common" and "that plaintiff was not entitled to judgment under his count for *quantum meruit*," said: "There can be no doubt that defendant did know that plaintiff was using effort and time in the sale of the common land, and that defendant acquiesced in such effort and expenditure of time. Nor can it be doubted that defendant was benefited by the sale of the land, nor that the sale was consummated by the efforts of Wall, the plaintiff, alone. Under such circumstances, I am of the opinion that the efforts of plaintiff were not in contemplation of joint or common tenancy, were without his duties as co-tenant of the defendant, and being acquiesced in by the defendant and the defendant having been benefited thereby, and that therefore the plaintiff is entitled to judgment on his count of *quantum meruit*." The case

comes to this court on the defendant's exceptions.

The essence of the action is a claim by one person against his co-tenant for compensation for services rendered in effecting a sale of the land held in common. The law relating to compensation of a co-tenant for individual services rendered in the management and care of the common property is well settled. A clear statement of it is found in Ranstead v. Ranstead, 75 Md. 378, 22 Atl. 405, 406, as follows: "It is certainly a well established principle that joint or common owners are not entitled to charge for services rendered in the care and management of the common property, except where there has been a special agreement or a mutual understanding to that effect; and courts are not disposed to extend such agreements beyond their plain and reasonable import. . . . But the mutual understanding of the parties may be proved by the facts and circumstances of the case, and, though it may not be shown that any specific amount had been agreed upon as compensation, yet, if it clearly appears to the satisfaction of the court that compensation [403] for the services to be rendered was to be made and services to be rendered with reference to such understanding, the law will imply an obligation to pay a reasonable amount." "Each joint owner, in taking care of the joint property, is taking care of his own interest and the law never undertakes to measure and settle, between partners, their various and unequal services bestowed on the joint business. This must be left to be regulated by contract." Franklin v. Robinson, 1 Johns. Ch. (N. Y.) 157, 164. "If an agreement that the partner shall be paid for his services can be fairly and justly implied from the course of business between the co-partners, he is entitled to recover. The question is one of evidence, or contract, and whether the right to recover is established by necessary implication or from express stipulation, the rule is the same." Levi v. Karrick, 13 Ia. 344, 350. To the same effect are: Freeman, Co-Tenancy and Partition, Sec. 260; 17 Am. & Eng. Ency. of Law (2d ed.) 688; 38 Cyc. 53, 54; Gay v. Berkey, 137 Mich. 658, 100 N. W. 920; Cole v. Cole, 57 Misc. 490, 108 N. Y. S. 124; Lake v. Perry, 99 Miss. 347, 54 So. 945. Upon principle the same rule applies when the services rendered consist of efforts to sell common property. Each owner in attempting to bring about an advantageous sale of the whole property is primarily taking care of his own interest and only incidentally benefiting his co-owner. Ordinarily a sale of the whole property will result more advantageously to each of the owners than will the sale of a mere undivided interest and for this reason a co-tenant may well endeavor to procure a purchaser of the whole with the hope that his co-owners will join in the sale. The law does not, in the absence of contract, undertake to measure between co-owners their various and unequal services bestowed on the business of selling their common land. The mere fact that a co-tenant is, with the knowledge of the other owners, making efforts to sell the common land and that the sale, if accomplished, will result to the benefit of all the other co-tenants is not sufficient to justify the inference that the more active co-tenant is making the [404] efforts with the expectation of compensation from the others or the inference that the others knew or must have known that he had such expectation.

In this connection it is well to bear in mind the distinction between express contracts, implied contracts and constructive contracts. The first are, as the term implies, those in which "the terms of the agreement are openly uttered and avowed at the time of the making." 2 Blackstone Com. 443. Constructive contracts are "fictions of law adapted to enforce legal duties by actions of contract where no proper contract exists, express or implied." Hertzog v. Hertzog, 29 Pa. St. 465, 468. In these the actual intention of the promisor is disregarded. "Implied contracts arise under circumstances which, according to the ordinary course of dealing and the common understanding of men, show a mutual intention to contract." (29 Pa. St. 468.) "An implied contract, in the proper sense, is where the intention of the parties is not expressed, but an agreement in fact, creating an obligation, is implied or presumed from their acts, as in the case where a person performs services for another, who accepts the same, the services not being performed under such circumstances as to show that they were intended to be gratuitous, or where a person performs services for another on request." 9 Cyc. 242. "There is some looseness of thought in supposing that reason and justice ever dictate any contracts between parties or impose such upon them. All true contracts grow out of the intentions of the parties to transactions and are dictated only by their mutual and accordant wills. When this intention is expressed we call the contract an express one; when it is not expressed it may be inferred; implied or presumed from circumstances as really existing and then the contract thus ascertained is called an implied one. . . . The law ordinarily presumes or implies a contract whenever this is necessary to account for other relations found to have existed between the parties. . . . A party who relies upon a contract must prove its existence; and this he does not do by merely proving a [405] set of circumstances that can be accounted for by another relation appear-

ing or existing between the parties. . . . Every induction, inference, implication or presumption in reasoning of any kind is a radical conclusion derived from and demanded by certain data or ascertained circumstances. If such circumstances demand the conclusion of a contract to account for them a contract is proved; if not, not." Hertzog v. Hertzog, supra. In general there must be evidence that defendant requested plaintiff to render the services or assented to receiving their benefit under circumstances negativing any presumption that they would be gratuitous. The evidence usually consists in, first, an express request pertaining to the services, or second, circumstances justifying the inference that plaintiff, in rendering the services expected to be paid, and defendants supposed or had reason to suppose and ought to have supposed that he was expecting pay, and still allowed him to go on in the service without doing anything to disabuse him of this expectation; or third, proof of benefit received, not on an agreement that it was gratuitous and followed by an express promise to pay." Columbus, etc. R. Co. v. Gaffney, 65 Ohio St. 104, 116, 61 N. E. 152.

In his first opinion the trial judge found, and there was ample evidence to support the findings, not only against the claim of an express contract for a commission of ten per cent. but also against the claim of an understanding or expectation on the part of both parties that plaintiff would be compensated by defendant in an amount not agreed upon. His findings of fact and his reasoning, above quoted, under the second count, admit of no other interpretation. His conclusion was in effect that the facts disclosed by the evidence were not such as to justify the implication of a contract or mutual understanding or expectation that the plaintiff was to receive compensation from defendant. It may be that in the later decision the statement that "there can be no doubt that the defendant did know that plaintiff was using effort and time in the sale of the common land and that the defendant acquiesced in such effort and expenditure [406] of time" and that "defendant was benefited by the sale of the land" and that "the sale was secured by the efforts of Wall, the plaintiff, alone" was intended or operates as a modification to that extent of the findings in the earlier opinion. Assuming, but not deciding, that that is so and that the court had the power under the circumstances to alter its findings of fact to that extent, it is clear that the original findings were not altered in any other respect and that in the later opinion all that the court intended to hold was that upon the facts, and those only, stated in the second opinion the plaintiff was, as a matter of law, entitled to compensation. But the four facts relied upon by the trial court, namely, that defendant had knowledge of plaintiff's efforts, that he acquiesced in those efforts, that he was benefited by the sale and that the sale was consummated by the paintiff aone, are not, under the law above stated, of themselves sufficient to give rise to an obligation on the defendant's part to pay and since the findings that there was no express contract and that no circumstances existed from which a mutual understanding or expectation should be presumed remain unreversed by the trial court the exceptions are sustained and the order granting a new trial is set aside.

NOTE.

Right of Tenant in Common to Compensation for Services in Selling Common Property.

As a logical application of the general rule that a tenant in common has no implied right to compensation from his cotenant for services rendered with respect to the common property, (see 38 Cyc. 53) the few cases passing on the question are agreed that a tenant in common who sells the common property is not entitled to compensation for his services in so doing, in the absence of an agreement by which the right to compensation is expressly given or plainly implied. Hamilton v. Conine, 28 Md. 635, 92 Am. Dec. 724; Franklin v. Robinson, 1 Johns. Ch. (N. Y.) 157; Central Trust Co. v. New York Equipment Co. 87 Hun 421, 34 N. Y. S. 349. And see the reported case. In Central Trust Co. v. New York Equipment Co. supra, it was said: "The defendant claims $3000 for its services in taking possession of, caring for, and selling the property. The referee found that the plaintiff had not agreed to compensate the defendant for such services. In the absence of a contract that compensation for services shall be paid, joint owners of property or persons jointly interested in property cannot recover of each other compensation for services rendered in caring for it and converting it into money." So in Hamilton v. Conine, 28 Md. 635, 92 Am. Dec. 724, the court, after reviewing the cases denying the right of a partner to sue his copartner at law for services, said: "It is impossible to distinguish the present case, in principle, from those just cited. The services rendered by the plaintiff, for which he seeks to recover in this action, were done during the continuance of the tenancy in common, on account of the whole common property, and inured to the benefit of all the joint owners, and if performed by a stranger the suit would have been against the four jointly, and the plaintiff must have contributed his proportionate share towards paying for them. The same

reason, therefore, holds against his right to maintain this action. It is difficult to find authorities precisely in point in the courts of other states, probably for the reason that the well settled practice has been so generally followed, that such suits at law have rarely been attempted."

However, it is said obiter in the reported case that an express agreement may give to a tenant in common the right to compensation for selling the common property, and compensation has been allowed without a specific discussion of the right thereto, it appearing that the sale was made under an agreement clearly providing for compensation. Thompson v. Salmon, 18 Cal. 632; McCreery v. Green, 38 Mich. 172. In Harman v. Moss, 117 Va. 676, 86 S. E. 111, it appeared that one of several tenants in common obtained from the others an agreement giving him an agency to sell the common land at a specified price. The court said: "With respect to the matter of commissions (without intending to be understood as intimating an opinion as to what should be the final result), the record seems to indicate the existence of special circumstances affecting the character and quantum of services rendered by appellant in selling the timber in question, which, if sustained, may take the claim to commissions out of the ordinary class of sales for which the customary commission of 5 per cent. is allowed."

JOHNSON ET AL.

v.

LIBBY.

Maine Supreme Judicial Court—October 29, 1913.

111 Me. 204; 88 Atl. 647.

Corporations — Double Liability of Stockholders — Acceptance of Statute.

The charter of the Waterville Trust Company (Priv. & Sp. Laws 1889, c. 401, § 6) imposed a double liability on stockholders, and a similar liability was imposed by Rev. St. c. 48, § 86, as amended by P. L. 1905, c. 19. Held, that one who voluntarily became a stockholder in such corporation assumed the double liability imposed by statute and charter.

Same.

A stockholder in a trust company who retained his stock after enactment of P. L. 1905, c. 19, amending Rev. St. c. 48, § 86, imposing a double liability on shareholders in such corporation by providing a method of enforcing the liability, must be deemed to have accepted the effect of the amendment.

Constitutional Law — Change of Remedy.

The legislature has the power to modify and change a remedy, provided no substantial right is thereby impaired; consequently a shareholder in a trust company cannot complain because the legislature changed the remedy by which the double liability previously imposed might be enforced.

Corporations — Liability of Stockholders — Enforcement against Estate of Decedent.

The double liability assumed by a purchaser of the stock of a trust company is contractual in its nature and does not abate at his death but survives and his estate is liable therefor.

[See note at end of this case.]

Assessment on Stock — Proceedings — Notice to Stockholders.

In proceedings for the liquidation of the affairs of a trust company and the payment of its debts, the court may make an assessment against the shareholders upon their double liability without personal service upon them; the proceeding being against the corporation, which is presumed to represent them.

Same.

Where a shareholder in a trust company died during the liquidation of its affairs, an assessment against the shareholders on their double liability is valid against such shareholder's estate, without personal service on his representatives; the shareholder being represented in the proceeding against the corporation.

When Liability Accrues.

The liability of a shareholder in a trust company which by statute is fixed at a sum equal to the par value of the shares, in addition to the amount invested therein, does not accrue as a claim against the shareholder's estate until assessed by a decree of court in liquidation.

Same.

Rev. St. c. 89, §§ 16, 17, 18, respectively, provide that, when an action on a contract or covenant does not accrue within the 18 months provided for the presentation of claims against an estate, the claimant may file his demand within that time in the probate office, and thereupon the judge shall direct that sufficient assets shall be retained by the administrator, and that, when such claim has not been filed in the probate office within said 18 months, the claimant may have a remedy against the heirs or devisees of the estate within one year after it becomes due and not against the executor or administrator. Held that, where the liability of a deceased shareholder in a trust company on account of an assessment against shareholders did not accrue until the decree of the court which was rendered more than 18 months after the time for the presentation of claims, an action to enforce such liability

might within the year be maintained against her heirs.

Enforcement of Assessment.

In view of P. L. 1905, c. 19, authorizing the receivers of a banking or trust company to enforce the double liability of shareholders in an appropriate action at law or in equity for the benefit of creditors, a decree of the court assessing the double liability of the shareholders and authorizing the receivers to institute all necessary proceedings in law or in equity to collect the same and enforce the decree is not limited in its scope solely to those persons who were shareholders at the time of the receivership but includes shareholders who have died subsequent to the receivership and authorizes an action against their estates.

[See 3 Am. St. Rep. 854.]

On report from Supreme Judicial Court, Kennebec county.

Action of assumpsit. Charles F. Johnson et al., receivers of Waterville Trust Company, plaintiffs, and Helen M. Libby, defendant. Case reported to Law Court on agreed statement of facts. The facts are stated in the opinion. JUDGMENT FOR PLAINTIFFS.

Johnson & Perkins for plaintiffs.
Manson & Coolidge for defendant.

[205] KING, J.—This case is reported to the Law Court on an agreed statement of facts.

July 1, 1909, the Waterville Trust Company of Waterville, Maine, by decree of the Supreme Judicial Court of Maine, was enjoined from further prosecuting business, and the plaintiffs were then appointed its receivers and duly qualified.

At that time Bertha L. Libby of Pittsfield, Maine, was the owner of record of five shares of the capital stock of said Trust Company of the par value of $100 each. April 3, 1910, she died, intestate, leaving a surviving husband, and the defendant, Helen M. Libby, as her sole heir. Her estate was settled by her husband, who was appointed as administrator in April, 1910, and he settled his final account in October, 1911, showing a balance of the estate of $3,592.05, which was distributed, one-third to the surviving husband, and two-thirds to the defendant.

Thereafter, April 29, 1912, upon the petition of the receivers against the corporation, and after notice and hearing, it was adjudged and decreed by a Justice of the Supreme Judicial Court that there was due the depositors of said Trust Company the sum of $107,058.90 in excess of the amount that could be realized from all its assets, and

"That an assessment of one hundred per cent upon the whole capital stock of said Waterville Trust Company, amounting to $100,000, is necessary to be made to meet the claims of said depositors.

[206] "And that the said Charles F. Johnson and Harry L. Holmes in their said capacity as receivers of said Waterville Trust Company be hereby authorized and directed to collect from each owner of the record of the stock of said Waterville Trust Company on the first day of July, 1909, the date when the receivers were appointed by this court, a sum equal to the par value of his stock to be used in payment of the claims of said depositors when ordered by the court.

"And that the said Charles F. Johnson and Harry L. Holmes in their said capacity as receivers aforesaid be authorized and directed to institute all necessary proceedings in law or equity to collect the same and enforce this decree."

This action was begun September 27, 1912 to collect of Helen M. Libby the sum of $500 as the assessment of 100 per cent on the five shares of said stock owned by Bertha L. Libby at the time of her death.

The plaintiffs base their right to recover on these propositions: that at the time of the death of Bertha L. Libby there was a contingent liability resting upon her as a shareholder in said Trust Company to pay a sum equal to the par value of her shares if required for the payment of the debts and engagements of the corporation; that that obligation was contractual in its nature and survived her death and became a contingent obligation against her estate; that by the decree of the court of April 29, 1912, that obligation became an absolute liability for a specific amount which then became due and payable from her estate; that her estate having been previously settled and a distributive part thereof received by the defendant, as the only heir of said Bertha L. Libby, in excess of the amount due under that obligation, the defendant became liable therefor; and that the receivers are authorized and empowered to enforce the defendant's liability in this action.

Bertha L. Libby, as a shareholder in the Waterville Trust Company, became liable for the debts and engagements of the corporation to an amount equal to the par value of her shares in addition to the amount invested in those shares. Such an additional liability was expressly provided for in the charter of the corporation. Sec. 6, ch. 401, Private and Special Laws, 1889. It was also imposed by statute. Section 86, ch. 48, R. S., before its amendment in 1905, was as follows: "The shareholders in a trust and banking company [207] shall be individually responsible, equally and ratably, and not one for the other, for all contracts, debts and engagements of said corporation, to a sum equal to the amount of the par value of the shares owned by each

in addition to the amount invested in said shares." This section was amended by chapter 19, P. L., 1905, by adding thereto the following: "Whenever in liquidating the affairs of such a corporation it appears that its assets are not sufficient to pay its indebtedness the receiver thereof, under proper orders of the court, shall proceed to enforce such individual liability of shareholders in any appropriate action at law or in equity, in his own name or in the name of the corporation for the benefit of the creditors."

Every person who voluntarily becomes a shareholder in a corporation thereby agrees to the terms of its charter, and assumes those obligations which the laws of the State creating the corporation impose upon such shareholders. Pulsifer v. Greene, 96 Me. 438, 445, 52 Atl. 921, and cases cited.

It does not appear whether Bertha L. Libby became the owner of the five shares of the stock of said trust company before or after the amendment of 1905. But that is immaterial, because, if she was a shareholder before, by continuing as such thereafter she thereby accepted the effect of the amendment so far as it applied to her liability as a shareholder. Flynn v. American Banking, etc. Co. 104 Me. 141, 145, 69 Atl. 771, 129 Am. St. Rep. 378, 19 L.R.A.(N.S.) 428. Moreover, if she was a shareholder before the amendment, it in no manner increased her liability as such. Its only purpose and effect was to provide a different remedy, a different course of procedure, by which the shareholders' liability could be enforced. The Legislature has power to modify or change a remedy, provided no substantial right is thereby impaired. And a shareholder in a corporation has no vested right in a particular remedy by which his liability as such may be enforced against him. A change of remedy, whereby no substantial right is affected, is not obnoxious to the fundamental law which forbids the impairment of contracts.

It may be regarded as well settled that the obligation which the shareholder assumes by becoming a member of the corporation is contractual in its nature, and does not abate at his death but survives, and his estate becomes chargeable therefor. This court in Pulsifer v. Greene, supra, speaking of such liability said: "The obligation which he thereby assumed though statutory in its origin [208] was contractual in its nature, and as such not local but transitory. It goes with him wherever he goes, and is enforceable in any court of competent jurisdiction."

In Cook on Corporations (5th Ed.) Vol. 1, Sec. 248, it is said: "The estate of a deceased person is liable upon stock held and owned by the decedent in the same way and to the same extent that the stockholder was liable in his lifetime. Accordingly an executor or administrator of the estate of a deceased stockholder is chargeable upon the shares of the decedent to the extent of the property that comes into his hands as the personal representative of the deceased. The cause of action against a stockholder arising from his statutory liability, is not defeated by his death. The action may proceed against his estate." See also Richmond v. Irons, 121 U. S. 27, 7 S. Ct. 788, 30 U. S. (L. ed.) 864; Fidelity Ins. Trust, etc. Co. v. Mechanics' Sav. Bank, 97 Fed. 297, 38 C. C. A. 193, 56 L.R.A. 228; Douglass v. Loftus, 85 Kan. 720, Ann. Cas. 1913A 378, 119 Pac. 74, 78, L.R.A.1915B 797. In 3 Thom. Corp. Sec. 3325, the author says: "Where the estate of the deceased shareholder is fully administered, and distribution made by the personal representative, the heirs or next of kin are assessable to the extent of the assets which they have received from the ancestor's estate, for the payment of calls subsequently made upon shares of stock belonging to his estate."

But, conceding the liability of Bertha L. Libby, as claimed, to an assessment on the shares owned by her, and that the defendant, as her heir and a distributee of her estate, might have been made liable therefor, it is contended that the necessary proceedings were not taken to make an assessment which is binding upon her, and that no sufficient order of court was made authorizing the receivers to bring this suit against her. We think these contentions in behalf of the defendant are not sustainable.

In construing the decree of the court of April 29, 1912, all its recitals and provisions are to be considered in order to ascertain its full scope and effect. It recites that it was made upon the petition of the receivers against the corporation, asking the court to ascertain and determine the value of the assets of the corporation remaining in the hands of the receivers, and "to ascertain and determine whether any assessment should be ordered and decreed upon the capital stock of said Waterville Trust Company, and the amount of said assessment." And it shows that after notice and hearing, the [209] court did ascertain and determine explicitly the amount due the depositors, the cash remaining in the receivers' hands, the value of the unsold assets, and that both the cash and value of the unsold assets would be insufficient to pay the depositors in the sum of $107,058.90. It was then ordered and decreed by the court as hereinabove quoted.

We entertain no doubt that by that decree a valid assessment was made of 100 per cent upon the whole capital stock of the Waterville Trust Company, including the five shares which stood in the name of Bertha L. Libby at the time of her death.

It has been repeatedly held that when, in proceedings for the liquidation of the affairs of a corporation, and for the payment of its

debts and engagements, an assessment is necessary to be made upon unpaid stock subscriptions and upon the additional liability which its shareholders have assumed by becoming members of the corporation as shareholders, the court may make such assessment in proceedings therefor against the corporation without the presence of, or personal service upon, the individual shareholders. In such proceedings the representation which a shareholder has by virtue of his membership in the corporation is all that he is entitled to. Bernheimer v. Converse, 206 U. S. 516, 532, 27 S. Ct. 755, 51 U. S. (L. ed.) 1163; Howarth v. Lombard, 175 Mass. 570, 577, 56 N. E. 888, 49 L.R.A. 301; Converse v. Spargo, 184 Fed. 324, and Spargo v. Converse, 191 Fed. 823, 112 C. C. A. 337. The case last cited is very similar to the one at bar. In that case, as in this, the assessment was made after the death of the shareholder, and it was contended in defense of a suit by the receiver against the executor of the shareholder, that the assessment was invalid because the proceeding in making the assessment was conducted in the same manner it would have been had the shareholder been alive. But that contention was not sustained, the court holding the assessment valid against the shareholder's estate, though made after his death. We think that conclusion rests in sound reasoning and well established principles.

It has already been noted that it is the accepted theory that in proceedings for liquidating the affairs of a corporation the shareholders are sufficiently represented by the corporation itself. Its presence in the ory carries with it the presence of its shareholders. Prior to the death of Bertha L. Libby the Waterville Trust Company had become insolvent and proceedings had been begun against [210] it under the statute to liquidate its affairs. Her liability as a shareholder in that corporation, under the terms of its charter and the laws of the State, became fixed by those proceedings which were binding upon her. She was then liable to pay such assessment not exceeding the par value of her shares, as the court should determine to be necessary to satisfy the debts and engagements of the corporation. The assessment itself was but the determination by the court in those proceedings, commenced in the lifetime of the shareholder, of the deficiency in the assets of the corporation; and hence the amount to be apportioned to each share of stock as the additional sum to be paid by those legally liable therefor. Had Bertha L. Libby been living at the time that part of the proceedings was had to determine the amount of the assessment, she would have been bound thereby without previous personal notice. And as her liability to pay such an assessment as should be made against her shares in those proceedings survived her death, and became a liability of her estate, we perceive no reason why her personal representative or heirs are not likewise bound by the assessment made subsequent to her death without previous notice to them.

It is provided by statute in this State (R. S., ch. 89, secs. 16, 17 and 18) that when an action on a contract or covenant does not accrue within the eighteen months provided for the presentation of claims against an estate, the claimant may file his demand within that time in the probate office, and thereupon the Judge of Probate shall direct that sufficient assets, if such there be, shall be retained by the executor or administrator, unless the heirs or devisees give bond to pay whatever is found due on said claim. And the statute further provides (sec. 18) that, "When such claim has not been filed in the probate office within said eighteen months, the claimant may have remedy against the heirs or devisees of the estate within one year after it becomes due, and not against the executor or administrator."

The liability of Bertha L. Libby at the time of her death to an assessment, as a shareholder in the trust company, did not accrue until April 29, 1912, when the court decreed that a resort to the statutory liability of the shareholders was necessary and fixed the amount thereof. Flynn v. American Banking, etc. Co. supra. That was after the expiration of the eighteen months during which claims [211] could have been presented against the estate of Bertha L. Libby. Nor was any demand, under said contingent liability, filed in the probate office within said eighteen months. But this action is brought, as provided for in said sec. 18, ch. 89, against the heir of Bertha L. Libby within one year after the decree of April 29, 1912, fixing the amount of the assessment.

Finally, the defendant says, that the decree of the court of April 29, 1912, authorized the receivers to collect the assessment of those persons only who were owners of stock of record on the first day of July, 1909, and therefore that the receivers have no authority to maintain this action against her, notwithstanding her liability for such assessment as the heir and distributee of her mother's estate.

We think such a construction of the decree is too narrow and limited. To sustain it would require a holding that the decree did not impose an assessment upon the whole capital stock of the trust company, for if by the decree the whole capital stock was assessed, then this suit is abundantly authorized by the last paragraph of the decree wherein the receivers were authorized and directed "to institute all necessary proceedings in law or in equity to collect the same and enforce this decree."

But we have already stated the opinion of the court to be that this decree reasonably construed, giving effect to all its parts, did

impose an assessment upon the whole capital stock of the trust company. And we need here only add that it appears from the decree itself that in the proceedings to liquidate the affairs of this banking corporation the court was called upon to determine the necessity for and the amount of an assessment upon the capital stock of the corporation to pay the claims of its depositors, and that it did judicially ascertain and expressly decree that "an assessment of one hundred per cent upon the whole capital stock . . . is necessary to be made to meet the claims of said depositors." Such determination and decree, we think, may reasonably be construed to be in effect such an assessment. No other construction would be consistent with the adjudged necessity in the premises, and the manifest purpose of the decree. It was clearly so intended by the Justice who signed it.

Moreover, it is expressly provided by sec. 86, ch. 48, R. S. amended by chapter 19, P. L. 1905, as hereinbefore quoted, that [212] whenever in liquidating the affairs of a trust and banking company "it appears" that its assets are not sufficient to pay its indebtedness "the receiver thereof, under proper orders of the court, shall proceed to enforce such individual liability of shareholders in any appropriate action at law or in equity, in his own name or in the name of the corporation for the benefit of the creditors." Under the provisions of this section the receivers in the case at bar were not only authorized but commanded to enforce the defendant's liability, under proper orders of the court, in any appropriate action at law or in equity. Considering the provisions of this statute in connection with the decree of April 29, 1912, it seems a reasonable conclusion that the receivers of the Waterville Trust Company were authorized to bring this action against the defendant.

Accordingly it is the opinion of the court that the plaintiffs are entitled to judgment against the defendant for $500 with interest from the date of the writ.

So ordered.

NOTE.

The reported case holds that the liability of a stockholder to a receiver of the corporation for an assessment on the stock may, after the death of the stockholder, be enforced against his personal representative, or if the estate has been fully administered, against the heirs. This holding is in accord with the earlier cases which are reviewed in the note to Douglass v. Loftus, Ann. Cas. 1913A 376.

PEOPLE

v.

KANE.

New York Court of Appeals—January 5, 1915.

213 N. Y. 260; 107 N. E. 655.

Homicide — Intent — Evidence Sufficient.

Evidence in a murder case held to make a question for jury whether the shooting was intentional or accidental.

Cause of Death — Supervening Cause.

Defendant was guilty of causing decedent's death, if his shooting her caused a miscarriage followed by blood poisoning, resulting in her death, notwithstanding any intervening medical negligence; it being only when the death is solely attributable to the secondary agency, and not at all induced by the primary one, that its intervention constitutes a defense.

[See note at end of this case.]

Dying Declarations — Foundation.

To make statements of deceased admissible as a dying declaration, preliminary questions to her as to anticipation of death should not be put in a perfunctory manner, as merely formal and unimportant, but so as to make sure that she understands them.

Same.

The rule, as to dying declarations, that it must be shown they were not made in answer to interrogatories calculated to lead deceased to make a particular statement, applies to the statements in regard to hope of recovery.

Appeal from Trial Term of Supreme Court, Kings county.

Criminal action. Robert Kane convicted of murder in first degree and appeals. The facts are stated in the opinion. AFFIRMED.

Edward J. Reilly for appellant.

James C. Cropsey, Ralph C. Hemstreet and *Hersey Egginton* for respondent.

[262] WILLARD BARTLETT, Ch. J.—On the afternoon of May 20th, 1914, at 35 Varick avenue in the borough of Brooklyn, the defendant inflicted two serious pistol-shot wounds on the body of Anna Klein, a young married woman about twenty-two years of age, who was then living with her grandmother at the house where the shooting occurred. Anna Klein was pregnant at the time. The evidence warranted the jury in finding, and their verdict shows they must have found, that the pistol-shot wounds inflicted by the defendant caused a miscarriage, the miscarriage caused septic peritonitis, and the septic peritonitis thus induced caused

Anna Klein's death on the third day after she was shot.

The defendant, who described his occupation as that of an engineer's assistant, was twenty-nine years old at this time, and had served as a first-class fireman in the United States navy. Upon leaving the navy, in 1911, he married a girl in New York, but left her at the end of their first week of marriage; and thereafter he appears to have lived with his wife only occasionally and for [263] comparatively brief periods of time. Anna Klein was also married but did not live with her husband. The defendant made her acquaintance while he was working for the Long Island Railroad Company at its freight station in Brooklyn, and illicit relations were soon established between them, and continued in St. Louis where they went to live. In 1913 they returned to Brooklyn, Anna Klein going to her mother's and the defendant rejoining his wife. Inspired by jealousy, the wife on one occasion attempted to shoot Anna, when the defendant, according to his account of the occurrence, tore the revolver from her hand and thus defeated her purpose. The defendant, nevertheless, was arrested for participation in the attempted assault by his wife, and was detained in jail eight days, when he was discharged, upon the refusal of the grand jury to indict him. It was the theory of the prosecution that the defendant regarded Anna Klein as largely responsible for his imprisonment on this occasion, and that this was one of the causes which led him to determine to kill her.

He did not return to work after thus being in custody, but, according to his own testimony given upon the trial, he spent his time roaming around and drinking, being disgusted and discouraged at the treatment he had received. Anna Klein's grandmother, at whose house the shooting took place, testified that the defendant came there on the night of the 16th of May, and that she "chased him out." She saw him subsequently on the same night asleep in front of a neighboring liquor saloon. He admits having purchased a revolver about a fortnight before the shooting, though he was unable to assign any reason for buying it.

The circumstances of the shooting were related by Anna Klein in her dying declaration as follows: "On Wednesday, May 20, Robert Kane was standing on the corner of Varick avenue and Harrison place in the saloon vestibule. About three o'clock when I saw him, Robert [264] Kane, standing there, I went back home, and told my grandmother that Robert Kane was there. Then I wanted to go out to my mother's, who lives at 31 Varick avenue. As I opened the door to go out into the street, Robert Kane opened the door at the same time. As soon as he got into the vestibule, he pulled out a gun from his pocket and says to me 'I want to speak to you.' I said, 'You can speak to me if you do not raise a disturbance.' So he said he wanted to talk to me in private and I then said, 'You can't. My grandmother and everybody else must be there.' He kept on talking that I could not call a policeman as I did the last time. My grandmother then came out and asked if he had a pistol. I said 'Yes' and my grandmother then went out and called my mother. My mother then chased him out of the vestibule. As he stepped out of the vestibule, he turned and fired four shots out of the vestibule. Three shots took effect. Robert Kane then walked to the saloon corner from where he came. I don't know what happened then. I then identified him as Robert Kane, the man who shot me."

This narrative of the tragedy was corroborated by the mother and grandmother, both of whom were eye-witnesses, and also by Mrs. Mary Meyer, of 31 Varick avenue, who went over with the mother to No. 35, when she learned that Robert Kane was there. This witness stated that he was standing "right close" to Anna Klein when he shot the first time, having hold of her elbow with his left hand. The mother testified he fired one shot at her daughter after she had fallen to the ground.

The defendant, testifying in his own behalf, declared that the shooting was all an accident; that, although he fired into the vestibule, he did not intend to kill anybody, but merely wanted to scare the persons there and keep them in, and thus prevent his own arrest.

The jury rejected this explanation of his conduct. In doing so they were doubtless influenced by the statements [265] made by him just after the shooting, in answer to questions by Assistant District Attorney Conway of Kings county at the Stagg Street police station. The defendant, after being fairly warned that anything he said might be used against him, identified his revolver as the weapon with which he had fired five times at Anna Klein on that day. The following are extracts from the stenographic transcript of his statement on that occasion:

"Question: That is the revolver you bought two weeks ago?

"Answer: Yes, sir.

"Question: Did you carry this revolver around with you for the last two weeks?

"Answer: Yes, sir.

"Question: You never left it at home?

"Answer: Yes, sir; I left it at home.

"Question: When did you put it in your pocket after you left it at home? Yesterday?

"Answer: This morning when I went out.

"Question: Did you tell your wife where you were going?

"Answer: Yes, sir.

"Question: What did you tell her?

"Answer: Told her I was going over to Jersey; to take that gun over to Jersey.

"Question: That was not true?

"Answer: No, sir.

"Question: What were you going to do?

"Answer: I was going to come over here to Brooklyn and shoot Anna Klein with it. . . .

"Question: What did you say to her before you shot her?

"Answer: I went in there and said 'I want to speak to you by yourself a minute.'

"Question: What did she say?

"Answer: She said, 'All right. Wait until I get my grandmother and grandfather out of here.'

[266] "Question: What did you say?

"Answer: I didn't say nothing; I just stayed there for a couple of minutes.

"Question: Then what happened?

"Answer: Then I saw the grandfather stick his head out of the window to call a cop, to have me arrested again and before I got arrested and go to jail for nothing, like I did the other time, I would do a good job and do something to go to jail for. . . .

"Question: What were you going to do with the five extra shells?

"Answer: I was going to use them if I had a chance to.

"Question: On whom?

"Answer: On anybody that got in front of me.

"Question: That is, on anybody that prevented you from escaping, from getting away?

"Answer: I do not know about that. I had them three shells and I had seven with the gun and I had five in my pocket. I do not know whether I would have used them or not.

"Question: When you told Anna Klein you wanted to speak to her for a minute, did you ask to see her alone?

"Answer: Yes, sir.

"Question: What was your idea in getting her to see you alone?

"Answer: I just wanted to speak to her.

"Question: Did you think you would have a better chance of getting away?

"Answer: No, if I wanted to kill anybody, I would kill them if there was a regiment around me.

"Question: That was the way you felt to-day?

"Answer: That was the way I felt, yes. I know what a man will get, if he commits murder.

"Question: What will be get?

"Answer: The electric chair.

"Question: You knew that before you shot her?

[267] "Answer: I read it enough in the newspapers to know that a man that commits a deliberate murder, he will get the electric chair.

"Question: You were willing to take that chance?

"Answer: Yes, I do not look for any sympathy whatever.

"Question: But you do not want to tell me why you shot her?

"Answer: I would not tell you that. You will do me a great favor if you do not try to make me."

At this point the assistant district attorney very properly ceased to inquire further, having already assured the witness that he was not required to answer any questions to which he objected.

It is true that when the defendant came to testify he denied having made some of the responses we have quoted which bore most strongly against him. He did not remember saying he was going to come over to Brooklyn and shoot Anna Klein; and he swore positively that he never had any such intention. According to his account of the occurences in the vestibule, Anna Klein readily assented to the interview which he desired, when her mother appeared on the scene—the grandfather and grandmother having retired into the background—and threatened the defendant with arrest, at the same time seizing him by the arm. She was about starting for a policeman when he shot into the vestibule "to scare them," as he said, and without intending to kill any one. He admitted having a faint recollection of being brought back to Anna when she was lying down but could not remember things thoroughly after that.

In this condition of the record, it was for the jury to determine which version of the occurrence was the true one—that given by the defendant on the witness stand or that presented by the case for the prosecution, including the inferences to be drawn from his admissions to the assistant district attorney, as recorded by the stenographer [268] at the time they are alleged to have been made. We cannot say that they were wrong in concluding that the latter represented the truth beyond all reasonable doubt.

The chief position assumed by the defense, however, upon the present appeal, as it was upon the trial, is that the defendant's shots were not proved to be the cause of Anna Klein's death. It matters not that the shooting was intentional and premeditated and deliberate, if it did not effect the death of the person shot. Of the five shots fired by the defendant three struck the deceased. One of the bullets merely came into contact with the skin without penetrating it, and that shot may be left out of consideration on this branch of the case. The second bullet lodged

in the back, three inches from the spine. The third entered the right arm, passed inward puncturing and fracturing the sixth rib, and lodged in the lower lobe of the right lung, where it was found. The wounded woman was taken to St. Catherine's Hospital in Brooklyn for treatment. She died there three days later, and the coroner's physician who performed the autopsy testified that the cause of her death was a pistol shot wound penetrating the lung and a septic peritonitis following an abortion (miscarriage). In behalf of the defendant it was insisted that the evidence failed to establish any causal connection between the wounds and the death; but that, on the contrary, it showed that death was due to the intervention of an outside agency, namely, negligent and improper medical and surgical treatment at the hospital.

This contention is based wholly on the testimony given by the medical witnesses and nurses called in behalf of the People, and the contents of the hospital charts. Soon after her arrival the patient complained of abdominal pains; at 2 o'clock the next morning vaginal bleeding was observed; and ergot appears to have been administered to check this. Counsel for the defendant attributes the miscarriage which followed to the action of this ergot; but no opinion evidence was adduced in support of his view in [269] this respect, and, on the other hand, Dr. George Bodkin, the assistant visiting surgeon connected with the hospital, gave opinion evidence to the effect that the miscarriage was caused by the shock of the shooting. "To begin with," this witness said, "the shooting, the bullet wounds, and the shock and fright attached to it or connected with it were, in my opinion, responsible for the miscarriage; the miscarriage resulted in a septic peritonitis; and the septic peritonitis resulted in her death." After the miscarriage, the uterus was packed with gauze to prevent further bleeding; and this procedure is bitterly denounced in the brief for the appellant, where it is asserted that the packing produced the septicæmia which proved fatal. The jury, however, could hardly be expected to adopt this view in the absence of any medical testimony to the effect that the septic condition was or could have been thus developed. Upon the evidence in the case such a finding would have been purely speculative.

As to this portion of the defense, which counsel contended reduced the charge to an attempt to commit murder, the learned trial judge instructed the jury as follows: "The defendant claims that he did not kill this girl. . . . That is a question of fact which the jury have to determine. I will say this to you, gentlemen: that if that shooting was the cause of a miscarriage and if the result of the miscarriage was death, even though there may have intervened some disease, like blood-poisoning, then, if that relation of cause and effect is traceable from the shooting of this girl right up to the point of her death, it caused her death in the eyes of the law. That is a question of fact. The responsibility of determining that question of fact rests upon you. . . . If the chain of cause and effect runs from the shots right up to the death, then, although there may have been subsidiary causes due to the pregnant condition of this woman, such as blood-poisoning resulting from a miscarriage which was produced by the [270] wound, then, even though those subsidiary causes existed, the defendant is responsible in the eyes of the law for all the consequences of his act. If the woman was pregnant and was peculiarly susceptible to injury from a gunshot wound, he cannot take refuge behind that. Of course, in order to find his responsibility, you must find that the gunshot wound caused her death. In other words, you must find, either that the gunshot wound directly caused her death or that the gunshot wound was the cause of the miscarriage and the miscarriage caused her death: if that relation of cause and effect existed then he is responsible for her death. . . . When one person wounds another in a part of the body in which the wound may result in serious injury, and death follows, it becomes a question of fact whether, under all the circumstances, the death is the result of that wound. I am going to leave that question to you, gentlemen."

In ruling upon the requests to charge the court consistently adhered to these instructions concerning the contention that death was due to a secondary intervening cause; so that if these instructions were correct no error was committed in dealing with this phase of the case.

We think they were correct. They accord with the uniform current of authority in those jurisdictions where the question has been passed upon, and enunciate the rule as derived by the leading text writers from such authoritative decisions.

If a felonious assault is operative as a cause of death, the causal co-operation of erroneous surgical or medical treatment does not relieve the assailant from liability for the homicide. It is only where the death is solely attributable to the secondary agency, and not at all induced by the primary one, that its intervention constitutes a defense. Thus, if the internes at St. Catherine's Hospital had carelessly killed Anna Klein by the negligent administration of a deadly poison, the defendant [271] would not have been liable for her death, though he would still have remained responsible for the assault; but he was liable for killing her, if the jury were satisfied, as they must have been, that

no matter what was done at the hospital, the pistol-shot wounds which he inflicted operated to cause her death.

That liability for homicide does not depend upon the death being the *immediate* consequence of the injury was clearly held in Cox v. People, 80 N. Y. 500, where it was contended that the deceased died from fright and not from the assault alleged in the indictment. The court charged the jury that "if the deceased died from fright, and if the fright was caused by the violence of the prisoner he is as responsible, and can as properly be convicted under this indictment of murder in the first degree as if the immediate result of his act was suffocation." This instruction was upheld by the Court of Appeals, which said, by Andrews, J.: "It was not necessary in order to convict the prisoner that it should appear that his actual personal violence was the sole and immediate cause of the death of the deceased. If his violence so excited the terror of the deceased that she died from the fright, and she would not have died except for the assault, then the prisoner's act was in law the cause of her death." (p. 515.)

The earliest consideration given by the courts in England to the negligent treatment of the wounded person as an excuse for one subsequently accused of homicide appears to have been in Rew's Case, (J. Kely. 26) in the reign of Charles II, wherein one Edward Rew was indicted for killing his brother, and upon the evidence it was resolved "that if one gives wounds to another who neglects the cure of them, or is disorderly, and doth not keep that rule which a person wounded should do; yet if he die it is murder or manslaughter, according as the case is in the person who gave the wounds, because if the wounds had not been, the man [272] had not died; and therefore neglect or disorder in the person who received the wounds, shall not excuse the person who gave them." This is in accordance with the rule as laid down by Hawkins: "But if a Person hurt by another die thereof within a Year and a Day, it is no Excuse for the other that he might have recovered if he had not neglected to take Care of himself." (Hawkins' Pleas of the Crown, bk. 1, ch. 13, § 10.)

The law of England as it exists to-day is thus stated in Lord Halsbury's elaborate work as follows: "If a dangerous wound is inflicted and death results, the person who inflicted the wound is criminally responsible for the death, although the person wounded neglected to use proper remedies; or refused to submit to a necessary operation; or died after such an operation which was carefully and properly performed. If a wound is given which is not in itself mortal or dangerous, but which from improper treatment becomes the cause of death, the person who gave the wound will not be criminally responsible for the death, *if it clearly appears that the death was caused by the improper treatment.*" (9 Halsbury's Laws of England, 572.)

Among the cases cited in support of this statement of the law is Reg. v. Holland, 2 M. & Rob. 351, which was tried before Maule, J., at the Liverpool assizes in 1841. The prisoner was indicted for murder by having inflicted divers mortal blows and wounds upon one Thomas Garland, including a cut upon one of his fingers. Garland refused to allow the finger to be amputated, although the attending surgeon advised him that he would imperil his life by his refusal. He eventually died of lockjaw. On the trial it was contended in behalf of the prisoner that the cause of death was not the wound which he had inflicted, but was the obstinate refusal of the deceased to submit to surgical treatment which would have averted the fatal result. Mr. Justice Maule, however, instructed the jury that if the prisoner willfully and without any [273] justification inflicted the wound which was ultimately the cause of death, the prisoner was guilty of murder; that for this purpose it made no difference whether the wound was in its own nature instantly mortal or whether it became the cause of death by reason of the deceased not having adopted the best mode of treatment, and that the real question was whether in the end the wound inflicted by the prisoner was the cause of death.

Where the wound or injury has contributed mediately or immediately to the death of the injured person and the injury was neglected or mismanaged, to warrant the escape of the person inflicting the injury from the responsibility for the killing, the subsequent neglect or mismanagement must have been the sole cause of death. (Wharton on Homicide [3d ed.] p. 41.)

In 2 Bishop on Criminal Law (§ 637 et seq.) it is stated: "Whenever a blow is inflicted under circumstances to render the party inflicting it criminally responsible if death follows, he will be deemed guilty of the homicide though the person beaten would have died from other causes, or would not have died from this one had not others operated with it; provided the blow really contributed either mediately or immediately to the death in a degree sufficient for the law's notice." (§ 637.)

"And the doctrine is established, that if the blow caused the death, it is sufficient, though the individual might have recovered had he used proper care himself; or submitted to a surgical operation, to which he refused submission; or had the surgeons treated the wound properly." (§ 638.)

"But where the wound is not of itself mortal, and the party dies in consequence solely of the improper treatment, not at all of the

wound, the result is otherwise. And it is the same if the wounded person becomes sick and dies of an independent disease, not connected with the wound, which was not mortal. But we should not suffer these propositions to carry us too far; because, in [274] law, if the person dies by the action of the wound, and by the medical or surgical action, jointly, the wound must clearly be regarded sufficiently a cause of the death." (§ 639.)

In Com. v. Hackett, 2 Allen (Mass.) 136, the defendant was convicted of murder of stabbing. He contended that the evidence showed that the wound of the deceased was unskillfully and improperly treated by the surgeons. Bigelow, Ch. J., after quoting from the English authorities, said: "The well established rule of the common law would seem to be, that if the wound was a dangerous wound, that is, calculated to endanger or destroy life, and death ensued therefrom, it is a sufficient proof of the offence of murder or manslaughter; and that the person who inflicted it is responsible, though it may appear that the deceased might have recovered if he had taken proper care of himself, or submitted to a surgical operation, or that unskillful or improper treatment aggravated the wound and contributed to the death, or that death was immediately caused by a surgical operation rendered necessary by the condition of the wound. The principle upon which this rule is founded is one of universal application and lies at the foundation of all our criminal jurisprudence. It is, that every person is to be held to contemplate and to be responsible for the natural consequences of his own acts. If a person inflicts a wound with a deadly weapon in such manner as to put life in jeopardy, and death follows as a consequence of this felonious and wicked act, it does not alter its nature or diminish its criminality to prove that other causes cooperated in producing the fatal result. Indeed, it may be said that neglect of the wound or its unskillful and improper treatment, which were of themselves consequences of the criminal act, which might naturally follow in any case, must in law be deemed to have been among those which were in contemplation of the guilty party, and for which he is to be held responsible."

[275] In State v. Bantley, 44 Conn. 537, 26 Am. Rep. 486, the defendant inflicted a gunshot wound upon the deceased, who died eleven days thereafter of lockjaw. There was evidence of mismanagement or carelessness on the part of the attending physicians. Again the court, after citing many of the same authorities cited in the Hackett Case (supra), deduces the following rule: "If one person inflicts upon another a dangerous wound, one that is calculated to endanger and destroy life, and death ensues therefrom within a year and a day, it is sufficient proof of the offence either of manslaughter or murder, as the case may be; and he is none the less responsible for the result though it may appear that the deceased might have recovered if he had taken proper care of himself, or that unskillful or improper treatment aggravated the wound and contributed to his death."

In Com. v. Eisenhower, 181 Pa. St. 470, 37 Atl. 521, 59 Am. St. Rep. 670, the killing was by shooting and there was evidence in the case that the attending surgeon treated the wound by means of a drainage tube which found its way into the spinal cord and thus caused death. The trial court in referring to this said: "But suppose it did, the prisoner cannot escape by showing that death was the result of an accident occurring in an operation which his felonious act made necessary. There is no pretense that the drainage tubes were not required or that they were improperly placed." This instruction was declared by the Supreme Court of Pennsylvania to be clearly correct.

In State v. Wood, 112 Ia. 411, 84 N. W. 520, the defendant was convicted of manslaughter for having committed homicide by means of an assault upon his victim with his fists and feet, inflicting mortal wounds of which the victim died. The latter had improved under medical treatment at first but subsequently empyema set in resulting in his death. The appellant insisted that the evidence tended to show that but for mismanagement on the part of the physician he might have recovered, and that the jury [276] should have been instructed, if they so found, that the accused could not be convicted of manslaughter. The Supreme Court of Iowa approved the rule applicable to such a case as thus stated by Greenleaf: "If death ensues from a wound given in malice, but not, in its nature, mortal, but which, being neglected or mismanaged, the party died, this will not excuse the prisoner who gave it." (3 Greenleaf on Evidence, § 139.) The court goes on to say: "The true reason for not allowing the defence is that the wound inflicted, though it may not have been the only cause, yet contributed, mediately or intermediately, to the death of the person assaulted. To warrant escape from the responsibility for the killing, the subsequent mismanagement or neglect must have been the sole cause of death. No principle is better settled than that he who, by his wrongful act, accelerates or hastens death, or contributes to its cause, is guilty of homicide; and whether this be murder or manslaughter necessarily depends on the intent or motive by which the person making it was actuated. The court rightly instructed that, if the injuries inflicted by the defendant directly con-

tributed to produce empyema causing death, he was guilty of taking the life of the deceased; if these did not so contribute, he could not be convicted of murder or manslaughter."

In State v. Strong, 153 Mo. 548, 55 S. W. 78, the wound was inflicted with a knife. An instruction by the trial court was approved which was to the effect that the jury might find the defendant guilty "notwithstanding you may also find and believe the testimony that unskilled medical treatment aggravated such wound and that deceased might have recovered if greater care and skill had been employed in treating him."

Further illustrations of the general rule as it has been stated may be found in People v. Cook, 39 Mich. 236, 33 Am. Rep. 380; Kelley v. State, 53 Ind. 311; Downing v. State, 114 Ga. 30, 39 S. E. 927; Daughdrill v. State, 113 Ala. 7, 34, 21 So. 378; State v. Foote, [277] 58 S. C. 218, 36 S. E. 551; Clark v. Com. 90 Va. 360, 18 S. E. 360, and Coffman v. Com. 10 Bush (Ky.) 495.

The instructions given to the jury by the learned trial judge on this phase of the case before us being in strict accordance with the settled law and the evidence being sufficient to warrant the finding that the wounds inflicted by the defendant operated as causes of death even though the medical treatment may also have had some causative influence, the record discloses no error in this respect.

The only other point which requires notice refers to the admission of the dying declaration of Anna Klein, taken by the coroner.

It appears from the evidence in the present case, and from the records in several other capital cases which have recently come before us, that a new custom has come into vogue among coroners in reference to dying declarations of victims of crime. A printed form is prepared by these officers for use in obtaining such declarations upon which the first question is: "Do you now believe that you are about to die?" Then follow these questions:

"Question: Have you any hope of recovery from the effects of the injury that you have received?"

"Question: Are you willing to make a true statement as to how and in what manner you came by the injury from which you are now suffering?"

This method of interrogation by reference to printed questions is not necessarily objectionable in itself provided the questions are put, not in a perfunctory manner, but in such a way as to impress the injured person with their true character and meaning. On the other hand, if the initial inquiry in reference to the patient's apprehension of death is slurred over and we have nothing but a careless assent, perhaps expressed only by a nod to the question, whether the patient now believes that he is about to die, there is an utter absence of the clear and unequivocal expression of the certain conviction of impending death which the law has always demanded as [278] an essential prerequisite to the admission of unsworn declarations of fact which may be used to deprive a human being of his life. We do not say that the necessary emphasis was lacking in the present case. On the contrary, if those who testified to the dying declaration here may be believed the victim declared in express words that she felt she would die and that she had no hope of recovery from the effects of the injury which she had received. These statements afforded ample ground for the reception of the statement which followed as to the circumstances of the fatal shooting. We deem it proper, however, to call attention to the untoward effects which may follow the use of printed forms, such as we have mentioned, unless extreme care is taken by the interlocutor to impress upon the wounded person the character of the preliminary inquiries relating to the anticipation of death. As we have already intimated, if these are treated as merely formal and unimportant, without taking any pains to make sure that the injured person understands them, the safeguard which the law exacts in such cases may be entirely wanting—in the absence of certainty that the patient looks upon death as an inevitable consequence of the injury and will, therefore, be as likely to tell the truth under the influence of that apprehension as he would be under the sanction of an oath calling God to witness that what he is about to say is true. In the case at bar the coroner who took the dying declaration, after testifying that he had a printed form and he took the questions from that form, said he had used as many as twenty of them for the purpose of taking dying declarations within the six months preceding the trial. His habit was to take the printed slip containing five printed questions out of his pocket and put the questions to the patient just as they were on the slip. It can readily be understood that a practice of this kind will be likely to degenerate into a mere perfunctory form; and we deem it proper to refer [279] to the matter in this way as a warning to those whose duties may call upon them to attend dying victims of crime. The precautions which the law prescribes to insure the existence of a state of mind on the part of the declarant which will be equivalent to the state of mind produced by the administration of a solemn oath, cannot be too carefully observed. If they are disregarded in the slightest degree the evidentiary value of the declaration is wholly destroyed.

In several of the states of the Union the reception in criminal cases of dying declara-

tions made under a sense of impending death, is regulated by statute. The Texas statute prescribes that in order to render declarations of the deceased competent evidence, it must be proved, among other things, that the declaration was not made in answer to interrogatories calculated to lead the deceased to make any particular statement. (Texas Code Crim. Pro. 1895, § 788.) This is doubtless the rule independent of any statutory enactment; and it applies to the statements of the wounded person in regard to his hope of recovery just as much as to his statement respecting the identity of his assailant.

We find no error of law or fact in this case which calls for a reversal of the judgment. There was ample evidence of an intent to kill; the necessary premeditation and deliberation could well be found by the jury; and whether the treatment that the wounded woman received at the hospital was all that it should have been or not, the conclusion that the pistol-shot wounds inflicted by the defendant were the cause of her death was warranted by the proof and we cannot say that it was wrong.

The judgment of conviction should be affirmed.

Werner, Chase, Collin, Hogan, Miller and Cardozo, JJ., concur.

Judgment of conviction affirmed.

NOTE.

Fact that Death Resulted from Supervening Cause as Defense to Charge of Homicide.

Treatment of Wounds, 692.
Disease Caused by Wounds, 693.
Perilous Condition Created by Accused, 693.
Independent Supervening Cause, 694.

Treatment of Wounds.

The recent cases are in accord with the holding in Hamblin v. State, 81 Neb. 148, 16 Ann. Cas. 569, that where a person inflicts on another wounds which are dangerous or calculated to cause death, under circumstances rendering the person inflicting the wounds criminally guilty therefor, erroneous treatment of the wound or of the wounded person suffering from it, which merely contributes to the death, will afford no protection against a charge of unlawful homicide. Johnson v. State, 64 Fla. 318, 59 So. 894; Allen v. State, 133 Ga. 260, 65 S. E. 431; Perdue v. State, 135 Ga. 277, 69 S. E. 184; Quinn v. State, 106 Miss. 844, 64 So. 738. And see the reported case. Thus in Johnson v. State, supra, wherein it was contended by the defendant that the life of the deceased who had been cut in the abdomen, might have been saved by proper surgery, the court said that one cannot escape the penalties for an act which in point of fact produces death, though the death might possibly have been averted by some possible mode of treatment. In Quinn v. State, 106 Miss. 844, 64 So. 738, it appeared that the deceased was struck by the defendant on the head with an empty whisky bottle, fracturing his skull. He contracted pneumonia and died some two months after the wound was inflicted. It was maintained that he had not received proper medical treatment. The court said: "It is undoubtedly the law that, if death results from the combined effect of a wound inflicted with malice and of a disease disconnected from the wound the person inflicting the wound is guilty of murder."

But where a person inflicts on another a wound, not of itself mortal or calculated to produce death, and the injured person dies solely because of improper treatment of the wound, the fact that death so results is a good defense to a charge of homicide. State v. Morahan, 7 Penn. (Del.) 494, 77 Atl. 488; Tibbs v. Com. 138 Ky. 558, 128 S. W. 871; Quinn v. State, 106 Miss. 844, 64 So. 738; McMillan v. State, 58 Tex. Crim. 525, 126 S. W. 875. And see the reported case. Thus in Quinn v. State, supra, the court said the law was that if the wound was not "in its nature mortal, and death results solely from an entirely independent cause, the person inflicting the wound cannot be held responsible for the death." And in McMillan v. State, 58 Tex. Crim. 525, 126 S. W. 875, the same rule was affirmed, the court saying: "Appellant was entitled to have the jury instructed as requested by him, that if the death of deceased was brought about by improper treatment or gross neglect of the physicians, he would not be guilty of the homicide. The evidence, even as briefly stated in the foregoing portion of the opinion, suggests that it may have been the improper treatment that brought about the peritonitis which resulted fatally. It was an issue before the jury on the facts sharply drawn and strongly presented."

Where a wound is apparently mortal, and a surgical operation is performed in a proper manner, under circumstances which render it necessary, in the opinion of competent surgeons, though the operation is itself the immediate cause of the death the person who inflicted the wound will be responsible. People v. Williams, 27 Cal. App. 397, 149 Pac. 768; State v. Gabriella, 163 Ia. 297, 144 N. W. 9; McCoy v. Com. 149 Ky. 447, 149 S. W. 903; Odeneal v. State, 128 Tenn. 60, 157 S. W. 419. Thus in People v. Williams, supra, wherein it appeared that the death of a person feloniously shot was due to the shock

of the wound and of the operation for the removal of the bullet, it was held that the wound was the primary cause. The court said that "it was immaterial to know, and therefore the trial court rightfully refused to permit the defendant to show, whether or not the deceased would have survived the shock of the wound in the absence of naturally resulting complications." In State v. Gabriella, 163 Ia. 297, 144 N. W. 9, it appeared that immediately after a shooting the victim was taken to a hospital where he was operated on with a view of improving his condition and saving his life. The trial judge rejected evidence offered by the defendant "to show that the operation was not performed in a manner that a reasonably prudent doctor would perform the same." Affirming a judgment of conviction for manslaughter the court said: "There is no claim that Turso had recovered from his wound at the time of the operation, nor that there was any evil intent in the performance of the operation, nor that it was performed for any other purpose than in a good-faith attempt to save the life of the patient. Lack of skill or bad judgment or mere negligence in any form on the part of the surgeon will not avail the slayer to protect him against the final consequences of his wrongful act." So in Odeneal v. State, 128 Tenn. 60, 157 S. W. 419, the court said: "One who unlawfully inflicts a dangerous wound upon another is held for the consequences flowing from such injury, whether the sequence be direct or through the operation of intermediate agencies dependent upon and arising out of the original cause. One of these dependent occurrences is the necessity of surgical aid, which may eventuate as the immediate cause of death. Surgical aid must be employed, with the attendant risks. Surgeons are not infallible. They are required to have and exercise only reasonable skill, measured by the rules of their art or profession. When the accused inflicts the injury that necessitates the operation, he is held to assume the risk attendant on it. Much is required before the surgeons can be substituted for the defendant."

The recent cases are agreed that the failure of a person feloniously wounded to procure treatment for his wounds, or improper conduct on his part aggravating his injuries, is no defense to a charge of homicide against the person causing the wounds. State v. Morahan, 7 Penn. (Del.) 494, 77 Atl. 488; Hollywood v. State, 19 Wyo. 493, 120 Pac. 471, *rehearing denied* 19 Wyo. 522, 122 Pac. 588. In the case last cited, wherein it was contended that the deceased by the use of opium caused hypostatic pneumonia to set in, the court said: "The use of opium or morphine by the deceased was not a defense, even though it may have contributed to the death of deceased, unless it was the sole cause of the death, or that death resulted from the use of morphine as a cause independent and distinct from the wound."

Disease Caused by Wounds.

The recent cases are in accord in holding that where a person wounds another, and death occurs from a disease which can be directly traced to the wound, the person inflicting the injuries is liable to the same extent as though the wound had caused the death. Dumas v. State, 159 Ala. 42, 49 So. 224, 133 Am. St. Rep. 17 (blood poisoning); State v. Block, 87 Conn. 573, 89 Atl. 167, 49 L.R.A.(N.S.) 913 (delirium tremens); State v. Harmon (Del.) 92 Atl. 853 (lockjaw); Clements v. State, 141 Ga. 667, 81 S. E. 1117 (blood poisoning); State v. James, 123 Minn. 487, 144 N. W. 216 (pneumonia); Terrell v. State, 10 Okla. Crim. 488, 138 Pac. 1039 (blood clots in heart); Paschal v. State (Tex.) 174 S. W. 1057 (lepto meningitis). Thus in State v. Harmon, supra, the court said that "if the lockjaw which it is alleged was the direct cause of Rickits' death resulted from the knife wounds inflicted by the prisoner, then the death was caused by said wounds." And in Dumas v. State, 159 Ala. 42, 49 So. 224, 133 Am. St. Rep. 17, wherein it appeared that blood poisoning set in and death resulted from the wound inflicted, it was held that the defendant could not minimize his criminal act by showing that the wounds were at first trifling and that the victim was so diseased as to become infected more readily with blood poison. So in State v. Block, 87 Conn. 573, 89 Atl. 167, 49 L.R.A.(N.S.) 913, it appeared that deceased while being driven in an automobile at a dangerous and reckless rate of speed by the defendant was thrown therefrom. The deceased was suffering from an alcoholic brain and delirium tremens ensued from the fall. It was held that the fall was the legal cause of his death. The court said: "The judge in the present case told the jury, in substance, that it was sufficient if they found from the evidence that the injuries received by Gilbert in his fall from the automobile caused delirium tremens, which caused his death, and that the delirium tremens would not have occurred and caused his death if the wounds received from the fall had not been received. These instructions are in conformity with the principles of law above indicated."

Perilous Condition Created by Accused.

It has been held recently that where a person by the use of force, applied either to the body or mind, compels another person to do that which causes his death, he is as

much responsible for the death as though he had caused it with his own hands. Rex v. Hayward, 21 Cox C. C. (Eng.) 692; State v. Angelina, 73 W. Va. 146, 80 S. E. 141, 51 L.R.A.(N.S.) 877. In the case first cited it appeared that the death of a wife was due to physical exertion and fright on her part caused by the violent conduct of her husband. The court held that the evidence was sufficient to support a conviction for manslaughter and that proof of actual physical violence was not necessary. And in State v. Angelina, supra, it appeared that the defendant inflicted a mortal wound on the deceased who within a minute and a half thereafter shot himself in the head from which wounds he died in about twenty minutes. The court said: "On the evidence before the jury at the trial, the proper theory of the state's instructions should have been a mortal wound by defendant, and that the self-inflicted injury by deceased, though it may have been the proximate cause of death, was not the act of an intervening responsible agent, but of one rendered irresponsible by the wound inflicted by defendant, and as the natural result of that wound, the causing cause of the immediate death of deceased."

Independent Supervening Cause.

Where it appears that the act of the accused was not the proximate cause of the death of the person for whose murder he is being prosecuted, but that another cause intervened, with which he was in no way connected, and but for which death would not have occurred, the supervening cause is a good defense to the charge of homicide. See State v. Angelina, 73 W. Va. 146, 80 S. E. 141, 51 L.R.A.(N.S.) 877. *Compare* Henderson v. State, 11 Ala. App. 37, 65 So. 721. In the case first cited, the court said that the well established rule or principle of homicide was that "if after a mortal blow or wound is inflicted by one person another independent responsible agent in no way connected in causal relation with the first, intervenes and wrongfully inflicts another injury, the proximate cause of the homicide, the latter and not the former is guilty of the murder."

But in Henderson v. State, 11 Ala. App. 37, 65 So. 721, it appeared that the deceased was first stabbed by the defendant, and then shot by his son, dying shortly thereafter. Affirming a conviction of murder in the second degree the court said: "Under the law, if the jury believe from the evidence beyond a reasonable doubt that the knife wound inflicted by the defendant contributed to the death of deceased, then defendant would be guilty of the homicide, notwithstanding the jury may not have believed that death would have inevitably followed from such knife wound alone, and notwithstanding they may not have believed that there was any preconcert or community of purpose between defendant and his son."

SOTHAM

v.

MACOMBER ET AL.

Michigan Supreme Court—April 7, 1914.

180 Mich. 120; 146 N. W. 674.

Brokers — Right to Compensation — Ability of Purchaser.

A person, employed to arrange for, advertise, and conduct an auction sale of lands, whether called a sales manager, with a salary and expenses and a right to one-half the net profits or a broker, cannot recover, unless there is a sale or the production of some one able and willing to purchase according to the terms previously agreed upon between him and the owners or on terms agreeable to the owners; and hence, in an action for compensation, evidence as to the pecuniary responsibility of one to whom the property was struck off, but who was never in a position to buy the land, is properly received.

[See 139 Am. St. Rep. 250; 4 R. C. L. tit. *Brokers*, p. 309.]

Witnesses — Confidential Communications — Stenographer.

In an action for compensation under a contract to arrange for, advertise, and conduct an auction sale of lands for an agreed price and expenses, the testimony of a stenographer, employed to assist plaintiff and paid out of the expense fund which came out of the proceeds of sales, concerning matters taken from plaintiff's books, is not privileged, as she owed no duty to plaintiff that she did not owe to defendants, and neither she nor plaintiff had any right to withhold information from defendants.

[See note at end of this case.]

Error to Circuit Court, Montcalm county: DAVIS, Judge.

Action to recover commissions. Thomas F. B. Sotham, plaintiff, and Esther Macomber et al., defendants. Judgment for plaintiff for less than amount claimed. Plaintiff brings error. The facts are stated in the opinion. AFFIRMED.

Laurence W. Smith for plaintiff in error.

N. O. Griswold and *S. F. Kennedy* for defendant in error.

[121] MOORE, J.—This action is brought to recover commissions claimed to have been earned by the plaintiff on the sale of various parcels of land in and about Lakeview, Montcalm county, Mich.; some of the sales being consummated and others, it is claimed, being defeated by the actions of the vendors. It is also sought to recover a percentage of the cost of conducting the sale.

The firm of Macomber & Bale owned many thousands of acres of wild and improved lands in and around Lakeview. Mr. Macomber died, and his wife, Esther Macomber, as executrix, and Charles M. Miller, as executor, with the will annexed, assumed the administration of his estate.

It is claimed by plaintiff as follows:

"That plaintiff should undertake to sell all the lands defendants owned about Lakeview.

"He was to arrange for, advertise, and conduct the auction sale of these lands, and was to receive the sum of $1,000 and his expenses in any event. A list price was placed on each lot, and in the event that the total sales amounted to more than the list plus the expenses of sale, including $1,000 for plaintiff, then and in that case such excess was to be equally divided between plaintiff and the defendants; the plaintiff receiving one-half. All expenses were to be borne by the defendants. . . .

[122] "It is claimed by the plaintiff that certain village property was put into the sale in the disposal of which he was to have no interest, except that these lots were to bear their *pro rata* of the general sale expense, which, in the event of a surplus, would inure one-half to his benefit."

This claim is not admitted by the defendants.

"The plaintiff claims also for the repairs necessarily made to his automobile, for parts and tires worn out in the sale service."

This claim is not admitted by defendants.

After the arrangement was made, an elaborate illustrated catalogue of 90 pages, containing maps, landscape views, pictures of State and other buildings, advertising for sale 111 tracts of land at auction, which was to be held September 6th, 7th, and 8th, and October 4th, 5th, and 6th, was published and freely circulated. This catalogue advertised special low-rate, round-trip excursion rates. The announcement was signed as follows:

"Lakeview, Michigan, July 15th, 1911.

"Estate of Allen Macomber, Deceased.
"Esther Macomber, Administratrix.
"Charles M. Miller, Administrator.
"Macomber & Bale.
"John J. Bale.
"Sotham & Sons Land Co.
"Carey M. Jones, Auctioneer.
"T. F. B. Sotham, Sale Manager."

At the close of the catalogue were printed 12 rules and regulations in relation to the sale. The following of which are important in this litigation:

"Rule IV.—Deposit. Whenever the auctioneer shall declare any lot (subdivision of lot, or combination of lots) sold, the buyer or buyers thereof shall forthwith deposit at least ten per cent. of the purchase price with the clerk of the sale as a first payment. Such deposits may be made in currency, bank draft, certificate of deposit or certified check, endorsed to the [123] satisfaction of the clerk. In event any buyer should fail or neglect to satisfactorily settle such first payment, the auctioneer may declare sale void and thereafter resell the premises in question."

"Rule IX.—Terms: *Cash or its equivalent.* Half cash with mortgage on land purchased to secure payment of balance will be deemed the same as all cash. Earnest, capable, honest workers desiring to buy on smaller cash payments will be accommodated, but before bidding should arrange for credit with the sale manager. Such sales will be covered by contract. Interest on all deferred payments will be at the rate of six per cent. per annum. Time to suit purchaser within 5-year limit unless otherwise agreed.

"Rule X.—Settlements. The right is reserved to the vendors to declare off any sale or sales not satisfatorily settled for within ten days from date of such sale and to declare any payment or payments under Rule IV forfeited thereafter.

"Rule XI.—Commissions. One commission, of one dollar ($1.00) per acre, on each lot or subdivision of lot sold and satisfactorily settled for, will be paid land agents who comply with the following conditions. Said land agent must attend sale in person. . . . Such names must be filed at least twenty-four hours prior to clients' purchase at sale; otherwise the agent will forfeit any commission rights that could accrue hereunder.

"XII. Any and all statements, offers, bids, sales, payments or settlements made by buyer, seller or agents of either, at these auctions are subject to these rules. The right to interpret these rules is strictly reserved to and in the vendors."

Part of the lands were sold and part were not. The parties to this litigation could not agree as to the compensation due the plaintiff, and this suit was commenced by summons, followed later by a declaration on all the common counts in assumpsit. This was followed by a bill of particulars for "commission due as per contracts earned on the following pieces of real estate." Then followed the lot numbers and the expense account. The case was put at issue, and early in the trial the respective counsel made concessions [124] that simplified the issues. It was conceded

by defendants that the profits on the land sold were $5,485, less the expenses incurred, which, including $1,000 for plaintiff's salary, amounted to $5,062.32, and that if the lands sold on contract were to be counted as though sold for cash, there was due plaintiff $234.13. This made no allowance for automobile repairs, salaries to the sons of plaintiff for acting as chauffeurs, or for the making of a map; it being the claim of defendants that plaintiff was not entitled to any allowances on these claims, except for the map, and as to that the parties could not agree as to the amount.

The trial judge submitted these two claims to the jury, who returned a verdict of $25 for the map, and $300 for chauffeurs' salaries and automobile repairs, and a verdict and judgment were entered in favor of the plaintiff for $500.25. The defendants have not appealed. The plaintiff has brought the case here by writ of error.

The first question we will consider is whether the jury should have been allowed to assess some damages because certain village properties should have borne their *pro rata* share of the general sale expense. It was the claim of defendants that these lands were put in the catalogue, at the request of plaintiff, for advertising purposes only, and that plaintiff's claim that they should bear part of the expense was untenable. The court was of the opinion that in any event there was no showing which would warrant an intelligent apportionment *pro rata* of these expenses. Counsel does not suggest in his brief whether it should be upon the basis of values, or acreage, or number of lots. We agree with the judge that there is no basis for intelligently arriving at an amount for this purpose.

The special grievance of the plaintiff is that the court decided, as a matter of law, that he was not [125] entitled to compensation as to various lots of land, where no sale was, in fact, made. It will not be necessary to discuss in this opinion each lot which was offered for sale, and struck off to a bidder, as is done by counsel in their brief. We will take up the most important items, and the ones most favorable to the claim of plaintiff. Those are lot 6 and lot 7.

We now quote from the brief:

"Lot 6 was struck off to Hiley Warner at $22,000 and sold to him. Lot 7 was struck off to the same buyer at $1,800, making a total of $23,800. Before the bidding started, Bale and plaintiff urged Warner to bid. Warner told them he couldn't comply with the rule as to 1 per cent. down, and defendant Bale told him to bid, and he would take care of him, give him time on the 10 per cent. and on the balance. Warner told him he thought he could interest other parties in it. It was struck off to him in the presence of defendants Bale and Miller.

"Bale told Warner that whatever arrangement he made with Sotham as to time was all right with him. Sotham told him he could have 20 days on the 10 per cent., and 90 days or longer on the balance, to be half cash and half mortgage or all cash. Accordingly Warner gave a check due in 20 days, which satisfied Sotham and Bale, but not defendant Miller, and one due in 10 days was substituted.

"Warner interested Meade, Sandell, Lambertson, and Chappell in the deal, and they agreed to finance him and give him one-fifth of the profits. Warner told Bale he had interested Lambertson and Chappell, and that they would back him. Then Sotham sent Exhibit 19 to Warner and to the bank at which the check was payable, attempting to change the terms and get the balance above the 10 per cent. in cash on the same day the check was due.

"Sotham and the vendors went to Belding the day the check was due, and met Warner and his people. The Belding people objected to the change in terms, and offered to pay the 10 per cent. check of $2,380 that day, and to bind themselves to pay the rest within 30 days, reserving the right to give a mortgage of $12,000. This was agreed to by all parties. Then [126] the dispute arose over the form by which this agreement should be set forth. Defendant Miller wanted a bond to guarantee payment of Warner's bid, and would not sign a land contract setting forth the agreement that was reached, on the advice of his attorney. The check was not protested until after the Belding meeting. At that time they were ready to pay it. The financial ability of the Belding parties up to the $12,000 to be covered by mortgage was conceded on the trial.

"After this deal fell through, Sotham readvertised lots 1 to 7 for the October auction in his circular of September 23d, but they were not offered in that auction. . . .

"The first assignment of error relates to the court's allowing the witness Warner to answer the folowing question: 'Q. What property did you have in September, 1911?' (the time of the sale). Unless the test of our performance is the buyer's ability at the time of the sale to pay the purchase price, the question was immaterial, and the answer should not have been received. Under the agreement as to the conduct of the sale, the vendors—that is, the defendants—were to pass on all credits. This would necessarily negative the idea of any guaranty on the part of the plaintiff of the financial ability of any purchaser. Nowhere in the correspondence is any such idea hinted at. In this connection let it be noted from a reading of Exhibit 6, which forms the basis of the agreement, that plaintiff was bound only as a sale manager, and is not held as strictly as a broker would

be. His duty consisted in working out a plan and putting it through. He was to run the sale and advertise it. He lacked many characteristics of a broker. But, even if he is considered as a broker, without an agreement on his part to guarantee the financial ability of a buyer, such ability or inability is immaterial in an action for commissions.

"Before citing authorities on this proposition, I desire to call the court's attention to another matter directly connected with it, viz., that, where a purhaser is presented who is ready and willing to sign a contract in compliance with his offer, the failure of the vendor to require such a contract is no defense to an action for commissions if the sale falls through, [127] and to argue from that the proposition demonstrated by the cases that where buyer and seller enter into a contract of sale, the agent's commissions are not thereafter defeated by the financial inability of the purchaser to perform. Consequently it is our claim in this case, under this assignment, that Warner is to be treated as having entered into a binding contract to buy, and his financial ability to carry that out being immaterial, the question and answer excepted to should not have been received."

The defendants do not admit the truth of the statements of counsel as we have stated them, but it may be safely assumed counsel will make as favorable a claim for his client as the record will warrant.

The foregoing claim raises the pivotal questions in the case. Mr. Warner testified as to the extent of his property. When he gave the check referred to, he had not to exceed $100 in the bank. He had some horses and other personal property, all of which was chattel mortgaged. Exhibit 19 referred to in the brief of counsel for appellant, which we have quoted, reads:

"Lakeview, Mich., Sept. 7, 1911.

"Hiley Warner, Orleans, Mich., to Macomber & Bale, Dr. to lots 1, 2, 3, 4, 5, 6, and 7 of land catalogue, $23,800.00. Due this day according to Rule 4 of the sale rules and regulations, a deposit of ten per cent., or $2,380.00, for which, purely as an accommodation to Mr. Warner, he was allowed to deposit a ten-day check, due on or before September 18, 1911. The balance of purchase price, $21,420.00, to be paid in cash on or before September 21, 1911, at the Farmers' & Merchants' State bank of Lakeview, Michigan.

"N. B. Should the ten-day check for $2,380 not be paid on presentation September 18, 1911, the sale will be declared off, and bill rendered for such damages as may have been done. Should the check for $2,380 be paid on September 18, 1911, as agreed the said $2,380 will be held as a deposit under Rule 4, and forfeited as liquidated damages in event the balance of $21,420 is not paid in cash or its equivalent on the date and in the manner hereinbefore provided."

[128] This exhibit was prepared and sent by the plaintiff, indicating his understanding of the situation. Notwithstanding the impecunious condition of Mr. Warner, the defendants were willing that he should have the benefit of his bid, if he could get the Belding parties to do what it was his duty to do, if the bid was to remain good, and the defendants and Mr. Sotham went to Belding to see what could be done.

The plaintiff claims an agreement was made by all the parties at Belding, and cites the testimony of the attorney, Mr. Hubbell. This witness, after testifying to the conferences held by the parties, and to drawing a contract which was satisfactory to his clients, and to the production by Mr. Miller of papers drawn by the attorney for defendant, closed his testimony as follows:

"Q. They four didn't get together and agree it was what they wanted and that they would sign it, did they? A. Oh, no; the two sides didn't get together upon it."

The conference ended without the parties being able to get together, and later the $2,380 check given by Mr. Warner went to protest.

Following the Belding conference Mr. Sotham prepared and circulated in large quantities a circular letter reading in part as follows:

"Lakeview, Michigan.

"Closing Session. Grand Wind-up.
"Wednesday, Thursday and Friday, October 4th, 5th, and 6th, 1911.

"T. F. B. Sotham, Sale Manager.

"Lakeview, Mich., Sept. 23d, 1911.

"Dear Sir:

"Since last writing we 'woke up' and got busy adding attractive land bargains to those (lots 56 to 111 of catalog) originally set apart for the closing session Oct. 4, 5, and 6 of our Lakeview land auctions. . . .

"Having revived somewhat from the disappointing [129] shock of low prices at the September auction, and adjusted ourselves to the situation, we saw that at the sale prices the lands we had sold were yet the very cheapest really first-class lands in Michigan. . . . Again, certain other buyers were disappointed in their money arrangements, and while the vendors will aid our customers in every consistent way and will not crawfish on any sale, no matter how absurdly low the price, it is obvious that they cannot be cut off from the right to reoffer in our October auction any September lot not settled for.

"Therefore, kindly take notice that in addition to lots 17 and 21 (passed) we will be able to reoffer lots 6, 7, 22, 36, 37 and 38 in our October auction. You will see by the catalog that lot 6 is the celebrated Macomber & Bale home farm made up of lots 1, 2, 3, 4,

and 5. . . . Now, if you missed coming to the September sale remember that we have these lots where you can get another chance at them. . . .

[Signed] "Sotham & Sons Land Co.,
"By T. F. B. Sotham."

The auction sale in October was held, but these lands found no purchaser, and had not been sold at the time of the trial. It is not very important in what way Mr. Sotham is characterized in this transaction, whether he is called sales manager, with a salary and expenses, with the right to one-half the net profits, or whether he is called a real estate broker; in either event he must show either a sale or the production of some one able and willing to purchase according to the terms fixed in the contract between him and the vendors, or to take the property upon terms agreeable to himself and the vendors.

As bearing upon the last of these two propositions, it was entirely proper to inquire into the pecuniary responsibility of Mr. Warner, who was the bidder, and to whom the property was struck off. The record shows beyond any question that Mr. Warner was never in a position to buy the lands; that Belding parties were never present at the sale; and that [130] though a conference was had with them at Belding, they and the vendors were not able to get together; and that nothing came of the extensive and expensive advertising, so far as securing a sale of these lands is concerned. The result of the ruling of the trial judge is that the plaintiff has been given a judgment for the balance due upon his share of the profits of all sales made, whether payment was made in cash, or partly in cash and partly upon land contract.

One other assignment requires attention. We again quote from the brief:

"13. This relates to permitting Miss Conant, the stenographer furnished the plaintiff, to testify in relation to Exhibit 43, the list she took from plaintiff's book of the list prices, the plaintiff claiming the communication is privileged. As appears on pages 8 and 9 of the record, in plaintiff's bill of particulars, Miss Conant's salary was a sale expense to which plaintiff contributed from the surplus. She was therefore as much his stenographer as the defendants'. . . .

"We submit that this communication, or, rather, this taking of information by a stenographer from records to which she is in confidence given access, demands the utmost protection. Its primary quality is confidence in nondisclosure. There can be no doubt that the universal opinion favors its maintenance. Compared with the benefit to a litigated case, if the privilege is abused the relation must terminate. The admission of the testimony was error. Its only purpose could be to dispute plaintiff when he says that his report of the list price of lot 94 contained in Exhibit 34 was an error on his part, unintentional any typographical, and that no such list was ever given him."

We have difficulty in understanding this contention. Mr. Sotham was the sales manager of defendants. Miss Conant was employed as stenographer to assist him in his duties, and was paid out of the expense fund, which, of course, came out of the proceeds of the sale of defendants' land. She owed no duty to Mr. Sotham that she did not owe to defendants, and [131] it was not the duty of either of them to withhold any information from defendants as to what was being done to promote the sales. We discover no reversible error in the case.

Judgment is affirmed.

McAlvay, C. J., and Brooke, Kuhn, Stone, Ostrander, Bird, and Steere, JJ., concurred.

NOTE.

Information Communicated in Contract, Fiduciary or Similar Relation as Privileged from Disclosure.

Introductory, 698.
Communication Based on Friendship or Promise of Secrecy, 699.
Information Acquired in Employment or Fiduciary Relation Generally, 701.
Communication in View of Litigation, 702.
Information Acquired by Banker or Broker, 703.
Telegram, 704.
Communication to Newspaper Reporter, 705.

Introductory.

This note is designed to review the status, with respect to privilege from disclosure, of communications made or information acquired in a fiduciary or confidential capacity other than that of legal, medical or spiritual adviser or of spouse. It excludes the question of privilege with respect to a person acting as assistant to one having an established privilege, such as the clerk of an attorney or a nurse assisting a physician. It also excludes the privilege accorded to state secrets and privilege, resting on the same reason, of the source of information leading to the detection of a crime.

It may be stated as a general rule that except for the common law privilege with respect to communications to an attorney and those privileges which have been expressly declared by statute, the public interest in the disclosure of all facts relevant to a litigated issue is deemed to be paramount to any consideration of the inviolability of a communication made in reliance on personal confidence

or on a fiduciary or contract relation. See the cases cited throughout this note. In Wheeler v. LeMarchant, 17 Ch. D. 675, the common law rule was stated by Jessel, M. R., as follows: "In the first place, the principle protecting confidential communications is of a very limited character. It does not protect all confidential communications which a man must necessarily make in order to obtain advice, even when needed for the protection of his life, or of his honor, or of his fortune. There are many communications which, though absolutely necessary because without them the ordinary business of life cannot be carried on, still are not privileged. The communications made to a medical man whose advice is sought by a patient with respect to the probable origin of the disease as to which he is consulted, and which must necessarily be made in order to enable the medical man to advise or to prescribe for the patient, are not protected. Communications made to a priest in the confessional on matters perhaps considered by the penitent to be more important even than his life or his fortune, are not protected. Communications made to a friend with respect to matters of the most delicate nature, on which advice is sought with respect to a man's honor or reputation, are not protected. Therefore it must not be supposed that there is any principle which says that every confidential communication which it is necessary to make in order to carry on the ordinary business of life is protected. The protection is of a very limited character, and in this country is restricted to the obtaining the assistance of lawyers, as regards the conduct of litigation or the rights to property."

The disinclination of the courts to extend the established limits of the privilege was thus expressed in Henisler v. Freedman, 2 Pars. Eq. Cas. (Pa.) 274: "The law is jealous of extending the circle of persons, excused or interdicted from giving testimony. Parents are required to testify against children, children against parents, brothers against brothers, friends against friends. Communications by letter, made under the deepest obligations of friendship, affection, or honor, still must be produced, if deemed necessary to the ascertainment of truth, and the administration of justice by the public tribunals. To this great end of social organization, all secondary causes are required to give way."

Communication Based on Friendship or Promise of Secrecy.

In a few early English cases the courts evinced some disposition to treat as privileged communications made in personal confidence, on the ground that the honor of the recipient was involved. Countess of Shrewsbury's Case, 12 Rep. 94; Rex v. Gray, 9 How. St. Tr. 129; Rex v. Layer, 16 How. St. Tr. 93. And after that view had been overruled by the decision of the House of Lords in the Rex v. Kingston, 20 How. St. Tr. 586, some reluctance was expressed in denying the privilege in Wilson v. Rastall, 4 T. R. 753, the court saying: "It is indeed hard in many cases to compel a friend to disclose a confidential conversation; and I should be glad if by law such evidence could be excluded. It is a subject of just indignation where persons are anxious to reveal what has been communicated to them in a confidential manner."

Following the decision of the House of Lords heretofore referred to, it is now established that a communication is not privileged from disclosure in evidence by the recipient because it is made in the confidence of personal friendship or in reliance on a promise of secrecy. Rex v. Hill, 20 How. St. Tr. 1362; Rex v. Shaw, 6 C. & P. 373, 25 E. C. L. 444; Hopkinson v. Burghley, L. R. 2 Ch. (Eng.) 447; Mills v. Griswold, 1 Root. (Conn.) 383; Sherman v. Sherman, 1 Root. (Conn.) 486; Calkins v. Lee, 2 Root. (Conn.) 363; Plunkett v. Hamilton, 136 Ga. 72, Ann. Cas. 1912B 1259, 70 S. E. 781, 35 L.R.A. (N.S.) 583; Com. v. Best, 180 Mass. 492, 62 N. E. 748; Rogers v. State, 88 Miss. 38, 40 So. 744; People v. Buchanan, 145 N. Y. 1, 39 N. E. 846; People v. Hess, 8 App. Div. 143, 40 N. Y. S. 486; Ex p. Parker, 74 S. C. 466, 55 S. E. 122; Owens v. Frank, 7 Wyo. 457, 53 Pac. 282, 75 Am. St. Rep. 932. In Plunkett v. Hamilton, supra, it was said: "It is declared in the constitution of this state that 'Protection to person and property is the paramount duty of government, and shall be impartial and complete.' Civil Code (1910), § 6358. In order that the judicial department of the government may discharge its duty in this regard, it is essential that the courts shall have the power to command and compel the giving of testimony. The citizen or inhabitant owes to the state the duty of testifying, when lawfully called upon to do so, in order that the truth may be ascertained and impartial and complete justice be done. Omitting any reference to instances which are expressly excepted, the law requires a witness to testify, when duly summoned before a court having jurisdiction, and called upon to give competent and relevant evidence. A promise not to testify when so required is substantially a promise not to obey the law. Such promises cannot be recognized, save in subordination to the requirements of the law. Neither can the wishes or even the commands, of employers be allowed to outweigh the commands of the law. If the views sought to be maintained in this case were permitted to prevail, the power to ascertain the truth in judicial investigations, and to administer

justice accordingly, would depend, not upon the law of the land, but upon the private promises of secrecy on the part of witnesses, or upon the wishes or orders of their employers. To sustain such a doctrine would render courts impotent and the effort to administer justice oftentimes a mockery. An extreme illustration will serve to show where such theories, pursued to their logical end, might lead. A murderer, a burglar, or a thief might pledge his friends or their employers to secrecy, and succeed in concealing himself or the results of his crime; and when the witnesses who had knowledge of the facts were placed upon the stand, they might claim exemption from testifying, on the ground that they had pledged their sacred words to the criminal not to do so, and that they considered it disgraceful to violate such promise, or that they feared a loss of their employment if they testified to the truth." So in Rogers v. State, 88 Miss. 38, 40 So. 744, the court said: "The grand jury was inquiring into the larceny of a two thousand dollar money express package. Rogers was a witness, and testified that a woman with an infant in her arms had brought the package unbroken to him, to be by him returned to the express company, upon his solemn promise of secrecy and immunity from prosecution of the person who committed the larceny, and that the guilty party was unknown to him. Because of this solemn promise Rogers refused to name the woman who brought him the package. The grand jury reported him to the court, which fined him, and he appeals. In the prosecution of its duty to ferret out crime, it was entirely competent, relevant and material for the grand inquest of the county to ask the witness the name of the person who had in possession the stolen package. Without this indictments would depend upon the personal conception of the witness of the requirements of his private honor. Individual standards of elevated principles of social duty cannot be permitted to terminate investigations so absolutely essential to the public welfare." In the case of Ex p. Parker, 74 S. C. 466, 55 S. E. 122, it was said: "It is not pretended that the witness was required to disclose a privileged communication, or that any personal privilege or constitutional right of the witness himself was involved in requiring an answer to the question asked. As to the position that the witness should not have been required to repeat a private conversation, it is hardly necessary to say that the law cannot take account of purely sentimental considerations as against the public interests or substantial rights." In Owens v. Frank, 7 Wyo. 467, 53 Pac. 282, 75 Am. St. Rep. 932, holding that no privilege attaches to a communication to a fellow member of a fraternal order in reliance on an obligation of secrecy imposed thereby, the court said: "The error assigned involves the question whether a witness may refuse to answer a material question in relation to a material conversation on the ground that, having been given and received as a Mason, it is a privileged communication. . . . It is perfectly clear that at common law the conversation would not have been privileged. (1 Greenleaf on Ev. 15th ed. Secs. 236–248; Hoffman v. Smith, 1 Caines (N. Y.) 157, 159.) In the case cited the court said in the course of the opinion, 'Nor was there any weight in the objection to the competency of Mr. Troup's testimony, his information being received in the character of a friend and not in that of counsel.' In Greenleaf, at Sec. 248, the author says that the protection is not extended 'to confidential friends, clerks, bankers or stewards, except as to matters which the employer himself would not be obliged to disclose.' Neither does the statute include such a conversation among privileged communications, although the privilege is extended to certain communications which were not entitled to that protection at common law. Rev. Stat. 1887, Sec. 2589. The ruling of the court was therefore erroneous. However binding an obligation may be, as between members of the same society, secret or otherwise, not to divulge to others that which may be confidentially communicated to them, such an obligation must be understood to be subject to the laws of the country, and doubtless the societies themselves recognize that such a limitation attaches to the obligation; and therefore it cannot be said that the obligation is violated when the disclosure is compelled in a court of justice, in the course of the administration of the laws."

So it has been held that an answer to an inquiry addressed to persons whom another has given as references is not privileged, though the inquiry embodies an assurance that the answer will be treated as confidential. Webb v. East, 5 Ex. D. 108; Mahony v. National Widows' L. Assur. Fund, L. R. 6 C. P. (Eng.) 252. In the case last cited it was said: "Then with regard to the private friends' reports, there is no authority for saying that inspection ought not to be granted of such documents, but it is urged that they are confidential as between the parties who wrote them and the company who receive them. No doubt, as between these parties and the company, it is stated that they shall be confidential; but on what principle is that to affect the plaintiffs, when a dispute arises between them and the company? The company now complain that they have been deceived in effecting this insurance. In so doing they acted on the proposal made by the plaintiffs, on the personal statement and medical

officer's report, and also on these reports by private friends. Upon the issue, whether the company were deceived or no, it may be most essential to the plaintiffs' case to know what the statements contained in these last documents were. I do not say that in every case the court would order such documents as these to be produced. The court has a discretion, and is bound to exercise it according to the circumstances of the particular case. It is easy to see that in some cases these documents may be of importance, and in others not. Here, there are no grounds shown by the affidavits why they should not be produced, except the mere fact that they are stated to be confidential as between the insurance office and the parties who wrote them. That is not any legal ground of privilege."

A person cannot by marking papers "private and confidential" impress them with a privilege in the hands of a person to whom he sends them. Kitcat v. Sharp, 48 L. T. N. S. (Eng.) 64.

Information Acquired in Employment or Fiduciary Relation Generally.

A clerk or other employee may be compelled to disclose information communicated to him in the course of his employment, though the disclosure operates to the detriment of his employer. Webb v. Smith, 1 C. & P. 337, 11 E. C. L. 410; J. I. Case Threshing Mach. Co. v. Fisher, 144 Ia. 45, 122 N. W. 575; Sondheim v. Schmidt, 66 N. Y. S. 1034. And see the reported case. In Corps v. Robinson, 2 Wash. 388, 6 Fed. Cas. No. 3,252 it was said: "It is certainly a very unpleasant thing, to compel a person, standing in the situation of this witness, to betray the confidence of his principal. But it has never been considered as an objection which the witness can make, and were it to be laid down as a general rule, that a person, standing in such a situation, could excuse himself from giving evidence, it is impossible to foresee the extent of the mischief which might arise from it. The objection cannot prevail." So in Holmes v. Comegys, 1 Dall. (Pa.) 439, 1 U. S. (L. ed.) 213, the court said: "It would be of very dangerous consequence, if it was established, that a commercial agent was not amenable as a witness in a court of justice, in a cause against his constituent. It is straining the matter of privilege too far. And if the law makes him a witness, we are too fond of getting at the truth, to permit him to excuse himself from declaring it, because he conceives, that, in point of delicacy, it would be a breach of confidence." In Falmouth v. Moss, 11 Price (Eng.) 455, holding that an employee could be compelled to state the contents of a writing which had been entrusted to him, the court said: "I cannot, under the circumstances, consider that his being the steward of the owner of the estate, afforded him any protection from the examination. An arbitrator, on a reference before whom it had been produced, and who had taken a note of it, might have given evidence of it, if, after the notice, it had not been produced. An amanuensis, who might have been employed to transcribe it any time, or a private friend, to whom it might have been communicated in confidence, whilst partaking the hospitalities of his lordship's table, that he had in his possession a deed which showed that his uncle had only a life estate in the premises. All these persons might have been called to give evidence of its existence and contents. These instances are all confidences, more or less, and are only not protected because the parties do not come within the rule, being neither barrister, attorney nor solicitor; and the witness in this case, the steward of the party, is in no better situation than any of the persons I have enumerated."

A report made by an employee to his employer in the ordinary course of the employment, such as a report of an accident made by a railroad employee, is not privileged. Anderson v. British Columbia Bank, 2 Ch. D. (Eng.) 644; Woolley v. North London R. Co., L. R. 4 C. P. (Eng.) 602; Mahony v. National Widows' L. Assur. Fund, L. R. 6 C. P. (Eng.) 252; Skinner v. Great Northern R. Co. L. R. 9 Exch. (Eng.) 298; Van Volkenburg v. Bank of British North America, 5 British Columbia 4; Shea v. Halifax, etc. R. Co. 47 Nova Scotia 366; Carlton v. Western, etc. R. Co. 81 Ga. 531, 7 S. E. 623. In Virginia-Carolina Chemical Co. v. Knight, 106 Va. 674, 56 S. E. 725, it was said: "In the case at bar the report in question was made by an official of the defendant in the course of his ordinary duty immediately after the accident, before any action had been brought or threatened. A report made under those circumstances, although the original or a copy of it was afterward communicated to the defendant's attorneys when suit was threatened or brought, is not a privileged communication within the reason of the rule under the authorities."

A statute making privileged communications by an employer to his stenographer applies only to communications connected with the confidential employment. Ewing v. Hatcher (Ia.) 154 N. W. 869, wherein the court said: "It is next complained that one Minnie E. Allen was permitted to testify as to certain statements made by the defendant. She was at the time the defendant's stenographer. It was claimed that statements made to her were privileged, and that one cannot be permitted to divulge a privileged communication. It is true she was doing work for him as a stenographer at the time, but the matters testified to by her had

no relationship to the duties imposed upon her as such, nor was the communication made to her in the capacity of stenographer. The statute relied upon is section 4608, Code Supplement 1913. The inhibition relates to confidential communications properly intrusted in a professional capacity, and necessary and proper to enable one to discharge the functions of his office according to the usual course of practice or discipline."

No privilege attaches to a confidential statement to a bank examiner. Cox v. Montague, 78 Fed. 845, 24 C. C. A. 364; to a mercantile agency, Shauer v. Alterton, 151 U. S. 607, 14 S. Ct. 442, 38 U. S. (L. ed.) 286; or to the pursuivant of the College of Heralds, Slade v. Tucker, 14 Ch. D. (Eng.) 824. In like manner no privilege attaches to information acquired by a trustee, Jones v. Manchester, 1 Vent. (Eng.) 197; or by a tenant in common or a guardian, Sutton v. Sutton (Tenn.) 58 S. W. 891. In Wills Point Bank v. Bates, 72 Tex. 137, 10 S. W. 348, holding that a communication between partners was not privileged, the court said: "The letter was an admission made by one member of the firm, shown to have been present at the time the transaction with Gugenheim & Co. was consummated, tending to show what its real nature was, and in reference to which either partner could be compelled to testify. Such declarations or admissions made by one partner to another have never been recognized as privileged communications. The fact of partnership being shown to have existed at the time the letter was written, and at the time the transaction to which it referred occurred, the writing of the letter and its contents might be proved by any person having knowledge of these facts."

Communication in View of Litigation.

Where an employer in view of existing or prospective litigation requires from an employee a report of facts relating to the subject matter thereof, the report is by the weight of authority deemed to rest on the same reason as a communication to counsel and is privileged. Reid v. Langlois, 2 Hall. & T. 59, 47 Eng. Rep. (Reprint) 1596; Woolley v. North London R. Co. L. R. 4 C. P. (Eng.) 602; Ross v. Gibbs, L. R. 8 Eq. 522; India Bank v. Rich, 4 B. & S. 73, 116 E. C. L. 73; Davenport Co. v. Pennsylvania R. Co. 166 Pa. St. 480, 31 Atl. 245. *Compare* Chadwick v. Bowman, 16 Q. B. D. (Eng.) 561; Kerr v. Gillespie, 7 Beav. 572, 49 Eng. Rep. (Reprint) 1188; Wheeler v. LeMarchant, 17 Ch. D. (Eng.) 675; Georgia, etc. Ry. v. Johnson, 10 Ga. App. 101, 72 S. E. 951. In Davenport Co. v. Pennsylvania R. Co. supra, the court, referring to an answer to a bill for discovery said: "This report they allege was not made in the ordinary course of business, but for a special purpose, viz., to resist and defend against the claim which the plaintiff had made on the company by letter dated the seventh of July, 1892. That it was prepared after the receipt of the plaintiff's letter and as a statement of the defense of the railroad company to the claim set up against it by him, so that if suit was brought it might be placed in the hands of counsel to guide them in making defense. The objection made to these answers is that they set up new matter that should come into the case by answer to the bill. There can be no doubt that the facts stated would have made a good answer to the bill, but we think they are equally good as a reply to the interrogatories. If they are true, as for the purposes of this appeal they must be assumed to be, they amount to a denial of the possession of any communication or report such as the plaintiff alleges; and an assertion that the documents they have were prepared after the plaintiff's claim for damages was made, and for the special purpose of resisting it. This brings the documents within the privilege accorded to communications made to counsel. It is true as appellant points out that they were not made directly to counsel but the answers allege they were made to the immediate superior of him who made them for the express purpose of being by him submitted to counsel. They were in effect made to counsel, for they were made for the use of counsel in resisting this particular claim and were transmitted to the proper officer, that he might deliver them to the attorney to whom the defense of the company might be committed. It is very clear that such reports do not belong to the class of instruments of which discovery will be compelled by a chancellor, and the learned judge of the court below was right in dismissing the exceptions."

In Baker v. London, etc. R. Co. L. R. 3 Q. B. (Eng.) 91, an exception was asserted as to a report on a medical examination of an injured person at the instance of a person alleged to be liable for the injury. The court said: "I adhere to the decision in Chartered India Bank v. Rich, 4 B. & S. 73, 116 E. C. L. 73, but the present case is clearly distinguishable, because in that case the documents in question were letters from the one party's own private and confidential agents who had never placed themselves in communication with the other party; and I quite agree that, when confidential communications have taken place between you and your agent, who has been sent to inquire and report about the subject matter of the litigation, you are not in general to be compelled to tell your adversary what the result of the inquiries may be. But when you send your agents to see and negotiate with the other party, whatever passes

at such interviews ought to be made known, and the other party, or those representing him, have a right to inspect the communications respecting them." In Fenner v. London, etc. R. Co. L. R. 7 Q. B. (Eng.) 767, the allowing of a privilege to such a report was said to rest in discretion. In Crossey v. London, etc. R. Co. L. R. 5 C. P. (Eng.) 146, the case of Baker v. London, etc. R. Co. supra, was said to be an exceptional one, and the subsequent decisions seem to establish an absolute privilege with respect to a medical examiner's report on an injured person made in anticipation of a personal injury action. Skinner v. Great Northern R. Co. L. R. 9 Exch. (Eng.) 298; Malden v. Great Northern R. Co. L. R. 9 Exch. (Eng.) 300; Friend v. London, etc. R. Co. 2 Ex. D. (Eng.) 437. In Skinner v. Great Northern R. Co. supra, Baron Pigott said: "The case of Cossey v. London, etc. R. Co. [L. R. 5 C. P. 146] lays down a clear, broad, and intelligible principle, which there is no difficulty in acting upon; but if that is departed from, and the matter is made to turn upon the discretion of the judge, there can be no certainty in the practice."

In the case of In re Krueger, 2 Lowell 182, 14 Fed. Cas. No. 7,942, correspondence between partners with respect to proposed litigation was held to be privileged, the court saying: "When a lawsuit is begun, or is imminent, the parties to it ought to be at liberty to consult with each other, and with agents, without the necessity of producing the correspondence, at the call of the opposing party."

Information Acquired by Banker or Broker.

A banker or broker is not privileged from disclosing the state of the account of a customer or depositor. Loyd v. Freshfield, 2 C. & P. 325, 12 E. C. L. 149; Interstate Commerce Commission v. Harriman, 157 Fed. 432; In re Lathrop, 184 Fed. 534; In re Davies, 68 Kan. 791, 75 Pac. 1048; Winder v. Diffenderffer, 2 Bland. (Md.) 166; McManus v. Freeman, 2 Pa. Dist. 144; Hannum v. McRae, 18 Ont. Pr. 185, *affirming* 17 Ont. Pr. 567. And see Heath v. Waters, 40 Mich. 457, wherein it was said: "No stronger evidence of probable fraud could exist than the obstinate and offensive manner in which every attempt to get at the real state of the partnership business was resisted, not only by Daniel Waters, but by his associates and his banker. The latter, who seems to have been honest in his remarkable notion that banking business privileged from scrutiny, was probably free from any wrong design." In Winder v. Diffenderffer, 2 Bland. (Md.) 166, it was said: "It surely cannot be pretended, that an individual, because it happens to be convenient to withhold a statement of his dealings with a party to the suit, pertinent to the matter in issue, from being used as evidence in that suit, should, therefore, be permitted to do so at his pleasure. A bank, as a body politic, is endowed with many attributes of personality; and acts as an individual in its dealings with all persons; consequently it can have no pretension to any greater right, arising from its mere character as a body politic, than any individual whatever to withhold any legal evidence, that may be in its possession." So in the case of In re Davies, 68 Kan. 791, 75 Pac. 1048, the court said: "It is next insisted that the petitioner should be discharged because the matter concerning which he was interrogated was privileged, and that to require a disclosure by a banker of the amount standing to a depositor's credit on the bank books would be against public policy. Counsel, thus contending, frankly admits that he has found no adjudicated case which sustains his position. The relation of debtor and creditor exists between a depositor and a banker. By the inquiry in this case, it was sought to ascertain how much the bank owed Bellringer on March 1. The ordinary debtor would hardly stop to assert a privilege in his behalf to protect him from disclosing the amount owing by him to another. Again, it is argued that to permit grand juries or courts to inquire into such private affairs of business men would cause withdrawal of deposits from banks annually for many weeks preceding the 1st of March—some to escape taxation, others to avoid publicity. It is a sufficient answer that annoyance to depositors or the loss to banks predicted by counsel has never appealed to courts or legislatures with enough force to work a change in the rules of evidence. In the case of Loyd v. Freshfield, 2 C. & P. 325, 12 E. C. L. 149, decided in 1826, it was held that a banker was bound to answer what a party's balance was on a given day, as it was not a privileged communication."

In *England* the same rule obtains except as it is modified by the Bankers Books Evidence Act. Emmott v. Star Newspaper Co. 62 L. J. Q. B. (Eng.) 77, 67 L. T. N. S. 829.

To require a disclosure, however, it must appear that the information is necessary for the purpose of the action in which it is sought to elicit it. Jonau v. Ferrand, 3 Rob. (La.) 364, wherein it was said: "The second bill is to the refusal of the judge to compel a broker, who was examined in order to fix the market value of certain stocks, to disclose the names of the different persons to whom he had sold such stocks. The broker objected to answering, stating that he considered his transactions with other individuals as confidential and appertaining to themselves, but

that if the court said he must answer, he would do so. The judge refused to compel the witness to disclose the names of the different purchasers, as there was no intimation of any intention to call on them to testify in contradiction to the broker, and the names were therefore immaterial. We think the judge decided correctly."

Telegram.

No privilege attaches to telegrams or copies of telegrams in the hands of a telegraph company and their production can be compelled. Tomline v. Tyler, 44 L. T. N. S. (Eng.) 187; Re Dwight, 15 Ont. 148; In re New York, etc. Tel. Co. [1854–1864] New Foundland L. Rep. 575; U. S. v. Babcock, 3 Dill. 566, 3 Cent. L. J. 101, 24 Fed. Cas. No. 14,484; U. S. v. Hunter, 15 Fed. 712; In re Storrer, 63 Fed. 564; Woods v. Miller, 55 Ia. 168, 7 N. W. 484; State v. Litchfield, 58 Me. 267; Ex p. Brown, 72 Mo. 83, 37 Am. Rep. 426; People v. Webb, 5 N. Y. S. 855; Henisler v. Freedman, 2 Pars. Eq. Cas. (Pa.) 274; Ex p. Gould, 60 Tex. Crim. 442, 132 S. W. 364, 31 L.R.A.(N.S.) 835; Merchants' Nat. Bank v. Wheeling First Nat. Bank, 7 W. Va. 544. In Ex p. Brown, supra, it was said: "The only ground, therefore, upon which the exemption of telegrams from this process of the court can be placed, is that they are privileged communications, and we cannot declare them to be such in the absence of a statute so providing. The transportation of packages and parcels by means of express lines, is becoming almost as great a necessity as that of sending communications by telegraph, and the two agencies are very frequently employed in intimate connection, and the argument which asserts the inviolability of telegrams, derived from a supposed analogy between the postal system and the telegraph, would as well apply to parcels or packages intrusted to the express company for transportation. The rules of the company forbidding the petitioner from delivering telegrams or copies, afforded no legal excuse for his refusal to produce the telegrams. Telegraph companies, it is true, are by section 13, Wagner's Statutes 325, subjected to a penalty for disclosing the contents of any private dispatch to any person other than the person to whom it is addressed, or his agent; but taken in connection with section 51, page 507, it is obvious that it is not to be construed as prohibiting such disclosure when it is required as evidence in a judicial proceeding. The latter section makes it a misdemeanor for any person connected with any telegraph line, wilfully to disclose the contents, or the nature of the contents, of any message intrusted to him for transmission or delivery to any one to whom it is not addressed, except a court of justice, and in that exception we have a legislative recognition of the amenability of custodians of telegrams to a subpoena duces tecum, commanding their production. It follows, if the court has the right to compel their production, that the company cannot, by any rules it may adopt, exonerate its agents from obedience to the judicial mandate." So in State v. Litchfield, 58 Me. 267, it was said: "Nor can telegraphic communications be deemed any more confidential than any other communications. Telegraphic communications are not to be protected to aid the robber or assassin in the consummation of their felonies, or to facilitate their escape after the crime has been committed. No communication should be excluded, no individual should be exempt from inquiry, when the communication, or the answer to the inquiry would be of importance in the conviction of crime or the acquittal of innocence, except when such exclusion is required by some grave principle of public policy. The honest man asks for no confidential communications, for the withholding the same cannot benefit him. The criminal has no right to demand exclusion of evidence because it would establish his guilt. The telegraph companies cannot rightfully claim that the messages of rogues and criminals, which they may innocently or ignorantly transmit, should be withheld, whenever the cause of justice renders their production necessary. They cannot wish their servants should, however innocently, co-operate in the commission of crime, and decline to co-operate in its detection and punishment, and thus become its accomplices. The interests of the public demand that resort should be had to all available testimony, which may lead to the detection and punishment of crime, and to the protection of innocence. The telegraphic operator, as such, can claim no exemption from interrogation. Like other witnesses, he is bound to answer all inquiries material to the issue." Similarly in Woods v. Miller, 55 Ia. 168, 7 N. W. 484, the court said: "The objection to the production and introduction of the telegrams was based upon section 1328 of the Code, which provides that any person employed in transmitting messages by telegraph, who makes known the contents of any message sent or received, to any person except to him to whom it is addressed, or to his agent, or attorney, is guilty of a misdemeanor. The defendants insist that a person cannot under one rule of law be compelled to do what under another rule of law is a misdemeanor. Nearly all kinds of business, however important, are transacted by telegraph. The contents of messages, unlike the contents of letters, are necessarily known to the persons engaged in transmitting them. The interests of business require that they should not be divulged to third persons, but the parties themselves have a right to

the messages to prove their contracts. Any rule which should disallow this would greatly impair the value of the telegraph as a means of doing business. It is evident that the statute was not designed to prevent the use of messages as evidence. That the statute does not prohibit the production and introduction of messages as evidence, under an order of court for that purpose, might be demonstrated by saying that the person who produces them in obedience to the order is not guilty of voluntarily disclosing their contents, and no person can be punished for an act which is not voluntary. The statute, therefore, does not reach such a case, and is wholly inapplicable."

No further disclosure will be permitted than the necessities of the particular issue require. Ex p. Gould, 60 Tex. Crim. 442, 132 S. W. 364, 31 L.R.A.(N.S.) 835, wherein it was said: "In this case the subpoena duces tecum was for all telegrams sent from the office at Baird, ordering intoxicating liquors; it did not specify whether the liquors ordered were unlawfully sent for; it said all intoxicating liquors. All intoxicating liquors are not under the ban of the law. What right had the grand jury to have exposed before them the messages sent indiscriminately by the citizenship of Baird in ordering intoxicating liquors? The demand made upon the witness was unreasonable and unwarranted; it was too general; it did not relate to any crime committed, nor to any person accused or suspected; it was not directed to the inquiry into any crime; it failed to show the purposes for which the telegrams were demanded, and was but a prying and fishing expedition that cannot be authorized by law. The protection of papers is as much secured under the provisions of the Bill of Rights as a man's house; and the same rules that apply to one apply to the other. The courts will not permit the exercise of an arbitrary power, where its tendency might be to disturb domestic relations; expose commercial secrets to satisfy the idle curiosity of men. The Constitution holds too sacred the privacy of home to permit this."

Communication to Newspaper Reporter.

The policy of a newspaper to treat as confidential the sources of information acquired by its reporters will not be regarded by the courts and no privilege attaches to a communication to a newspaper reporter. People v. Durrant, 116 Cal. 179, 48 Pac. 75; Ex p. Lawrence, 116 Cal. 298, 48 Pac. 124; Pledger v. State, 77 Ga. 242, 3 S. E. 320; Plunkett v. Hamilton, 136 Ga. 72, Ann. Cas. 1912B 1259, 35 L.R.A.(N.S.) 583; In re Grunow, 84 N. J. L. 236, 85 Atl. 1011; People v. Fancher, 4 Thomp. & C. (N. Y.) 467. In the case of In re Grunow, supra, it was said: "The appellant gave as his reason for refusing to answer the question the following: 'I declined to give the sources of my information or the names of any person or persons who gave me any information about it, and gave as my reason for such refusal that I was a newspaper reporter, and therefore could not give up my sources of information.' In effect he pleaded a privilege which finds no countenance in the law. Such an immunity, as claimed by the defendant, would be far-reaching in its effect, and detrimental to the due administration of law. To admit of any such privilege would be to shield the real transgressor and permit him to go unwhipped of justice." In Ex p. Lawrence, 116 Cal. 298, 48 Pac. 124, the rule was applied, the court saying: "The senate of the state was engaged in an investigation of the conduct of its members under a published charge that some of them, whose names were not given, had taken bribes for aiding in the passage of a certain bill. The news editor and one of the reporters of the paper which published this charge were called upon to testify in the matter, and refused to answer certain interrogatories propounded to them, upon the ground that the information sought to be elicited was privileged. . . . It cannot be successfully contended, and has not been seriously argued, that the witnesses were justified in refusing to give these names upon the ground that the communications were privileged." In People v. Fancher, 4 Thomp. & C. (N. Y.) 467, holding that a newspaper proprietor could be compelled to disclose the name of the person from whom was obtained the information embodied in a libellous article, the court said: "As the law now is, and has for ages existed, no court could possibly hold that a witness could legally refuse to give the name of the author of an alleged libel, for the reason that the rules of a public journal forbade it. That some other party assumes the responsibility of a crime, and is willing to suffer its consequences, can never prevent an inquiry as to each and every person concerned therein, and the holding of all such equally responsible with the one avowing it. The admission of such a principle, if carried to its logical conclusion, would shield him who hires an assassin to strike a fatal blow, so long as the slayer avowed himself to be solely responsible for the act. This extreme case is put for the purpose of showing the impolicy of the reason, and its worthlessness in a court of justice."

PHILADELPHIA LIFE INSURANCE COMPANY

v.

ARNOLD ET AL.

South Carolina Supreme Court—December 10, 1913.

97 S. Car. 418; 81 S. E. 964.

Life Insurance — Incontestability Clause — Validity.

A life policy, providing that it shall be incontestable, except for nonpayment of premiums, after one year from its date, is not objectionable as in conflict with the state statute of limitations, but is valid.

[See 4 Ann. Cas. 364; 13 Ann. Cas. 305.]

Effect on Attack for Fraud.

Where a life policy provides that it shall be incontestable, except for nonpayment of premiums, after one year from date, the insurer, after the expiration of the year, cannot maintain a suit against the insured and the beneficiary to cancel the policy for the defendant's alleged fraud in procuring it.

[See note at end of this case.]

Appeal from Common Pleas Circuit Court, Anderson county: DE VORE, Judge.

Action to cancel policies of life insurance. Philadelphia Life Insurance Company of Philadelphia, Pa., plaintiff, and Quincy L. Arnold et al., defendants. Judgment for plaintiff. Defendants appeal. The facts are stated in the opinion. REVERSED.

Quattlebaum & Cochran for appellants.
Bonham, Watkins & Allen for respondent.

[420] HYDRICK, J.—This action was brought to have two policies of insurance, issued by the plaintiff on the life of the defendant, Q. L. Arnold, in favor of his wife, Mattie H. Arnold, cancelled on the ground that they were obtained by fraud. The policies were issued and dated June 11, 1910. The premiums were duly paid. The policies contain this clause: "This policy shall be incontestable, except for nonpayment of premiums, after one year from its date." This action was commenced June 3, 1912, more than a year after the date of the policy. On motion of defendants, issues were referred to a jury, which answered them all in favor of defendants. But the Court set aside the verdict, holding that the fraud alleged had been proved, and adjudged the policies void.

From the view that we take of the case, it will be necessary to consider only one question: Is the incontestable clause above quoted a bar to the action? The language is plain—so plain that it does not require interpretation. There can be no doubt of its meaning, and unless there is some reason why an insurance company cannot lawfully make such a contract, this action is barred. The Courts, with practical unanimity, hold such a [421] stipulation valid. It is called by some of them a short statute of limitations in favor of the insured, and it is sustained on the analogy of the cases which hold that the parties to a contract may, by stipulation therein, fix a reasonable time within which action thereon must be brought, or claims made. We cannot agree that such a stipulation conflicts with the statute of limitations, only in the sense that by its terms action must be brought within a shorter period than that allowed by law. But the statute of limitations does not expressly or impliedly prohibit such an agreement. It merely fixes the maximum time within which actions may be brought.

No doubt the clause was inserted in the policy as an inducement to the public to insure with the plaintiff company. It is matter of common knowledge that insurance companies have, in the past, so frequently defended against claims under their policies, and tried to defeat payment of them on various grounds—sound and unsound—and especially on the ground of alleged false representations and warranties, that the legislature of this State deemed it necessary to take the matter in hand, and in 1878 (16 St. at Large, p. 530) a statute was enacted (Civ. Code 1912, secs. 2722, 2723) which provides that, when a company receives the premiums on a policy for the space of two years, it shall be deemed to have waived any right to dispute the truth of the application, or to allege that the insured made false representations. The same statute authorizes the companies to bring actions to vacate policies on that ground, but limits the time to two years from date of the policy. This legislation goes far to prevent these companies from taking a man's hard-earned money as long as he lives, and then slandering his memory after he is dead. While it is true in this case that the insured is alive, that circumstance does not make the meaning of the clause or the application of the law different from what it would be if he were dead. To hold that the clause means only [422] that the company cannot defend for any cause, except nonpayment of premiums, after the death of the insured, is to read into the contract, by construction, what the parties did not write into it.

The objection to taking insurance, arising out of the probability of such a defense being set up, whether founded in truth or not, grew to be such that the insurance companies found it to their advantage to insert in the policies certain stipulations specifying the

grounds upon which they could be contested, and limiting the time within which such contest must be made. Of course, other things being equal, the more favorable to the insured these stipulations are, the more attractive will the policies be to insurers, and we have no doubt the clause in question was inserted for that purpose, and that the company has received the benefit of it in that intending insurers have been thereby induced to take its policies.

By the stipulation, the plaintiff practically agreed that it would take a year to investigate and determine whether any fraud had been perpetrated in procuring the policies, and, if it failed within that time to discover any, it would make no further investigation, and would not thereafter contest the validity of the policies on that ground. The evidence in the case shows that, if plaintiff had been diligent, it could have discovered the fraud within the year. Therefore, we do not feel that we are condoning the fraud by enforcing the stipulation. The following authorities sustain the validity of such a stipulation: Kline v. Nat. Ben. Ass'n, 111 Ind. 462, 11 N. E. 620, 60 Am. Rep. 703; Wright v. Mut. Ben. Ass'n, 43 Hun (N. Y.) 61, *affirmed* 118 N. Y. 237, 23 N. E. 186, 6 L.R.A. 731, 16 Am. St. Rep. 749; Clement v. Insurance Co. 101 Tenn. 22, 46 S. W. 561, 42 L.R.A. 247, 70 Am. St. Rep. 650, and note; Massachusetts Ben. Life Ass'n v. Robinson, 104 Ga. 256, 30 S. E. 918, 42 L.R.A. 261; Murray v. State Mut. Life Ins. Co. 22 R. I. [423] 524, 48 Atl. 800, 53 L.R.A. 743; 25 Cyc. 873, 881; 19 A. & E. Enc. L. (2d ed.) 79 et seq.

FRASER, J. (*dissenting*).—I cannot concur in the opinion of the majority of the Court. I think the statutory right of the company to two years may be waived, and that the incontestable clause did waive it, except for fraud. I think the words in the incontestable clause, "all statements made by the insured shall, in the absence of fraud, be deemed representations, and not warranties," clearly show that the insurer did not intend to waive any of its rights where there is fraud. The policy also provides that the question of age may be contested. The incontestable clause, therefore, was not absolute, and I think the plaintiff has the right to bring this action within the statutory period.

Gage, J., did not sit in this case.

NOTE.

The reported case holds that under a provision in a life insurance policy that it shall be incontestable after the lapse of one year except for nonpayment of premiums, not only is the insurer precluded from defending on the ground of fraud, but a suit to cancel the policy on the ground of fraud cannot be maintained after the lapse of a year from the date of the policy. The earlier cases as to the effect, on a contest of a life insurance policy on the ground of fraud, of a clause making the policy incontestable, are reviewed in the note to Harris v. Security L. Ins. Co. Ann. Cas. 1914C 648.

CAUSEY

v.

SEABOARD AIR LINE RAILWAY COMPANY.

North Carolina Supreme Court—May 20, 1914.

166 N. Car. 5; 81 S. E. 917.

Release and Discharge — Fraud in Procuring — Evidence Sufficient.

In an action for death of an employee, evidence held to warrant a finding that a release of liability for the injuries resulting in decedent's death had been procured by fraud or undue influence.

Limitation of Action — Action by Administrator.

Since an administrator succeeds to the rights of his intestate, derives his title from him, and in an action endeavors to enforce a right which belonged to the intestate, the bar of limitations, if available against the intestate, is ordinarily available against the administrator.

Death by Wrongful Act — Limitations — Effect of Bar of Action for Injury.

Since a right of action for injuries belongs to the injured person, terminates at his death, and depends on the common law, while the right to damages for wrongful death resulting from such injuries belongs exclusively to the administrator and is a creature of statute, limitations having run against an action for injuries to decedent is no bar to the administrator's right to recover for wrongful death.

[See note at end of this case.]

Appeal from Superior Court, Randolph county: LONG, Judge.

Action for death by wrongful act. R. L. Causey, administrator, plaintiff, and Seaboard Air Line Railway Company, defendant. Judgment for plaintiff. Defendant appeals. AFFIRMED.

[6] This is an action to recover damages for the wrongful death of the plaintiff's in-

testate, caused, as alleged, by the negligence of the defendant.

The intestate was injured on 1 December, 1903, and died on 7 June, 1912. On 27 December, 1903, the intestate executed the following conditional release:

SEABOARD AIR LINE RAILWAY.

Conditional Release Agreement.

If, before the expiration of thirty days from this date, the Seaboard Air Line Railway shall pay to me, H. O. Causey, the sum of $75, I hereby agree to release the said railway of and from all claims whatsoever for damages for or on account of personal injury sustained by No. 1 freight running into A. C. L. freight at Hilton Bridge, throwing me against stove, cutting my head, on 1 December, 1903.

Witness my hand and seal, this 27 December, 1903.

(Signed) H. O. Causey. [Seal]

Witness:

(Signed) R. M. Baldwin.

The foregoing conditional release agreement has the following indorsements stamped on it: "Vouchers made for 5 January, 1904, amount shown," and "Voucher sent to Auditor Disbursements, 8 February, 1904."

On 17 February, 1904, the intestate executed the following release:

SEABOARD AIR LINE RAILWAY.

Release.

For and in consideration of the sum of seventy-five and no/100 dollars ($75) to me paid, the receipt of which is hereby acknowledged, I, H. O. Causey, do hereby release and forever discharge the Seaboard Air Line Railway, and any and all railroads [7] owned, leased, operated, or controlled by it, and its successors, from all injuries received by me in collision of trains S. A. L. No. 1, and A. C. L. No. 80, on or about 1 December, 1903, at or near Wilmington, N. C., while a conductor in the employ of the Seaboard Air Line Railway; the consideration hereinbefore referred to being in full compromise, satisfaction, and discharge of all claims and causes of action arising out of the injuries, and in exoneration of the railway from all liability by reason thereof.

In witness whereof I have hereunto set my hand and seal, this 17 February, A. D. 1904.

(Signed) H. O. Causey. [Seal.]

Signed, sealed, and delivered in the presence of:

(Signed) R. M. Baldwin.

The defendant pleaded the release as a defense, and also the statute barring a recovery for personal injury within three years.

The plaintiff replied, alleging that the release was procured by undue influence and fraud.

The jury returned the following verdict:

1. Was H. O. Causey, the intestate of the plaintiff, killed by the negligence of the defendant, as alleged in the complaint? Answer: Yes.

2. Did H. O. Causey, the intestate of plaintiff, execute the release as alleged by the defendant, the Seaboard Air Line, in its answer? Answer: Yes.

3. If plaintiff's intestate did execute and deliver the said release, did he at the time of the execution thereof have sufficient mental capacity to understand the nature and effect of the said release? Answer: Yes.

4. If the deceased, H. O. Causey, did not have such mental capacity, did the defendant have notice thereof? Answer: No.

5. If said release was executed and delivered as alleged in the answer, was the same procured by fraud and undue influence of the defendant, the Seaboard Air Line, as alleged by the plaintiff? Answer: Yes.

[8] 6. Is the plaintiff's cause of action barred by the statute of limitations? Answer: No.

7. What damage, if any, is the plaintiff entitled to recover? Answer: $6,075.

W. H. Neal for appellant.

Hammer & Kelly for appellee.

ALLEN, J.—There was evidence to support the finding by the jury that the injury in 1903 caused the death of the intestate, and this is practically conceded by the defendant.

It is, however, earnestly insisted that there was no evidence of fraud or undue influence in procuring the execution of the release set up as a defense.

No presumption of fraud arises from the relation of employer and employee, "but it is recognized by the courts that the employer has great influence in determining the conduct of the employee, and may use it to his injury." King v. Atlantic Coast Line R. Co. 157 N. C. 63, 72 S. E. 801, 48 L.R.A.(N.S.) 450. And "Where there is no coercion amounting to duress, but a transaction is the result of a moral, social, or domestic force exerted upon a party, controlling the free action of his will and preventing any true consent, equity may relieve against the transaction on the ground of undue influence, even though there may be no invalidity at law. In the vast majority of instances undue influence naturally has a field to work upon in the condition or circumstances of the person influenced which render him peculiarly

susceptible and yielding—his dependent or fiduciary relation towards the one exerting the influence, his mental or physical weakness, his pecuniary necessity, his ignorance, lack of advice, and the like." Pom. Eq. Jur. vol. 2, sec. 851.

The plaintiff relies upon circumstantial evidence to prove fraud and undue influence, and as was said by Justice Brown in the matter of Everett's Wills, 153 N. C. 85, 68 S. E. 924: "Experience has shown that direct proof of undue or fraudulent influence is rarely attainable, but inference from circumstances must determine it.

[9] "Undue influence is generally proved by a number of facts, each of which standing alone may be of little weight, but taken collectively may satisfy a rational mind of its existence."

Let us, then, examine the circumstances connected with the execution of the release. The intestate was in the employment of the defendant when the release was executed, and wished to continue the employment. He was injured on 1 December, 1903, by a blow on the back of the head, and while the jury finds that he had sufficient mental capacity to execute a release, it was in evidence that he had trouble with his head continuously after the injury. He accepted $75 in settlement for an injury which finally resulted in death.

The settlement was made under an agreement to pay him for his lost time (the claim agent of the defendant testifies to this), and he was at that time earning from $90 to $95 a month, and according to the evidence of the plaintiff, lost two and one-half months.

The evidence does not disclose that any one was present when the release was executed, except the claim agent of the defendant, and he made conflicting statements as to his meeting with the intestate, saying: "I met him by appointment. He sent word that he wanted to see me. I did not meet him by appointment. I did not send for him to come and see me. I met him on the hotel porch at Hamlet by accident."

The conditional release was executed on 27 December, 1903, conditioned to accept $75, if paid within thirty days, under an agreement to pay for lost time, when there was due him then, computing at the rate of $90 per month, $81, and the time he would lose could not then be ascertained, as he had not resumed work.

The sum of $75 was not paid within the thirty days, but the intestate stood by the agreement; and at the end of two months and seventeen days, while still unable to work, executed a full release for $75, under the same agreement, the defendant says, to pay for lost time, when his wages alone would, at that time, have amounted to $231, not considering damages for mental and physical suffering and for reduced capacity, for which the defendant was liable, if for anything.

[10] We have, then, a full release executed upon the payment of less than one-third of the amount agreed to be paid, and when the most important element of damages was not then taken into consideration—mental and physical suffering and reduced capacity.

It was executed by an employee who was, at the time, suffering mentally and physically from his injury, and who wished to retain his place with the defendant, and when no one was with him except the claim agent of the defendant, who made contradictory statements about his meeting with the intestate.

It would seem that one of two conclusions must follow, if the jury accepted this evidence: that the intestate did not have sufficient mind to execute a release, or that he as improperly influenced.

The jury has adopted the latter solution, and in our opinion there was evidence to support it.

In King v. Atlantic Coast Line R. Co. 157 N. C. 65, 72 S. E. 801, 48 L.R.A. (N.S.) 450, quoting from our own reports and from the Supreme Court of the United States, as to the effect of inadequacy of consideration upon an issue of fraud and undue influence, we said: "In Byers v. Surget, 19 How. 311 [15 U. S. (L. ed.) 674], the Supreme Court of the United States says: 'To meet the objection made to the sale in this case, founded on the inadequacy of the price at which the land was sold, it is insisted that inadequacy of consideration, singly, cannot amount to proof of fraud. This position, however, is scarcely reconcilable with the qualification annexed to it by the courts, namely, unless such inadequacy be so gross as to shock the conscience, for this qualification implies necessarily the affirmation that, if the inadequacy be of a nature so gross as to shock the conscience, it will amount to proof of fraud.' And again, in Hume v. U. S. 132 U. S. 411, 10 S. Ct. 136, 33 U. S. (L. ed.) 393: 'It (fraud) may be apparent from the intrinsic nature and subject of the bargain itself, such as no man in his senses, and not under delusion, would make, on the one hand, and as no honest and fair man would accept, on the other.' Our Court, speaking through Justice Brown, so declares the law in reference to awards and other transactions. In Perry v. Greenwich Ins. Co. 137 N. C. 406, 49 [11] S. E. 890, he says: 'Where there is a charge of fraud or partiality made against an award, the fact that it is plainly and palpably wrong would be evidence in support of the charge, entitled to greater or less weight according to the extent or effect of the error and the other circumstances of the case. There might be a case of error in an

award so plain and gross that a court or jury could arrive only at the conclusion that it was not the result of an impartial exercise of their judgment by the arbitrators. Goddard v. King, 40 Minn. 164, 41 N. W. 659. The settled rule, which is applicable not only to awards, but to other transactions, is that mere inadequacy alone is not sufficient to set aside the award; but if the inadequacy be so gross and palpable as to shock the moral sense, it is sufficient evidence to be submitted to the jury on the issues relating to fraud and corruption, or partiality and bias.' Where there is inadequacy of consideration, but it is not gross, it may be considered in connection with other evidence upon the issue of fraud, but will not, standing alone, justify setting aside a contract or other paper-writing on the ground of fraud."

The finding of the jury that the release was procured by fraud and undue influence, rendered upon competent evidence, makes it unnecessary to consider the effect of a valid release executed by the intestate on the plaintiff's right of action.

The remaining question presented by the appeal is the effect of the lapse of time between the injury to and the death of the intestate.

The right of action in favor of the intestate to recover damages for personal injury was barred by the statute of limitations of three years at the time of his death, and the question is presented, whether this can avail the defendant in an action by the administrator to recover damages for death, the result of the same injury.

Ordinarily, the bar of the statute is a good defense against the administrator, if available against the intestate, but this is because the administrator succeeds to the rights of the intestate, derives his title from him, and is endeavoring to enforce a [12] right which belonged to him, and if no such relation exists in a given case, there would seem to be no good reason for admitting the defense.

The right to recover damages for personal injury belonged to the intestate, and terminated at his death, while the right to recover damages for wrongful death never belonged to him, and did not exist until death. A recovery in an action for personal injury belongs to the estate of the intestate, but a recovery for death is no part of the assets of the intestate.

The two rights of action have no common source, one being under the principles of the common law and the other the creature of statute. The administrator sues, not because of any privity between him and the intestate, but for the reason that the statute designates him as the party plaintiff, and he is substantially a statutory trustee.

This Court said, in Hood v. American Telegraph, etc. Co. 162 N. C. 94, 77 S. E. 1096, in considering the statute conferring the right of action for death (Rev. sec. 59): "Prior to the statute, which was first enacted in 1854, there was no right of action to recover damages for wrongful death (Killian v. Southern R. Co. 128 N. C. 261), and as the right of action is conferred by the statute, it may designate who may sue. In 8 Am. & Eng. Enc. of Law (2d ed.) 887, the author says: 'The right of action for the death of any person caused by the wrongful act of a defendant is, with the isolated exceptions mentioned, purely statutory, and in all cases the statute must be looked to in determining to whom such right belongs.' When we turn to our statute, we find that the right of action is given to the executor, administrator, or collector; and there being an executor in this case, the plaintiff cannot sue. The statute designates the person to bring the action and determines the disposition of the recovery. As was well said by Justice Walker in Hartness v. Pharr, 133 N. C. 570: 'It must be borne in mind that whatever the varying forms of the statute may be, the cause of action given by them, and also by the original English statute, was in no sense one which belonged to the deceased person or in which he ever had any interest, and the beneficiaries under the law do not claim by, through, or under him; [13] and this is so, although the personal representative may be designated as the person to bring the action. Baker v. Raleigh, etc. R. Co. 91 N. C. 308. The latter does not derive any right, title, or authority from his intestate, but he sustains more the relation of a trustee in respect to the fund he may recover for the benefit of those entitled eventually to receive it, and he will hold it when recovered actually in that capacity, though in his name as executor or administrator, and though in his capacity as personal representative he may perhaps be liable on his bond for its proper administration. Baker v. Raleigh, etc. R. Co. supra."

If there is no privity between the administrator and the intestate as to this cause of action, and the former succeeds to no rights of the other, it is illogical, as it appears to us, to hold that the failure of the intestate to sue for personal injury will bar the right of the administrator to recover damages for death, when the first right of action could not pass to the administrator and the second did not exist until death.

It would be, in effect, an adjudication that the second cause of action was barred before it came into existence.

The weight of authority elsewhere is, we think, in support of the position that the action is not barred.

In Robinson v. Canadian Pac. R. Co. App. Cas. (Eng.) [1892] 481, it was held by the Privy Council, on appeal from the Supreme Court of Canada, "that the Civil Code of

Lower Canada does not make it a condition precedent to the right of action given by section 1056 to the widow of a person dying as therein mentioned, that the deceased's right of action should not have been extinguished in his lifetime by prescription under section 2262 (2). The death is the foundation of the right given by the former section, which is governed by the rule of prescription contained therein and is exempt from the rule of prescription which barred the claim of the deceased."

In Hoover v. Chesapeake, etc. R. Co. 46 W. Va. 268, 33 S. E. 224 (the statute of limitations in West Virginia being one year), the Court said: "It is claimed that, the injured having lost his right to sue by reason of the bar of the statute of limitations at the time of his death, the cause of action is thereby destroyed, both as to himself and [14] his administratrix; that death must find him with a cause of action legally enforcible, or she has none. This is undoubtedly true where the cause of action never existed, or is defeated by contributory negligence, or it has been compromised or released; for in such cases there is a complete want of or destruction by satisfaction of the cause, not merely of the right of action or remedy. Dibble v. New York, etc. R. Co. 25 Barb. (N. Y.) 183; Whitford v. Panama R. Co. 23 N. Y. 485; Littlewood v. New York, 89 N. Y. 24; Fowlkes v. Nashville, etc. R. Co. 5 Baxt. (Tenn.) 663. In a certain class of cases the bar of the statute not only takes away the remedy, but destroys the cause of action. When the liability and the limitation is created by the same statute, the latter operates on the former, or liability, and not on the remedy alone. The Harrisburg, 119 U. S. 199, 7 S. Ct. 140, [30 U. S. (L. ed.) 358]. Generally speaking, however, the statute of limitations acts on the remedy, and takes away the right of action, and while it prevents relief, it does not destroy the cause of action, or the moral obligation on the negligent party to make good the injury caused by his default or neglect. . . . The first clause of the section, 'Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action to recover damages in respect thereof,' plainly relates to the character of the injury, without regard to the question of time of suit or death. In other words, if the character of injury is such that the injured party could have at any time maintained a suit in relation thereto, his administrator could sue after his death. His cause of action is the negligent injury, but the administrator can have no cause of action until such negligent injury results in death. If such were not the case, why not provide merely that the decedent's cause of action survive to his personal representative, without making the death, coupled with the negligence that occasioned it, a new cause of action? And why not give the damages recovered to his estate, instead of exempting them from his debts and liabilities? . . . It is possible for learned and able counsel to give the statute a different construction, but the Court adopts what appears to be [15] the more reasonable view, and this is, that an action lies, notwithstanding the death of the injured person did not occur until more than a year after the negligence which caused the injury occurred."

In German-American Trust Co. v. LaFayette Box Board, etc. Co. 52 Ind. App. 211, 98 N. E. 874, the appellate court of Indiana held that, "The foundation of the right given by Burns' Ann. St. 1908, sec. 285, providing that if one's death is caused by the wrongful act of another, his personal representative may sue therefor, if he, had he lived, might have sued for an injury for the same act, and the action shall be commenced in two years, is death; and the limitation for the action thereon is two years from the death, unaffected by decedent's action for his injuries being barred before his death.

In Louisville, etc. R. Co. v. Simrall, 127 Ky. 55, 104 S. W. 1012, the Supreme Court of Kentucky said of this question: "It is strongly insisted for appellant that the court erred in sustaining appellee's demurrer to its pleas of the statute of limitations; it being the contention of counsel that no right of action exists for causing the death of a person where no right of action for the injury causing the death exists at the time the death occurs, and, further, that neither section 241 of the Constitution of Kentucky nor section 6 of the Kentucky Statutes of 1903 was intended to give a right of action for causing the death of a person, unless a right of action for the injury existed at the time of the death. The argument advanced by learned counsel for appellant is that, as section 2516, Ky. St. 1903, which provides, 'An action for an injury to the person of the plaintiff, or his wife, child, ward, apprentice, or servant, or for injuries to person, cattle or stock, by railroads or any company or corporation . . . shall be commenced within one year next after the cause of action accrued, and not thereafter,' applies to actions for injuries resulting in death, as well as those which do not result in death, the statute runs in each case from the time the injury was inflicted. It is further argued that the starting point is the same in each case, and that if, in the case of an injury subsequently resulting in the loss of a leg, [16] the statute runs from the date of the original injury, and not from the loss of the leg, so, in the case of any injury subsequently resulting in death, the statute runs from the date of the original

injury, and not from the death. It is also urged that any other construction of the statute than that contended for by appellant would lead to injustice and oppression, for the reason that if an administrator may maintain an action for causing the death of his intestate, where the death did not result until the lapse of ten or fifteen years from the time the injury was inflicted, then he may recover, although his intestate could not do so, if living, for the injuries received, and that, too, very probably after many of the witnesses have died or disappeared, and after the circumstances surrounding the infliction of the injury have faded from the memories of those by whom it was witnessed. Though plausible, the foregoing argument is unsound. Hardships may result in exceptional cases from the application of any statute or legal principle, however salutary the operation of either in general. . . . In the first case, the cause of action is asserted by the person injured, or his administrator, and it arises out of and is for the injury received. It therefore accrues from and at the time of the infliction of the injury; hence the statute then begins to run. In the second case, the cause of action does not accrue until the death of the person injured occurs, because the action is not for the injury sustained by the intestate, but for the death resulting from the injury, which is an independent and distinct grievance, created by statute, for which the personal representative alone may sue. This being true, the statute of limitation begins to run at the death and with the accrual of the cause of action. It is an indisputable rule that the statute of limitation can never begin to run until the cause of action accrues."

In Nestelle v. Northern Pac. R. Co. 56 Fed. 261, the plea of the statute was denied, the Court holding: "The statute of limitations begins to run against the statutory right of action for an injury resulting in death only at the time the death occurs, although that event takes place long after the time of receiving the injury."

[17] In Western, etc. R. Co. v. Bass, 104 Ga. 390, 30 S. E. 874, the date of the injury was 21 February, 1891, and death ensued five years thereafter, and the Court says upon the question now before us: "Was the plaintiff's right of action barred by the statute of limitations because her suit was not filed within two years from the date her husband was injured? 'Actions for injuries done to the person shall be brought within two years after the right of action accrues.' Civil Code, sec. 3900. If the plaintiff's husband had sued for the injuries to his person, he must have brought his action within two years from the date such injuries were inflicted. The plaintiff's action, however, was not for injuries done to the person of her husband. She had no right under the law to sue for such injuries; no one except the husband himself could maintain an action for them. If, however, such injuries resulted in his death, then, under section 3828 of the Civil Code, a right of action accrued to her. That section provides that a widow may recover for the homicide of her husband, and plaintiff's suit is based upon the cause of action therein given her. This statute does not profess to revive the cause of action for the injury to the deceased in favor of his widow, nor is such its legal effect, but it creates a new cause of action, in favor of the widow, unknown to the common law. The right of action given by the statute is for the *homicide* of the husband in all cases where the death results from a crime, or from criminal or other negligence, and is founded on a new grievance, namely, his homicide, and is for the injury thereby sustained by the widow and children, to whose exclusive benefit the damages must ensue, as, under section 3829 of the Civil Code, 'in the event of a recovery by the widow, she shall hold the amount recovered subject to the law of descents, as if it had been personal property descending to the widow and children from the deceased, and no recovery had shall be subject to any debt or liability of any character of the deceased husband.' The widow's right of action for the wrongful homicide of her husband cannot exist at all until he is actually dead, and she cannot, as a matter of course, bring suit before her cause of action comes into life. The statute of limitation begins to run from [18] the time the right of action accrues, that is, as soon as the party is entitled to apply to the proper tribunal. Angell on Lim. (6 ed.) sec. 42. It is clear, therefore, that the statute of limitations which began to run against the husband from the date his right of action accrued, namely, the time the injuries were inflicted, could not be pleaded against the plaintiff in a suit for his homicide, alleged to have been caused by the same injuries; because she had no right of action until her husband died, and the statute could not run against a right of action before it came into existence."

In Louisville, etc. R. Co. v. Clarke, 152 U. S. 230, 14 S. Ct. 579, 38 U. S. (L. ed.) 422, which was an action to recover damages for death, the railroad relied upon the rule of the common law, obtaining in prosecutions for murder, that death must ensue within a year and a day. The Court repudiated the defense, and the reasoning based upon a construction of the statute giving a right of action for death, strongly supports our view. The Court says: "The statute, in express words, gives the personal representative two years within which to sue. He cannot sue until the cause of action accrues, and the

cause of action given by the statute for the exclusive benefit of the widow and children or next of kin cannot accrue until the person injured dies. Until the death of the person injured, the 'new grievance' upon which the action is founded does not exist. To say, therefore, that where the person injured dies within one year and *two* days after being injured, no action can be maintained by the personal representative, is to go in the face of the statute, which makes no distinction between cases where death occurs within less than a year and a day from the injury, and where it does not occur until after the expiration of one year and a day. Although the evidence may show, beyond all dispute, that the death was caused by the wrongful act or omission of the defendant, and although the action by the personal representative was brought within two years after the death, yet, according to the argument of learned counsel, the action cannot be maintained if the deceased happened to survive his injuries for a year and a day. We cannot assent to this view. Was the death, in fact, caused by the wrongful act [19] or omission of the defendant? That is the vital inquiry in each case. The statute imposes no other condition upon the right to sue. The court has no authority to impose an additional or different one. If death was so caused, then the personal representative may sue at any time within two years from such death."

The diligent and learned counsel for the defendant has collected all of the cases holding to the contrary.

Canadian Pac. R. Co. v. Robinson, 54 Am. & Eng. R. Cas. 49, by the Supreme Court of Canada, was, as we have seen, reversed on appeal.

The two Alabama cases, Williams v. Alabama Great Southern R. Co. 158 Ala. 398, 17 Ann. Cas. 516, 48 So. 485, and Suell v. Dericott, 161 Ala. 259, 18 Ann. Cas. 630, 49 So. 895, 23 L.R.A.(N.S.) 996, and Seaboard Air Line R. Co. v. Allen, 192 Fed. 480, 112 C. C. A. 642, by the Circuit Court of Appeals, are based upon the construction of the Alabama statute conferring a right of action for death, which is different from ours in that the right there is not new and independent, but is a survival of the right of action of the intestate.

In the first of these cases the Court says: "The object of the statute (section 1751, Code 1896), as we understand it, was to continue the cause of action which the person injured had—and which he had not enforced, but might have enforced had not death intervened—for the benefit of the legal distributees of his estate; and to enable the distributees to obtain their damages, resulting from the same primary cause, and not to create an entirely new and additional right of action, although the mode of estimating the damages might be entirely different from that employed had the action been brought by the employee. 'In the view we take of the statute, the right to be enforced is not an original one, springing into existence from the death of the intestate, but is one having a previous existence, with the incident of survivorship, derived from the statute itself.'"

The Circuit Court of Appeals adopts this construction, the injury causing death in that case having occurred in Alabama.

Kelliher v. New York Cent. etc. R. Co. 153 App. Div. 617, 138 N. Y. S. 894, is in point, but it is [20] now pending on appeal in the Court of Appeals of New York.

We are, therefore, of opinion, on reason and authority, that the cause of action is not barred by the statute of limitations.

No error.

NOTE.

Commencement of Running of Statute of Limitations against Action for Death by Wrongful Act.

It is the purpose of this note to review the recent cases discussing the commencement of the running of the statute of limitations against an action for death by wrongful act. The earlier cases passing on this question are reviewed in the notes to Williams v. Alabama Great Southern R. Co. 17 Ann. Cas. 516, and Brown v. Electric Ry. Co. 70 Am. St. Rep. 666.

The statutes of a number of jurisdictions expressly require an action for death by wrongful act to be brought within a specified period after the death of the injured person. Chesapeake, etc. R. Co. v. Hawkins, 174 Fed. 597, 98 C. C. A. 443, 26 L.R.A.(N.S.) 309 (construing West Virginia statute); Devine v. Metropolitan West Side Elevated R. Co. 162 Ill. App. 629; Hammond v. Lewiston, etc. R. Co. 106 Me. 209, 76 Atl. 672, 30 L.R.A. (N.S.) 78; Bretthauer v. Jacobson, 79 N. J. L. 223, 75 Atl. 560; Martin v. Pittsburg Rys. Co. 227 Pa. St. 18, 19 Ann. Cas. 818, 75 Atl. 837, 26 L.R.A.(N.S.) 1221; Carpenter v. Rhode Island Co. 36 R. I. 396, 90 Atl. 768; Zimmer v. Grand Trunk R. Co. 19 Ont. App. 693.

The *Massachusetts* statute provides that an action to recover damages for a death caused by the wrongful act or default of another must be commenced within two years after the injury which caused the death. Cristilly v. Warner, 87 Conn. 461, 88 Atl. 711, 51 L.R.A.(N.S.) 415.

In *New York* the rule is that the statute of limitations does not begin to run against an action for death by wrongful act until the appointment of the executor or administrator; but it seems that this rule is limited by a provision requiring the action to be

brought within two years after the decedent's death. Conway v. New York, 139 App. Div. 446, 124 N. Y. S. 660; Boffee v. Consolidated Tel. etc. Co. 157 N. Y. S. 318. *Compare* Dodge v. North Hudson, 188 Fed. 489 (construing New York statute) *criticised* in American R. Co. v. Coronas, 230 Fed. 545. In Casey v. Auburn Telephone Co. 131 N. Y. S. 1, it was held that an action could be brought in behalf of the next of kin of a person whose death was caused by the wrongful act of the defendant, to recover damages which the next of kin had sustained by the death of the decedent, although the decedent before her death had brought an action to recover damages for personal injuries arising out of the same act that caused her death.

In a number of jurisdictions the rule obtains that the statute of limitations against an action for death by wrongful act does not begin to run until the death of the decedent, although the right of the decedent to recover damages for the injuries which caused his death was barred by limitations. The reason for this rule is that the right of action given by the statute to the persons entitled to sue for the death of the decedent is distinct from the right of the person injured to recover damages for the injuries. Robinson v. Canadian Pac. R. Co. [1892] A. C. (Eng.) 481 (construing Lower Canada statute), *reversing* 19 Can. Sup. Ct. 292; Donnelly v. Chicago City R. Co. 163 Ill. App. 7; Wilson v. Jackson Hill Coal, etc. Co. 48 Ind. App. 159, 95 N. E. 589; German-American Trust Co. v. Lafayette Box Board, etc. Co. 52 Ind. App. 211, 98 N. E. 874. And see the reported case. *Compare* Seaboard Air Line Ry. v. Allen, 192 Fed. 480, 112 C. C. A. 642 (construing Alabama statute); Kelliher v. New York Cent. etc. R. Co. 212 N. Y. 207, 105 N. E. 824, L.R.A.1915E 1178, *affirming* 153 App. Div. 617, 138 N. Y. S. 894, which *reversed* 77 Misc. 330, 136 N. Y. S. 256, and *answering* certified question in Keller v. New York House Wrecking Co. 154 App. Div. 938, 139 N. Y. S. 1128; Casey v. Auburn Tel. Co. 155 App. Div. 66, 139 N. Y. S. 579. In Donnelly v. Chicago City R. Co. supra, it was contended that since death did not ensue for two years after the date of the accident, there could be no recovery by the personal representative of the deceased. The court in answering the contention said: "We do not so construe the statute. The language is, 'Whenever the death of a person shall be caused by the wrongful act, neglect or default, and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then,' etc. In our opinion, this language refers to the right of the injured person as it existed immediately after the accident and not to the situation as it would exist more than two years after the accident, when the right of the injured party had expired by the limitation. The action for the death is different from the action by the injured man himself, in this, that two things must exist; the injury must have been sustained because of the neglect or default of the defendant, and the person injured must have died. It is not until death occurs that the right of action in the widow and next of kin through the administrator exists. We hold, therefore, that the only limitation on the right of the personal representative of the injured person to sue is that contained in the act which gives the right to the personal representative to sue, namely two years (since July 1, 1903, one year) from the date of the death of the person injured. In other words . . . the right of action is statutory and not a survival of decedent's right of action for personal injury."

Where the statute provides that a right of action accruing to a person injured by the wrongful act of another does not abate by the death of the person from the injuries received, but survives to his widow, children, or personal representative, the statute of limitation begins to run from the initiation of the injury, the cause of action being not the death of the person injured, but the breach of duty that caused the injury. Larue v. C. G. Kershaw Contracting Co. 177 Ala. 441, 59 So. 155; Murphy v. Chicago, etc. R. Co. 80 Ia. 26, 45 N. W. 392; Flynn v. Chicago Great Western R. Co. 159 Ia. 571, 141 N. W. 401, 45 L.R.A.(N.S.) 1096.

Under the federal statute giving to the personal representative a right of action for the death of a railroad employee when caused by the negligence of the railroad, and providing that the suit must be commenced within two years from the day the cause of action accrues, the period of limitation does not begin to run until the appointment of the personal representative. American R. Co. v. Coronas, 230 Fed. 545 (*explaining* Bixler v. Pennsylvania R. Co. 201 Fed. 553). In that case the court said: "In view of the fact that Lord Campbell's Act, upon which the Employers' Liability Act was modeled, expressly provided that the limitation should run from the death of the injured party, and that, in the enactment of the present law, Congress declined to adopt such a limitation, and fixed the period from the time the action accrued, we are of the opinion that the proper construction of the statute is that the right of action did not accrue, so that the limitation attached, until the administrator was appointed, and that the demurrer was properly overruled."

The infancy of the plaintiff at the time when the right of action accrues does not

postpone the running of the statute. Anthony v. St. Louis, etc. R. Co. 108 Ark. 219, 157 S. W. 394; Gulf, etc. R. Co. v. Bradley (Miss.) 69 So. 666. *Compare* Conway v. New York, 139 App. Div. 446, 124 N. Y. S. 660. "Section 6290 of Kirby's Digest, commonly known as Lord Campbell's Act, upon which the claim of the plaintiff is based, contains the proviso, 'that every such action shall be commenced within two years after the death of such person.' Inasmuch as the statute creates no saving clause for the benefit of persons under disability, the infancy of the plaintiffs at the time the cause of action accrued, does not postpone the running of the statute. . . . It follows that the bringing of the suit within two years from the death of the person whose death has been caused by the wrongful act is made an essential element of the right to sue. . . . But counsel for plaintiffs claim that the proviso of section 6290, above quoted, is repealed by section 5075 of Kirby's Digest, which reads as follows: 'If any person entitled to bring any action . . . be, at the time of the accrual of the cause of action, under twenty-one years of age, . . . such person shall be at liberty to bring such action within three years next after full age.' . . . The two statutes relate to different subjects, and there is no necessary repugnancy between their provisions." Anthony v. St. Louis, etc. R. Co. supra.

ARNOLD

v.

HUSSEY ET AL.

Maine Supreme Judicial Court—November 5, 1913.

111 Me. 224; 88 Atl. 724.

Evidence — Admissibility of Private Diary.

When a deceased person, a stranger to the transaction, made entries in a book which are relevant to the case, the entries are admissible in evidence only when made in the regular course of business, which means in the way of business, and hence entries by a private person in a diary concerning the weather kept only as a matter of custom and not as a matter of business or duty are not admissible after his death.

[See note at end of this case.]

Same.

In an action for injuries caused by a fall on the ice in front of defendant's building, the erroneous admission of entries in a private weather record kept by one now deceased, tending to show that the temperature was such that ice could not have formed on the day in question, is prejudicial.

[See note at end of this case.]

Exceptions from Supreme Judicial Court, Piscataquis county.

Action for damages. Annie Crandall Arnold, plaintiff, and Marcellus L. Hussey et al., defendants. Judgment for defendants. Plaintiff alleges exceptions. The facts are stated in the opinion. EXCEPTIONS SUSTAINED.

J. S. Williams and *C. W. Hayes* for plaintiff.

Hudson & Hudson for defendants.

[225] SPEAR, J.—This case comes to the Law Court upon exceptions, which are stated as follows: This is an action brought for the purpose of recovering against the defendants, as owners of the Braeburn Block in Guilford, for negligence in so constructing and maintaining said block that the water from the roof was precipitated upon the sidewalk, wholly on the private property of the defendants, so that a ridge of ice naturally would be formed, and the plaintiff alleges actually was formed on said walk in front of the postoffice which was in said building. Evidence was introduced which tended to show that a ridge of ice was formed in front of the said postoffice, and that the plaintiff in the exercise of due care and in the prosecution of lawful business, stepped upon said ridge of ice, and slipped, breaking her leg, which was the injury sued for.

The defendants introduced evidence which tended to deny the fact that there was any ice there at the time of the injury, and for the purpose of showing that the weather on the afternoon of the day on which the accident happened was too warm for the formation of ice, offered to be read to the jury extracts from the diary of one James Ham. Evidence in regard to said diary was adduced by the defendants from their witness, Ernest Ham, which is as follows: Q. What is your residence? A. Guilford. Q. Your father's name? A. James Ham. Q. When did he die? A. The 6th of November. Q. Have you in your possession a record of the weather in his handwriting? A. Yes, sir. Q. Do you know that he kept a record of the weather there in Guilford village? A. Yes, he always did. Q. Will you let me see his book? I show defendant's exhibit No. 1, and calling your attention to a page at the top of which are the words "Thermometer, Saturday, Jan. 21, 1911," and "weather," and to the handwriting directly thereunder, ask you if that is the handwriting of your father?

A. Yes, it is. [226] Mr. Hudson: We offer that. Mr. Hayes: We object. The Court: A private diary, was it? Mr. Hudson: Yes, your honor. The Court: Not kept as a part of any employment or duty. Mr. Hudson: Simply a matter of custom. The Court: Do you dare risk it? Mr. Hudson: Yes, your honor. The Court: Admitted. Mr. Hayes: Exceptions? The Court: Certainly. Q. Do you know how many times a day he took the temperature? A. Twice a day, at six in the morning and six at night. Mr. Hudson: "Saturday, Jan. 21, 1911, 10 above. Cloudy, S. W. P. M." S. W. means wind southwest. That was in the A. M. "P. M. 36 above."

The exceptions raise a question upon the competency of one class of hearsay evidence, upon which the authorities are not in full accord. When a deceased person, who is a stranger to the transaction has made entries in a book, which become relevant to the proof of some fact in issue in the case on trial, such entries with certain limitations may be admitted in evidence, and although not made in the presence of the parties, and not directly concerning their transactions, yet they may be pertinent and even conclusive proof of coeval facts.

But just what the limitations are is where the authorities divide. Yet there seems to be but one qualification that differentiates the decisions. All agree that such entries to become admissible must be made "in the ordinary course of business." Some hold that they must also be made against the interest of the parties making them; others, that this is not essential. Accordingly the result to be reached is not whether this kind of testimony is competent, but what are the limitations to its admissibility. As suggested, the important division of the courts upon the limitations is confined to the one question, whether the entries made must be against interest. But this limitation has been rejected by our court, as will appear below.

While no Maine cases are cited by plaintiff's counsel, yet the Maine reports, in several opinions, contain as comprehensive and satisfactory a solution of the question as we have been able to find. Augusta v. Windsor, 19 Me. 317, very early announced the rule on this subject, in harmony with the leading cases of that time, confirmed by the weight of authority since, and consistent with both reason and authority now. The principle here enunciated for the [227] government of the admission of this class of testimony is found in this language, adopted from Nichols v. Webb, 8 Wheat. 337, 5 U. S. (L. ed.) 628: "We think it a safe principle, that memoranda made by a person in the ordinary course of his business of acts or matters, which his duty in such business requires him to do for others, in case of his death, are admissible evidence of the acts and matters so done." In the next paragraph the opinion in terms rejects the limitation, found in some states, that the entry must appear to have been made against the interest of the party making it, saying: "This court is not satisfied with the reasoning upon which that limitation was introduced, and does not feel obliged to adopt it."

With the statement of this rule, which has not been modified or repealed, we might well sustain the exceptions without further citation, but as no recent opinion, that we are aware of, has had occasion to discuss this precise question, where it was directly raised, and became the pivot upon which the decision of the case turned, it may be well to collate the few decisions that are found, and note the different forms of expression in which the rule is announced. We have already referred to Augusta v. Windsor in the 19th Maine. The next case, in which the point is considered is Dow v. Sawyer, 29 Me. 117, which uses this language: "Contemporaneous entries made by third persons in their own books in the ordinary course of business, the matter being within the knowledge of the parties making the entry and there being no apparent motive to pervert the fact, are received as original evidence." This case also holds that such entries may be received without extraneous proof, if upon inspection of the books they appear to have been fairly kept and contain entries respecting the matter in issue. The next case is Oldtown v. Shapleigh, found in 33 Me. 278, which states: "A minute in writing made at the time when the fact it records took place, by a person since deceased, in the ordinary course of his business, corroborated by other circumstances, which render it probable that the fact occurred, is admissible in evidence. And such a minute is competent, where it is one of a chain or combination of facts, and the proof of one raises a presumption, that another has taken place." See also cases cited. In Lord v. Moore, 37 Me. 208, it is stated this way: "To make such entries in books of a private character admissible, the books in which they are made must have been fairly [228] and regularly kept, the entries must have been made by a deceased person whose duty it was to make them, or in the regular course of business, who had personal knowledge of the subject matter entered, and whose situation was such as to exclude all presumption of his having any interest to misrepresent the fact recorded." See also Pike v. Crehore, 40 Me. 503. In Wigmore on Evidence, Vol. 2, sec. 1523, the author says relating to this class of testimony: "The first general requirement is that the entry must have been made in the regular course of business. The judicial phrasings of this requirement vary in

terms. The entry must have been, therefore, in the way of business." In Leask v. Hoagland, 205 N. Y. 171, Ann. Cas. 1913D 1199, 98 N. E. 395, is found this expression: "The reason for receiving statements or entries made in the course of business as an exception to the rule (hearsay rule) is that they were made as a part of the regular course of ones livelihood or profession." In Kennedy v. Doyle, 10 Allen (Mass.) 161, we find this conclusion: "In the United States, the law is well settled that an entry made by a person in the ordinary course of his business or vocation, with no interest to misrepresent, before any controversy or question has arisen, and in a book produced from the proper custody, is competent evidence, after his death, of the facts thus recorded." From these varied expressions of the rule, it seems to be well established that the entries of deceased persons in books kept by them, but not connected with the suit in question and not made in the performance of any duty, nor in the course of their own business, are inadmissible; and we fail to find any cases in which a contrary rule is declared. On the other hand, the cases are numerous where entries not made in accordance with the rule herein stated have been rejected.

While public records, kept in the discharge of public duties, when produced by the proper custodian, tending to prove the facts therein contained, are admissible, such as entries made in books kept by the weather bureau, this question is not here involved and requires no discussion.

It very clearly appears from the exceptions that the diary offered and admitted was a book of private memoranda, whose entries were not made by the owner in the performance of any duty nor in the regular course of his own business and were therefore inadmissible.

It was argued that, even if the exceptions were sustainable, the [229] admission of the entries in the book were not prejudicial. We are not able to concur in this view. The very question at issue, was whether the weather conditions on the day in question, were such as to congeal the water flowing from the roof of the building, and thus form the ridge of ice complained of, or whether the weather was so warm as to avoid the conclusion that ice could thus form.

Exceptions sustained.

NOTE.

Private Diary as Evidence.

A private diary is not ordinarily admissible as evidence of the facts therein stated. Mair v. Bassett, 117 Mass. 356; Costelo v. Crowell, 139 Mass. 588, 2 N. E. 698; Stabler v. Clark, 155 Mich. 26, 118 N. W. 605; Elliott v. Sheppard, 179 Mo. 382, 78 S. W. 627; Burke v. Baker, 188 N. Y. 561, 80 N. E. 1033; Whitaker v. White, 69 Hun 258, 23 N. Y. S. 487; Covey v. Rogers, 84 Vt. 151, 78 Atl. 792. See also Barber's Appeal, 63 Conn. 393, 27 Atl. 973, 22 L.R.A. 90; Star Mills v. Bailey, 140 Ky. 194, 130 S. W. 1077, 140 Am. St. Rep. 370; Dorris v. Morrisdale Coal Co. 215 Pa. St. 638, 64 Atl. 855. And see the reported case. The reasons for excluding a private diary were well summarized in Elliott v. Sheppard, supra, wherein the court said: "This diary does not belong to that class of documentary evidence which is admissible. It is not in the nature of a book account, which, upon showing that it was correctly kept, would render it admissible. It is merely a statement purporting to be made by Hamilton, and is of no more force or effect than if he had made such statements to some witness the day before he died. Again it is inadmissible, because it falls within that class of testimony denominated self-serving statements. So in Mair v. Bassett, 117 Mass. 356, it was said: "To prove that the loan was made to the defendant, and the note given by him, the plaintiff offered in evidence certain entries in the diary of Dillaway in his handwriting, purporting to have been made April 14, 17 and 20, 1871. These entries are vague and incomplete, but giving them the most favorable construction, they are to the effect that he had made an agreement with the defendant to take his note, with certain mortgages and policies of insurance as collateral, and had paid $4000 to the defendant on the agreement. No evidence was offered that the defendant had ever seen the entries or had any knowledge of them, or that he had anything to do with the transaction therein recited, except that he did, on April 14, assign to Dillaway, a mortgage on land in New Hampshire. These entries were merely the declarations of Dillaway, and were properly excluded as not competent to prove that the defendant borrowed the money of Dillaway and gave his note therefor."

The holding of the reported case that entries, in a private diary, of daily weather observations are not admissible finds support in Monarch Mfg. Co. v. Omaha, etc. R. Co. 127 Ia. 511, 103 N. W. 493, wherein it was held that private records of weather observations, not, however, kept in the form of a diary, were inadmissible.

If a diary is kept as a book of account it is admissible as such. Remick v. Rumery, 69 N. H. 601, 45 Atl. 574; Gleason v. Kinney, 65 Vt. 560, 27 Atl. 208. In the case first cited it was said: "Exclusion of the diaries altogether was erroneous. They were the plaintiff's books of account, kept by himself

as a daily and original record of his transactions and business, and as such they were competent evidence in his favor, in the absence of anything in their appearance or character, or in the circumstances of the case, indicating that they were not kept with honesty and accuracy. Nothing of this nature is found or suggested." So in Gleason v. Kinney, supra, it was said: "The entry is in the form of an original entry of a charge in book account, rather than a memorandum from which such a charge could be formulated. The subject matter of each was a proper matter for charge on book account. In subject matter and form there is no objection to treating these entries as original entries in a book account. The only objection to treating them as such is the fact that they are found entered under the proper dates in a diary, and not on the orator's regular books of account, which it is found that he kept. . . . We think these entries were, in substance and form, proper entries in book account, and as such admissible in evidence, and that these items should be allowed to the orator." But in Covey v. Rogers, 84 Vt. 151, 78 Atl. 792, it was said: "The first exhibit is contained in a diary, on pages having the printed heading 'cash account.' The other exhibits are in blank memorandum books. In all of them the amounts are entered in columns under the headings 'received' and 'paid.' The entries are not in the ordinary form of book account entries. The items are without the usual signs of debit and credit. There is nothing to connect the defendant with the transactions represented. For anything that appears the several items may represent transactions with as many different persons. Considered as anything more than a cash account, the entries are meaningless until explained by the testimony of the person who made them. They must be regarded as mere private memoranda, available in aid of the recollection and as confirmatory of the testimony given, but not entitled to use as direct evidence against the party sought to be charged."

An entry in a diary being in the nature of a declaration, if it was against interest when made, is admissible. Miller v. McLean, 31 Ohio Cir. Ct. Rep. 64, wherein the court said: "The entry in his diary purporting to be the result of an examination of his account as shown by the books of Mills, Spellmire & Co., some of which had since been destroyed by fire, and being against interest when made, was admissible as evidence of payment or assumption of payment of his wife's debt."

In Barber's Appeal, 63 Conn. 393, 27 Atl. 973, 22 L.R.A. 90, entries in a diary kept by the testator were held to be admissible as tending to show his mental condition but not as proof of the facts therein stated.

A diary may be used by the person keeping it to refresh his recollection. Burson v. Vogel, 29 App. Cas. (D. C.) 388; Star Mills v. Bailey, 140 Ky. 194, 130 S. W. 1077, 140 Am. St. Rep. 370. And see Pierce v. Brady, 23 Beav. (Eng.) 64. In the case first cited it was said: "Burson is a man over seventy years of age, and appears to have kept a diary for fifty years, in which he made a daily record of events. There is nothing in the appearance of this diary to excite suspicion. The dates follow consecutively. It is true that the record is in shorthand, after the Pittman system; but it appears that the interpretation thereof could be made with sufficient certainty by one skilled in that method. Having testified in regard to his conception and the work done therein, he read a number of entries from the diary, showing dates and memoranda of work done. We see no substantial difference between this and the ordinary use of memoranda by a witness to refresh his memory." So it was said in Star Mills v. Bailey, supra: "Newton kept a diary. With it before him he was enabled to say that he was not in Owensboro the first of June, 1906, the day the note is dated, and when appellee says the transaction occurred. While the diary is not evidence, it may be referred to by the witness to refresh his recollection as to where he was on a certain day, and if when so refreshed he could remember and say that he was not at the place testified to by the adversary witness, the testimony is not only relevant, but the circumstance indicates a carefulness of habit, and a ready and generally reliable means of refreshing the recollection." In Smith v. Tebbitt, L. R. 1 P. & D. (Eng.) 398, the weight of such evidence was commented on as follows: "Considerable exception was taken to the evidence of Mrs. Cooke. She was a niece of Mrs. Thwaytes, and for many months was a visitor at her house. She occupied herself during this time in keeping notes in a diary of all the extravagant things her aunt said to her; and she did not deny that this diary was designed as a proof in future days of her aunt's incapacity to make a will. This diary was given in evidence, and records conversations with Mrs. Thwaytes still more remarkable than any here quoted. Such a document, if the honesty of its purpose could be relied upon, would form the best evidence in the case. But if there should have been an intention, as unquestionably there was a strong motive, to deceive, it would be the worst. I think it safer to set this portion of the evidence, for the present, aside, and recur to it, if need be, hereafter."

HADLEY
v.
CITY OF TALLAHASSEE.

Florida Supreme Court—May 11, 1914.

67 Fla. 436; 65 So. 545.

Death by Wrongful Act — Right to Sue — Mother of Illegitimate Child.

Under our statutes the mother of an illegitimate minor child, and the mother alone, has the right to sue for and recover damages for the death of such child by the wrongful act, negligence, carelessness, or default of another.

[See note at end of this case.]

(Syllabus by court.)

Error to Circuit Court, Leon county: MALONE, Judge.

Action for death by wrongful act. Emma Hadley, plaintiff, and City of Tallahassee, defendant. Judgment for defendant. Plaintiff brings error. The facts are stated in the opinion. REVERSED.

W. J. Oven and *S. H. Diamond* for plaintiff in error.

F. T. Myers for defendant in error.

[436] TAYLOR, J.—The plaintiff in error as plaintiff below sued the defendant in error as defendant below in the Circuit Court of Leon County for damages for the alleged negligent killing by electricity of an illegitimate child of the plaintiff of the age of six years.

The defendant demurred to the declaration on the grounds, among others, that the statute giving the right of recovery for the negligent death of a minor child, contemplates only legitimate children, and that no recovery can be had under it by the mother of an illegitimate child negligently killed; and that if a right of action exists under the statute for the wrongful death of a bastard [437] child, it does not accrue to the mother unless the father be dead. This demurrer was sustained by the court below, and final judgment rendered thereon in favor of the defendant, and against the plaintiff, who brings it here for review by writ of error.

Our statute, Section 3147 General Statutes of 1906, enacted in 1899, provides as follows:

"Death of Minor Child by Wrongful Act.—Whenever the death of any minor child shall be caused by the wrongful act, negligence, carelessness or default of any private association of persons, or by the wrongful act, negligence, carelessness or default of any officer, agent or employee, or by the wrongful act, negligence, carelessness or default of any corporation, or by the wrongful act, negligence, carelessness or default of any officer, agent or employee of any corporation acting in his capacity as such officer, agent or employee, the father of such minor child, or if the father be not living, the mother, as the legal representative of such deceased minor child, may maintain an action against such individual, private association of persons or corporation, and may recover not only for the loss of service of such minor child, but in addition thereto such sum for the mental pain and suffering of the parent or parents as the jury may assess."

Long prior to the enactment of the foregoing statute our Legislature on November 17th, 1829, enacted the following provision, brought forward as Section 2292 of the General Statutes of 1906:

"Bastards shall be capable of inheriting or transmitting inheritance on the part of their mother in like manner as if they had been lawfully begotten of such mother."

Prior to the adoption of the last above quoted statute, [438] under the Common Law of England, then in force in this Territory, a bastard in the eye of the law had neither father or mother, nor any other kindred, but was regarded as *nullius filius*. But by the adoption of this statute a mother was assigned to him through whom and to whom he could receive and transmit inheritance of property just as though he had been of legitimate birth. This statute recognizes in the parentage of bastards their mother as such, but leaves the parentage so far as the father is concerned where it was before its adoption. On his father's part he is still *nullius filius*. In other words under this statute a bastard has a mother fully recognized by law as such, but no father. Our Legislature had this statute before them when in 1899 it enacted Section 3147 General Statutes above quoted, giving to the mothers of minor children, when the fathers of such children were not living, the right to recover for their death by wrongful act. Insofar as bastards are concerned, they have no fathers recognized as such by any law, but as to them and the right of their mothers to recover for their wrongful death under this statute, they occupy the same status before the law as a legitimate child whose legally recognized father was actually dead. This statute, being in derogation of the common law, we admit under the general rule, should receive a somewhat strict construction, but at the same time it should be borne in mind that it is a remedial statute also, and that it should not receive so narrow a construction as to defeat the intention of the lawmaking power in its enactment. What was that intention? In the broad language of the statute itself, it was to furnish a remedy for the death of "*any minor child*" by the wrongful act, negligence or careless-

ness of another. Could it have been the intention of our lawmaking power in the enactment of this law, to exclude [439] from its remedial provisions the unfortunate illegitimate for whose misfortune of birth he has no sort of personal responsibility, thereby making him a double outcast, with no right to the protection of the law for his life, leaving him the unprotected target for the wilful, negligent and careless on every hand? We are not inclined to give the statute such a construction; but our better judgment leads us to hold with those courts, that in the construction of statutes similar in all material respects to ours, have held that the mother of an illegitimate minor child, and the mother alone, has the right to sue for and recover damages for the death of such child by the wrongful act, negligence, carelessness or default of another. Southern R. Co. v. Hawkins, 35 App. Cas. (D. C.) 313; Croft v. Southern Cotton Oil Co. 83 S. C. 232, 65 S. E. 216; Security Title, etc. Co. v. West Chicago St. R. Co. 91 Ill. App. 332; Muhl v. Michigan Southern R. Co. 10 Ohio St. 272; Galveston, etc. R. Co. v. Walker, 48 Tex. Civ. App. 52, 106 S. W. 705; Marshall v. Wabash R. Co. 120 Mo. 275, 25 S. W. 179; Dickason Coal Co. v. Liddil, 49 Ind. App. 40, 94 N. E. 411.

It follows from what has been said that the judgment of the court below must be, and is hereby, reversed, *and* the cause remanded with directions to overrule the demurrer of the defendant to the plaintiff's declaration, at the cost of the defendant in error.

Shackleford, C. J., and Cockrell, Hocker and Whitfield, J. J., concur.

NOTE.

Right of Parent to Recover for Death of Illegitimate Child.

Contrary to the holding in Lynch v. Knoop, 118 La. 611, 10 Ann. Cas. 807, the doctrine of the reported case that the mother of an illegitimate child has the right to recover for its death finds support in several late decisions, based on statutes giving to illegitimates the power to transmit inheritance. Dickason Coal Co. v. Liddil, 49 Ind. App. 40, 94 N. E. 411; Kenney v. Seaboard Air Line R. Co. 167 N. C. 14, 82 S. E. 968; Thompson v. Delaware, etc. R. Co. 41 Pa. Super. Ct. 617; Croft v. Southern Cotton Oil Co. 83 S. C. 232, 65 S. E. 216 (express statutory provision); Andrzejewski v. Northwestern Fuel Co. 158 Wis. 170, 148 N. W. 37. Thus Thompson v. Delaware, etc. R. Co. supra, was a case wherein the mother of an illegitimate child sought damages for her offspring's negligent killing. The action was brought under a statute entitled an act "to regulate and define the legal relation of an illegitimate child or children, its or their heirs, with each other, and the mother and her heirs." The first section thereof declared that "illegitimate children shall take and be known by the name of their mother and the common-law doctrine of nullius filius shall not apply as between the mother and her illegitimate child or children, but the mother and her heirs and her illegitimate child and its heirs, shall be mutually liable one to the other, and shall enjoy all the rights and privileges one to the other, in the same manner, and to the same extent, as if the said child or children had been born in lawful wedlock." The second section provided that "the mother of an illegitimate child, her heirs and legal representatives, and said illegitimate child or children, its or their heirs and legal representatives, shall have capacity to take or inherit from or through each other, personal estate, as next of kin, and real estate as heirs in fee simple or otherwise, under the intestate laws of this commonwealth, in the same manner and to the same extent, subject to the distinction of half-bloods, as if said child or children had been born in lawful wedlock." The fourth section was as follows: "The intent of this act is to legitimate an illegitimate child and its heirs, as to its mother and her heirs; but it is not intended to change the existing laws with regard to the father of such children, or their respective heirs or legal representatives." The court, holding that the mother was entitled to recover, said: "In interpreting this statute, the question is not, Could the right of the mother of an illegitimate child to maintain the action have been more clearly expressed? but, Do the words used clearly convey the legislative intention of her right to maintain such an action? There is no ambiguity in its provisions; it is the last step taken in a long series of enactments and adjudications, involving the same subject matter, and each enactment is a step forward in the direction of relief and protection for the unfortunate mother of an illegitimate child, and of an increase of the rights of her offspring. By its very terms the old common law doctrine of nullius filius no longer applies; the mother and her heirs, and the child and its heirs, shall be mutually liable one to the other, and shall enjoy all the rights and privileges one to the other, in the same manner, and to the same extent as if the child had been born in lawful wedlock, and the special declaration of intent is stated in unequivocal words to be, to legitimate an illegitimate child as to its mother. With this declaration of intention, can it be questioned that the object and effect of this statute was to change the status and capacity of an illegitimate child to the

status and capacity of a legitimate child, and create the relation of parent and child for all purposes as if the latter had been born in lawful wedlock. These are the words used, and to our mind they can be interpreted in but one way."

So in Kenney v. Seaboard Air Line R. Co. 167 N. C. 14, 82 S. E. 968, an action brought under the federal Employers' Liability Act by the administrator of an illegitimate child to recover for its wrongful death, it was held that the suit could be rightfully maintained for the benefit of the minor dependant children of the mother, as the expression "next of kin" as used in section 1 of the Act should be construed in the light of the statute law of North Carolina where the suit was brought, which law provided as follows: "Illegitimate children, born of the same mother, shall be considered legitimate as between themselves and their representatives, and their personal estate shall be distributed in the same manner as if they had been born in lawful wedlock. And in the case of the death of any such child or his issue, without leaving issue, his estate shall be distributed among his mother and all such persons as would be his next of kin if all such children had been born in lawful wedlock."

Likewise Andrzejewski v. Northwestern Fuel Co. 158 Wis. 170, 148 N. W. 37, wherein it was held that a recovery could be had for the benefit of an illegitimate's mother in an action for the negligent killing of the bastard, the court said: "It is contended that the recovery for loss to the mother of the deceased is improper because the deceased was an illegitimate. It is useless to review the conflict of authority on this point. The policy of our written law is to give an illegitimate, as regards the mother, substantially the same status as a child born in lawful wedlock. That was the situation when the law as it now exists respecting recoveries for loss accruing to ancestors by the negligent killing of their children, was enacted. The legislature must have appreciated that in providing for a recovery for the benefit of the lineal ancestors in default of there being lineal descendants. Sec. 4256, Stats. The statute is general. It makes no discrimination between lineal ancestors of illegitimates and those of legitimates. The former have inheritable and descendible blood as to the mother. Secs. 2273, 2274. That is not so as to the father, especially in the absence of a statutory acknowledgment of paternity, or legitimization by marriage. So while there is reason for excluding the father of an illegitimate from the privileges of the statute there is none as to the mother."

In Dickason Coal Co. v. Liddel, 49 Ind. App. 40, 94 N. E. 411, the action was brought by the administrator of an illegitimate child for the benefit of the alleged next of kin (a mother, two half brothers, and a half sister) to recover damages for its wrongful death under a statute (sec. 285, Burns' Rev. Stat. 1908) which provided that "the damages cannot exceed ten thousand dollars; and must inure to the exclusive benefit of the widow, or widower (as the case may be), and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." It was held that the mother was next of kin within the meaning of this statute. The court said: "The chief incapacity of a bastard consisted in his want of inheritable blood. This want has been supplied in this state by statute, and the harsh rule of the common law that forbade an illegitimate child from inheriting from its mother or she from it, has been thereby abrogated. The statute, conferring upon illegitimate children the right to inherit from the mother, is as follows: 'Illegitimate children shall inherit from the mother as if they were legitimate, and through the mother, if dead, any property or estate which she would, if living have taken by gift, devise, or descent from any other person.' § 2998 Burns 1908, § 2474 R. S. 1881. The statute conferring upon the mother of an illegitimate child and her descendants the right to inherit from such illegitimate child is as follows: 'The mother of an illegitimate child dying intestate, without issue or other descendants, shall inherit his estate; and if such mother be dead, her descendants or collateral kindred shall take the inheritance in the order hereinbefore prescribed.' § 3002 Burns 1908, § 2477 R. S. 1881. . . . The phrase 'next of kin' includes such persons as are entitled to inherit the personal property of the deceased person. Under the statutes of our state the mother of an illegitimate child and her descendants and collateral and kindred are entitled to inherit the personal property of such deceased child, and are therefore its next of kin. We recognize the rule that a statute in derogation of the common law must be strictly construed, and we regard § 285, supra, as such a statute, but we do not think that a strict construction of this section will prevent the mother of an illegitimate child from being considered its next of kin within the meaning of this act."

A section of an act providing that "in event of the death of such illegitimate child or the mother of such illegitimate child, by the wrongful or negligent act of another, such illegitimate child or the mother of such illegitimate child, shall have the same rights and remedies, in regard to such wrongful or negligent act, as though such illegitimate child had been born in lawful wedlock," has been held to be constitutional as against the objection that it did not relate to the subject

expressed in the title of the act which read as follows: "An act to provide for an illegitimate child, to inherit from its mother, and the mother from her illegitimate child." Croft v. Southern Cotton Oil Co. 83 S. C. 232, 65 S. E. 216.

FROHLICH ET AL.

v.

DEACON ET AL.

Michigan Supreme Court—July 24, 1914.

181 Mich. 255; 148 N. W. 180.

Survival of Actions — Conspiracy to Restrain Trade.

A right of action for damages sustained from an unlawful conspiracy and combination between the defendants for the purpose of creating restrictions in trade and commerce, and of destroying the credit, reputation, and business of F., whereby F.'s business was ruined, and he was forced to sell its tangible assets for an inadequate price, does not survive the death of F. at common law, nor under Comp. Laws 1897, § 10117, which provides that actions for negligent injury to persons, for damages to real or personal estate, and actions to recover real estate, where persons have been induced to part therewith through fraudulent representations and deceit, shall survive.

[See note at end of this case.]

Same.

Under Pub. Acts 1897, No. 195 (Comp. Laws 1897, §§ 10421, 10422), providing that where, by the fraudulent representations any injury shall be done to the person, property, or rights of another for which an action for fraud may be brought, assumpsit may be brought to recover damages for such injury, and that the cause of action shall, upon the death of the person injured, survive, held, by an equally divided court, that such cause of action did not survive the death of F., since defendant's acts, though illegal and oppressive, were neither deceptive nor fraudulent, and, while they would give a right of action on the case, the action was not one for fraud and deceit.

[See note at end of this case.]

Error to Circuit Court, Wayne county: HOSMER, Judge.

Action for damages. Edward Frohlich et al., plaintiffs, and John F. Deacon et al., defendants. Judgment for defendants. Plaintiffs bring error. The facts are stated in the opinion. AFFIRMED.

Lucking, Emmons & Helfman for plaintiffs in error.

James O. Murfin for defendant in error Miller Lumber Company.

Geer, Williams, Martin & Butler for defendant in error City Lumber Company.

[255] BROOKS, J.—The opinion of Chief Justice McAlvay proceeds upon the assumption, which I think is warranted in law, that the cause of action set up in plaintiffs' declaration does not survive at common law, nor under section 10117, 3 Comp. Laws (5 How. Stat. [2d ed.] § 12761). He holds, however, that said cause of action does survive under sections 10421, 10422, 3 Comp. Laws (5 How. Stat. [2d ed.] [256] §§ 13954, 13955). Under those sections it is apparent that only those causes of action survive where the injured party in his lifetime might have brought "an action on the case for fraud or deceit." The question, therefore, arises: Are the alleged illegal acts ascribed to defendants such acts as would have sustained an action on the case for fraud or deceit brought by plaintiffs' testator in his lifetime? Upon this point, Mr. Justice McAlvay says:

"The conduct charged in the declaration by plaintiffs against defendants may, without misnomer, be labeled fraudulent. It may further be said that this declaration was intended to state a cause of action for deceit brought about by fraud."

With this conclusion I find myself unable to agree. The essential elements of actionable fraud are said to be:

(1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth, and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury.

20 Cyc. p. 13.

In Parker v. Armstrong, 55 Mich. 176 (20 N. W. 892), it is said:

"The cause of action being the successful use of false pretenses to get plaintiff to pay for the notes passed off on him, the declaration must, in order to support such a judgment as was rendered, show—*first*, what pretenses were made; *second*, that they were made by the defendants in person, or by authority and design; *third*, that they were material; *fourth*, that they were false and fraudulent, and deceived complainant; and, *fifth*, what defendants obtained by them."

[257] The term "fraud and deceit" implies deception by means of fraudulent representations or otherwise, resulting in injury. While the adjective "fraudulent" is frequently used

in the declaration to characterize the acts alleged to have been committed by the defendants, the use of that term alone is not sufficient to fix the quality of the acts, or to give them a legal significance which they do not intrinsically possess. It is nowhere averred in the declaration that the illegal acts alleged to have been committed by defendants misled or deceived plaintiffs' testator, nor that in consequence of those acts, being so misled, he acted to his injury. The acts described were illegal and oppressive. They were not deceptive nor fraudulent. The commission of those acts by the defendants gave to plaintiffs' testator in his lifetime a right of action on the case under the statute or at common law; but such an action cannot by any stretch of the imagination be considered one for fraud and deceit.

Without further considering the other objections raised by the demurrer to plaintiffs' declaration, I am of opinion that the foregoing conclusion is inevitable, and therefore fatal to plaintiffs' right to recover.

The order sustaining defendants' demurrer should be affirmed.

Stone, Ostrander, and Steere, JJ., concurred with Brooke, J.

McALVAY, C. J.—In this case the trial court sustained the demurrers of defendants to an amended declaration. Plaintiffs have brought the case to this court for review upon a writ of error asking for a reversal of the judgment entered upon the order sustaining such demurrers.

The facts in the case set forth in the amended declaration, which if well pleaded are admitted by the demurrers, are as follows:

[258] Plaintiffs are executor and executrix of Simon Frohlich, deceased. The declaration, in three separate counts, charges a fraudulent conspiracy at common law on the part of defendants to ruin and destroy the credit, reputation, and business of the plaintiffs' testator, and also a violation of the anti-trust laws of this State.

Simon Frohlich, prior to January 1, 1906, owned and operated a factory in the city of Detroit. He was engaged in the manufacture and sale of sash, doors, and other building material. At this time he enlarged his business to include buying, manufacturing, wholesaling, retailing, and jobbing lumber and building materials, under the name and style of Frohlich Glass Company, investing in such enterprise a cash capital of $70,000. In two years he doubled the number of his employees and built up a business of $12,000 sales per month. He had prospects of continued expansion and success.

Defendants were competitors of Simon Frohlich and engaged in the lumber business, doing more than 90 per cent. of the wholesale, retail, and jobbing business in lumber in Detroit, and comprising about 75 per cent. of the lumber dealers. They fraudulently and unlawfully entered into a conspiracy and combination on or about June 1, 1907, actionable at the common law, and for the purpose of creating and carrying out restrictions in trade and commerce, contrary to the laws of Michigan, and for the purpose of destroying the credit, reputation, and business of Simon Frohlich.

By this combination and fraudulent conspiracy and their subsequent illegal acts in carrying out the same, defendants succeeded in ruining the lumber business of Simon Frohlich, and forcing him to sell practically all its tangible assets to one of them at an inadequate price of $20,000 less than its value, and in driving him out of this business.

[259] Eighteen individuals, firms, and corporations are joined as defendants in this suit. Of these, 15 have demurred, and the grounds of these demurrers presented and relied upon in their briefs are as follows:

"(1) The declaration is not sufficiently specific, and does not set forth a cause of action.

"(2) Such action does not survive the death of Simon Frohlich.

"(3) Simon Frohlich was estopped by reason of the sale of the tangible assets of his business."

The second ground of demurrer relied upon by defendants raises in our opinion the most important question in the case. It requires the construction of the statute under which the action is brought in assumpsit, and upon which plaintiffs rely. The exact question is for the first time before this court. This is Act No. 195 of the Public Acts of 1897, entitled:

"An act to provide for bringing actions of assumpsit in certain cases, and to provide that in such cases the cause of action shall survive."

The entire act reads:

"Sec. 1. In all cases where, by the fraudulent representations or conduct of any person, an injury has been or shall be produced, either to the person, property or rights of another, for which an action on the case for fraud or deceit may by law be brought, an action of assumpsit may be brought to recover damages for such injury, and in all such cases a promise shall be implied by law to pay all just damages arising from such fraud or deceit and may be so declared.

"Sec. 2. The causes of action specified in section one of this act shall, upon the death of the person injured, survive to his personal representatives."

Sections 10421 and 10422, 3 Comp. Laws (5 How. Stat. [2d ed.] §§ 13954, 13955).

The act in question, as its title indicates, is to provide that certain actions sounding in tort may be brought in assumpsit, and also to provide that in all cases where this may be done the causes of action [260] shall survive. This presupposes the fact that before the enactment of this statute such actions could not have been brought in assumpsit, nor would the causes of action have survived. It will therefore be necessary, first, to determine the class of actions which may be brought under this statute in assumpsit, from which it will logically follow that all such causes of action will survive.

In this State provision is made for the survival of actions, as follows:

"In addition to the actions which survive by the common law, the following shall also survive: that is to say: actions of replevin, and trover, actions of assault and battery, false imprisonment, for goods taken and carried away, *for negligent injury to persons*, for damages done to real or personal estate, *and actions to recover real estate where persons have been induced to part with the same through fraudulent representations and deceit.*" Section 10117, 3 Comp. Laws (5 How. Stat. [2d ed.] § 12761).

To this is added, by the act under consideration, the provisions as quoted in sections 10421, 10422, supra.

All such actions specifically mentioned survive by force of these statutes, whether or not they were assignable at the common law. Rights of action which survive are also assignable. Stebbins v. Dean, 82 Mich. 385–388, 46 N. W. 778.

Section 10117, supra, was adopted by this State verbatim (except the portions italicized) from the State of Massachusetts. In construing this statute, this court, in Stebbins v. Dean, supra, in an opinion written by Mr. Justice Grant, adopted and followed the construction placed upon it by the Massachusetts courts, holding that the statute "was intended to include only those cases where injury is occasioned to property by the direct wrongful act of a party upon the property," citing Cummings v. Bird, 115 Mass. 346. Wisconsin, following Michigan, adopted the same statute, and in a line of decisions has given to [261] it a like construction. The same is true of the courts of several of the States.

Upon the construction of this statute, where similar phraseology is used, there appears to be no disagreement among the better authorities.

The contention of the demurring defendants is that by the words of this new act under consideration no change has been made in this respect, and that the rule laid down in the case of Stebbins v. Dean, supra, controls in this case. They insist that the cause of action plaintiffs declare upon essentially sounds in tort, and is based upon an alleged conspiracy entered into by defendants to create and carry out a trust and monopoly, a restriction in trade and commerce in lumber and building material to injure plaintiffs' testator and drive him out of business, in violation of the common law, and of the Michigan anti-trust act, so called, as a result of which conspiracy plaintiffs' testator suffered damage to his business in his lifetime, and that under all the authorities such causes of action do not survive.

The dispute upon this question, then, is narrowed to a single proposition, and that is whether Act No. 195, Pub. Acts 1897, supra, by its express provisions, has made a change in the law by adding to the list of causes of action which survive.

This statute includes all cases arising from injuries produced by the false representations or conduct of any person for which an action on the case for fraud or deceit might be brought at law, and gives the person injured a right to bring an action in assumpsit for such injuries. The nature of the injuries are specified as injuries "either to the person, property or rights of another."

Dealing with the instant concrete case, we must determine whether, upon the facts stated in the declaration, plaintiffs' testator could have brought an action on the case at law for fraud or deceit against [262] defendants to recover damages for the injury received.

The conduct charged in the declaration by plaintiffs against defendants may, without misnomer, be labeled fraudulent. It may further be said that this declaration was intended to state a cause of action for deceit brought about by fraud. In a similar case the action has been so recognized by the Supreme Court of Wisconsin in Murray v. Buell, 76 Wis. 657, 45 N. W. 667, 20 Am. St. Rep. 92. This was an action for conspiracy to monopolize the coal business in Milwaukee to the injury of plaintiff's business, referring to which in a later case, Lane v. Frawley, 102 Wis. 373, 78 N. W. 593, that court said:

"That action is in all respects analogous to the action of deceit, resulting in loss and damage."

And of the case then under consideration it said:

"This, then, being a tort action for deceit to recover general damages caused by the fraud, and not to recover back specific property obtained by fraud, it is vigorously debated whether or not it survives."

In both these Wisconsin cases, supra, it was held that the actions did not survive by rea-

son of the Wisconsin statutes which have at no time contained language indicative of the intention that they should survive.

The instant case is a tort action for deceit to recover general damages to the business of plaintiffs' testator caused by fraud during his lifetime, and not to recover damages for injuries to specific tangible property. If a recovery can be had, it will be because this court holds that the right of action survived under the statute in question.

This statute makes provision for a right of action in assumpsit for injuries done "either to the person, property or rights of another." By the addition of the words "or rights of another," it must be held that the clear intent of the legislature was to add to the [263] actions which survived in this State another class of actions which were not theretofore included, namely: all actions for damages for injuries caused by the fraudulent representations or conduct of any person to the "rights of another."

The damages for which the instant suit has been brought are included in that class, and, as already stated, are damages, not to the specific property of plaintiffs' testator, but to his business. Such injury to his business was an injury to his rights.

The statute of the State of New York provides for the survival of actions for "wrongs done to the property, rights or interests of another." This language has been frequently before the court of last resort of that State for construction. In Cregin v. Brooklyn Crosstown R. Co. 75 N. Y. 192, 31 Am. Rep. 459, Mr. Justice Rapallo, speaking for the court said:

"The rights and interests, for tortious injuries to which this statute preserves the right of action, have frequently been considered, and it is generally conceded that they must be pecuniary rights or interests, by injuries to which the estate of the deceased is diminished. . . . Where an injury to pecuniary interests is shown, the intent of the statute seems plain that the cause of action shall survive, notwithstanding that such injury be caused by a tort, provided it be not one of the torts specifically mentioned and excepted."

That this New York statute declaring that causes of action for injuries to "property, rights and interests shall survive" is much broader than the statutes of Wisconsin, Massachusetts, and the former statute of Michigan is apparent, and is recognized and admitted by defendants in one of their briefs. It is also recognized by the Supreme Court of Wisconsin in John V. Farwell Co. v. Wolf, 96 Wis. 10-18, 70 N. W. 289, 290, 71 N. W. 109, 37 L.R.A. 138, 65 Am. St. Rep. 22, where the court said:

[264] "The New York statute provides that 'actions for all wrongs done to property, rights or interests of another shall survive.' It is held that this language is so broad and comprehensive as to cover all injuries to rights of property, and is not confined to injuries, . . . as such—that it includes actions for damages for conspiracies to defraud and damages for deceit. Bond v. Smith, 4 Hun 48; Haight v. Hayt, 19 N. Y. 464; Lyon v. Park, 111 N. Y. 350, 18 N. E. 863; Brackett v. Griswold, 103 N. Y. 425, 9 N. E. 438. These cases turn entirely on the meaning of the significant words 'property, rights and interests.'"

In our statute under construction the words "or rights of another" are of much broader significance than any of the language used in section 10117, 3 Comp. Laws, quoted supra, and are as comprehensive as the words quoted from the New York statute; and section 2 of the act provides that:

"The causes of action specified in section one of this act shall, upon the death of the person injured, survive."

Both upon reason and authority the conclusion cannot be avoided that the instant case is within the provisions of section 1 of this act, and that the cause of action by virtue of section 2 survived.

This same question was before the supreme court of the State of Wisconsin in Lane v. Frawley, supra, and upon the statute which contained words identical with those in the New York statute and those in the act of this State under consideration.

The contention was that the words were entitled to the same construction as given to them by the courts of the State of New York, and therefore the action in the case under consideration should be held to have survived. The section in the Wisconsin statute containing these words contained no words of survival as did the New York statute, and also our Act No. 195 under consideration. The court held the section was not intended to provide for the survival [265] of any action, but merely to regulate the proceedings in such actions as otherwise survived.

An examination of that opinion makes it clear that, had the section contained specific words of survival, the court would have held that the cause of action survived. Our legislature has declared that such case of action shall survive in words so clear that the intent cannot be mistaken.

The remaining grounds for demurrer do not require extended consideration. An examination of the amended declaration satisfies us that the pleader has stated a good cause of action both at the common law and under the Michigan anti-trust laws. The document is necessarily of great length, and must be

considered as a whole. To make it more specific would, in our opinion, require that the evidence be pleaded. Similar declarations in actions in cases for damages for wrongful acts in interrupting and destroying plaintiff's business and injuring the reputation of his business which contained no more specific allegations than are set forth in the declaration under consideration have been held by this court to state a cause of action. Oliver v. Perkins, 92 Mich. 304–315, 52 N. W. 609; Church v. Anti-Kalsomine Co. 118 Mich. 219, 76 N. W. 383.

The Federal courts have sustained similar declarations in cases brought under the Sherman anti-trust law (Act July 2, 1890, chap. 647, 26 U. S. Stat. 209 [U. S. Comp. Stat. 1901, p. 3200]). Wheeler-Stenzel Co. v. National Window Glass Jobbers' Assoc. 152 Fed. 864, 81 C. C. A. 658, 10 L.R.A.(N.S.) 972; Monarch Tobacco Works v. American Tobacco Co. 165 Fed. 774–779; People's Tobacco Co. v. American Tobacco Co. 170 Fed. 396, 95 C. C. A. 566; Hale v. O'Connor Coal, etc. Co. 181 Fed. 267.

The remaining ground for demurrer relied upon is that plaintiffs' testator was estopped from bringing this action by reason of having sold his business prior to his death. The declaration shows that, after [266] Simon Frohlich's business was ruined, the unlawful acts of defendants as charged and his factory ceased operations, he was forced to and did sell all the tangible personal property used by him in connection with his business to one of the defendants at a price $20,000 less than its value. This sale carried with it no rights of action or other intangible property or interests. If he had a cause of action against defendants, this sale in no way disposed of it. This ground for demurrer is therefore not meritorious. Our conclusion is that the demurrers should have been overruled.

The judgment of the circuit court should be reversed and set aside, with permission to the demurring defendants, after notice of this decision, to plead to the declaration within the usual time allowed by rule.

Kuhn, Bird, and Moore, JJ., concurred with McAlvay, C. J.

NOTE.

Survival of Right of Action for Conspiracy to Restrain Trade.

The reported case holds by an equally divided court that a right of action for the damages caused by an illegal conspiracy in restraint of trade is not an action for damages by fraud and does not survive the death of the injured person. A like result has been reached in what appears to be the only other case passing on the survival of such a cause of action. Murray v. Buell, 76 Wis. 657, 45 N. W. 667, 20 Am. St. Rep. 92. In that case the action was for damages for a conspiracy to control and monopolize the coal business in a certain city. After referring to the common law rule whereby personal actions die with the injured person, the court said: "It is claimed, however, that such cause of action would survive by virtue of ch. 280, Laws of 1887, amending that section by the introduction of the words, 'or other damage to the person,' so that the part here applicable now reads: 'Actions for assault and battery, or false imprisonment, or other damage to the person.' But it is very manifest that the conspiracy in question inflicted no injury or damage to the person of the plaintiff. The acts alleged were unlawful and injured his business, and gave him a right of action for damages, but such damages were in no sense 'damage to the person' of the plaintiff." In Jones v. Barmm, 217 Ill. 381, 75 N. E. 505, it was held that an action to recover for a malicious interference with business did not survive under a statute providing for the survival of actions "to recover damages for an injury to real or personal property." So in Young v. Aylesworth, 35 R. I. 259, 86 Atl. 555, it was held that an action for a conspiracy to deprive a person of the benefits of his membership in a fraternal order was not within a statute providing for the survival of "actions of trespass and trespass on the case for damages to the person or to real and personal estate." In Brackett v. Griswold, 103 N. Y. 425, 9 N. E. 438, under a statute discussed in the reported case it was said of an action brought inter alia for a conspiracy by a corporation and its officers to defraud a creditor by making a false report: "So far as the cause of action was for a conspiracy to cheat or defraud the intestate it was for an injury to a property right, and did not die with its owner."

PURDY

v.

WESTERN UNION TELEGRAPH COMPANY.

South Carolina Supreme Court—April 28, 1914.

97 S. Car. 22; 80 S. E. 459.

Telegraphs and Telephones — Disclosing Contents of Message — Punitive Damages.

Proof of wilfulness is essential to the recovery of punitive damages against a tele-

graph company for the act of its agent in disclosing the contents of a message.

[See note at end of this case.]

Appeal from Circuit Court, Ridgeland county: SHIPP, Judge.

Action for damages. H. Klugh Purdy, plaintiff, and Western Union Telegraph Company, defendant. Judgment for plaintiff. New trial granted. Plaintiff appeals. AFFIRMED.

[22] This is an action brought by H. Klugh Purdy, plaintiff, against the defendant, Western Union Telegraph Co., for twenty-five hundred dollars punitive damages on account of an alleged wilful and wanton disclosure of the contents of a certain telegram sent plaintiff by the National Surety Co., with reference to its rates on the bond of certain public officers. The case went to the jury only on the question of punitive damages and the jury returned a verdict for eight hundred dollars.

A motion for new trial was made upon two grounds: first, because the verdict of the jury for eight hundred dollars is grossly excessive; and, second, because there was no evidence of wanton, wilful or intentional wrong on the part of defendant or its agents or any evidence which would warrant a verdict for punitive damages, and the evidence at most would support only a verdict for nominal damages.

The case was tried and the motion argued on May 16th, 1913, and on July 18th, 1913, Hon. S. W. G. Shipp, presiding Judge, filed an order granting the new trial upon the ground that there was no testimony warranting punitive damages.

From the order granting a new trial the plaintiff appeals.

L. A. Hutson for appellant.

Nelson, Nelson & Gettys for respondent.

[23] FRASER, J.—The appellant thus states his case:

"The testimony in this case shows that a telegram was sent from New York by the National Surety Company to H. Klugh Purdy, its agent at Ridgeland, S. C., reading as follows:

"'Necessary to maintain manual rates on all public business.' That H. Klugh Purdy was not in Ridgeland when the said message was received, but had instructed said agent at Ridgeland to forward said message to Verdery, S. C., which said agent did.

"That said agent delivered the above stated message to John P. Wise, who was agent for a competing bonding company, and to H. H. Porter without the consent of the sender or addressee and that the contents of said message was generally known in Ridgeland when the addressee was at Verdery, S. C., two hundred miles away.

"The only question in this appeal is whether his Honor erred in granting a new trial on the ground that there was a total absence of testimony to show wilfulness."

The Circuit Judge was right. There was a total absence of testimony to show wilfulness.

The appeal is dismissed.

NOTE.

Liability of Telegraph Company for Disclosure of Contents of Message.

A telegraph company acts at its peril if it divulges the contents of a message without the consent of either the sender or the addressee, as it is part of the company's undertaking, with respect to the transmission and subsequent handling of the message, that its contents shall not be disclosed to any unauthorized person. Barnes v. Postal Telegraph-Cable Co. 156 N. C. 150, 72 S. E. 78. A telegraph company incurs no liability for telephoning a message beyond the limits of its lines with the consent of the sendee. Barnes v. Postal Telegraph-Cable Co. supra; Hellams v. Western Union Tel. Co. 70 S. C. 83, 49 S. E. 12. But it was held in Barnes v. Western Union Tel. Co. 120 Fed. 550, that a case was made out for the jury where it appeared that a message was telephoned to an inn by the telegraph company's agent and was left in a place where people could see and read it, by reason of which publicity the sendee of the message lost a business opportunity.

The reported case holds that a new trial is properly granted to a telegraph company in a suit against it to recover for the disclosure of the contents of messages intrusted to it for transmission, where it appears that there was, in the trial court, an entire absence of testimony to show a wilful divulgence on the part of the company's agents.

It has been held that a person who must rely on his own acts of immorality to prove his damages in a suit to recover from a telegraph company for disclosing the contents of messages addressed to him is not entitled to any recovery. Western Union Tel. Co. v. McLaurin (Miss.) 66 So. 739, L.R.A. 1915C 487. The court in that case said: "The publication of the telegrams did not disclose the character of the sender. It was necessary for the plaintiff's case that he should disclose her business (if this is the proper word for this sort of traffic), in order that he might thereby show that he was injured. He could not 'open his case' without confessing his

criminal intimacy with the courtesan, and it was his relations with the woman that brought about his shame—and it was this shame which produced the injury, or actual damages. It was wrong, of course, for the telegraph company to disclose the contents of the telegrams, but the disclosure would not and could not cause any actual injury to complainant, except for his own immoral practices. Leaving out of view the immorality of plaintiff, the wrongs of the company did not injure plaintiff. Without the aid of his immoral relations with the scarlet woman, he cannot show any injury to his self-respect. It thus appears that the courts will not entertain this action at all, although it may appear that the telegraph company has been guilty of a wanton disregard of its public duties. The state will not undertake to punish the wrong because the plaintiff who brings the controversy into court comes with unclean hands, and the court can enter no judgment except such judgment as will rid it of this entire litigation."

It has been held that where the disclosure was merely the thoughtless act of a telegraph operator, from the kindest of motives, in revealing a matter of public interest which would have become general property in a few hours after the divulgence complained of, the addressee was entitled to recover nominal damages only. Cocke v. Western Union Tel. Co. 84 Miss. 380, 36 So. 392.

In Matter of Renville, 46 App. Div. 37, 61 N. Y. S. 549, wherein a person sought to compel a telegraph company to connect a ticker in his office with its telegraph wires and to furnish him with quotations of transactions on the New York Stock Exchange the court in refusing to grant the petitioner's application said: "The information delivered to the respondents for transmission is a communication which the stock exchange wishes to transmit to the persons it designates and to no one else. I can see no reason why the stock exchange should be required to furnish the appellant with this information, which relates solely to its own business upon its own property, or why the respondents should be required to violate their agreement with the stock exchange and the law of this state, and furnish to the appellant information which had been communicated to the respondents by the stock exchange for a specific purpose and none other."

Western Union Tel. Co. v. Bierhaus, 8 Ind. App. 563, 36 N. E. 161, was an action to recover from a telegraph company a penalty of one hundred dollars for the disclosure of the contents of several telegraphic dispatches. The statute on which the suit was based provided, among other things, that the company should, on the usual terms, transmit the messages received "with impartiality and good faith, and in the order of time in which they are received, and shall in no manner discriminate in rates charged, or words or figures charged for, or manner or conditions of service between any of its patrons, but shall serve individuals, corporations and other telegraphic companies with impartiality." It was held that the action would not lie as there was no express provision in the statute which prohibited telegraph companies from divulging the contents of a message, and to disclose its contents had no necessary connection with its transmission, for transmission in good faith and with impartiality meant only the forwarding of the message, and the delivery thereof, accurately and without favor of preference. It should be noted in connection with that case that the suit was instituted under the statute quoted and not under another act which prohibited, in express terms, the disclosure of the contents of messages and which gave a remedy in damages to the party injured to the extent of the injury.

As to the effect of the obligation of secrecy imposed on telegraph companies as giving a privilege against the production of telegrams in evidence, see the note to Sotham v. Macomber, Ann. Cas. 1916C 694.

STATE

v.

SALISBURY ICE AND FUEL COMPANY.

North Carolina Supreme Court—May 27, 1914.

166 N. Car. 403; 81 S. E. 956.

Criminal Law — New Trial — Motion in Appellate Court.

A petition in a criminal case to rehear or grant a new trial for newly discovered evidence cannot be entertained in the Supreme Court.

[See 19 Ann. Cas. 508.]

Defenses — Entrapment.

Accused, obtaining money by means of short weight of coke sold to prosecutor, was guilty of obtaining money by false pretenses, punishable by Revisal 1905, § 3432, though prosecutor testified that he had been suspecting that accused was selling short weight, and that he had to buy from him to find out whether that was true or not, and that he did not know positively that accused sold short weight until the coke had been weighed after paying the price.

[See note at end of this case.]

Appeal from Superior Court, Rowan County. LONG, Judge.

Criminal action. Salisbury Ice and Fuel Company convicted of false pretenses and appeals. Petition to review record and reconsider opinion. The facts are stated in the opinion. PETITION DISMISSED.

Linn & Linn for appellant.

Attorney-General Bickett, Assistant Attorney-General Calvert and *A. H. Price* for appellee.

[403] CLARK, C. J.—This is a petition to "review the record and reconsider the opinion filed in this case before certification to the lower court, on account of an alleged palpable oversight therein." This is a criminal action in which the defendant is indicted for false pretense in obtaining money by means of short weight in coal. The petition to reconsider relies upon the evidence of the prosecutor, in that when he was asked, "Yet you [404] allowed the money to be paid the driver, thinking and feeling and knowing at the time that the ton of coke was at least 200 pounds short?" he answered, "To the best of my judgment."

This Court has uniformly held that "a petition to rehear, or to grant a new trial for newly discovered testimony, cannot be entertained in this Court in criminal actions." State v. Lilliston, 141 N. C. 864, 54 S. E. 427, which reviews and approves State v. Jones, 69 N. C. 16; State v. Starnes, 94 N. C. 982; State v. Gooch, 94 N. C. 1006; State v. Starnes, 97 N. C. 424, 2 S. E. 447; State v. Rowe, 98 N. C. 630, 4 S. E. 506; State v. Edwards, 126 N. C. 1055, 35 S. E. 540; State v. Council, 129 N. C. 511, 39 S. E. 814; State v. Register, 133 N. C. 746, 46 S. E. 21, and State v. Lilliston, has itself since been cited and followed in State v. Turner, 143 N. C. 643, 57 S. E. 158; State v. Arthur, 151 N. C. 654, 19 Ann. Cas. 505, 65 S. E. 758; Murdock v. Carolina, etc. R. Co. 159 N C. 132, 74 S. E. 887.

But this differs from a petition to rehear in that it is a motion to reconsider the opinion before it is certified down. In the evidence cited by the petitioner the question is mistaken for the answer. The answer does not say that before the witness paid for the coal he knew that it was less than a ton, but merely that it was so "to the best of his judgment." He further said in his evidence that he "had to buy from the defendant to find out whether it was or not (selling short weight)." He said he had been suspecting it all the time. Counsel for the defendant further asked the witness: "The very minute you looked at this coal that weighed 1,750 pounds, it was not necessary for you to take it to the scales?" To which the witness replied: "Yes, sir; to prove how many pounds; I had much rather have the weights than my judgment." All this shows that while the witness strongly suspected the defendant of selling short, he did not know positively that this was so until he had tested the matter on the scales. In fact, it was impossible for him to know beforehand as to his own purchase. All he really knew was that he was offered a ton of coal by defendant for $5, that the coal was sent to him for a ton, and that he paid the $5, and on weighing it he found that it was 250 pounds short. He also testified to several other instances in which he had bought coal from defendant for other parties, and when it came it was short weight by the scales, and that he sent the coal on to his customers, adding enough of his own coal to make up the weight.

[405] The judge charged the jury: "A false pretense is a false representation of a subsisting fact, false within the knowledge of the person making the representation, calculated to deceive and intended to deceive, and which representation does deceive. . . . When this is made to appear—all these things are made to appear to the satisfaction of the jury and beyond a reasonable doubt—then the offense is what is called obtaining goods under false pretense." There was evidence sufficient to submit the case on these points to the jury, and the charge was unexceptionable to the defendant in this respect.

While the charge included the expression "and did deceive," the latter expression means only that the defendant, by means of the false representation, procured the article. Revisal, 3432, requires merely that the person shall knowingly and designingly, by any false pretense whatsoever, obtain from any other person anything of value with intent to cheat. That section further provides that it is not necessary to allege an intent to defraud any particular person or any ownership of the thing of value obtained nor to prove an intent to defraud any particular person; "but it shall be sufficient to prove that the party accused did the act charged, with an intent to defraud," and that amply appears in these sales made by defendant.

Nor was it different under the original English statute. In Rex v. Ady, 7 C. & P. 140, 32 E. C. L. 469, 32 E. C. L. 469, it was held: "If a party obtains money by false pretense, knowing it to be false at the time, it is no answer to show that the party from whom he obtained the money laid a plan to entrap him into the commission of the offense."

This is followed by many cases in this country cited in the notes to State v. Littooy, 17 Ann. Cas. 292, which held: "It is no defense that the complaining witness solicited the defendant to perform the illegal operation

charged in the bill with a view to having him prosecuted therefor." In the notes to that case, ib. 295–298, numerous decisions are cited as to different offenses, holding the above doctrine, among them Abortion, Counterfeiting, Disposing of bank notes with intent to defraud, False pretense, Selling obscene matter, and especially in Liquor Law violations, as to which it is held that "a person making an [406] unlawful sale of liquor is not excused from the consequences thereof because the sale was induced for the sole purpose of securing evidence to be used in prosecuting the seller," citing Borck v. State (Ala.) 39 So. 580; Evanston v. Myers, 172 Ill. 266, 50 N. E. 204; People v. Murphy, 93 Mich. 41, 52 N. W. 1042; People v. Rush, 113 Mich. 539, 71 N. W. 863; State v. Quinn, 94 Mo. App. 59, 67 S. W. 974, 170 Mo. 176, 70 S. W. 1117; State v. Lucas, 94 Mo. App. 117, 67 S. W. 971; Comrs. v. Backus, 29 How. Pr. (N. Y.) 33; State v. Smith, 152 N. C. 796, DeGraff v. State, 2 Okla. Crim 519, 103 Pac. 538; Tripp v. Flanigan, 10 R. I. 128.

Another offense as to which there have been many decisions to the above purport are prosecutions for using the mails illegally, in which it was held: "It is no defense that the mails were so used at the instance and solicitation of an officer of the Government." Grimm v. U. S. 156 U. S. 604, 15 S. Ct. 470, 39 U. S. (L. ed.) 550; Rosen v. U. S. 161 U. S. 29, 16 S. Ct. 434, 480, 40 U. S. (L. ed.) 606; Andrews v. U. S. 162, U. S. 420, 16 S. Ct. 798, 40 U. S. (L. ed.) 1023; Price v. U. S. 165 U. S. 311, 17 S. Ct. 366, 41 U. S. (L. ed.) 727; U. S. v. Duff, 6 Fed. 45; Bates v. U. S. 10 Fed. 99; U. S. v. Moore, 19 Fed. 39.

In Onondaga County v. Backus, 29 How. Pr. (N. Y.) 33, which was an action for a penalty for an unlawful sale of liquor, the Court said: "The mode adopted by the plaintiff to bring to light the malfeasance of the defendant had no necessary connection with his violation of law. He exercised his own volition independent of all outside influence or control. Even if inducements to commit crime could be assumed to exist in this case, the allegation of the defendant would be but the repetition of the plea as ancient as the world and first interposed in Paradise: 'The serpent beguiled me and I did eat.' That defense was overruled by the great Lawgiver, and whatever estimate we may form, or whatever judgment we may pass, upon the character or conduct of the tempter, this plea has never since availed to shield crime or give indemnity to the culprit, and it is safe to say that under any code of civilized, not to say Christian, ethics it never will."

There are some offenses, as, for instance, larceny and burglary, in which it is held that if the act is committed with the consent of the owner the perpetrator cannot be convicted; but that is because it is no offense unless the act is done against the [407] owner's consent. The difference between the cases like this and those cases in which the defense can be set up that the prosecuting witness was consenting to the act seems to be that where the owner of the property procures the offense to be committed and seduces or influences the perpetrator to do the act, then he cannot complain. But where the offender commits the act of his own volition, and an officer, or other party, suspecting that the crime is being committed, sets a trap, as furnishing money to buy whiskey that is being sold illegally, or, as in this case, bargains for an article which on being weighed proves to be short weight, or sends decoy letters through the mail to "trap" a person who is suspected of using the mails illegally, and in like cases, such conduct does not procure the offense to be committed, but the offender acts of his own volition, and is simply caught in his own devices.

In any aspect of the case, therefore, we see no reason to reverse our former decision.

Petition dismissed.

NOTE.

Inducement to Commit Offense with View to Prosecution Therefor as Defense to Such Prosecution.

Introductory, 730.
Bribery, 730.
Burglary, 731.
False Pretenses, 731.
Immigration Offense, 732.
Larceny, 732.
Liquor Law Violation, 732.
Malpractice of Medicine, 733.
Manufacture of Explosives, 733.
Postal Law Violation, 733.
Prostitution, 734.
Pure Food and Drug Act Offense, 734.
Selling Obscene Matter, 734.

Introductory.

The present note discusses the recent cases treating of the question whether it is a defense to a criminal prosecution that the accused was induced to commit the offense by one intending to prosecute him therefor. The earlier cases on this point are collected in the notes to State v. Littoy, 17 Ann. Cas. 292, and State v. Hull, 72 Am. St. Rep. 694.

Bribery.

It has been held that an inducement to accept a bribe offered by a person seeking to entrap the accused with a view to a prose-

cution is no defense to a person prosecuted for bribery. State v. Dougherty, 86 N. J. L. 525, 93 Atl. 98; Davis v. State, 70 Tex. Crim. 524, 158 S. W. 288. See also People v. Bock, 69 Misc. 543, 125 N. Y. S. 301. Thus in the case first cited, it was said: "The principle evolved from the cases appears to be that in a prosecution for an offense against the public welfare, such as accepting a bribe, the defense of entrapment cannot be successfully interposed." And in Com. v. Wasson, 42 Pa. Super. Ct. 38, wherein it appears that at the solicitation and inducement of a detective certain public officials conspired to accept a bribe, the court said: "If there is any ground upon which the facts as to the part the detectives took in the formation of the conspiracy can be held to be a defense, it is upon the ground of public policy, and it is strenuously contended that an acquittal should have been directed for that reason. In general, one who has committed a criminal act is not entitled to be shielded from its consequence merely because he was induced to do so by another. There has been much discussion in the courts of this country and by the text-writers as to the relation of detectives to crime, and many of their methods have been severely denounced. A few exceptional cases can be found where upon grounds of public policy the courts have refused to sustain convictions because of the abhorrent methods adopted to lure the accused into crime. Upon the other hand there are many cases wherein the courts, while in some instances condemning the methods employed by the detectives, have sustained the convictions, although the particular crime charged would not have been committed had it not been for the deceptions or subterfuges or the suppression of the truth resorted to by the detective." That case was decided on the ground that the defendants had been suspected of the commission of accepting bribes on various occasions prior to the entrapment.

Burglary.

The rule that a person who has been induced to commit a burglary by the owner or some one representing the owner of the premises, to the end that he may be entrapped and apprehended, may set up as a defense the entrapment has been affirmed in a recent case. Adams v. State (Ala.) 69 So. 357, wherein the court said: "This evidence clearly shows that the act here made the basis of this prosecution was conceived by Dr. Saunders, and by his agent and under his instructions suggested to the accused. The rule as to cases of entrapment as to offenses against property is thus stated: 'The fact that decoys were set, or traps laid, by means of which a person was detected in the perpetration of a crime, cannot be set up as a defense to the prosecution therefor, where the crime was conceived by the accused, and not suggested by the prosecuting witness or those acting for him duly authorized in the premises.' 1 Wharton, Criminal Law (11th ed.) § 389 Referring to the above-quoted section, this author further says: 'The law in relation to entrapment in crime has already been fully discussed, and the principles there stated apply in a prosecution for burglary the same as in prosecutions for other crime [against property]. The fact that the owner of a building having knowledge of a contemplated burglary therein, remains silent and presumably permitted entry into the building for the purpose of arresting the intruder does not constitute a consent to the act, and will not furnish a defense to the prosecution therefor, for the reason that it in no wise affects the guilt of the accused. . . . Owner persuading a person to enter building and take his property constitutes a consent to such entry and taking, and for that reason is a complete defense in a prosecution for the act charged as burglary.' . . . And the same rule applies if the occupant of the building suggests and induces the act, through his agent."

In State v. Goffney, 157 N. C. 624, 73 S. E. 162, wherein it appeared that an owner of a building, through a servant, induced the defendant to break into his store, and that the servant and the defendant entered the store together, it was held that the crime of breaking and entering was not committed because of the proprietor's consent. The court said: "There is no burglary where the occupant of a house, or his servant or agent by his direction, or a public officer or detective with his consent . . . takes active steps to aid the suspect or to induce him to enter, although this may be done for the purpose of apprehending and prosecuting him, and although he may intend to commit a felony in the house. . . . In the case at bar the owner himself gave permission for the defendant to enter, which destroyed the criminal feature and made the entry a lawful one."

False Pretenses.

The reported case announces the rule that an inducement to commit the crime of obtaining goods by false pretenses is no defense to a person accepting such inducement and engaging in the commission of the crime. That case, it may be pointed out, is not as far reaching as some others on this question. The crime was not initiated or proposed by the prosecuting officer, but he merely furnished the opportunity. In Missouri, etc. R. Co. v. McCrary, 182 Fed. 401, the fact that decoys

were used to entrap ticket scalpers, long under suspicion, was declared to be no defense.

Immigration Offense.

In Woo Wai v. U. S. 223 Fed. 412, 137 C. C. A. 604, it appeared that certain government officers persuaded and induced the defendant to commit the crime of bringing Chinamen across the Mexican border, not for the purpose of punishing the defendant for the crime, but for the purpose of forcing the defendant to reveal certain information concerning other violations of the immigration laws. The entrapment was held to be a good defense, the court saying: "We are of the opinion that it is against public policy to sustain a conviction obtained in the manner which is disclosed by the evidence in this case, taking the testimony of the defendants to be true, and that a sound public policy can be upheld only by denying the criminality of those who are thus induced to commit acts which infringe the letter of the criminal statutes. Some of the courts have gone far in sustaining conviction of crimes induced by detectives and by state officers. This is notably so of the decision in People v. Mills, 178 N. Y. 274, 70 N. E. 786, 67 L.R.A. 131. But it is to be said, by way of distinguishing such cases from the case at bar, that in all of those cases the criminal intention to commit the offense had its origin in the mind of the defendant. Thus in People v. Mills, it was the defendant who made the first suggestion looking toward the commission of the criminal act, and for the commission of that act the district attorney furnished him opportunity and lent him aid. In the case at bar, the suggestion of the criminal act came from the officers of the government. The whole scheme originated with them."

Larceny.

For a discussion of the question whether an inducement to commit larceny is a defense to a prosecution therefor, see the notes to Rex v. Ryan, 4 Ann. Cas. 875, and Topolewski v. State, 10 Ann. Cas. 627.

Liquor Law Violation.

The general rule that a person making an unlawful sale of liquor is not excused from the consequences thereof because the sale is induced for the sole purpose of securing evidence to be used in prosecuting the seller has found support in the following recent cases. Swope v. State, 12 Ala. App. 297, 68 So. 562; State v. Spiker, 88 Kan. 644, 129 Pac. 195; State v. Feldman, 150 Mo. App. 120, 129 S. W. 998; State v. Richie (Mo.) 180 S. W. 2; State v. Hopkins, 154 N. C. 622, 70 S. E. 394; Caveness v. State, 3 Okla. Crim. 729, 109 Pac. 125; Stack v. State, 4 Okla. Crim. 1, 109 Pac. 126; Moss v. State, 4 Okla. Crim. 247, 111 Pac. 950; Cunningham v. State, 4 Okla. Crim. XIII, 111 Pac. 959. *Compare* Smith v. State, 61 Tex. Crim. 328, 135 S. W. 154; Scott v. State, 70 Tex. Crim. 57, 153 S. W. 871; Salt Lake City v. Robinson, 40 Utah 448, 125 Pac. 657. In Swope v. State, supra, it was said: "As to the second contention, we may say that we know of no rule of law, and are cited to none, which exempts a defendant in this kind of case from the consequences of his crime simply because another may have induced him to commit it, when that inducement does not amount to duress. Of course, in cases of larceny and the like, there can be no crime where the owner of the property taken consents to its taking or it is done by his procurement for ulterior purposes (18 Am. & Eng. Enc. of Law [2d ed.] 471); but the principle upon which that doctrine is rested has no application to the character of crime here involved, which is not one against property rights."

But in Scott v. State, 70 Tex. Crim. 57, 153 S. W. 871, it was maintained that an inducement by an officer to commit such a crime was unjustifiable. The court said: "The writer has had occasion heretofore to criticise the character and manner of inducing men to commit crime as is evidenced by this record. This witness testifies, and is not uncontroverted or contradicted, that the sheriff agreed to give him $10 for each case he would 'turn in' and additional money or compensation if a conviction should occur. The officers are not justified in inducing men to commit crime or in employing others to induce them to commit crime in order that prosecutions may be instituted. It is his duty as an officer, where he understands that parties are engaged in crime, to use every effort legitimate and permissible by law to detect and ferret out crimes and bring criminals to trial and justice. But this does not justify him in employing parties to go out and induce the citizens to commit crime that prosecutions may be instituted and carried on. We here call the attention of the legislature to such matters and would suggest that appropriate legislation be enacted to prevent matters of this sort occurring." And in U. S. v. Healy, 202 Fed. 349, it was held that a government officer, an Indian whose outward appearance gave no indication that he was an Indian, who induced the defendant to sell liquor to him, thereby violating the regulation prohibiting the selling of liquor to an Indian, was not justified in this ruse, and that the defendant was not bound to know that the government employee was an Indian. The court said: "Decoys are permissible to entrap criminals, but not to create them; to present opportunity to those having intent to or willing to

commit crime, but not to ensnare the law-abiding in unconscious offending. Where a statute, as here, makes an act a crime regardless of the actor's intent or knowledge, ignorance of fact is no excuse if the act be done voluntarily; but when done upon solicitation by the government's instrument to that end ignorance of fact stamps the act as involuntary, and excuses, or at least estops the government from a conviction. In the former case the actor is bound to know the facts, and acts at his peril. In the latter case he is relieved of the obligation by the government's invitation, which is of the nature of fraudulent concealment and deceit, and, if not consent, yet doth work an estoppel. Though the seller has violated the statute, he was the passive instrument of the government, and his is a blameless wrong for which he cannot be justly convicted." And in Smith v. State, 61 Tex. Crim. 328, 135 S. W. 154, the investigation of offenses against the liquor law for the purpose of prosecution was severely criticized. The court said: "This manner of instituting prosecutions against the citizenship of the state and inducing them to commit crime is to be deplored. While it is eminently proper that officers should be diligent in ferreting out crime and violations of the law, yet it does not occur to us that the theory of our law is predicated upon the idea that parties should be induced to violate the law in order that a prosecution may be brought about. The machinery of the state should be put into operation to detect and punish crime, but not to organize and institute it. The prevention of crime is one of the main purposes of our law, not its encouragement or propogation."

Malpractice of Medicine.

It has been held that a physician or druggist who at the solicitation of a person intending to commence a criminal prosecution, has sold or prescribed for that person in violation of the statute, cannot set up as a defense the fact that he was induced to violate the law for the very purpose of prosecution. Niswonger v. State, 179 Ind. 653, 102 N. E. 135, 46 L.R.A.(N.S.) 1. So in Hyde v. State, 131 Tenn. 268, 174 S. W. 1127, wherein it appeared that a physician at the solicitation of a government officer gave a prescription for morphine in violation of the statute, the defense that the offense was induced by the government agent was declared to be unavailing. The court said: "May the physician successfully defend by proving that the prescription was caused to be issued and the sale to be made by means of the solicitation of an agent of a department of the state government, for the purposes of a criminal prosecution? Whatever may have been the trend of the earlier authorities, it is now a well-established rule that such acts of government agent do not absolve the defendant's act of criminality."

Manufacture of Explosives.

In Kosciak v. State, 160 Wis. 255, 152 N. W. 181, wherein it appeared that the defendant was prosecuted for the violation of a statute regulating the manufacture and use of explosives it was held that the act of a detective or other person in originating and instigating the commission of the crime constituted a good defense for the accused. The court said: "The statement in State v. Currie, 13 N. D. 655, 102 N. W. 875, is a just rule to govern persons engaged in such transactions: 'The authorities almost unanimously hold that a detective may aid in the commission of an offense in conjunction with a criminal, and that the fact will not exonerate the guilty party. Mere deception by the detective will not shield the defendant, if the offense be committed by him free from the influence or instigation of the detective. The detective must not prompt or urge or lead in the commission of the offense.' This rule is approved in the adjudications of different courts as a proper one in the administration of the criminal law. The question was a proper one for the consideration of the jury under the evidentiary facts and circumstances adduced on the trial and the court's attention was directed thereto by the defendant's requested instruction. True the court informed the jury that they must be satisfied affirmatively that defendant intended to and did the acts required under the instructions given to constitute guilt, but the jury were not informed that if the detectives prompted, urged, or originated the perpetration of these offenses, or that they intimidated the defendant and thereby became the active parties to instigate and perpetrate the offense charged, and that defendant under the facts and circumstances of the case was only a passive participant in the crime charged, then he was not guilty."

Postal Law Violation.

Recent cases have sustained the general rule that in a prosecution for using the mails for the purpose of sending obscene matter or information concerning lotteries, it is no defense that the mails were so used at the instance and solicitation of an officer of the government. In Ackley v. U. S. 200 Fed. 217, 118 C. C. A. 403, it appeared that decoy letters were used by a government official for the purpose of catching a physician suspected of illegally using the mails. That fact was held to be no bar to the defendant's prosecution. And in Kemp v. U. S. 41 App. Cas. (D. C.) 539, 51 L.R.A. (N.S.) 825, wherein it appeared that a decoy letter was sent to a

physician, for the purpose of discovering whether he violated the postal regulations, the court held that the defense of inducement could not be set up, saying: "The motive, however, of the writer of the decoy letter is not important. The letter was admissible on its face, irrespective of the motive of the writer. It was not such an inducement to commit crime as the law condemns. It left the way open to defendant, either by ignoring it or by answering it, to disclose that he was not conducting the sort of unlawful business in which he was requested by its express terms to engage. It was optional with him either to act the part of an honest man or the part of a criminal. Without any influence from anyone he chose the latter course. He is estopped to complain when he is confronted with the trap into which he knowingly and voluntarily stepped. 'Even if inducements to commit crime could be assumed to exist in this case, the allegation of the defendant would be but the repetition of the plea as ancient as the world, and first interposed in Paradise: "The serpent beguiled me and I did eat." That defense was overruled by the great Lawgiver, and whatever estimate we may form, or whatever judgment pass upon the character or conduct of the tempter, this plea has never since availed to shield crime or give indemnity to the culprit, and it is safe to say that under any code of civilized, not to say Christian ethics, it never will.'" But in Goldman v. U. S. 220 Fed. 57, 135 C. C. A. 625, *affirming* 207 Fed. 1002, it appeared that a government inspector in order to detect the defendant who had been suspected of misusing the mail, answered an advertisement by the defendant and succeeded in getting sufficient evidence to support a prosecution against the defendant. The court sustained the conduct of the government agent, but intimated that if the agent's conduct had been to induce rather than to detect a crime already planned the conduct would not be justified, saying: "The evidence tends to justify the course taken by the post office officials; in other words, it seems to have been an effort to detect, and not to induce commission of, a crime."

Prostitution.

In People v. Moore, 142 App. Div. 402, 127 N. Y. S. 98, *affirmed* 201 N. Y. 570, 95 N. E. 1136, it was held that a person prosecuted for providing inmates for houses of prostitution could not set up in defense that the commission of the offense was induced by persons intending to prosecute.

Pure Food and Drug Act Offense.

In U. S. v. Morgan, 181 Fed. 587 (*reversed* 222 U. S. 274, 32 S. Ct. 81, 56 U. S. (L. ed.) 198, on other grounds), a prosecution for a violation of the pure food and drug act, the fact that the defendant was induced to act by a person intending to prosecute him was declared to be immaterial.

Selling Obscene Matter.

It has been held to be no defense to a prosecution for selling obscene matter that the purchase which formed the basis for the prosecution was made by a person for the express purpose of prosecution. Hanish v. U. S. 227 Fed. 584. In that case it appeared that the defendant in response to decoy letters sent by a government inspector shipped certain obscene books in violation of the Interstate Commerce Act. The court said: "Another assignment of error raises the question whether the fact that the alleged offenses were committed at the instance of government officials, through decoy letters asking that the obscene book be sent to a fictitious person, excuses the offender. The system of detecting crime by the use of decoy letters, or decoy witnesses, is necessary to the proper administration of criminal justice, and is in quite general use. It does not of itself excuse the offender, unless a constituent element of the crime be thereby removed. In cases of larceny, if the owner of the property, through a decoy, consents to the taking of the property by the accused, the element of trespass or tortious taking, essential to the offense of larceny, is absent, as explained in Love v. People, 160 Ill. 501, 43 N. E. 710, 32 L.R.A. 139, and Topolewski v. State, 130 Wis. 244, 253, 109 N. W. 1037, 7 L.R.A.(N.S.) 756, 118 Am. St. Rep. 1019, 10 Ann. Cas. 627. In the case at bar, however, although defendant sent the books pursuant to the decoy letters, and sent them to a fictitious person, yet the gist of the offense still remained, which was the abuse of interstate commerce facilities to carry his obscene books."

LAUGHLIN ET AL.

v.

CITY OF PORTLAND.

Maine Supreme Judicial Court—April 4, 1914.

111 Me. 486; 90 Atl. 318.

Constitutional Law — Scope of Legislative Power.

Under Const. art. 4, pt. 3, § 1, giving the legislature full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of the state not repugnant to the Constitution, the powers

of the legislature are absolute, except as limited by the Constitution.

Presumption in Favor of Statute.

Unless an act is clearly and beyond all rational doubt in conflict with the constitution, it will not be so declared; all reasonable doubts will be resolved in favor of its constitutionality.

[See 6 R. C. L. tit. *Constitutional Law*, p. 97.]

Municipal Corporations — Sale of Fuel to Inhabitants.

Rev. St. c. 4, § 87 (Laws 1903, c. 122), authorizing and empowering any city or town to establish and maintain a permanent wood, coal, and fuel yard, for the purpose of selling, at cost, wood, coal, and fuel to its inhabitants, is not unconstitutional, it being a public use for which taxation is permissible, since the furnishing of fuel to its citizens is a matter of public necessity, convenience, or welfare with which it is difficult for the citizens to provide themselves, due to the existence of monopolistic combinations.

[See note at end of this case.]

Courts — Opinions as Authority — Advisory Opinion.

An advisory opinion given by the justices of the Supreme Court to the legislature is not the exercise of a judicial function, and has not the quality of judicial authority.

Municipal Corporations — Encroachment on Private Enterprise.

The principle that municipalities can neither invade private liberty nor encroach upon the field of private enterprise should be strictly maintained, as it is one of the main foundations of our prosperity and success.

On report from Supreme Judicial Court, Cumberland county.

Action for injunction. Alexander T. Laughlin et al., plaintiffs, and City of Portland, defendant. Case reported to Law Court. The facts are stated in the opinion. DISMISSED.

Eben Winthrop Freeman for plaintiffs.
James H. McCann for defendant.

[487] CORNISH, J.—The Legislature of Maine in 1903 enacted the following law: "Any city or town is hereby authorized and empowered to establish and maintain within its limits, a permanent wood, coal and fuel yard, for the purpose of selling, at cost, wood, coal and [488] fuel to its inhabitants. The term 'at cost' as used herein, shall be construed as meaning without financial profit." Pub. L. 1903, c. 122, R. S. ch. 4, sec. 87.

At the municipal election held in the City of Portland on December 2, 1912, the question of establishing and maintaining a fuel yard under the terms of the above act was submitted to the voters and a majority vote was cast in favor of the proposition. On February 3, 1913, both branches of the city council passed a resolution in favor of the same proposition and on February 4, 1913, this resolution was duly approved by the mayor and became effective. At the same time a special committee was appointed, consisting of the mayor, two aldermen and three councilmen "to investigate and obtain full information as to the cost of plant, machinery, rolling stock, and things whatsoever necessary to the establishment and maintaining a Municipal Fuel Yard, and carrying on the business thereof, including sources from which fuel can be purchased, and prices to be paid therefor, with the duty of furnishing a full report of their findings to the City Council; and for the purpose of defraying the expense of said committee, the sum of $1,000 is hereby appropriated, the sum to be charged to special appropriation when made."

On February 4, 1913, this bill in equity was brought by fifteen taxable inhabitants of Portland, asking that the city and its officers and agents be restrained and enjoined from establishing a municipal fuel yard, from raising by taxation the money necessary for that purpose and from carrying into effect any of the votes before recited. The defendant demurred to the bill and the demurrer being joined, the case is before the Law Court on report.

The important question is therefore sharply raised, whether this court must declare unconstitutional this act of the Legislature of 1903. It is not a question whether under the general statutory powers a municipality has the right to take this step, a question that has arisen in many cases, but whether such municipality can exercise the right when conferred upon it by the Legislature in clear and unambiguous terms. In other words, is this court obliged to declare, as the plaintiffs ask us, that this act is so obviously beyond the realm of constitutional legislative action that it must be declared void.

[489] Before considering the main issue it is necessary to restate certain familiar and yet fundamental propositions that lie at the very basis of our inquiry.

First. The Legislature has, under the constitution, "full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State, not repugnant to this Constitution, nor that of the United States." Const. of Maine, Art. IV, Part III, sec. 1. While, therefore, the executive and the judiciary, the other two coördinate departments of government, can exercise only the powers conferred upon them by the Constitution, the powers of the Legislature are, broadly speaking, absolute, except as limited or restricted by the Constitution.

"As to the executive and judiciary, the constitution measures the extent of their authority, as to the legislature it measures the limitations upon its authority." Sawyer v. Gilmore, 109 Me. 169, 83 Atl. 673.

Second. The court is bound to assume that, in the passage of any law, the Legislature acted with full knowledge of all constitutional restrictions and intelligently, honestly and discriminatingly decided that they were acting within their constitutional limits and powers. That determination is not to be lightly set aside. It is not enough that the court be of the opinion that had the question been originally submitted to it for decision it might have held the contrary view. The question has been submitted in the first instance to the tribunal designated by the Constitution, the Legislature, and its decision is not to be overturned by the court unless no room is left for rational doubt. All honest and reasonable doubts are to be solved in favor of the constitutionality of the act. This healthy doctrine is recognized as the settled policy of this court. State v. Doherty, 60 Me. 504; State v. Pooler, 105 Me. 224, 74 Atl. 119, 134 Am. St. Rep. 543, 24 L.R.A. (N.S.) 408. "The power of the judicial department of the government to prevent the enforcement of a legislative enactment by declaring it unconstitutional and void is attended with responsibilities so grave that its exercise is properly confined to statutes that are clearly and conclusively shown to be in conflict with the organic law. It is the duty of one department to presume that another has acted within its legitimate province until the contrary is made to appear by strong and convincing reasons." State v. Rogers, 95 Me. 94, 49 Atl. 564, 85 Am. St. Rep. 395.

[490] "In determining the constitutionality of any legislation, all reasonable presumptions are in favor of its validity and the courts will not declare an act of the legislature to be invalid because contrary to the provisions of the organic law unless clearly so. . . . And this is as true respecting legislative enactments by which the power to exercise the right of eminent domain is delegated as in regard to any other species of legislation. The determination by the legislature that the use for which property is authorized to be taken is a public one, is, undoubtedly, subject to review by the court, but all reasonable presumptions are in favor of the validity of such determinations by the legislature, and the act must be regarded as valid unless it can be clearly shown to be in conflict with the constitution." Ulmer v. Lime Rock R. Co. 98 Me. 579, 57 Atl. 1001, 66 L.R.A. 387.

With these principles conceded the precise question before the court is seen to be, whether the act in question, having been passed by the Legislature conformably with what it deemed to be an exercise of its constitutional power, can be set aside by this court as invalid on the ground that it palpably and unquestionably transcends that power. We are unable to go to that extent.

The main ground of attack is that the maintenance of what, in general terms, may be called a municipal fuel yard is not a public use, and as the power of taxation is confined to public purposes, the authority conferred by this act cannot be constitutionally exercised.

The Constitution of Maine, Art. II, sec. 21, provides that "private property shall not be taken for public uses without just compensation, nor unless the public exigencies require it." The power of taxation is akin to the right of eminent domain, because it rests upon the right of the sovereign power to appropriate the private property of its citizens to public purposes. Therefore the power of taxation must rest upon two elements in order to be permitted by the Constitution, first a public use and second a public exigency, the first to be determined, in the first instance, by the Legislature and finally by the court, if cases are brought before it raising the question, and with the limitations before referred to, and the second to be determined by the Legislature without judicial revision. Brown v. Gerald, 100 Me. 351, 61 Atl. 785, 109 Am. St. Rep. 526, 70 L.R.A. 472; Hayford v. Bangor, 102 Me. 340, 66 Atl. 731, 11 L.R.A. (N.S.) 940.

[491] Did then the Legislature transcend its constitutional powers when it authorized municipalities to make provision for supplying heat to its citizens? In so doing, was it clearly and unquestionably diverting the power of taxation from a public to a private purpose?

This leads us to consider what is meant by the term "public use," as employed in connection with the power to tax.

The exact line of cleavage between what is, and what is not, a public use, it is somewhat difficult to mark. Some purposes readily align themselves on one side of the line as being clearly public in their nature, while others as readily fall on the other side as being obviously private, and there is a debatable ground between the two. Thus the support of schools, the relief of paupers and the maintenance of highways are clearly public uses for which taxation is permissible and it has also been held that the maintenance of a public clock, Willard v. Newburyport, 12 Pick. (Mass.) 227; the purchase of a fire engine, Allen v. Taunton, 19 Pick. (Mass.) 485; the erection of a market house, Spaulding v. Lowell, 23 Pick. (Mass.) 71; the building of a memorial hall, Kingman v. Brockton, 153 Mass. 255, 26 N. E. 998, 11

L.R.A. 123; the aid of a railroad, Augusta Bank v. Augusta, 49 Me. 507; Dyar v. Farmington Village Corp. 70 Me. 515, all come within the scope of the same term.

On the other hand taxes cannot be imposed to aid a private enterprise, and a municipality cannot assist individuals or corporations to establish or carry on such business, either directly or indirectly, nor can it engage in such business itself. Opinion of Justices, 58 Me. 590; Allen v. Jay, 60 Me. 124, 11 Am. Rep. 185; Citizens' Sav. etc. Assoc. v. Topeka, 20 Wall 655, 22 U. S. (L. ed.) 455; Parkersburg v. Brown, 106 U. S. 487, 1 S. Ct. 442, 27 U. S. (L. ed.) 238; In re Opinion of Justices, 204 Mass. 607, 91 N. E. 405, 27 L.R.A.(N.S.) 483. If the direct object is private, the indirect benefits that may result to the public, even in a large measure, are unavailing to remedy the vital defect. Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39; In re Opinion of Justices, 211 Mass. 626; Brown v. Gerald, 100 Me. 351, 109 Am. St. Rep. 526, 70 L.R.A. 472.

The courts have never attempted to lay down with minute detail an inexorable rule distinguishing public from private purposes because it would be impossible to do so. Times change. The wants and necessities of the people change. The opportunity to satisfy those wants and necessities by individual effort may vary. What was clearly a public use a century ago, may, because of changed conditions, have ceased to be such today. Thus the mill act which [492] came into being in the early days of our parent Commonwealth of Massachusetts, and was adopted by our own State, was upheld as constitutional because of the necessities of those primitive times. The court in later days have strongly intimated that were it an original question it might be difficult to sustain it in view of present industrial conditions, Murdock v. Stickney, 8 Cush. (Mass.) 113; Salisbury Mills v. Forsaith, 57 N. H. 124; Jordan v. Woodward, 40 Me. 317.

On the other hand, what could not be deemed a public use a century ago, may, because of changed economic and industrial conditions, be such today. Laws which were entirely adequate to secure public welfare then may be inadequate to accomplish the same results now. As was said in Sun Printing, etc. Assoc. v. New York, 8 App. Div. 230, 40 N. Y. S. 607, *affirmed* in 152 N. Y. 257, 46 N. E. 499, 37 L.R.A. 788: "The true test is that which requires that the work shall be essentially public and for the general good of all the inhabitants of the city. It must not be undertaken merely for gain or for private objects; gain or loss may incidentally follow but the purpose must be primarily to satisfy the need or contribute to the convenience of the city at large. Within that sphere of action novelty should impose no veto. Should some inventive genius bye and bye create a system for supplying us with pure air, will the representatives of the people be powerless to utilize it in the great cities of the state, however extreme the want or dangerous the delay? Will it then be said that pure air is not so important as pure water and clear light; we apprehend not."

Thus a class of public uses has grown up and been recognized within a comparatively recent time, due both to the growing needs of the community and to modern inventions calculated to meet those needs, that furnish in our judgment a logical precedent for the case at bar. These public uses or utilities, embrace water, light and heat. It is common knowledge that in the early days our citizens, even in the more populous towns and cities, obtained their water supply from private wells and cisterns. There was no public supply other than perhaps the town pump in the village square. But in course of time the private sources became both inadequate in quantity and hazardous in quality and private water companies were chartered to meet the changed demands, one of the earliest to do business on [493] a large scale being the Portland Water Company, chartered in 1866, Priv. and Spec. L. 1866, ch. 159. The purpose of these companies is admittedly public, Portland v. Portland Water Co. 67 Me. 136; Riche v. Bar Harbor Water Co. 75 Me. 91; Hamor v. Bar Harbor Water Co. 78 Me. 127, 3 Atl. 40. "The supply of a large number of inhabitants with pure water is a public purpose," says Shaw, C. J., in Lumbard v. Stearns, 4 Cush. (Mass.) 60.

Later the municipalities in which some of these water companies were established were given the right by the Legislature to take over and maintain these plants, or municipal water districts were formed to accomplish the same purpose. The compensation for those plants was raised by taxation or by loan, and again the purpose is obviously public, Auburn v. Union Water Power Co. 90 Me. 576, 38 Atl. 561, 38 L.R.A. 188; Mayo v. Dover, etc. Village F. Co. 96 Me. 539, 53 Atl. 62; Kennebec Water Dist. v. Waterville, 97 Me. 185, 54 Atl. 6, 60 L.R.A. 856; Brunswick, etc. Water Dist. v. Maine Water Co. 99 Maine 371, 59 Atl. 537; Augusta v. Augusta Water Dist. 101 Me. 148, 63 Atl. 663.

Conditions as to lighting met with similar changes. Candles, lamps, gas and electricity have followed each other in due course of time. As late as 1890, a doubt seems to have arisen in Massachusetts as to the constitutional power of municipalities in respect to public and private lighting and the House of Representatives of that year submitted to the Justices of the Supreme Judicial Court two questions, first, whether the Legislature had the power under the Constitution to authorize the cities and towns within the common-

wealth to manufacture and distribute gas or electric light for use in their public streets and buildings and second for the purpose of selling the same to its own citizens. These questions were both answered unanimously in the affirmative. The justices in the course of their opinion say that "the extent of the right of taxation is not necessarily to be measured by that of the right of eminent domain, but the rights are analogous." So far as the lighting of the public buildings and streets are concerned the court held that it was an incident of their maintenance and tended both to common convenience and common necessity, and then these significant words are added "If the legislature can authorize cities and towns to light their streets and public buildings, it can authorize them to do this by any appropriate [494] means which it may think expedient." In holding the supply to individuals to also be a public purpose, after discussing the question of water companies the justices say: "Artificial light is not, perhaps, so absolutely necessary as water, but it is necessary for the comfortable living of every person. Although artificial light can be supplied in other ways than by the use of gas or electricity, yet the use of one or both for lighting cities and thickly settled towns is common, and has been found to be of great convenience and it is practically impossible for every individual to manufacture gas or electricity for himself. If gas or electricity is to be generally used in a city or town, it must be furnished by private companies or by the municipality, and it cannot be distributed without the use of the public streets or the exercise of the right of eminent domain. It is not necessarily an objection to a public work maintained by a city or town, that it incidentally benefits some individuals more than others, or that from the place of residence or for other reasons every inhabitant of the city or town cannot use it, if every inhabitant who is so situated that he can use it has the same right to use it as the other inhabitants. It must often be a question of kind and degree whether the promotion of the interests of many individuals in the same community constitutes a public service or not. But in general it may be said that matters which concern the welfare and convenience of all the inhabitants of a city or town, and cannot be successfully dealt with without the aid of powers derived from the Legislature, may be subjected to municipal control when the benefits received are such that each inhabitant needs them and may participate in them, and it is for the interest of each inhabitant that others as well as himself should possess and enjoy them. If the Legislature is of the opinion that the common convenience and welfare of the inhabitants of cities or towns will be promoted by conferring upon the municipalities the power of manufacturing and distributing gas or electricity for the purpose of furnishing light to their inhabitants, we think the Legislature can confer the power. We therefore answer the second question in the affirmative."

Following the reasoning of the Massachusetts court, if the lighting of private residences and buildings is a public purpose and one [495] which the municipality can legitimately carry on, the heating of the same buildings is equally public. It is even a greater necessity. Gas and electric lights are in the nature of luxuries, but heat is indispensable. In the regions supplied with natural gas, municipal heating from that source has been adopted, and has been held to be constitutional. State v. Toledo, 48 Ohio St. 112, 26 N. E. 1061, 11 L.R.A. 729.

The reasoning of the court is as follows: "Heat being an agent or principle indispensable to the health, comfort and convenience of every inhabitant of our cities, we do not see why, through the medium of natural gas, it may not be as much a public service to furnish it to the citizens as to furnish water. . . . It is sufficient 'if every inhabitant who is so situated that he can use it has the same right to use it as the other inhabitants.' . . . The establishment of natural gas works by municipal corporations, with the imposition of taxes to pay the cost thereof, may be a new object of municipal policy, but in deciding whether in a given case the object for which taxes are assessed is a public or private purpose, we cannot leave out of view the progress of society, the change of manners and customs, and the development and growth of new wants, natural and artificial, which may from time to time call for a new exercise of legislative power. And in deciding whether such taxes shall be levied for the new purposes that have arisen, we should not, we think, be bound by an inexorable rule that would embrace only those objects for which taxes have been customarily and by long course of legislation levied."

If, then, science had advanced so far that the heating as well as the lighting of houses by electricity were now a practicable method, there would seem to be no doubt that this also would fall within the realm of public purposes. The heat would be conducted from the central power station by means of wires along or under the public streets, the same as light is now. Or suppose it were practicable to install a central heating plant and conduct the heat through pipes in the streets to the various buildings, much the same as water or gas is now conducted, we see no reason why this too should not be called a public use.

Just here, however, the petitioners contend for a distinction between all these illustrations and the case at bar. They say that in

[496] the case of the distribution of water, and of light and heat by gas or electricity, the use of the public highways is required for the mains and the poles and wires, that the purpose is public because it is necessary to obtain permission from public authorities, either state or municipal in order to carry it out. We grant that in those cases this element of public permission exists, but it does not follow that the converse is true and that no purpose is public, where such permission does not exist. How can this criterion be applied to the erection of public buildings, the erection of a park, the building of a memorial hall, or of a market house, or the maintenance of a public clock? In other words under this rule, public service of this sort would be limited to one which can only be performed by a so-called public service corporation and not by an individual or corporation, independent of chartered rights. This is, in our judgment, too narrow. It makes an incident to some forms of public service an essential element. It transforms the method or means of rendering the service into the essence of the service itself. It makes the exercise of public rights in supplying the necessities of a community a prerequisite to the public use. But this exercise of public rights can itself be authorized only by the Legislature and if that branch of the government sees fit to bestow the public service in a manner that may obviate the use of the public right they certainly should have the right and the power so to do. It is a matter within their control.

Let us look at the question from a practical and concrete standpoint. Can it make any real and vital difference and convert a public into a private use if instead of burning the fuel at the power station to produce the electricity, or at the central heating plant to produce the heat and then conducting it in the one case by wires and in the other by pipes to the user's home, the coal itself is hauled over the same highway to the same point of distribution? We fail to see it. It is only a different and a simpler mode of distribution and, if the Legislature has the power to authorize municipalities to furnish heat to its inhabitants "it can do this by any appropriate means which it may think expedient." The vital and essential element is the character of the service rendered and not the means by which it is rendered. It seems illogical to hold that a [497] municipality may relieve its citizens from the rigor of cold if it can reach them by pipes or wires placed under or above the highways but not if it can reach them by teams traveling along the identically same highway. It will be something of a task to convince the ordinarily intelligent citizen that an act of the Legislature authorizing the former is constitutional but one authorizing the latter is unconstitutional beyond all rational doubt. For we must remember that we are considering the existence of the power in the Legislature which is the only question before the court and not the wisdom of its exercise which is for the Legislature alone.

Cases directly in point are lacking. We have been unable to find anywhere that the issue has been squarely decided.

The learned counsel for the plaintiffs confidently rely upon the opinions of the justices in 155 Mass. 598, 30 N. E. 1142, 15 L.R.A. 809, and 182 Mass. 605, 66 N. E. 25, 60 L.R.A. 592, rendered in answer to questions propounded by the House of Representatives as to the constitutionality of proposed acts for the establishment of municipal fuel yards. While such answers are entitled to great consideration they do not have the force of decision. Kent, J. 58 Me. 573, Tapley, J. 58 Me. 615, and Libbey, J. 72 Me. 562, 563. "The giving of advisory opinions is not the exercise of the judicial function at all, and the opinions thus given have not the quality of judicial authority." Prof. James B. Thayer, 7 Harv. L. Rev. 153.

In 155 Mass. 598, 30 N. E. 1142, 15 L.R.A. 809, the justices were divided, five advising that the proposed act would be unconstitutional, one, Justice Holmes, that it would be constitutional, and one, Justice Barker, giving a qualified assent to its validity. In 182 Mass. 605, the opinions of the majority in 155 Mass. were adopted without dissent, and these views have been reaffirmed by way of illustration in Opinion of Justices, 211 Mass. 624, 98 N. E. 611, 42 L.R.A.(N.S.) 221, the subject matter of that opinion being the power of municipalities to construct houses in the suburbs for wage earners, a power clearly not theirs. A careful study of these opinions shows that the general principles enunciated are in accord with our own views and that in only one particular are we at variance.

The conclusions reached by the majority in the Massachusetts cases seem to be:

[498] (1) That it is beyond the power of a municipal corporation to engage in the sale of commodities which are and can be easily conducted by private business concerns in competition with one another, and which can be sufficiently regulated thereby. In this we most heartily concur.

(2) That the sale of fuel falls within this class of commodities and there is no necessity why cities and towns should undertake this form of business any more than many others which have always been conducted by private enterprises. Here we differ.

(3) That in regard to "a condition in which the supply of fuel would be so small and the difficulty of obtaining it so great,

that persons desiring to purchase it would be unable to supply themselves through private enterprises it is conceivable that agencies of government might be able to obtain fuel when citizens generally could not. Under such circumstances we are of opinion that the government might constitute itself an agent for the relief of the community, and that money expended for the purpose would be expended for a public use." Here again we concur.

The principle, therefore, seems to be conceded that if the difficulty of obtaining an adequate supply exists, the furnishing of such supply by municipalities would be a public use. And this is the construction placed upon the Massachusetts opinion by learned text writers. Dillon Mun. Corp. 5th ed. sec. 1292. McQuillan Mun. Corp. (1912) sec. 1809.

In the last analysis this differs but little from the definition of a public use laid down by Judge Cooley in his work on Constitutional Limitations, 6th ed. p. 655, viz: "That only can be considered a public use where the government is supplying its own needs or is furnishing facilities for its citizens in regard to those matters of public necessity, convenience or welfare which on account of their peculiar character and the difficulty—perhaps impossibility—of making provisions for them otherwise, is alike proper, useful and needful for the government to provide." This court in discussing the question of public uses with reference to the power of eminent domain adopted this definition in a very recent case, remarking "there is perhaps no general definition more satisfactory than this one." Brown v. Gerald, 100 Me. 351, 370, 109 Am. St. Rep. 494, 70 L.R.A. 472. And this [499] general definition we adhere to and seek to apply in the case at bar. Its two tests are: first, the subject matter, or commodity, must be one "of public necessity, convenience or welfare." Fuel clearly comes within this category. The second test is the difficulty which individuals have in providing it for themselves. The causes creating the difficulty may vary, but if the difficulty exists, the test is met. For instance, in the case of a water supply the difficulty arises from the fact that individual sources are inadequate or unsanitary and the conditions can be remedied only by the municipality itself providing or allowing some public service corporation to furnish the community at large from a single and common source. This is a matter of common knowledge and the court in passing upon the question of public use cannot ignore it.

In the case of fuel the practical difficulty is caused by the existence of monopolistic combinations. The mining, transportation and distribution of coal, has, in the process of industrial development, fallen into the hands of these combinations to such an extent that the greater part of the supply is in the absolute control of a few. The difficulty and practical impossibility of obtaining an adequate supply for private needs at times in the past, and the consequent suffering among the people, especially in the more populous cities, are matters of history, and this difficulty may as well be caused by unreasonable prices as by shortage in quantity. All this is a matter of common knowledge and cannot be overlooked by the court. The supply of water may be inadequate from one cause, that of fuel from another, but out of each arises the condition which renders the furnishing of it by the municipality a public use.

The majority of the Massachusetts justices conceded the right to create municipal fuel yards under certain conditions and exigencies, but say that in their opinion fuel is like all other commodities of ordinary purchase and sale in the open market and there is no necessity why cities and towns should undertake that form of business any more than many others which have always been conducted by private enterprise. This might seem to be invading the province of the Legislature, because the determination of the exigency is for that coördinate branch of the government alone, and by the passage of this act that branch has necessarily determined that the exigency exists. If, however, independent of their finding the court has a [500] right to consider all the conditions and circumstances connected with the subject matter, all the elements which, under the definition of Judge Cooley, make up the public use, then we cannot close our eyes to existing economic conditions and must admit that in determining the existence of the difficulty the finding of the Legislature is not wrong beyond all rational doubt, and therefore under the well settled rules of constitutional construction it should not be disturbed.

But it is urged, why, if a city can establish a municipal fuel yard, can it not enter upon any kind of commercial business, and carry on a grocery store, or a meat market or a bakery. The answer has been already indicated. Such kinds of business do not measure up to either of the accepted tests. When we speak of fuel, we are dealing not with ordinary articles of merchandise for which there may be many substitutes, but with an indispensable necessity of life, and more than this, the commodities mentioned are admittedly under present economic conditions regulated by competition in the ordinary channels of private business enterprise. The principle that municipalities can neither invade private liberty nor encroach upon the field of private enterprise should be strictly maintained as it is one of the main foundations of our prosperity and success. If the case at bar clearly

violated that principle it would be our duty to pronounce the act unconstitutional, but in our opinion it does not. The element of commercial enterprise is entirely lacking. The purpose of the act is neither to embark in business for the sake of direct profits (the act provides that fuel shall be furnished at cost), nor for the sake of the indirect gains that may result to purchasers through reduction in price by governmental competition. It is simply to enable the citizens to be supplied with something which is a necessity in its absolute sense to the enjoyment of life and health, which could otherwise be obtained with great difficulty and at times perhaps not at all, and whose absence would endanger the community as a whole. In our opinion it is a proper and constitutional function of government either to itself provide such a necessity under these circumstances or to see to it that it is so provided as to bring it within the reach of the citizens.

[501] A similar inquiry based upon fears for the future was asked as to the limit of legislative power in Olmstead v. Camp, 33 Conn. 532, 89 Am. Dec. 221, and is there answered by the court in these words: "The question is asked with great pertinence and propriety, what then is the limit of legislative power under the clause which we have been considering and what is the exact line between public and private uses? Our reply is that which has heretofore been quoted. From the nature of the case there can be no precise line. The power requires a degree of elasticity to be capable of meeting new conditions and improvements and the ever increasing necessities of society. The sole dependence must be on the presumed wisdom of the sovereign authority, supervised, and in cases of gross error or extreme wrong, controlled, by the dispassionate judgment of the courts." This furnishes, we think, a safe and sufficient barrier between the Constitution and those who might attempt to break it down.

Nor is the fact that in operation the act may tend to lessen the profits of a few private dealers or even force them from business, a matter of consideration for the court. "It is for the legislature to determine from time to time what laws and regulations are necessary or expedient for the defence and benefit of the people, and however inconvenienced, restricted or even damaged, particular persons and corporations may be, such general laws and regulations are held valid unless there can be pointed out, some provision in the State or United States Constitution, which clearly prohibits them." Opinion of Justices, 103 Me. 506, 13 Ann. Cas. 745, 69 Atl. 627, 19 L.R.A.(N.S.) 422.

The brief opinion of Mr. Justice Holmes now of the Supreme Court of the United States, in 155 Mass. 607, supra, goes even farther than the rule which we have laid down. He says: "I am of opinion that when money is taken to enable a public body to offer to the public without discrimination an article of general necessity the purpose is no less public when that article is wood or coal than when it is water or gas or electricity or education, to say nothing of cases like the support of paupers or the taking of land for railroads or public markets. I see no ground for denying the power of the Legislature to enact the laws mentioned in the questions proposed. The need or expediency of such legislation is not for us to consider."

[502] Our attention is further called by the plaintiffs to Baker v. Grand Rapids, 142 Mich. 687, 106 N. W. 208, but that case has no bearing upon the question at issue. There, the city government without authority from the Legislature transferred $10,000 from the contingent fund to the poor fund for the purchase and distribution of coal when the price of coal was rapidly rising and a combination had been formed to exist among the local dealers. A bill in equity was brought by one of these dealers to prevent the action, and was held not to be maintainable, first because the plaintiff being engaged in the unlawful combination did not come into court with clean hands, second because the act had already been done and the city had ceased to carry on the business, and third because the plaintiff was not damaged. This case certainly furnishes no authority for the plaintiffs; and no others in point have been cited.

On the other hand the very recent case of Holton v. Camilla, 134 Ga. 560, 20 Ann. Cas. 199, 68 S. E. 472, 31 L.R.A.(N.S.) 116 (1910), cited by the defendant is an important precedent by analogy. In that case the court held constitutional a legislative act authorizing the city to establish and maintain a municipal ice plant in connection with its water works. In discussing the question of public use after referring to water, light and heat, the court says:

"If a city has the right to furnish heat to its inhabitants, because conducive to their health, comfort and convenience, we see no reason why they should not be permitted to furnish ice. . . . Is the difference between water in a liquid and in a frozen condition a radical one? Upon what principle could the doctrine rest that liquid water may be delivered by the city to its inhabitants by flowage through pipes, but that water in frozen blocks cannot be delivered by wagons or otherwise? If the city has the right to furnish its inhabitants with water in a liquid form, we fail to see any reason why it cannot furnish it to them in a frozen condition. . . . If the furnishing of ice to its inhabitants is conducive generally to their health, comfort and convenience it is certainly being

furnished for a municipal or public purpose." It requires no argument to prove that coal is as conducive to the health, comfort and convenience of the inhabitants of this northern latitude as is ice to that of the inhabitants of Georgia.

Without discussing the question further it is sufficient to say that [503] we see in this act of the Legislature a sign neither of paternalism nor of socialism. We do not regard it as a departure from previous legislation but in line with it, although perhaps one step further. The direction however is the same and the advance is caused by the development of a new want which has called for a new exercise of legislative power, not an exercise of new legislative power, and such an advance is both legitimate and commendable.

Our conclusion, therefore, is that the acts threatened by the defendant are not an invasion of the constitutional rights of the plaintiffs and that the plaintiffs are not entitled to a perpetual injunction as prayed for.

Bill dismissed with costs.

NOTE.

Power of Municipality to Engage in Business of Furnishing Fuel to Inhabitants.

The holding of the reported case that a municipality may, on appropriate legislative authority, engage in the business of furnishing fuel to its inhabitants is contrary to the few decisions passing directly on the question. In Opinion of Justices, 155 Mass. 601, 30 N. E. 1142, 15 L.R.A. 809, it was said: "When the constitution was adopted the buying and selling of wood and coal for fuel was a well known form of private business, which was generally carried on as other kinds of business were carried on; and is now carried on in much the same manner as it was then. It was and is a kind of business which in its relations to the community did not and does not differ essentially from the business of buying and selling any other of the necessaries of life. Although all kinds of business may be regulated by the legislature, yet to buy and sell coal and wood for fuel requires no authority from the legislature, and requires the exercise of no powers derived from the legislature, and every person who chooses can engage in it in the same manner as in the buying and selling of other merchandise. We are not aware of any necessity why cities and towns should undertake this form of business any more than many others which have always been conducted by private enterprise, and we are not called upon to consider what extraordinary powers the commonwealth may exercise, or may authorize cities and towns to exercise, in extraordinary exigencies for the safety of the state or the welfare of the inhabitants. If there be any advantage to the inhabitants in buying and selling coal and wood for fuel at the risk of the community on a large scale, and on what has been called the co-operative plan, we are of the opinion that the constitution does not contemplate this as one of the ends for which the government was established, or as a public service for which cities and towns may be authorized to tax their inhabitants." That decision was followed in Opinion of Justices, 182 Mass. 605, 66 N. E. 25, 60 L.R.A. 592, wherein, answering a question of the legislature as to its powers in an emergency, the court said: "Looking to the possible consequences of the emergency for which a remedy is desired, they can be divided into four classes: First, an increase of the number of those who fall into distress and are in need of relief from the public authorities, because they have no means to buy fuel at a greatly increased price. Secondly, increased expenditure, to their serious detriment, by those who have the means to buy. Thirdly, a possibility of a famine in fuel, such as to make it impossible reasonably to supply the needs of the community for comfortable living. Fourthly, a scarcity falling short of a famine but so great as to create widespread and general distress in the community which cannot be met by private enterprise. The first of these possible consequences does not call for legislation. Cities and towns now have ample power to provide in any reasonable way for paupers, whether it be by furnishing out-of-door relief or by support in almshouses, and whether their need of relief is permanent or caused by a temporary condition. It is equally true that the second of these consequences does not justify taxation of those who do not have occasion to buy coal, for the benefit of those who do. The use of the money of taxpayers for such a purpose would not be a public use, but a use for the special pecuniary benefit of those who happen to be affected by the state of the coal market. The third possibility, that of an absolute famine in fuel because of the lack of a supply and the impossibility of obtaining a sufficient quantity reasonably to satisfy the needs of the community, would be a condition which would warrant the expenditure of the public money under appropriate legislation, if the legislature could discover a way through public agencies to supply the people. But it is difficult to see how the method referred to in the question could produce this result. If at any time there was an impossibility of obtaining supplies because the supplies were not here and could not be bought elsewhere, the opening of a city coal yard would furnish no relief. Such an establishment could not work a miracle of creation. If

reference to an anticipated possible famine, the procurement and storage of a supply in time of plenty might be a remedy or an alleviation if the dread anticipation should become a realty, but the maintenance of a city fuel yard to conduct the business of buying and selling in a time of plenty, would have no tendency to avert a famine, or to relieve from its consequences if one should come. We are not called upon to consider whether the legislature would deem it advisable, if it has the power, to authorize cities and towns to build storehouses in which to keep large quantities of fuel in anticipation of a possible famine. In regard to the fourth of the possible consequences, a condition in which the supply of fuel would be so small, and the difficulty of obtaining it so great, that persons desiring to purchase it would be unable to supply themselves through private enterprise, it is conceivable that agencies of government might be able to obtain fuel when citizens generally could not. Under such circumstances we are of opinion that the government might constitute itself an agent for the relief of the community, and that money expended for the purpose would be expended for a public use. We do not think that we are expected to determine whether there might be any other conceivable emergency which would call for an affirmative answer to this question. Considering the question only in reference to the accompanying bills and the conditions to which we suppose it relates, our answer is in the negative, except in reference to the fourth of the above-mentioned possible consequences. As to that, we are of opinion that if the supposed conditions exist in any city or town, it may be authorized, under proper legislation, to sell fuel with the limitations above stated, so long as these conditions continue." In Baker v. Grand Rapids, 142 Mich. 687, 106 N. W. 208, it was held that a city has no power, even in a time of coal famine aggravated by the action of a combination of dealers, to divert money from its contingent fund to buy coal to sell to its citizens. The court said: "The city authorities had the right, through the board of poor commissioners, to provide fuel for needy citizens, and under the then existing emergency, where a coal famine appeared imminent, were authorized to purchase such amount of fuel in any market, as, in their opinion, would be necessary for that purpose. A municipality, however, cannot enter into a commercial enterprise, such as buying and selling coal to its citizens as a business, thereby entering into competition with dealers in coal. Such use of moneys is held not to be for a public purpose. . . . It appears that complainant at the time in question was in a combination with certain other coal dealers in the city of Grand Rapids, in violation of the provisions of sections 11377–11379, 3 Comp. Laws, the purpose and intent of which was to enhance, regulate, and control the price of coal in that market, and that by reason of such unlawful combination the municipality acted as it did relative to supplying coal to some of its citizens. Such unlawful conduct of complainant would not excuse unauthorized action by the city, but would bear upon the question as to whether complainant came into a court of chancery with clean hands."

However in State v. Toledo, 48 Ohio St. 112, 26 N. E. 1061, 11 L.R.A. 729, quoted at length in the reported case, it was held that a municipality has the power to furnish natural gas to its inhabitants.

As to analogous municipal powers, see Holton v. Camilla, 20 Ann. Cas. 199 (municipal ice plant); State v. Lynch, Ann. Cas. 1914D 949 (municipal moving picture theater); Egan v. San Francisco, Ann. Cas. 1915A 754 (municipal theater).

WEBER ET AL.

v.

WEBER.

Arkansas Supreme Court—June 22, 1914.

113 Ark. 471; 169 S. W. 318.

Appeal — Review of Questions of Fact.
The court, in testing the legal sufficiency of the evidence of plaintiff to sustain a verdict in her favor, must give that evidence the highest probative value.

Husband and Wife — Alienation of Affections — Wife's Right of Action.
Under Kirby's Dig. § 6017, authorizing a wife to sue alone as to any separate property or for damages for any injury, a wife may maintain an action for damages for the alienation of the affections of her husband, whether the cause of action is denominated a personal or a property right.
[See note at end of this case.]

Same.
A verdict of $2700 damages for alienation of the affections of the plaintiff's husband reviewed and held not to be excessive.
[See note at end of this case.]

Appeal from Circuit Court, Pulaski county: HENDRICKS, Judge.

Action for alienation of affections. Ida Weber, plaintiff, and Englebert Weber et al., defendants. Judgment for plaintiff. Defendants appeal. AFFIRMED.

[471] This suit was instituted to recover damages against appellants, for the alleged alienation of the affections of the appellee's husband, Joe Weber. The appellee married Joe Weber, the only child of appellants, in the city of Little Rock, on the 22d day of November, 1910, and they lived and cohabited together as husband and wife, until the 30th day of August, 1911, when there was born to them a male child. Thereafter appellee was taken seriously ill, and to such an extent that she lost the control of her mental faculties, and, at the instance and recommendation of the family physician, was, by proper [472] order of the Pulaski County Court, adjudged insane and placed in the State Hospital for Nervous Diseases, for treatment.

Appellee and her husband, at the time of the birth of the child, and during their married life, lived immediately adjoining appellants, and her husband worked for them. Appellee was released from the hospital as cured, and soon thereafter disagreements arose between appellee and appellants, and the evidence is sharply conflicting as to the cause of these disagreements, and is especially so as to the extent to which appellants were responsible for the separation of appellee and her husband. According to appellee's version, appellants, without legal justification or excuse, brought about the separation, as a result of which appellee's husband took away their child, when it was only seven weeks old, since which time appellee had never been permitted to see the child. She recovered judgment in the sum of twenty-five hundred dollars, and, a motion for a new trial having been overruled, this appeal has been duly prosecuted.

Gus Fulk and *E. B. Buchanan* for appellants.

Henry C. Reigler and *W. T. Tucker* for appellee.

[474] SMITH, J., (*after stating the facts*).—A number of exceptions were saved at the trial both to the admission of evidence and the giving of instructions, and these exceptions have been considered by us; but we do not find any prejudicial error, or question of sufficient importance to require discussion. It is also earnestly insisted that the evidence is insufficient to support the verdict, but when appellee's evidence is given its highest probative value, as we must give it, when testing its legal sufficiency to support the verdict, we can not say that the evidence is legally insufficient to sustain the verdict, nor can we say the amount recovered is excessive.

[475] A question is raised, however, which is one of first impression in this State, and which has received our earnest consideration. This question is the right of the wife to maintain an action for damages for the alienation of the affections of her husband.

There is conflict among the authorities as to whether this right of action existed in favor of the wife, or not, at common law, and although there are numerous cases which hold that she had no such right, the better view appears to be that she did. Common law causes of action for a personal injury to a married woman belonged to her; but the husband was required to sue with her to recover compensation because of her disability to sue. The husband's right of action abated at the death of the wife; but the cause of action survived to the wife and could be maintained by her after the death of her husband. Her right of action existed, but could not be set in motion unless her husband joined, and, by reason of the disability of coverture, it remained in abeyance, and could not be prosecuted in her own name. Bennett v. Bennett, 116 N. Y. 584, 23 N. E. 17, 6 L.R.A. 553; Smith v. Smith, 98 Tenn. 101, 38 S. W. 439, 60 Am. St. Rep. 838.

The case of Bennett v. Bennett, supra, is a leading authority on this subject, and the opinion in that case reviewed the authorities upon this question, and in upholding a judgment in favor of the wife, it was there said: "We think the judgment appealed from should be affirmed, upon the ground that the common law gave the plaintiff a right of action, and that the Code gave her an appropriate remedy."

In 1 Cooley on Torts (3 ed. p. 475) it was said: "At least twenty States now hold that such an action may be maintained, some basing their conclusion upon common law principles and some, more or less, upon the various enabling statutes in favor of married women, which have been passed in recent years."

A number of cases support the wife's right to recover for the alienation of the affection of her husband, as an invasion of her personal rights, while other cases regard the wife's right to the *consortium* of her husband [476] as a property right. One of the leading cases taking this latter view is that of Jaynes v. Jaynes, 39 Hun 40, in which case it is there said: "These reciprocal rights may be regarded as the property of the respective parties, in the broad sense of the word property, which includes things not tangible or visible, and applies to whatever is exclusively one's own." And it is there further said: "But as at common law, the husband and wife were regarded as one person, and her personal rights were suspended or incorporated with his, during coverture, so that if she were injured in her person or property, she could bring no action for redress without her husband's concurrence, and in his name as well as her own, she was

practically precluded from suing for damages caused by alienating the affections of her husband and enticing him away. . . . Her disability in that respect, we think, has been removed in this State by legislation. A married woman may now, while married, sue and be sued in all matters having relation to her sole and separate property or for any injury to her person or character the same as if she were sole, and it is not necessary or proper to join her husband with her as a party in any action or special proceedings affecting her separate property. If we are correct in holding that the right which the plaintiff alleges was invaded by the defendant in this action was her separate property, the case is within the statutes referred to. If it be not property in the sense in which the word property is used in the statutes cited, it is a personal right, and, as the statutes extend to all injuries, whether to property, person or character, it seems sufficiently comprehensive to embrace an injury to the right in question."

In the case of Warren v. Warren, 89 Mich. 123, 50 N. W. 842, 14 L.R.A. 545, the wife's right to sue and recover damages for the alienation of the affections of her husband was said to exist under the statute which was set out in the opinion. It was there said: "Under the statutes of this State relative to the rights of married women, and the decisions of our own courts in relation thereto, the right of the [477] wife to bring this action, as well as all other suits to redress her personal wrongs, seems to me to be perfectly clear. The statutes provide: 'That the real and personal estate of every female, acquired before marriage, and all property, real and personal, to which she may afterward become entitled, by gift, grant, inheritance, devise, or in any other manner, shall be and remain the estate and property of such female, and shall not be liable for the debts, obligations, and engagements of her husband, and may be contracted, sold, transferred, mortgaged, conveyed, devised, or bequeathed by her, in the same manner and with the like effect as if she were unmarried.' How Stat. p. 6295.

"'Actions may be brought by and against a married woman in relation to her sole property, in the same manner as if she were unmarried; and in cases where the property of the husband cannot be sold, mortgaged, or otherwise incumbered without the consent of his wife, to be given in the manner prescribed by law, or when his property is exempted by law from sale on execution or other final process issued from any court against him, his wife may bring an action in her own name, with the like effect as in cases of actions in relation to her sole property as aforesaid.' How. Stat. 6297.

"Under these statutes it has been held that a wife is entitled to and may sue for and recover in her own name damages for her personal injuries and suffering from assault and battery (Berger v. Jacobs, 21 Mich. 215; Hyatt v. Adams, 16 Mich. 180–198), and for injuries to her person through the negligence of another (Michigan Cent. R. Co. v. Coleman, 28 Mich. 440); also for slander (Leonard v. Pope, 27 Mich. 145). If the damages in such cases are her individual property, as expressly held in Berger v. Jacobs, I cannot see why, in reason and on principle, the damages arising from the loss of the society and support of her husband are not also her individual property. Surely, the support and maintenance which she is entitled to from her husband, and which she loses by his abandonment, is capable of ready and accurate [478] measurement in dollars and cents, and can be said to be a property right, which she has lost by the wrongful interference of the defendants. The loss of the society of her husband, and her mental anguish and suffering, are not easily ascertained when compensation is sought, and to be gauged by a money standard; but damages for such anguish and suffering are given, as best the jury can, and are permissible, in most actions of tort. . . .

"There has never been any reason urged against the right of the husband to sue for the loss of the *consortium* of his wife, and if, as shown, the wife is now, under either the liberal letter or spirit of our marriage laws, entitled, as of her own property, to the damages arising from her personal injuries—the injuries of her body or mind—there can be no good reason why she cannot sue for and recover damages for the loss of the *consortium* of her husband that does not equally and as well apply to the suit of the husband on account of the loss of her society. The wife is entitled to the society, protection and support of her husband as certainly, under the law, and by moral right, as he is to her society and services in his household. . . .

"It is an old maxim, and a good one, that the law will never 'suffer an injury and a damage without redress.' Will the law aid the husband, and not help the wife in a like case? Not under the present enlightened views of the marriage relation and its reciprocal rights and duties. The reasoning that deprives the wife of redress when her husband is taken away from her by the blandishments and unlawful influences of others is a relic of the barbarity of the common law, which, in effect, made the wife the mere servant of her husband, and deprived her of all right to redress her personal wrongs except by his will."

In the case of Bennett v. Bennett, supra, the court discussed the nature of this action and treated it as of the nature of a personal injury to the wife, and it was there said: "An injury to the person within the meaning [479] of the law includes certain acts which

do not involve physical or personal injury. Thus, criminal conversation with the wife has long been held as personal injury to the husband, and the seduction of a daughter a like injury to the father." And it was there further said: "The basis of the action is the loss of *consortium*, or the right of the husband to the conjugal society of his wife. It is not necessary that there shall be proof of any pecuniary loss in order to sustain the action. Hermance v. James, 32 How. Pr. (N. Y.) 143; Rinehart v. Bills, 82 Mo. 534. Loss of service is not essential but is merely a matter of aggravation and need not be alleged or proven. Bigaouette v. Paulet, 134 Mass. 125." Cooley says that the gist of the action is the loss of *consortium*, which includes the husband's society, affections and aid. 1 Cooley on Torts, p. 478.

In the case of Nolin v. Pearson, 191 Mass. 283, 6 Ann. Cas. 658, 114 Am. St. Rep. 605, 4 L.R.A.(N.S.) 643, which was a suit by the wife for the alienation of the affections of her husband, the right of the wife to maintain the suit was upheld and many cases are cited in the opinion of the court and in the briefs of counsel; other cases are collected in the foot note, and after a review of the American cases, the following statement is made by the editor of the foot note: "In the United States, Wisconsin, Maine and New Jersey seem to stand alone in denying to the wife the right to sue for the alienation of her husband's affections and enticing him away from her, thus depriving her of his support, under statutes giving her the right to sue and be sued in her own name." But New Jersey can no longer be classed among the States which deny the right of the wife to maintain this cause of action.

In the case of Sims v. Sims, 79 N. J. L. 577, 29 L.R.A.(N.S.) 842, 76 Atl. 1063, an appeal was taken from the order of the trial court sustaining a demurrer which was interposed upon the general ground that a suit would not lie, which was instituted to recover damages for maliciously enticing away the plaintiff's husband and thereby alienating his affections. The opinion in that case recited that [480] plaintiff based her right to sue upon an act entitled "An Act for the Protection and Enforcement of the Rights of Married Women." This act provided that any married woman may maintain an action in her own name and without joining her husband therein, for all torts committed against her or her separate property, in the same manner as she lawfully might if a *feme sole;* provided, however, that this act shall not be so construed as to interfere with or take away any right of action at law or in equity now provided for the torts above mentioned. The second section provided that "Any action brought in accordance with the provisions of this act may be prosecuted by such married woman separately in her own name, and the nonjoinder of her husband shall not be pleaded in any such action." The Court of Appeals of New Jersey reversed the action of the trial court in sustaining the demurrer, and in doing so used the following language in construing the act above quoted: "The question, therefore, presented in this case, in the light of the act of 1906, is *res nova*, and the conclusion we have reached is supported by the great weight of authority. That this act was intended to confer the power upon a married woman to protect and enforce her rights is the specific announcement contained in its title. The body of the act declares that she may maintain an action, as a *feme sole* might lawfully do, and without joining her husband therein, for all torts committed against her or her property. Keeping in mind the old law and the existing mischief, it becomes manifest that the legislative intent which inspired this remedial measure could have been only a desire to confer upon the married woman that equality of remedy as an independent suitor, which would enable her to vindicate her right in person for a tort committed against her, and thus remedy the inequality to which she was subjected by the common law."

It will be seen that our statute giving married women the right to sue, which will later be set out, is broader and more comprehensive than the New Jersey [481] statute, which the Court of Appeals of that State said was sufficient to authorize the maintenance of a suit by the wife such as we have here.

In the case of Gernerd v. Gernerd, 185 Pa. St. 236, 39 Atl. 884, 64 Am. St. Rep. 646, 40 L.R.A. 549, involving the question here under consideration, the Supreme Court of that State said: "When the wife has been freed from her common law disabilities and may sue in her own name and right for torts done her, we see no reason to doubt her right to maintain an action against one who has wrongfully induced her husband to leave her. Generally, this right has been recognized and sustained in jurisdictions where she has the capacity to sue." One of the earliest American cases holding the wife has the right to sue for the loss of *consortium* of her husband, is the case of Westlake v. Westlake, 34 Ohio St. 627–633, 32 Am. Rep. 397, and this has become one of the leading cases, and is cited in many of the subsequent cases on this subject. It was there said: "If, in this State, the common law dominion of the husband over the property and personal rights of the wife has been taken away from him and conferred upon her, and remedies in accordance with the spirit of the civil law have been expressly given to the wife for the redress of injuries to her person, property, and personal rights, all of which I hope to show has been

done, then it must follow that she may maintain an action in her own name for the loss of the *consortium* of her husband against one who wrongfully deprives her of it, unless the *consortium* of her husband is not one of her personal rights. . . .

"Is the right of the wife to the *consortium* of the husband one of her personal rights? If it is, then the statute makes the right of action growing out of an injury to the right, the separate property of the wife, for which the Code gives her a right to sue in her own name. Before marriage the man and woman are endowed with the same personal rights. If under no disability, each is competent to contract. When the agreement to marry is entered into, but, before its consummation, each has the same interest in it, and either may sue for a breach [482] of it by the other. In this State, neither the husband nor wife unconditionally surrenders their personal rights by consummating the contract of marriage. On the contrary, each acquires a personal as well as legal right to the conjugal society of the other, for the loss of which either may sue separately."

In the third edition of Cooley on Torts, volume 1, page 477, the case of Foot v. Card, 58 Conn. 1, 18 Atl. 1027, 18 Am. St. Rep. 258, 6 L.R.A. 829, is quoted from at length with approval, and we find there the following quotation from that case: "Whatever inequalities of right as to property may result from the marriage contract, husband and wife are equal in rights in one respect, namely, each owes to the other the fullest possible measure of conjugal affection and society; the husband to the wife all that the wife owes to him. Upon principle this right in the wife is equally valuable to her as property, as is that of the husband to him. Her right being the same as his in kind, degree and value, there would seem to be no valid reason why the law should deny to her the redress which it affords to him. But from time to time courts, not denying the right of the wife in this regard, not denying that it could be injured, have nevertheless declared that the law neither would nor could devise and enforce any form of action by which she might obtain damages. In 3 Blackstone's Commentaries, 143, the reason for such denial is thus stated: 'The inferior hath no kind of property in the company, care or assistance of the superior, as the superior is held to have in those of the inferior; therefore, the inferior can suffer no loss or injury.' Inasmuch as by universal consent it is of the essence of every marriage contract that the parties thereto shall, in regard to this particular matter of conjugal society and affection, stand upon an equality, we are unable to find any support for the denial in this reason, and the right, the injury, and the consequent damage, being admitted, there comes into operation another rule, namely, that the law will permit no one to obtain redress for wrong except by its instrumentality, and it will furnish a mode for obtaining adequate redress for [483] every wrong. This rule, lying at the foundation of all law, is more potent than, and takes precedence of, the reason that the wife is in this regard without the pale of the law, because of her inferiority."

In this case of Foot v. Card, supra, a recovery was permitted without reference to any enabling act authorizing the wife to sue alone. The complaint had been demurred to upon the ground that the wife could not alone maintain this action but that her husband was a necessary party to the action, if any cause of action existed. That contention was disposed of in the following language: "Wherever there is a valuable right, and an injury to it, with consequent damage, the obligation is upon the law to devise and enforce such form and mode of redress as will make the most complete reparation. A technicality must not be permitted to work a denial of justice. The defendant has no possible interest in requiring the husband to be co-plaintiff, other than that she should have security for her costs in the suit, and be protected from a second judgment upon the same cause of action in his name. As she is in no danger of a second judgment, and can compel the plaintiff to give security for costs, it is simply an empty technicality which she here interposes. There are good reasons for the rule that the husband should join in a complaint for damages resulting from an injury to the person, property, reputation or feelings of the wife in every case other than before us. Whenever in any of these she suffers, presumably he suffers. He has a direct pecuniary interest in the result and the defendant is entitled to protection from a second judgment. But in the case before us it is the pith and marrow of the complaint that in alienating the husband's conjugal affection from the wife, in inducing him to deny his conjugal society, in persuading him to give his adulterous affections and society to the defendant, the latter has inflicted upon the plaintiff an injury by which from the nature of the case it is impossible for the husband to suffer injury; for which it is impossible for him to ask redress either for himself [484] or his wife. . . . In a case of this kind, the wife can only ask for damages by and for herself. The law cannot make redress otherwise than to her solely, apart from all others, especially apart from her husband; for no theory of the law as to the merger of the rights of the wife in those of the husband could include her rights to his conjugal affection and society. Although all other debts and rights to her might go to him, there yet remained this particular debt from him to her absolutely alone, and beyond the reach of the law of merger."

We are not called upon to approve all that we have here quoted from this Connecticut case; but the significance of that opinion is that a recovery was permitted without reference to any enabling act permitting the wife to sue alone.

Many other cases are cited in the cases we have quoted from; but those quoted from show upon what theories and under what circumstances recoveries have been permitted. The absurdity and cruel injustice of the common law fiction of the identity of husband and wife has long been recognized, and the tendency of all modern legislation has been toward the emancipation of the wife. But this amelioration of the wife's condition must come through the legislative function, and her disabilities at the common law exist, except in so far as they have been removed by constitutional conventions, or legislative enactments. Some of the disabilities under which the wife still labors, as the result of the common law fiction of the legal unity of the husband and wife, are pointed out in the opinion in the case of Kies v. Young, 64 Ark. 381, 42 S. W. 669, 62 Am. St. Rep. 198. But while she still labors under the disabilities there recited, we think the Legislature has clearly manifested its purpose to manumit her, so far as maintaining an action to enforce any legal right she may have, or to secure redress for any actionable wrong inflicted upon her, where the recovery would inure to her benefit. "Where a married woman is a party, her husband must be joined with her except in the following cases:

[485] "*First.* She may be sued alone upon contracts made by her in respect to her sole and separate property, or in respect to any trade or business carried on by her under any statute of this State.

"*Second.* She may maintain an action in her own name for or on account of her sole or separate estate or property, or for damages against any person or body corporate for any injury to her person, character or property.

"*Third.* Where the action is between herself and her husband, she may sue and be sued alone." Kirby's Digest, § 6017.

These words, person, character or property, are of the broadest signification and import, and would appear to include any cause of action which could arise in favor of a married woman, out of any relation which she can legally occupy. Although she still labors under some disabilities, she is given by this statute the power to enforce in her own name any right which she legally possesses. While it appears from a study of the cases, which hold that a wife may sue for the alienation of the affections of her husband, that in some of the States, where the courts so hold, the statutes have entirely manumitted the wife from her common law disability with reference to suing in her own name, it will also appear, from cases which we have cited, and from other cases therein cited, that the right of action has been upheld in the wife's favor where the enabling acts were not as broad as that of this State.

So that, whether this cause of action be denominated a personal right or a property right, the wife, under the laws of this State, may sue if it is either, and the judgment of the court below is therefore affirmed.

NOTE.

Action by Wife for Alienation of Affections or for Criminal Conversation.

I. Introductory.
II. Alienation of Affections:
1. Right of Action, 748.
2. Parties, 750.
3. Evidence, 751.
4. Damages, 752.
5. Statute of Limitations, 753.
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I. Introductory.

The earlier cases discussing the right of action by a wife for the alienation of her husband's affections or for criminal conversation are collected in the notes to Nolin v. Pearson, 6 Ann. Cas. 658; Keen v. Keen, 14 Ann. Cas. 45; Burch v. Goodson, Ann. Cas. 1912C 1177; and Clow v. Chapman, 46 Am. St. Rep. 468. The present note reviews the recent cases on that subject.

II. Alienation of Affections.

1. Right of Action.

The holding of the reported case that a wife may maintain an action for damages for the alienation of her husband's affections follows the reasoning of the earlier decisions, in jurisdictions wherein by statute the common law disabilities of coverture have been removed, and is sustained in the following recent cases: Work v. Campbell, 164 Cal. 343, 128 Pac. 943, 43 L.R.A.(N.S.) 581; Lupton v. Underwood, 3 Boyce (Del.) 519, 85 Atl. 965; Golden v. Gartleman, 159 Ill. App. 338; Claxton v. Pool, 182 Mo. App. 13, 167 S. W. 623; Hall v. Smith, 80 Misc. 85, 140 N. Y. S. 796; Rott v. Goehring (N. D.) 157 N. W. 294; Nieberg v. Cohen, 88 Vt. 281, Ann. Cas. 1916C 476, 92 Atl. 214, L.R.A.1915C 480. *Compare* Ney v. Ney (No. 1) 21 Ont. W. Rep. 523, 3 Ont. W. N. 896. In Work v. Campbell, supra, the court said: "Under our statutes, a wife may maintain an action for damages suffered by her by reason of the abduction or enticement from her of her husband, as may

a husband for the damages suffered by him for the abduction or enticement from him of his wife, and in such an action by the wife her husband is not a necessary party plaintiff. (See Civ. Code, sec. 49, subds. 1 and 2.)" In Lupton v. Underwood, 3 Boyce (Del.) 519, 85 Atl. 965, it was said: "Under the statutes of this state removing the disability, at common law, of a married woman to sue in respect to her property in her own name alone, a married woman may maintain an action for alienation of her husband's affections. Marriage gives to the wife the same right of conjugal society as it does to the husband. Each is entitled to the comfort, companionship and affection of the other. The rights of the one and the obligations of the other spring from the marriage relation. Any interference with these rights, whether of the one or the other—particularly by a stranger—is a violation, not only of natural right, but also of a legal right arising out of the marriage relation. . . . Whoever, therefore, by the alienation of the affections of a wife's husband, deprives her of his affections, commits a wrong against her property rights for which such wrongdoer is liable to respond in damages." In Claxton v. Pool, 182 Mo. App. 13, 167 S. W. 623, the court said: "In this state, since the decision of the case of Clow v. Chapman, 125 Mo. 101, 28 S. W. 328, the wife may maintain an action against third persons for enticing away her husband and alienating his affections for her, just as the husband could maintain such an action at common law. . . . It is also good law in this state and elsewhere that to sustain the action there must be evidence that the party charged is the enticer, and this requires more than a mere showing of the abandonment and improper relations." In Hall v. Smith, 80 Misc. 85, 140 N. Y. S. 796, it was said: "Although at common law it was said that the wife could not maintain an action for the alienation of her husband's affections, or for the consequent loss of *consortium*, because, among other things, of the wife's lack of any property right in the affections and companionship of her husband, and her incapacity to sue without joining her husband with her, . . . yet the principles of the common law have been, in this as well as in other respects affecting the marital relations and the relative rights of husband and wife, abrogated by the innovating spirit of modern legislation, . . . and it has become settled law by competent authority in the courts of this and of many other states that a wife may sue for the alienation of the affections of her husband and the consequent loss of *consortium*." In Williamson v. Osenton, 220 Fed. 653, 136 C. C. A. 261, the court said: "We decline to make any distinction between the character of the wrong of alienating the affections of the wife from the husband by alluring with habitual criminal intercourse and that of alienating the affections of the husband from the wife by like means."

In a number of the recent actions instituted by a wife to recover damages for the alienation of her husband's affections her right to maintain the suit has not been questioned.

United States.—Williamson v. Osenton, 220 Fed. 653, 136 C. C. A. 261.

California.—Cripe v. Cripe, 170 Cal. 91, 148 Pac. 520.

Illinois.—Taylor v. Wilcox, 188 Ill. App. 18; Nolte v. Nolte, 190 Ill. App. 469.

Iowa.—Porter v. Heishman, 154 N. W. 503; Warren v. Graham, 156 N. W. 323.

Massachusetts.—Geromini v. Brunelle, 214 Mass. 492, 102 N. E. 67, 46 L.R.A.(N.S.) 465; Lanigan v. Lanigan, 222 Mass. 198, 110 N. E. 285.

Michigan.—Walter v. Walter, 172 Mich 351, 137 N. W. 677; Gornetzky v. Gornetzky, 174 Mich. 492, 137 N. W. 706; Diedrich v. Swift, 178 Mich. 593, 146 N. W. 170.

Missouri.—Knapp v. Knapp, 183 S. W. 576.

New York.—Hendrick v. Biggar, 151 App. Div. 522, 136 N. Y. S. 306 (*modifying judgment* 66 Misc. 576, 122 N. Y. S. 162).

North Dakota.—Greuneich v. Greuneich, 23 N. D. 368, 137 N. W. 415.

Oklahoma.—Brison v. McKellop, 41 Okla. 374, 138 Pac. 154.

Oregon.—McCann v. Burns, 73 Ore. 167, 136 Pac. 659, 143 Pac. 916–1099.

Pennsylvania.—Ickes v. Ickes, 237 Pa. St. 582, 85 Atl. 885, 44 L.R.A.(N.S.) 1118; Stewart v. Hagerty, 96 Atl. 1099.

Vermont.—Miller v. Pearce, 86 Vt. 322, 85 Atl. 620, 43 L.R.A.(N.S.) 332; Frederick v Morse, 88 Vt. 126, 92 Atl. 16.

Washington.—Phillips v. Thomas, 70 Wash. 533, Ann. Cas. 1914B 800, 127 Pac. 97, 42 L.R.A.(N.S.) 582.

In an action instituted against a parent of the husband for the alienation of the latter's affections it is generally held that the parent may honestly advise the son and is liable only where the advice is actuated by malice. Thus in Lanigan v. Lanigan, 222 Mass. 198, 110 N. E. 285, the court said: "A father from parental affection may advise his son to discontinue the marital relation, and no action lies if such advice, honestly given, results in a separation. But if because of hostility and ill-will to his son's wife he procures the separation, her conjugal rights are invaded, justification fails, malice is proved, and damages may be recovered." And in Knapp v. Knapp (Mo.) 183 S. W. 576, the court held, in an action against the husband's mother and sister for alienation of affections, that proof of malice was part of the plaintiff's case as the parent was clothed with the presumption that the advice which he gave his child was given

in good faith. In Greuneich v. Greuneich, 23 N. D. 368, 137 N. W. 415, the court said: "The law recognizes the natural solicitude of a parent for the happiness and welfare of a child, even after the child has married and left the parental home; and it is well settled in the authorities that, if a wife leave her husband, or a husband his wife, and he or she is induced so to do by the advice or counsel of a parent, the parent will not be held liable in an action for alienation of affections, unless it is made to appear that in giving such advice or counsel he acted in bad faith, and not honestly to promote the interest and welfare of his child. This is the case, even though the advice was not wisely given." See to the same effect Brison v. McKellop, 41 Okla. 374, 138 Pac. 154. In Ickes v. Ickes, 237 Pa. St. 582, 85 Atl. 885, 44 L.R.A.(N.S.) 1118, the court said: "While the law would not permit him maliciously to break up the marriage, yet, since the defendant was the father of the plaintiff's husband, the measure of proof required was greater than it would have been had he been a mere intermeddling stranger." And in Walter v. Walter, 172 Mich. 351, 137 N. W. 677, it was held to be error to charge the jury that it was the duty of the parents to advise their son to live with his wife.

It has been held that it is not necessary to prove malice in an action instituted against a stranger. Thus in Warren v. Graham (Ia.) 156 N. W. 323, which was an action instituted by a wife against a stranger for the alienation of her husband's affections, the court said: "As this action is against a stranger, a person having no interest in either of the parties to the suit and under no duty to shield or protect either, it is not, as we understand it, necessary to show actual malice in order to justify a recovery from one who alienates the affections of either husband or wife. . . . It may be true that malice is the gist of the action, but it is not necessary that express malice must be shown. It may be implied, and, as a rule, all that plaintiff need show in an action against a stranger who was under no duty and who was not called upon to give advice is that such person intentionally, unjustifiably, and wrongfully induced the husband to leave his wife. This establishes all the malice that is necessary to make out a case for plaintiff." However, in Geromini v. Buenelle, 214 Mass. 492, 102 N. E. 67, 46 L.R.A.(N.S.) 465, it was held that in order to render the defendant liable to the plaintiff for alienating the affections of her husband it must appear that his advice was not given honestly or was given from malevolent motives; that it was necessary to prove malice on the part of the defendant.

It has been held that in an action against a female defendant for the alienation of the affections of the plaintiff's husband it must appear that the defendant was the pursuer and the inducing cause of the separation. Thus in Stewart v. Hagerty (Pa.) 96 Atl. 1099, it was held that in order to sustain an action for the alienation of the affections of the plaintiff's husband there must be some evidence from which the conclusion could be drawn that the defendant, a woman, was the pursuer, and not merely the pursued. And it was further held that there must be clear proof that the defendant was the inducing cause of the separation. Evidence that the defendant was seen walking on the streets with the plaintiff's husband was held not to be sufficient to sustain a verdict. See to the same effect Claxton v. Pool, 182 Mo. App. 13, 16 S. W. 623. However, in Miller v. Pearce, 86 Vt. 322, 85 Atl. 620, 43 L.R.A.(N.S.) 332, the court held that in an action by a wife for the alienation of her husband's affections, proof of an act of adultery between the husband and the defendant perfected the cause of action and established the right of recovery regardless of which party was the seducer. The court said that one of the consequences which the law attaches to the act of adultery, in such a case, is that the loss of consortium necessarily results from it. And in Rott v. Goehring (N. D.) 157 N. W. 294, the court said: "The fact, if it be a fact, that the husband was more to be blamed than the defendant does not exonerate the latter from liability; nor will plaintiff's action be defeated because plaintiff was estranged from her husband prior to his illicit relations with defendant."

2. Parties.

To warrant a recovery against two persons as joint tortfeasors there must be a showing of co-operation in the perpetration of the wrong complained of. Thus in Claxton v. Pool, 182 Mo. App. 13, 167 S. W. 623, which was an action brought by a wife for the alienation of her husband's affections against a husband and a wife as defendants, there was evidence sufficient to show that the defendant wife by her relations with the plaintiff's husband was responsible for the alienation of his affections but there was no evidence to show that the husband was a joint tortfeasor. The court said: "In considering the liability of the husband . . . it will be well to observe that the petition does not charge him as a joint tortfeasor with his wife, alleging only that what his wife did he had knowledge of and gave his consent to. To charge that he was a joint tortfeasor would require that he not only had knowledge and gave consent, but that he encouraged, aided or abetted his wife in her wrong or that he obtained some benefit from her acts which he ratified. . . . If

he is liable at all, it can only be on the common-law liability of a husband for his wife's torts. . . . We . . . hold, on principle, that a husband is not liable and has never been held liable at common law, for the wrongs of his wife to a third person by reason of her conduct where such conduct is also a violation of her marital duties to him." In Knapp v. Knapp (Mo.) 183 S. W. 576, the action was instituted against the husband's mother and sister for alienation of affections. The court said: "Co-operation of tortfeasors is essential to support a joint judgment against them for a wilful and intentional tort, like that forming the basis of the charge in this case."

3. Evidence.

In Frederick v. Morse, 88 Vt. 126, 92 Atl. 16, the court said: "Reputation and cohabitation are not competent proof of a marriage in actions for criminal conversation; . . . and . . . a marriage certificate, however complete and formal, does not prove itself. . . . But the plaintiff's testimony to the performance of a marriage ceremony and subsequent cohabitation was admissible in connection with the production of a marriage certificate with proof of the official signature, if there was competent evidence of the authority of the person signing. . . . Evidence that one is reputed to be and has acted as a justice of the peace is prima facie proof that he was regularly appointed to that office." It was further said, however: "The only evidence of qualification was the statement of the witness that he knew that marriages were performed in New York by justices of the peace. If the exercise of an official function can be accepted as proof of a statutory authority, it must be something more than its exercise in a single instance or by a single person."

In Walter v. Walter, 172 Mich. 351, 137 N. W. 677, an action by a wife against her father-in-law for the alienation of her husband's affections, it appeared that the plaintiff had previously instituted and withdrawn a divorce proceeding against her husband. It was held that the defendant should have been permitted to cross-examine the wife on the subject of her divorce proceeding.

In Hendrick v. Biggar, 151 App. Div. 522, 136 N. Y. S. 306, *modifying judgment* 66 Misc. 576, 122 N. Y. S. 162, an action by a wife for the alienation of her husband's affections, the plaintiff offered in evidence a decision and judgment in a divorce action brought by her against her husband wherein the defendant in the case at bar was named as co-respondent and appeared in the action by attorney. The court said: "It should be the rule, and we think it is, that where one comes into a divorce action by voluntary appearance as a corespondent, a decision and judgment in that action are admissible in evidence thereafter against him as to any material facts affecting his conduct which were decided in the action, as basis for the entry of a judgment.

In Brison v. McKellop, 41 Okla. 374, 138 Pac. 154, it appeared that the plaintiff was permitted, over the objection of the defendants, to state what her husband had told her that his mother had said to him, the statements having been made some three months after the separation between the plaintiff and her husband, and in the absence of either of the defendants. The court held the admission of that evidence to be reversible error.

In Ickes v. Ickes, 237 Pa. St. 582, 85 Atl. 885, 44 L.R.A.(N.S.) 1118, it was held that the testimony of a witness who had seen the plaintiff and her husband on the street and overheard a conversation between them in which the wife had confessed to her husband that the child about to be born to her was not his, should have been admitted as proof of the motives which caused the husband to leave his wife. The court said: "When evidence of this character is produced, sufficient to show a then present intention, or state of mind; it may be assumed to have continued and formed the motive which controlled the doing of a subsequent act following closely thereafter, if under all the surrounding circumstances one would naturally associate the two together; and it is for the jury to draw the conclusion."

It is generally held that evidence of an estrangement between the plaintiff and her husband prior to any act on the part of the defendant, is admissible in mitigation of damages but not as a bar to the action itself. Thus in Williamson v. Osenton, 220 Fed. 653, 136 C. C. A. 261, the court said: "The bearing of the evidence as to estrangement was properly limited in the charge to the subject of mitigation of damages. Estrangement is obviously not a bar to the recovery of either compensatory or punitive damages." And in Lupton v. Underwood, 3 Boyce (Del.) 519, 85 Atl. 965, the court in charging the jury on the question of evidence offered and received in mitigation of damages, said: "The extent of the actual injury to the plaintiff will of course depend upon the prior relations between the plaintiff and her husband. Evidence in mitigation or reduction of damages will, therefore, be received, which tends to show that the plaintiff has in fact suffered less injury than would otherwise be a probable inference from the act complained of. It is proper therefore, for you to consider, in mitigation of damages, but not in bar of the action, evidence, if any, which shows any unhappy relations between the wife and hus-

band, not caused by the defendant, any want of affection for each other, and the fact that they are living apart, together with the circumstances under which the separation occurred. These and like matters are proper for your consideration, in mitigation of damages, to determine whether on account of such relation, the wife lost much or little by reason of the alleged acts and conduct of the defendant, if you find the defendant committed them and that they induced the injury complained of." In Cripe v. Cripe, 170 Cal. 91, 148 Pac. 520, it was held that evidence tending to show the feeling of the husband toward the plaintiff before the defendant acted at all was admissible, as the charge of alienating the affections of the husband would not be sustained if it appeared that before the defendant acted, the husband entertained no affection for his wife. It was also held that such evidence would be admissible on the question whether the defendant had acted maliciously or in good faith. For a discussion of the lack of affection between a husband and wife as a defense to an action for alienation of affections, see the note to Morris v. Warwick, 7 Ann. Cas. 687.

In Taylor v. Wilcox, 188 Ill. App. 18, the court held that evidence of the financial condition of the parties was admissible for the purpose of increasing damages. For a general discussion of the admissibility of evidence of the defendant's financial circumstances in an action for alienation of affection, see the note to Phillips v. Thomas, Ann. Cas. 1914B 800.

4. Damages.

In Lupton v. Underwood, 3 Boyce (Del.) 519, 85 Atl. 965, the court in charging the jury on the question of damages said: "If you find from the evidence that the defendant wrongfully and unjustly, by any, or all of the acts complained of, had a controlling influence in alienating the affections of the plaintiff's husband, your verdict should be for the plaintiff; and the measure of damages would be such as you believe would reasonably compensate the plaintiff for the injury to her feelings; for the loss of her husband's comfort and society; and for the loss of his support. If you find from the evidence that the defendant's conduct was effective in causing the alienation of the affections of plaintiff's husband and was wanton and malicious toward the plaintiff, you may, in such event, in your discretion, award exemplary or punitive damages, in addition to compensatory damages. But in order to warrant the awarding of exemplary damages, you must be clearly satisfied by the evidence that the defendant's conduct was wanton and malicious. If you find from the evidence that plaintiff's husband alienated his affections from plaintiff without the influence of the alleged misconduct and interference on the part of the defendant, or that the alienation of his affections was the result of some other cause, over which the defendant did not exercise an effective influence, your verdict should be for the defendant."

In Taylor v. Wilcox, 188 Ill. App. 18, it was said: "The cause of action is such that if plaintiff is entitled to recover damages then the jury may, because of the wilful and wanton nature of the cause of action, give exemplary or punitive damages." The court further held that the plaintiff could recover damages for the support of the children over twelve years of age, which had been imposed on her. She was also entitled to recover for the value of her support and loss of consortium, and for mental anguish and injuries to her feelings but she was not entitled to recover for any injury to the good name and character or dishonor of her family.

In Phillips v. Thomas, 70 Wash. 533, Ann. Cas. 1914B 800, 127 Pac. 97, 42 L.R.A.(N.S.) 582, it was held that exemplary or punitive damages cannot be recovered except when expressly allowed by statute. It was also held that a verdict of $35,000 was so excessive as to raise a presumption of passion and prejudice and although reduced to $10,000 by the trial court it was still considered grossly excessive. In Hendrick v. Biggar, 151 App. Div. 522, 136 N. Y. S. 306, *modifying judgment* 66 Misc. 576, 122 N. Y. S. 162, it appeared that the plaintiff had recovered a verdict of $75,000 in an action for the alienation of her husband's affections. The defendant appealed from an order denying a motion for a new trial and reducing the verdict to $50,000. The court said: "The judgment in this action is a large one, even as it stands, and, under the facts shown in the record, apparently excessive. In cases of this class, there is a large measure of discretion in the jury as to the amount of damages, and a verdict is not to be interfered with lightly on the claim that it is excessive. At the same time it is the duty of the trial court and of this court to consider such question wherever it arises properly. Every case of this character is somewhat a rule unto itself. We think that the judgment and order should be reversed and a new trial granted, costs to abide the event, on the ground that the verdict was excessive, unless the plaintiff stipulate within twenty days to reduce the damages to the sum of $30,000 with interest, exclusive of the costs taxed on the entry of the judgment." In Warren v. Graham (Ia.) 156 N. W. 323, it appeared that the husband of the plaintiff was not a thrifty man and with the help of his family his only savings were a house and lot which he had deeded to the

plaintiff. A verdict of $4875 was held to be excessive and she was given an election to accept a verdict for $2000 or to take a new trial. In Porter v. Heishman (Ia.) 154 N. W. 503, a verdict for $10,000 in favor of the plaintiff was held to be excessive where it appeared that the husband had been the aggressor in his relations with the defendant and that he had been unfaithful to his wife before meeting the defendant. There was also evidence of the fact that the plaintiff's husband had nothing except what he earned each day. In Diedrich v. Swift, 178 Mich. 593, 146 N. W. 170, a verdict for $3,000 was held not to be excessive. In Williamson v. Osenton, 220 Fed. 653, 136 C. C. A. 261, it appeared that on the trial of an action for the alienation of the affections of her husband, the plaintiff recovered a verdict for $35,000, and a motion for a new trial was refused by the district court. On appeal the court said: "Careful examination of the law of the case leads to the conclusion that all the rulings of the district court were sound. In such an action for damages this court cannot review the action of the district court in refusing to grant a new trial for excess in the verdict. . . . There is no more salutary judicial power than that of relieving against excessive verdicts. With the changes which modern life has brought, the importance of the exercise of the power with moderation and firmness becomes more and more important, especially when it is considered that the refusal of the trial court to give relief cannot be reviewed. Large as this verdict is, the motion to reduce by granting a new trial nisi was in the discretion of the district court and beyond the consideration of this court." For a general discussion of what is an excessive verdict in an action for alienation of affections, see the note to Fuller v. Robinson, Ann. Cas. 1912A 938.

5. Statute of Limitations.

In Hall v. Smith, 80 Misc. 85, 140 N. Y. S. 796, an action by a wife for the alienation of her husband's affections, the plaintiff moved for a temporary injunction to restrain the further alienation by the defendant of the affections of her husband. Holding that the action was barred the court said: "The motion which has been made in this action requires the determination of the question whether in such an action an injunction order may and should be made to restrain the defendant pendente lite from the continuance of those acts which lie at the foundation of the cause of action. While the question is most unusual in respect of the power of the court to grant such relief, I have no doubt whatever that in a proper case the right to grant such an injunction resides in the court of equity and that it is not unduly extending the jurisdiction or cognizance of the court to restrain the impending, threatened or continued commission of such acts as are violative of the rights of a plaintiff in a suit of this character. . . . Rules of general application in cases of injunctions of a temporary character are applicable to this case. The plaintiff must show not only the existence of a legal right but must affirmatively show that the acts sought to be restrained will be a violation of it. Injunctions do not issue to prevent acts merely because they are immoral or illegal or criminal, but only in case the plaintiff's civil rights are being invaded. In this case the gravamen of the charge made by the plaintiff is an act which occurred in or about July, 1906. It is alleged as being at that time a completed act of alienation 'since which date her husband has not lived with or shown any love or affection to the plaintiff herein but has lived with and continues to live with the said defendant; that he has refused to come back to the plaintiff,' etc. The present suit was not begun, according to the affidavits submitted on this motion, until the 17th day of February, 1913, more than six years subsequent to the act of alienation charged against the defendant. This fact raises a question not presented by counsel, to wit: Is the action maintainable after the lapse of six years from the date of the alleged alienation? It was held in Hogan v. Wolf, 32 N. Y. St. Repr. 550, that the cause of action in a suit of this nature was barred at the expiration of six years. . . . But even if the cause of action itself were to be considered as not being barred in the present case, the plaintiff by failing for so long a period to seek the peculiar relief which she now asks has, I think, waived her right to the intervention of this court on her behalf pending the suit. Her laches are wholly unexplained, no excuse of any sort is offered to the court for this long delay; and, while no arbitrary rule exists for determining what constitutes laches, the peculiar circumstances in this case lead me to hesitate to employ the equitable powers of this court at the present stage, or unless or until the plaintiff's prospect of final success in the action seems more assured than it now does."

III. Criminal Conversation.

In Ney v. Ney (No. 1) 21 Ont. W. Rep. 523, 3 Ont. W. N. 896, it was held, following the previous judgments of the court in Hellis v. Lambert, 24 Ont. App. 653, and Weston v. Perry, 14 Ont. W. Rep. 956, that no action will lie by a married woman for the loss of the consortium of her husband. In Frederick v. Morse, 88 Vt. 126, 92 Atl. 16, it appeared

that the case was tried on two counts, alleging alienation of affection as the first count, and criminal conversation as a second count. After discussing several exceptions taken to the instructions of the court regarding the proof of marriage the court said: "The court charged in substance that if the jury found the fact of an adulterous disposition, and the opportunities to commit adultery which the evidence tended to establish, and were satisfied from these facts that sexual intercourse was had on any of these occasions, the plaintiff could recover under the second count, unless the jury found that she was willing that her husband should have criminal conversation with the defendant and consented to the act of intercourse. This instruction was excepted to, but we think it was correct and adequate."

CARPENTER

v.

BUFFALO GENERAL ELECTRIC COMPANY.

New York Court of Appeals—November 10, 1914.

213 N. Y. 101; 106 N. E. 1026.

Adoption of Children — Inheritance from Adopted Child.

Decedent was duly adopted by his mother's sister, after his father had abandoned his family, under Laws 1873, c. 830, providing that the adopted child should sustain the legal relation of a child, and which as amended by Laws 1887, c. 703, gave the right of inheritance, previously denied, and declared his "next of kin" to be the same as if he was the "legitimate child" of the person adopting him. After the death of his foster mother, leaving a brother and two sisters, decedent, while in defendant's employ, was killed, dying intestate and unmarried. Code Civ. Proc. §§ 1902–1905, provides a recovery for wrongful death for the benefit of decedent's "next of kin," defined by reference to include all those entitled under the law relating to the distribution of personal property. Domestic Relations Law (Consol. Laws, c. 14) § 114, provides that a foster parent and an adopted minor child sustain the legal relation of parent and child, with rights of inheritance from each other, extending to the child's heirs and "next of kin," as if he were the "legitimate child" of the person adopting him. Decedent Estate Law (Consol. Laws, c. 13) § 98, subd. 7, provides that the father of an adopted child, dying intestate, unmarried, and without children, takes all the unbequeathed assets. Held, that the law in force at decedent's death controlled; that the right of inheritance which passed to decedent's next of kin was not merely the right to inherit from his foster parent; that the term "legitimate child," used in the established meaning of a child born in lawful wedlock, made decedent the next of kin, as though the adopted parent were his natural parent; and hence that the brother anl sisters of his deceased adopted mother, and not his natural father, were the "next of kin" entitled to substantial damages.

[See note at end of this case.]

Carpenter v. Buffalo General Electric Co. 155 N. Y. App. Div. 655, affirmed.

Appeal from Appellate Division of Supreme Court, Fourth Judicial Department.

Action for death by wrongful act. Margaret E. Carpenter, administratrix, plaintiff, and Buffalo General Electric Company, defendant. Judgment for plaintiff in trial court. Judgment affirmed by Appellate Division of Supreme Court. Defendant appeals. The facts are stated in the opinion. AFFIRMED.

Alfred L. Becker for appellant.

Carleton H. White and *Hamilton Ward* for respondent.

[103] HOGAN, J.—In March, 1884, plaintiff's intestate, then about five years of age, was duly adopted by a sister of the natural mother of the intestate, under an order of adoption made pursuant to the provisions of chapter 830 of the Laws of 1873. The relation of mother and son thereby created between the adoptive parent and the intestate continued to the time of the death of the foster parent, November 3, 1906. The evidence justifies the assumption that the natural father of the intestate, though still alive, abandoned his family prior to the adoption proceedings, and that the intestate during his lifetime did not contribute to his support.

Subsequent to the adoption of the child, the natural mother and foster mother lived together down to the time of the death of the latter in 1906. The foster mother died intestate leaving her surviving the intestate, the adopted son, one brother and two sisters, one of whom is the plaintiff. The decedent, the adopted child, never married and never had a brother or sister.

April 13th, 1911, the intestate, then about 31 years of age, was an employee in the service of the defendant. On that day he died as a result of injuries received by him alleged to have been caused by the negligence of the defendant. The plaintiff was appointed administratrix of his estate, and sought in this action, under the provisions of sections 1902–1905 inclusive, Code of Civil Procedure, to recover damages for the death of the intestate

and recovered a verdict for a substantial amount.

The appellant does not complain of the amount of the recovery in this action provided that the plaintiff, her brother and her sister are the next of kin of the deceased, but contends that if deceased left any next of kin, the foster parent having predeceased the plaintiff's intestate, the natural father would be the sole next of kin interested [104] in any recovery, and that under the facts in this case such a recovery would be nominal rather than substantial as awarded by the jury.

The appeal, therefore, presents questions raised by exceptions to the rulings and charge of the trial justice.

The right of recovery in an action of this character is regulated by section 1902, and sections following, of the Code of Civil Procedure. By section 1903 of the Code, the decedent having died unmarried, the damages recovered, if any, would be exclusively for the benefit of the decedent's next of kin.

By section 1905 of the Code, the term "next of kin" is defined by reference to section 1870 of the Code, and includes all those entitled under the provisions of law relating to the distribution of personal property to share in the unbequeathed assets of a decedent, after payment of the debts and expenses, other than the surviving husband and wife.

The intestate having died unmarried, leaving no child, the father would take the whole of the unbequeathed assets of the decedent (Decedent Estate Law, section 98, subdivision 7) unless the statute relating to adoption has otherwise provided. The question is presented: Is the natural father the next of kin of the decedent? If the natural father is not next of kin of the decedent, then are the brother and two sisters of the decedent's foster mother to be regarded as next of kin of decedent?

The right of adoption was recognized and practiced among a number of the continental nations, though it was not embodied in the common law of England. It exists in this state by enactment of the legislature wherein is defined the legal rights and relations of the foster parent or parents and the adopted child, and such statute must be read in connection with the provisions of the Decedent Estate Law. As no right of inheritance or succession could arise prior to the death of the intestate, and the legislature was empowered at any time to repeal or [105] amend the statute, the law in force at the time of the death of the intestate (1911) is controlling upon the question presented in this case. (Dodin v. Dodin, 16 App. Div. 42, 44 N. Y. S. 800, *affirmed* 162 N. Y. 635, 57 N. E. 1108; Gilliam v. Guaranty Trust Co. 186 N. Y. 127, 78 N. E. 697, 116 Am. St. Rep. 536.)

The original statute relating to the subject of adoption, chapter 830 of the Laws of 1873, was in effect at the time the intestate was adopted. That law provided, so far as material to be considered, that the adopted child should take the name of the person adopting and the two thenceforth should sustain towards each other the legal relation of parent and child, but the statute by express terms expressly inhibited the right of inheritance. Chapter 703, Laws of 1887, amended the law of 1873. The amendatory law continued the legal relation of parent and child between the adoptive parent and the adopted child, and, whereas, under the statute of 1873 a right of inheritance was denied, the law of 1887 included such right of inheritance, and in addition defined who should be the next of kin of the child in the following words: "and the heirs and next of kin of the child so adopted shall be the same as if the said child was the legitimate child of the person so adopting."

By chapter 272 of the Laws of 1896, the Domestic Relations Law (Cons. Laws, ch. 14) was enacted as a compilation, with certain changes and additions, of the preceding laws. Section 64 of that law, now embodied in section 114 of the same law, is as follows:

"§ 64. Effect of adoption.—Thereafter the parents of the minor are relieved from all parental duties towards, and of all responsibility for, and have no rights over such child, or to his property by descent or succession. . . . The child takes the name of the foster parent. His right of inheritance and succession from his natural parents remain unaffected by such adoption.

"The foster parent or parents and the minor sustain towards each other the legal relation of parent and child, [106] and have all the rights and are subject to all the duties of that relation, including the right of inheritance from each other, . . . and such right of inheritance extends to the heirs and next of kin of the minor, and such heirs and next of kin shall be the same as if he were the legitimate child of the person adopting; . . .

This statute continued the legal relation of parent and child established by the laws of 1873–1887, which imposed upon the foster parent or parents a legal obligation to support, maintain and educate the child, and in return to be entitled to the custody and services of the child as well as the liability on the part of the child to render service and in certain cases to respond to the support of such parent or parents.

Additional provisions were embodied in the Domestic Relations Law not contained in the earlier laws. The natural parents were *excluded* from any rights over the child or to his property by descent or succession, though

the child's right of inheritance and succession from his natural parents was to remain unaffected by such adoption. In view of that provision it is clear that the natural father of the intestate was excluded as a next of kin of the decedent. The law quoted also provided that the parental relations should include the right of inheritance between the adoptive parent or parents and the adopted child, which right of inheritance was to extend to the heirs and next of kin of the minor, and that such heirs and next of kin should be the same as if he (the minor) were the legitimate child of the person adopting him.

It is argued by appellant that the omission of the legislature to provide that the right of inheritance extends to the heirs and next of kin of the adoptive parents is significant, as the right of inheritance possessed by the child and which passes to his next of kin was the right of inheritance from the foster parents. Reading the several laws enacted in this state the conclusion is irresistible [107] that the policy of the legislature has been to extend the artificial relations created by adoption to the relation existing by nature. We do not think that the statute is susceptible of the construction urged by appellant. The death of the foster parent did not reestablish the relation of parent and child between the natural parents and the intestate. The natural parents had surrendered all paternal and maternal ties to the adoptive parent pursuant to the law of the state which defined the legal rights of all of the parties and by which they were severally bound, unless the adoption was abandoned or changed pursuant to law for which ample provision was made. When the legislature provided that the heirs and next of kin of the adopted child shall be the same as if he were the legitimate child of the person adopting, it clearly used the words "legitimate child" in the well-established meaning of the term as a child born in lawful wedlock, and effectively embodied in the law of descent a provision that the adopted child was the heir at law and next of kin of the adoptive parent to the same extent as though the adoptive parent in this case had borne the adopted child, with all that the term "mother" implies.

As was said by Judge Vann, writing for this court, in In re Cook, 187 N. Y. 253–260, 79 N. E. 991: "The legislature has supreme control of the subject and may give heritable blood when nature did not." Had the intestate during his lifetime inherited a substantial property from his foster parent, and subsequently died in possession of the same, his natural parents having been inhibited from a right to inherit from him, the argument of appellant would, if adopted, result in the adopted child dying without heirs and next of kin and the property owned by him derived by inheritance from his foster parent would escheat to the state.

Such construction of the statute would be repugnant to the policy of the law, if any other reasonable interpretation [108] is permissible. When the legislature provided that the heirs at law and next of kin of the adopted child should be the same as if he were the legitimate child of the person adopting, the adopted child, in a legal sense, became the natural child of the adoptive parent. It is not to be presumed that the legislature intended to render well-established principles of law nugatory and to provide additional grounds for escheat, to enable the state to take the property of the intestate where he survived the adoptive parent and still give to him a right of inheritance where the adoptive parent predeceased him. Such construction of intention would be contrary to the rule that in case of failure of descendants capable of taking, the inheritance should go back to the kinsman from whom it came. That rule was founded upon justice and equity, and it cannot be presumed that the legislature intended to create an exception to that rule, where it had surrounded the relation of foster parent and child with all the safeguards, rights and privileges of the relation of parent and child by blood, for the purpose of acquiring by escheat to the people the property of an adopted child in a case like the one at bar.

We have examined the cases cited from other jurisdictions and do not deem it essential to take the time to point out the distinguishing features of the laws of the various states as compared with the statute before us in this state. Numerous cases are also to be found in other states, in addition to those cited, bearing on the subject under consideration. While the question presented here has not been directly considered by this court, several cases have been decided involving principles of law having a direct bearing upon the subject which seem to justify the conclusion reached in this case. Gilliam v. Guaranty Trust Co. 186 N. Y. 127, 78 N. E. 697, 116 Am. St. Rep. 536; In re Cook, 187 N. Y. 253, 79 N. E. 991; Dodin v. Dodin, 16 App. Div. 42, 44 N. Y. S. 800, *affirmed* 162 N. Y. 635, 57 N. E. 1108; In re MacRae, 189 N. Y. 142–147, 12 Ann. Cas. 505.

We, therefore, conclude that the brothers and sisters of [109] decedent's foster mother are the next of kin of the decedent.

The judgment should be affirmed, with costs.

Werner, Chase, Collin, Miller and Cardozo, JJ., concur; Willard Bartlett, Ch. J., absent.

Judgment affirmed.

NOTE.

Right of Inheritance from Adopted Child as between Natural Parents and Adoptive Parents or Their Descendants.

It is the purpose of the present note to discuss only those cases which deal with the right of inheritance from an adopted child where it appears that the property which is to be distributed came to the adopted child from some source other than the adopting parents. The right of succession to an estate inherited from a foster parent by an adopted child is discussed in the notes to Lanferman v. Vanzile, Ann. Cas. 1914D 563, and Russell v. Jordan, reported post, this volume, at page 760. As to the right of the child of an adopted person to inherit from the adoptive parent, see the note to In re Walworth, Ann. Cas. 1914C 1223.

From the cases hereinafter cited, it is apparent that the right of inheritance from an adopted child is entirely dependent on the interpretation of the various statutes affecting the question of adoption and descent in each jurisdiction. However, the proposition may be said to be supported by the weight of authority that unless the statutes specifically confer the right of inheritance on the adopting parents or their descendants, the natural parents of an adopted child or their descendants, will succeed to his estate. White v. Dotter, 73 Ark. 130, 83 S. W. 1052; In re Namauu, 3 Hawaii 484; Edwards v. Yearby, 168 N. C. 663, 85 S. E. 19, L.R.A.1915E 462; Upson v. Noble, 35 Ohio St. 655; Daisey's Estate, 15 W. N. C. (Pa.) 403; Com. v. Powel, 16 W. N. C. (Pa.) 297, 20 Cent. L. J. 343; Hole v. Robbins, 53 Wis. 514, 10 N. W. 617. Thus in the case last cited, it appeared that the intestate, an adopted child, died seized of certain property inherited from his natural father. He was survived by his adoptive parents and brothers and sisters of his natural father. The property was awarded to the brothers and sisters of the natural father, the court saying: "Both by the common law and by the statutes of this state inheritance is confined to the blood of the deceased, the only exception made being in favor of the wife of the deceased. . . . After carefully considering all the provisions of the law regulating the adoption of children, we are of the opinion that there was no intention on the part of the legislature to change the general law upon the subject of inheritance from an adopted child. . . . The adopting parent is of full age, and enters into the engagement with full knowledge of its effect. The child, in most instances, is entirely unable to comprehend the relationship made by the process of adoption, and can give no legal consent to any change of his rights by such adoption. If the adoption is to work a radical change as to the right of inheritance to his estate, it would seem to require an explicit declaration to that effect. The seventh section, above quoted, which undertakes to define what rights of the natural parents of the child adopted shall be taken away by such adoption, fails entirely in taking away the right of inheritance from such child in case he should die without issue or descendants and leaving no widow. It merely declares that the order of adoption shall deprive the natural parents 'of all legal rights whatsoever as to the child, and the child shall be freed from all legal obligations of maintenance and obedience as respects his natural parents.' These words refer solely to the right of the natural parent to the personal control, education and maintenance of the child. The rights of which the natural parents are deprived respect the child itself, and not his property or their right to inherit from him. The statute having expressly declared that the adopted child shall inherit from the adopted parent, and having omitted to declare that the adopted parent shall inherit from the child, we think it must be held, according to the rules of construction, that the general law of inheritance was not intended to be changed in favor of the adopted parent, and that the estate of the adopted child, upon his death without a will, must descend to his kindred of blood as prescribed by section 1, ch. 92, R. S. 1858, as amended. That the word 'parents,' in subdivision 2 of section 1, ch. 92, means natural parents, and not parents by adoption, cannot be doubted. All the other provisions of the section refer to kindred of the blood of the deceased; and the word 'parents,' both by derivation and common understanding, means the natural parents." In Edwards v. Yearby, 168 N. C. 663, 85 S. E. 19, L.R.A.1915E 462, it appeared that the decedent, who died possessed of the property in dispute, had inherited the same from his natural mother. He was the natural son of the plaintiff and the adopted son of the defendant. In passing on the right of inheritance from the adopted child the court said: "Our general statute on descents of real property, founded on and, to a great extent, embodying the principles of the common law, would give this property to the natural father (Revisal, c. 30, rule 6), and this present law of adoption (Revisal, c. 2, § 177) having in express terms conferred the right of inheritance only on the child, it should, by correct interpretation be confined to that, and create no other interference with the general law that the statute itself declares. . . . The question does not seem to have been hitherto presented to this court, and there is some variety of ruling on the subject in other jurisdictions, owing largely

to differing phraseology of their statutes; but the view we adopt is supported, we think, by correct principles of interpretation and is in accord with many authoritative decisions elsewhere construing laws which more nearly resemble our own, many of them expressed in terms much more favorable than ours towards the rights of the adopted father." In White v. Dotter, 73 Ark. 130, 83 S. W. 1052, it appeared that the right of inheritance to certain property was litigated between an adoptive mother and the children of the natural father by a second marriage. The property in question had been given to the deceased adopted child by the adoptive mother in accordance with a desire expressed by the adoptive father prior to his death. It further appeared that a special act had been prepared and submitted to the legislature which was intended to change the name of the decedent and constitute her the lawful heir of the plaintiff and her husband. The journals of the legislature recorded the fact that the bill had passed the House and was twice read in the Senate but there was no evidence that it ever became a law. The plaintiff testified that she had made the gift under the impression that the decedent had been legally adopted by her. The court said: "Under the circumstances, the court must treat these parties as if the act had passed, and the exact effect should be given it that was intended by (the foster parents) viz., that the child's name be changed to theirs, they given legal control of her, and she given the right to inherit from them. There was nothing in that act giving (the foster parents) the right to inherit from the adopted child. It may be safely assumed that, in desiring that act passed, neither of these adoptive parents ever contemplated a contingency arising in which they would inherit from this waif, who had come to them almost as flotsam cast up from the river. The law is settled that adoptive parents do not inherit from the adopted child." In Upson v. Noble, 35 Ohio St. 655, the action was brought by an administrator to determine, as between conflicting claimants, the rightful distribution of the assets in his hands. The plaintiff's intestate was the illegitimate child of one of the claimants and the adopted daughter of another of the claimants. The estate to be distributed was derived from her putative father, in settlement of a proceeding in bastardy. The court made a decree in favor of the natural mother on the ground that the statute providing for the adoption of children did not specifically give the adoptive parents the right to inherit from the adopted child and in so far as it changed the general course of descents and distribution of intestate property it should be strictly construed. In Com. v. Powel, 16 W. N. C. (Pa.) 297, 20 Cent. L. J. 343, the court quoted with approval the opinion of the lower court as follows: "The adopted child can inherit equally with children by nature from the adopting parent, because the law expressly so declares; and provides, also, that 'if such adopting parent shall have other children, he, she, or they shall respectively inherit from and through each other, as if all had been lawful children of the same parent.' Yet it has been held that such adopted child cannot take under a devise to the 'children' of the parent by adoption; for it is not a child by nature. . . . Neither can the parent by adoption inherit from the adopted child, for the Act does not so declare; whilst it does in express words confer the inheritable qualities mentioned upon the adopted child. However reasonable it might seem that the adopting parent, who acted the parent's part in cherishing, maintaining, and educating the child during infancy, and conferring upon it by adoption the rights of inheritance, should in turn be capable of inheriting from it, rather than the parent by nature, who surrendered the rights and duties of a parent towards it, this is an argument to be considered only by the law-making power. It is to the law of inheritance laid down by our Intestate Act that we must look for the heir of one who, possessed of personal estate, dies unmarried and intestate, leaving a parent surviving. The law casts the inheritance in such case upon the father and mother, or the survivor of them. (See section 3 of Act of April 8, 1833, P. D. 807, pl. 15.) Construing the words of the act strictly, as we are taught to do in the adjudications referred to as applied to the other Act we have been considering, the terms 'father' and 'mother' can be applied only to the father and mother by nature. The estate of the decedent, therefore, in this case, goes to the surviving father."

Practically the identical questions passed on in the reported case, was considered by the New Jersey Court of Errors and Appeals in Heidecamp v. Jersey City, etc. St. R. Co. 69 N. J. L. 284, 55 Atl. 239, 101 Am. St. Rep. 707. This is apparently the only decision on all fours with the reported case, and under the New Jersey statutes a contrary decision was reached. It appeared that the suit was brought under the Death act, for the benefit of the next of kin, to recover damages for the death of the plaintiff's adopted daughter. The trial court held that the adopting father was not the next of kin, and that the natural mother could recover nominal damages only, and a verdict was rendered accordingly. On appeal the court said: "Our Death act, under which this suit is prosecuted, provides that the action shall be for the exclusive benefit of the widow and the next of kin of such deceased person, and the sum

recovered shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate. The next of kin in this act must be held to mean the next of kin by blood, unless the 'Act concerning the adoption of infants' impresses upon the term a different meaning as applicable to this case. Our 'Act concerning adoption' (Gen. Stat. p. 1714, pl. 17) provides 'that, upon the entry of the decree of adoption, the parents of the child, if living, shall be divested of all legal rights and obligations due from them to the child or children or from the child or children to them; and the child or children shall be free from all legal obligations of obedience or otherwise to the parents; and the adopting parent or parents of the child or children shall be invested with every legal right in respect to obedience and maintenance on the part of the child or children as if said child or children had been born to them in lawful wedlock; and the child or children shall be invested with every legal right, privilege, obligation and relation in respect to education, maintenance and the rights of inheritance to real estate or to the distribution in personal estate on the death of such adopting parent or parents as if born to them in lawful wedlock.' The statute expressly invests the adopting parent with every legal right in respect to obedience and maintenance on the part of the child as if the child had been born to them in lawful wedlock, but it wholly fails to bestow upon the adopting parent any right to inherit the estate of the adopted child. That the draftsman of the act did not intend to confer any such property right upon the adopting parent is emphasized by the immediately succeeding provision that the adopted child shall be invested with every legal right, privilege, obligation and relation in respect to education, maintenance and the rights of inheritance to real estate or to the distribution in personal estate on the death of the adopting parents as if born to them in lawful wedlock. The statute further provides that, on the death of the adopting parent and the subsequent death of the adopted child without issue, the property of such adopting deceased parent shall descend to, and be distributed among, the next of kin of said parent and not to the next of kin of the adopted child. The adopting father is therefore excluded from inheriting, as the next of kin of the adopted child, not only by the failure of the statute to invest him with such right, but also by the declaration that, in determining who are the next of kin of the adopted child, regard is not to be paid to the fact of adoption; the next of kin of the adopted child are his next of kin by blood. I have found no authority which will justify a different interpretation of our statutes."

In harmony with the reasoning of the reported case, however, it has been held in South Dakota that it is the purpose of statutes dealing with adoption to extend the artificial relation so created to that relation which exists by nature, thereby giving the adopting parents or their descendants the right of inheritance from an adopted child in preference to the natural parents or their descendants. Calhoun v. Bryant, 28 S. D. 266, 133 N. W. 266. That case involved the right of inheritance from an adopted child. It was conceded, under the facts of the case, that the adopted mother would have been the sole heir, if the intestate had been her natural son instead of an adopted child. The court held her rights to be the same in either case and said: "It is urged that, in the absence of a statute specifically declaring that the parent by adoption shall inherit from the child adopted, there can be no such inheritance by the parent. It may be conceded that the adoptive parent cannot inherit from an adopted child in the absence of a statute conferring the right of inheritance. The exact question in this case is whether the statute of this state, creating and defining the rights and obligations between the adoptive parent and the adopted child, gives the right of inheritance to the adoptive mother. In this case, as in all the cases cited by appellant as authority, the question resolves itself into one of construction of statutory provisions. Title 2 of the Civil Code of this state treats of the relationship between parent and child. Chapter 1 of that title defines the right, duties, and obligations of children by birth, while chapter 2 of the same title provides the method of adoption of children and defines the rights, duties and obligations of parent and child created by the proceeding. Neither chapter contains any specific provision relating to the right of inheritance. But section 136 of chapter 2 provides: 'A child, when adopted, may take the family name of the person adopting. After adoption, the two shall sustain towards each other the legal relation of parent and child, and have all the rights and be subject to all the duties of that relation.' The complete assumption of a new relationship created by adoption is emphasized by the provisions of section 137 of the same chapter, which says: 'The parents of an adopted child are, from the time of adoption relieved of all parental duties towards and of all responsibility for the child so adopted, and have no right over it.' Under the provisions of the two chapters the relationship created between the adoptive parent and the adopted child is in no manner differentiated from the same relationship arising from birth. Chapter 2 expressly declares that: 'After adoption the two shall sustain towards each other the legal relation of parent and child and have all the rights and be

subject to all the duties of that relation.' There are no limitations or qualifications as to the relationship created and no limitations as to the rights of each with respect to the other, which under the law grow out of the natural relation. Whatever rights the natural parent and child possess under the laws of this state are conferred and possessed equally by the adoptive parent and the adopted child, and we are unable to conceive of any refinements of reasoning which would warrant a distinction between the rights, duties, and obligations of the natural parent and child, and the rights, duties, and obligations arising between the adoptive parent and the adopted child. It seems clear to us that it was the legislative intent to give the adoptive mother all the rights of the natural mother."

In Foley's Estate, 1 W. N. C. (Pa.) 301, it appeared that the intestate died in the state of Pennsylvania leaving certain real estate. She was survived by an adoptive mother and her natural father. The Massachusetts act under which she was adopted provided as follows: "The parents of the child shall be deprived of all legal rights as respects the child, and the child shall be freed from all obligations of maintenance and obedience as respects the parents." The court said: "Both claimants were domiciled in Massachusetts, both at the time of the adoption and of the death, and the minor must be considered to have had her domicil there also. . . . The fund is therefore distributable, under the laws of Massachusetts, to the mother by adoption, who can claim it in this proceeding."

RUSSELL ET AL.

v.

JORDAN ET AL.

Colorado Supreme Court—April 5, 1915.

58 Colo. 445; 147 Pac. 693.

Statutes — Construction of Adopted Statute.

The construction given a statute by the courts of the state from which it was adopted is strongly persuasive, the presumption being that the construction was also adopted.

[See 1 Ann. Cas. 147.]

Adoption of Children — Inheritance from Adopted Child.

Rev. St. 1908, § 526, provides that after a decree of adoption the person adopted shall be entitled to inherit as if he had been the petitioner's child born in holy wedlock. Section 529 declares that the adopted child shall be to all intents and purposes the child and legal heir of the person adopting him, while section 7042 also declares that adopted children shall be legalized and entitled to inherit as legitimate children. Held, that an adopted child and his adopters do not, except in so far as provided by statute, assume the relation of parent and child, and where, after the death of the adopters, the adopted child died leaving no issue, his relatives by blood take in preference to the children of the adopting parents.

[See note at end of this case.]

Error to Rio Grande County Court: WHITE, Judge.

Action to determine heirship. Alexander Russell et al., plaintiffs, and Catherine Jordan et al., defendants. Judgment for defendants. Plaintiffs bring error. The facts are stated in the opinion. REVERSED.

Palmer & True, Jesse C. Wiley and *Albert L. Moses* for plaintiffs in error.

A. L. Jeffery and *Edwin H. Stinemeyer* for defendants in error.

[445] SCOTT, J.:—This is a case to determine heirship. Nathan Russell by his first wife had three children, who are the defendants [446] in error. Subsequent to the death of this wife he was again married to a widow with a minor child, named John Albers. By this marriage Russell had three children, who are the plaintiffs in error here. The second wife died and thereafter Russell, in the manner provided by law, adopted her child, John Albers, who took the name of John Albers Russell. Russell married a third time and afterwards died without issue from the third marriage. The estate of Russell, aside from the widow's share, was divided equally between all his children, including the adopted son. Later, John Albers Russell, the adopted son, died intestate, unmarried and without issue.

This proceeding is upon error to the county court ordering an equal division of the estate of John Albers Russell between the six children of Nathan Russell.

It is the contention of plaintiffs in error, that being related by blood, they alone are entitled to participate in the distribution of the estate of John Albers Russell.

It is said that by the common law inheritable interest follows the blood. That adoption was unknown to the common law, and comes from the civil law. That it rests upon statutes entirely, and while these statutes do in a degree modify and change the common law rule of descent and distribution, this change goes no further than the provision of the statute. That the property of John Albers Russell descends, as would the property of

any other decedent, to the next of kin, except as our statutes change the line of descent because of his adoption by Nathan Russell. This must be conceded to be a fair statement of the law upon this subject. Webb v. Jackson, 6 Colo. App. 211, 40 Pac. 467.

It is agreed by counsel that the question here to be determined has not been considered, nor have our adoption statutes been constructed in that respect by the appellate [447] courts of this state. Our statutes upon this subject for consideration here are, Revised Statutes 1908, as follows:

Sec. 526. "A decree of adoption shall be rendered and entered by the court declaring such person the heir at law of the petitioner or petitioners and entitled to inherit from the petitioner or petitioners any or all property in all respects as if it had been petitioners' child born in holy wedlock."

Sec. 529. "The natural parents shall, by such order, be divested of all legal rights and obligations in respect to the child, and the child be free from all legal obligations of obedience and maintenance in respect to them; such child shall be to all intents and purposes the child and legal heir of the person so adopting him or her, entitled to all the rights and privileges and subject to all the obligations of a child begotten in lawful wedlock; but upon the decease of such person and the subsequent decease of such adopted child without issue, the property of such adopting parent shall descend to his or her next of kin, and not to the next of kin of such adopted child."

Sec. 7042. "Legally adopted children shall be to all intents and purposes, children and legal heirs of the person so adopting them, entitled to inherit as fully as children of the foster parents begotten in lawful wedlock, and in case any such adopted child shall die, leaving no husband, wife or children, then the foster parents shall inherit as though such adopted child had been a child of such foster parents born in lawful wedlock."

Sec. 526 was enacted in 1885, and appears to have been adopted bodily from the Ohio statutes. The statute was constructed by the supreme court of Ohio before it was enacted by our legislature. It has been held by this court that prior construction under such circumstances is at least strongly persuasive upon the courts of this state, [448] for the reason that the presumption is that the law was enacted in the light of the construction given it by the courts of the state from which the statute was taken.

The supreme court of Ohio in an opinion rendered in 1880, in the case of Upson v. Noble, 35 Ohio St. 655, in construing the statute that now constitutes our Section 529, Rev. Stat. 1908, said:

"This statute, in so far as it changes the general course of descents and distribution of intestate property, and ignores all merit on account of blood, should be strictly construed. And while we find in it a clear declaration that the adopted child shall be the 'legal heir' of its adopting parents, there is no express provision that it shall be capable of inheriting from any other person, or of transmitting an inheritance to any one. It is true that it is declared to be the 'child,' to all legal intents and purposes, of the adopters, as if begotten in lawful wedlock; but if the relation thereby created was intended to bring the parties to it within the operation of the general statute regulating descents and distribution of estates, the additional words, 'and legal heir of his or her adopted or adopters,' would have been entirely superfluous. Now, as we cannot assume that these additional words were not intended to have an operation, which the statute without them would not have, their use suggests that the word 'child' was not used in the sense of 'heir' within the meaning of the general statute relating to descents and distribution. And when we consider the context the truth of the suggestion is made quite palpable. It is declared that by such order the natural parents shall be divested of all legal rights and obligations in respect to such child, and the child shall be free from all legal obligations of obedience and maintenance in respect to them, and shall be, to all intents and purposes, the child . . . of his or her adopter, [449] thus showing that the legislature was dealing with personal rights and duties growing out of the relation of parent and child, by transferring them from the natural to the adopted relation."

The doctrine of this case was later affirmed by the same court in the case of Phillips v. McConica, 59 Ohio St. 1, 51 N. E. 445, 69 Am. St. Rep. 753, and wherein further reasons were advanced in support of it. The court said:

"True, section 3140, Rev. Stat. provides that such adopted child 'shall be to all intents and purposes the child and legal heir of the person so adopting him or her, entitled to all the rights and privileges, and subject to all the obligations, of a child of such person, begotten in lawful wedlock.' But this is far from providing that such adopted child shall be the issue of the adopter, and of his blood and of the blood of his ancestors. It was well said in Upson v. Noble, 35 Ohio St. 658, that in passing the adopting statute 'the legislature was dealing with personal rights and duties growing out of the relation of parent and child, by transferring them from the natural to the adopted relation.' The statute enables the adopted child to inherit from its adopter, but not through him. The statute does not make the adopted child the heir of the ancestors of its adopter, and the right of the adopted child to inherit cannot be extended beyond where the statute has fixed it. The

statute in this regard must be strictly construed, as held in 35 Ohio St. 658. Adoption does not change the law of descent and distribution as to the property of the ancestors of the adopter. Quigley v. Mitchell, 41 Ohio St. 375. The ancestors of the adopter are presumed to know their relatives by blood, and to have them in mind in the distribution of their estates, either by will or descent, but they cannot be expected to keep informed as to adoption proceedings in the probate courts of the counties of this state; and to [450] allow an adopted child to inherit from the ancestors of the adopter would often put property into the hands of unheard of adopted children, contrary to the wishes and expectations of such ancestors."

It will be seen that the conclusion reached in these cases, the relation created by adoption is regarded as personal between the adopting parent and adopted child. That while the statute makes the adopted child an heir of the adopting parent, and provides that if the adopted child shall die without marriage or issue, his estate shall go to the adopting parent, the provision does not apply to the heirs of the adopting parent, and in such case the general law of descent applies.

The doctrine of the Ohio cases is supported by the following among other authorities:—Helms v. Elliott, 89 Tenn. 446, 14 S. W. 930, 10 L.R.A. 535; Hockaday v. Lynn, 200 Mo. 456, 9 Ann. Cas. 775, 98 S. W. 585; 118 Am. St. Rep. 672, 8 L.R.A.(N.S.) 117; Boaz v. Swinney, 79 Can. 332, 99 Pac. 621; Hole v. Robbins, 53 Wis. 514, 10 N. W. 617; Van Derlyn v. Mack, 137 Mich. 146, 100 N. W. 278, 66 L.R.A. 437, 109 Am. St. Rep. 660, 4 Ann. Cas. 879.

But the statutes of the several states are widely different in the matter of adoption of children and there is likewise striking want of uniformity of opinion concerning similar statutes.

The following cases among others, take a contrary view from that adopted in the above cited cases.—Humphries v. Davis, 100 Ind. 274, 50 Am. Rep. 788; Hilpire v. Claude, 109 Ia. 159, 80 N. W. 332, 46 L.R.A. 171, 77 Am. St. Rep. 524; Flannigan v. Howard, 200 Ill. 396, 65 N. E. 782, 59 L.R.A. 664, 93 Am. St. Rep. 201; Calhoun v. Bryant, 28 S. D. 266, 133 N. W. 266; Swick v. Coleman, 218 Ill. 33, 75 N. E. 807.

For the reasons above stated, and because of the seeming weight of authority in support thereof, we have adopted the reasoning of the Ohio authorities.

[451] The judgment is reversed. Former opinion withdrawn.

In banc.

NOTE.

Succession to Estate Inherited from Foster Parent by Adopted Child Who Dies without Issue.

The earlier cases discussing the right of succession to an estate inherited from a foster parent by an adopted child who dies without issue are collected in the note to Lanferman v. Vanzile, Ann. Cas. 1914D 563. The present note reviews the few recent cases on this point. The right of inheritance from an adopted child as between natural parents and adoptive parents or their descendants, where the estate is derived from some source other than the adoptive parents, is discussed in the note to Carpenter v. Buffalo General Electric Co., reported ante, this volume, at page 754. As to the right of the child of an adopted person to inherit from the adoptive parent, see the note to In re Walworth, Ann. Cas. 1914C 1223.

The decision in the reported case construes, apparently for the first time, the statute of Colorado with reference to the succession to the estate of an adopted child. It is in harmony with the cases holding that in so far as such statutes modify the common-law rule of descent and distribution the change goes no further than the express provision of the statute, and holds that a provision that if an adopted child shall die without marriage or issue, his estate shall go to the adopting parent, does not apply to the heirs of the adopting parent, and that the brothers and sisters by blood of the adopted child are entitled to participate in the distribution of his estate to the exclusion of the children of the adopting parent though the estate was derived from the parent. Likewise in Fisher v. Browning, 107 Miss. 729, 66 So. 132, it was held that the brothers and sisters of an adopted child inherited her estate to the exclusion of her adoptive mother. The court said: "We cannot subscribe to the doctrine that an adoptive parent inherits from an adopted child to the exclusion of its blood relatives. We think that the property inherited by an adopted child goes to the child in fee simple, and upon its death the property descends according to the law of descent and distribution of this state, which would be to its blood relatives. . . . The law on adoption of children is in derogation of the common law, and unless the statute of the state provides for descent and distribution from an adopted child to go to the adoptive relatives in preference to the natural relatives, we are of the opinion that the natural relatives or blood kin inherit in preference to the adoptive kin."

However, in Warner v. King, 267 Ill. 82, 107 N. E. 837, the court construed a statute relating to the succession of an estate of an

adopted child providing as follows: "The parents by adoption and their heirs shall take by descent, from any child adopted under this or any other law of this state for the adoption of children, and the descendants, and husband or wife, of such child, only such property as he has taken or may hereafter take from or through the adopting parents, or either of them, either by gift, bequest, devise or descent, with the accumulations, income and profits thereof; and all laws of descent and rules of inheritance shall apply to and govern the descent of any such property, the same as if the child were the natural child of such parents; but the parents by adoption and their heirs shall not inherit any property which such child may take or have taken, by gift, bequest, devise or descent, from his kindred by blood." It was held that the foster mother inherited the estate of the decedent to the exclusion of her natural parents. The principal point discussed, however, was whether the intestate could be considered an adopted child under the statutes of Illinois.

SMITH

v.

SMITH ET AL.

South Carolina Supreme Court—April 23, 1914.

97 S. Car. 242; 81 S. E. 499.

Judicial Sales — Rights of Purchaser — Time to Examine Title.

A master in chancery in selling land under a decree only allowed the purchaser three hours in which to comply with the terms of sale, and, upon noncompliance within that time, resold the property. Held, that the purchaser was not allowed a reasonable time to examine the title, and hence the resale was a nullity.

[See note at end of this case.]

Appeal from Common Pleas Circuit Court, Walterboro: DeVore, Judge.

Action to sell lands to pay debts. Perry G. Smith, administrator, plaintiff, and Owens H. Smith et al., defendants. From judgment rendered, defendant Sophia A. Stack appeals. Reversed.

[242] The facts are thus stated in the decree of his Honor, the Circuit Judge:

"This was an action by Perry G. Smith, administrator of Ann E. Murrell, and in his own right, against the defendants, as her heirs at law; the object being, among other things, to obtain the sale of certain real estate owned by the intestate for the payment of her debts, and for the partition and distribution of the proceeds of sale among the parties, according to their respective rights. The cause was heard originally before presiding Judge T. S. Sease, and his decree was filed on February 3, 1912. This decree, among other things, contained this provision: That the two tracts or parcels of [243] land, situated and located in the county of Orangeburg, be sold by C. G. Henderson, Esq., master, on sales day in March, 1912, or some convenient sales day thereafter, to be named by plaintiff's attorneys, at the courthouse at Orangeburg, S. C., at the usual hour for making public sales, for one-half cash, balance on a credit of one year, and be secured by bond and mortgage of premises sold, with interest from date of sales. That in the event of the failure of the purchaser or purchasers to comply with the terms of sale, that the said master do resell the same on the said sales day, or some convenient sales day, to be named by plaintiff's attorneys, until compliance be had.

"Soon after the filing of the decree, these lands were duly advertised for sale on sales day in March by the master for Colleton county. Within the time allowed by law, notice of intention to appeal on the part of the part of the defendants, Stacks, was served upon the plaintiff's attorneys. No further step was taken until the latter part of February. At that time, but on what particular day does not appear, the attorneys for the Stack defendants, who had given notice of their intention to appeal to the Supreme Court, gave the plaintiff's attorneys notice that on March 2d, they would move before Judge Robert E. Copes, at Orangeburg, S. C., for an order fixing the amount of the undertaking to be given by the appellants in order to stay the sale. . . .

"Judge Copes made an order fixing the amount of the undertaking at $1,000, and providing that the same should be approved 'by the clerk of Court in order to stay the sale of the real estate aforesaid, as provided by statutes in such case made and provided.' On Monday morning, March 4th, the day on which the sale was to be had at Orangeburg, the appellant's attorneys handed to the clerk of the Court for Colleton county the undertaking; such undertaking being in the sum of $1,000, made payable to the clerk of Court for Colleton county, and approved by the clerk of Court for Orangeburg county, and dated on February 29, 1912 . . .

[244] "At the usual hour for holding sales on Monday, March 4th, the master for Colleton county sold these lands in accordance

with the decree of Judge Sease. Before the bidding commenced, he made public announcement that, 'under the terms of the decree, I should require compliance with the terms of sale within three hours, and that I would be at the office of Glaze & Herbert, where compliance could be made, and, if compliance was not had at that time, the property would again be offered for sale on the same day, at the risk of the former purchaser, as provided in the decree.' The property was then offered for sale, and was bid in by A. J. Hydrick, Jr., Esq., an attorney, for Sophia A. Stack, the wife of D. D. Stack, one of the defendants, for the sum of $6,000. The purchaser did not comply with the terms of the sale within the time stipulated by the master, and made no offer to comply, and at the expiration of the time specified by the master he again offered the property for sale, and the same was bid off by W. B. Gruber, Esq., one of the plaintiff's attorneys, for the sum of $1,200. Mr. Gruber subsequently assigned his bid to J. G. Padgett, Esq., and Mr. Padgett complied with the terms of the sale, and the master executed title to him. From the proofs submitted to me on the hearing, I am satisfied, as a matter of fact, that Mr. Hydrick's bid for Sophia A. Stack was at the request of the attorneys for the Stacks, and that that bid is not entitled to be treated as a *bona fide* offer for the property. . . ."

His Honor, the Circuit Judge, concluded his decree by ordering that the master's report of sale be confirmed.

Mr. A. J. Hydrick, Jr., made the following affidavit, which shows what took place when the property was sold: "Personally appeared before me A. J. Hydrick, Jr., who, being duly sworn, says that he is and was at the times hereinafter mentioned a practicing attorney at the Orangeburg bar, in the county of Orangeburg, in said State. The deponent was present when C. G. Henderson, master of Colleton county, offered for sale certain real estate in the above entitled [245] cause in front of the courthouse at Orangeburg, S. C., at about 12 o'clock m., on sales day in March of 1912, and that at said sale he became a purchaser of said property as attorney for Mrs. Sophia A. Stack; that, immediately prior to the time when the said master offered the said property, certain notices protesting and objecting to the sale were offered and made known to the bidders, and to Messrs. Brantley and Zeigler and W. C. Wolfe, attorneys for certain of the parties in said cause; that these notices were read either by M. E. Zeigler, Esq., Thos. F. Brantley, Esq., or W. C. Wolfe, Esq., or by two of them. Deponent does not remember and cannot say positively which one or two of these gentlemen actually read the notices, but remembers that certain protests were read. . . . Deponent further remembers that the master demanded of him an immediate compliance on the part of his client, whereupon deponent stated that he could not advise his client to comply until he had an opportunity to examine the title to the said property, whereupon the master announced, if the bids were not complied with by 2 o'clock p. m. of that day, that he would resell the property; that deponent did not attend a resale of the property at 2 o'clock p. m., nor was he among the bidders at that time, nor did he make any bid or bids thereon. (Signed) A. J. Hydrick, Jr."

There are other affidavits substantially to the same effect.

A. J. Hydrick, Jr., Robert E. Copes, W. B Martin, Brantley & Zeigler and *Wolfe & Berry* for appellant.

Howell & Gruber for respondent.

[246] GARY, C. J. (*after stating the facts*). —The practical question is whether there was error in the resale of the property after it was bid by Mr. A. J. Hydrick, Jr., as attorney for Mrs. Sophia A. Stack.

In Virginia-Carolina Chemical Co. v. McLucas, 87 S. C. 350, 69 S. E. 670, the Court says: "The principle is well settled in this State that a purchaser of land, under a decree rendered by the Court, in the exercise of its chancery jurisdiction, is entitled to a reasonable time, after bidding off the property, to ascertain whether the title is definite" —citing the case of Mitchell v. Pinckney, 13 S. C. 212. To the same effect is the case of Fuller v. Missroon, 35 S. C. 314, 14 S. E. 714, in which the Court announced the principle that a purchaser at a sale for partition is entitled to have the title examined, and a report made thereon by the master.

The facts unquestionably show that Sophia A. Stack was not allowed a reasonable time within which to examine the title, and the authorities just cited sustain the proposition that the resale of the property by the master was a nullity.

It is the judgment of this Court that the judgment of the Circuit Court be reversed, and that Sophia A. Stack, appellant, be allowed 20 days after the remittitur is sent down within which to comply with the terms of the sale under which property was sold; that, if she fails to comply with the terms of sale within that time, then the property shall be resold upon the terms mentioned in the decree.

Fraser, J., concurs in the result.

NOTE.

Right of Purchaser at Judicial Sale to Reasonable Time to Examine Title.

A reasonable time in which to examine the title should be given to the purchaser at a

judicial sale. Warren v. Bateman, Flan. & Kel. (Ire.) 189; Buell v. Kanawha Lumber Corp. 185 Fed. 109, 109 C. C. A. 194; Mitchell v. Pinckney, 13 S. C. 203; People's Bank v. Bramlett, 58 S. C. 477, 36 S. E. 912, 79 Am. St. Rep. 855; Virginia-Carolina Chemical Co. v. McLucas, 87 S. C. 350, 69 S. E. 670. And see the reported case. See also Warren v. Bateman, Flan. & Kel. (Ire.) 189; Dunscomb v. Holst, 13 Fed. 11; Beavers v. Nelson, 152 Ky. 319, 153 S. W. 428. Thus in Buell v. Kanawha Lumber Corp. supra, an order forfeiting a deposit made in connection with a bid was set aside. The court said: "It is quite apparent that there were defects in some of the titles to the lands sold, and as the purchaser had been given reasonable time to investigate said titles, and as the practice under the procedure in the district of South Carolina recognizes the right of a purchaser to show defects in title, and, if shown, to be excused from complying with the purchase, we think the appellant should not have been decreed to comply with its bid." And in Mitchell v. Pinckney, 13 S. C. 203, the court said tersely: "Reasonable time is always given for the examination of titles, and, if necessary, a reference will be ordered." So in People's Bank v. Bramlett, 58 S. C. 477, 36 S. E. 912, 79 Am. St. Rep. 855, the court said: "The general doctrine is, that one who agrees to purchase land will be allowed a reasonable opportunity to investigate the title, and if he finds that the title fails as to a portion, or there is a defect in the title, he will be allowed to rescind the trade or an abatement from the purchase price." See to the same effect Virginia-Carolina Chemical Co. v. McLucas, 87 S. C. 350, 69 S. E. 670.

In substantial accord with the foregoing cases is Beavers v. Nelson, 152 Ky. 319, 153 S. W. 428, wherein, while it was not held explicitly that a purchaser should have a reasonable time for examining a title, the court said: "Purchasers at judicial sales are not required to examine the title to the property before they bid. Were this the rule many persons would be deterred from bidding." And in Dunscomb v. Holst, 13 Fed. 11, it appeared that the purchaser of land at a marshal's sale declined to complete the purchase under the advice of counsel, who examined the title to the land for him. Holding that the purchaser should be relieved from complying with his bid the court said: "Under such circumstances a purchaser has a right to require a good title, and will not be compelled to complete his purchase if such title cannot be given. The usual course in such cases is to direct a reference, as has been done here, and if it appears that the title is not good, and cannot be made perfect by deeds from the parties in the suit before the court, to relieve the purchaser from his bid and order a resale of the property."

In Fuller v. Missroon, 35 S. C. 314, 14 S. E. 714, the court upheld a sale made by the agent of a master wherein it appeared among other facts that two weeks had been allowed to the purchaser for the examination of the title.

DOLLIVER

v.

GRANITE STATE FIRE INSURANCE COMPANY.

Maine Supreme Judicial Court—December 10, 1913.

111 Me. 275; 89 Atl. 8.

Fire Insurance — Forfeiture for Vacancy — Effect of Subsequent Occupancy.

Fire insurance policies in the Maine standard form, expiring in December, 1913, and December, 1914, provided that they should be void if the premises should become vacant and so remain for more than 30 days without the previous assent of the insurer in writing. The premises were vacant without such assent from January 31, to June, 1912, after which they were occupied until July 28, 1912, when the loss occurred. Rev. St. c. 1, § 6, par. 1, provides that words and phrases shall be construed according to the common meaning of the language. Held, that the word "void" meant null, of no effect, and that the force of the provision did not depend upon an increase of risk, but that the vacancy worked a forfeiture and not merely a suspension of risk, so that the subsequent occupancy did not revive the policy.

[See note at end of this case.]

Waiver of Forfeiture.

An insurer may waive a breach of a provision for forfeiture in case of vacancy without its assent.

On report from Supreme Judicial Court, Hancock county.

Action on fire insurance policies. Clifton E. Dolliver, plaintiff, and Granite State Fire Insurance Company, defendant. Case reported to Law Court. The facts are stated in the opinion. JUDGMENT for defendant.

Edward S. Clark for plaintiff.
John E. Nelson for defendant.

[276] CORNISH, J.—Several questions are raised in defense to this action on two fire insurance policies, but it is necessary for this court to consider only one, namely, the legal effect of the breach of contract as to occupancy.

The policies were dated respectively December 8, 1909, and December 13, 1911, were issued for a term of three years, and covered farm buildings in the town of Trenton. When the first policy was issued the plaintiff was living with his family upon the premises and making his home there. In June, 1910, he moved with his family to Bar Harbor and has since resided in that town but he claims to have kept workmen as tenants in the insured premises until [277] about January 1, 1912, and we think the evidence fairly supports this contention. The buildings therefore were occupied when the policies were issued.

On January 1, 1912, the premises being then unoccupied, the plaintiff secured thirty-day vacancy permits from the defendant's agent, which expired January 31, 1912. But the premises remained unoccupied until June 18, 1912, when other workmen for the plaintiff entered into possession and continued to occupy the buildings until July 28, 1912, when the fire occurred.

The policies were of the Maine Standard form adopted by the Legislature in 1895, and each contained the usual provision: "this policy shall be void . . . if the premises hereby insured shall become vacant by the removal of the owner or occupant, and so remain vacant for more than thirty days without such assent," such assent having been previously defined as "in writing or in print of the Company." It being conceded that the written assent to vacancy issued on January 1, 1912, expired on January 31, 1912, and that no other permit was given, it follows that by their own terms the policies were rendered void, because of the subsequent vacancy extending to June 18, 1912, unless as claimed by the learned counsel for the plaintiff, the reoccupation begun on June 18, and continued till the time of the fire, of itself, revivified the contract and restored the plaintiff to his former rights. Did it have that legal effect?

This is a question raised sharply for the first time in this State and because of its consequences is deserving of the most careful consideration. Especially is this true because the decisions in other jurisdictions are not in harmony.

The policy contains eleven distinct conditions, the violation of any one of which, renders it void. One of these, false representation in the application, relates to matters antedating the policy; nine others, viz.: other insurance, removal, increase of risk, sale, vacancy for more than thirty days, manufacturing establishments running later than nine o'clock P. M., or ceasing operations more than thirty days; keeping of gunpowder or other like articles contrary to law; keeping of camphene, benzine, naptha or other chemical oils, all relate to matters while the policy is in force; while the eleventh, fraud, relates to acts either before or after the loss.

[278] An examination of the authorities reveals the fact that in some states the courts have held that the breach of these conditions does not render the policy void but merely suspends its operation, and when the breach ceases, the policy again attaches. They make it a case of suspended animation rather than of death. But it would seem that in order to do this they ignore the plain words of the contract and seek to reach a conclusion which under the circumstances might seem fairer to the assured, working out what they conceive to be "substantial justice."

The reasons given for these decisions do not commend themselves to our judgment. In some cases the later decisions are based upon earlier ones arising under a different form of policy where the temporary suspension was expressly provided for, but the distinction is not noted, or if noted, the earlier is followed, notwithstanding the changed contract.

For instance, three early cases are often cited as authority for the doctrine of revivification, viz.: Lounsbury v. Protective Ins. Co. 8 Conn. 459, 21 Am. Dec. 686 (1831); Phœnix Ins. Co. v. Lawrence, 4 Metc. (Ky.) 9, 81 Am. Dec. 521 (1862), and U. S. Fire, etc. Ins. Co. v. Kimberly, 34 Md. 224, 6 Am. Rep. 325 (1870) but in each of them the policy provided, not that it should be void in case the property were used contrary to the conditions specified, but that "so long as the same shall be so appropriated, applied or used, these presents shall cease and be of no effect." It is obvious that under that plain language the policy was suspended by its own terms, but when that language was abandoned and it was provided that the policy should be "void," it is difficult to see how these early decisions form any precedent in favor of the doctrine of suspension. In fact they are authorities against it. Yet these decisions among others are cited as authorities in Athens Mut. Ins. Co. v. Toney, 1 Ga. App. 492, 57 S. E. 1013 (1907), one of the more recent cases that adopts the theory of suspension and revivification.

Along the same line are the decisions in Illinois. The earliest case on this subject in that state, and the one often cited by that court as the leading case, is New England Fire, etc. Ins. Co. v. Wetmore, 32 Ill. 221 (1863).

[279] But the policy in that case provided, as in the other early cases before referred to, that if the premises should be appropriated to any prohibited use then "so long as the same shall be so appropriated, applied, or used, these presents shall cease and be of no force or effect," and the court say: "The import of this language it seems to us, is most clear, not that this policy should be absolutely void to

all intents and purposes, if the premises are misappropriated, but only while they are so improperly used, the insurance shall have no effect." With this construction we can have no quarrel because plain words are given their plain meaning.

But following this the Illinois court has extended the doctrine even to cases where the policy contains the word "void," as in Germania F. Ins. Co. v. Klewer, 129 Ill. 599, 22 N. E. 489 (1889), and Traders' Ins. Co. v. Catlin, 163 Ill. 256, 45 N. E. 255, 35 L.R.A. 595 (1896).

In Germania F. Ins. Co. v. Klewer, supra, the court went so far as to hold that while the policy provided that it should be void in case of other insurance existing at the time the policy was taken out, the legal effect was, not to avoid the second policy, the one in suit, but to suspend it until the expiration of the prior policy and then it would come into full force.

Our court has squarely rejected such a doctrine in a case arising under the same clause, and presenting the same point; Bigelow v. Granite Ins. Co. 94 Me. 39, 46 Atl. 808. The opinion concludes: "By the express terms of the policy in suit, the defendant company is absolved from all liability thereunder." To the same effect are Jersey City Ins. Co. v. Nichol, 35 N. J. Eq. 291, 40 Am. St. Rep. 625; Georgia Home Ins. Co. v. Rosenfeld, 95 Fed. 358, 37 C. C. A. 96, and Carleton v. Patrons' Androscoggin Mut. F. Ins. Co. 109 Me. 79, 82 Atl. 649, 39 L.R.A.(N.S.) 951.

In Traders' Ins. Co. v. Catlin, supra, the question arose over changes in the property that increased the hazard, and the court held that if the changed conditions had ceased to exist before the fire, leaving the risk no more hazardous than before, the policy again became in force. The court say: "If a loss occurs during the increased hazard, it would defeat a recovery. If a former increase of hazard has ceased to exist; and that increase of hazard at that former time in no way has affected the risk when the loss occurs, no reason exists why a forfeiture should result from a cause which occasions no damage."

This clearly shows the reasoning of the Illinois court. It is based upon increase of risk at the time of the fire and whether or not the [280] specific conditions have in the meantime been broken they hold to be of no consequence providing the situation has been restored. They applied the same rule by way of dictum in case of vacancy in Insurance Co of North America v. Garland, 108 Ill. 220, and it is the rule of the early case of New England Fire, etc. Ins. Co. v. Wetmore, supra, applied to an entirely different policy.

This same idea of construing the policy, not according to its own plain terms but according to an arbitrary and unauthorized standard of increase of risk at the time of the loss, forms the basis of many of the decisions which hold to the doctrine of intermittent liability.

In Athens Mut. Ins. Co. v. Toney (Ga.), supra, after citing the early decisions before referred to and others including decisions from Illinois, the court say: "We place our decision squarely on the proposition that the violation of the condition as to vacancy in this case in no wise contributed to the loss. The increased hazard existed while the house was vacant, but when the house was reoccupied the danger from vacancy terminated, and the policy again attached and became of binding effect, and the company was liable for the loss." The same reason is given in Born v. Home Ins. Co. 110 Ia. 379, 81 N. W. 676, 80 Am. St. Rep. 300 (1900), when construing the clause against incumbrance, and in North America Insurance Co. v. Pitts, 88 Miss. 587, 9 Ann. Cas. 54, 41 So. 5, 117 Am. St. Rep. 756, 7 L.R.A.(N.S.) 627 (1906), when construing the clause as to vacancy.

Here again our own court has taken the directly opposite view and has rejected the doctrine that the effect of vacancy, under the present form of policy depends upon the increase of risk.

Prior to the enactment of the standard policy in this State in 1895, there was a general statutory provision (passed in 1861) of this tenor: "A change in the property insured or in its use or occupation, or breach of any of the terms of the policy by the insured, do not affect the policy unless they materially increase the risk." R. S. 1883, ch. 49, sec. 20.

And under this statute it was held that the breach of the condition as to vacancy did not in the absence of fraud, affect the contract of insurance unless the risk was thereby materially increased. Cannell v. Phœnix Ins. Co. 59 Me. 582; Thayer v. Providence Washington Ins. Co. 70 Me. 531. It is evident that in such cases reoccupancy would keep the policy valid.

But the enactment of the Standard form of policy repealed the general statute of 1861, supra, so that the question of increase of [281] risk no longer affects the condition as to vacancy, Knowlton v. Patrons' Androscoggin F. Ins. Co. 100 Me. 481; 62 Atl. 289, 2 L.R.A.(N.S.) 517. The court made use of this emphatic language which is significant in the case at bar:

"In the light of experience it was practicable to specify ten conditions or changes in the situation of the property, each of which would render the policy void without opening to actual inquiry the question of the increase of the risk. The language of the standard policy is not to be construed to mean that an issue of fact is to be raised upon the question

of increase of risk under each of the independent clauses in question. It would not be reasonable to suppose that the legislature contemplated a judicial inquiry under the clause relating to the keeping of gun-powder, or naptha, or under the clause respecting other insurance on the property, or the clause in regard to the sale of the property and the assignment of the policy without the assent of the company as there specified. With no greater or better reason can it be claimed that the question of increase of risk is open under the clause rendering the policy void for vacancy or non-occupancy. It is an independent and absolute stipulation that the policy shall be void if the premises become vacant, and remain so for more than thirty days as there specified. It is not qualified by any other clause in the policy."

It is unnecessary to further analyze or comment upon the decisions holding that the violation of the plain terms of the contract as to vacancy creates only a suspension of liability. Such a construction would seem to be a perversion of the clear and explicit terms of the contract, a creation rather than an interpretation.

In our opinion no better statement can be made of their lack of convincing power than that by Ostrander on Insurance, 2d ed. sec. 145, viz.: "Regarding the purpose of this provision to be the protection of the insurer from such changes in the circumstances of the risk as would increase the hazard of fire, the courts have sometimes held that although the building becomes vacant and unoccupied during the term of the policy, if it was actually occupied when the fire occurred, the insurer would be held. These decisions appear to be based on the principle, which is not exactly cardinal in the law, that 'substantial justice' need be secured at all hazards. It must be admitted that if no harm comes to the risk during the period of its abandonment and if it is in the care of an occupant at the time [282] of the loss, no important interest of the insurer is prejudiced on account of the temporary vacancy, and in such case there is an apparent hardship to the honest claimant, if the insurer is excused from paying the loss. But may the courts properly interfere to prevent the execution of a contract, which the parties were competent to make and did make in the exercise of their natural and constitutional rights? The policy plainly enough provides that on the happening of a certain event it shall be void. The event occurred and the obligation of the Insurance Co. then terminated. Unless the court has the power to create for the parties a different contract than the one they created for themselves, it can do nothing to relieve the situation; and when the courts undertake to correct mistakes of persons by taking away their right to make contracts, the well meant effort, in the long run is likely to produce more evil than good."

Let us now turn to the line of authorities holding that the contract should be interpreted as meaning what its language clearly expresses, that a violation of its conditions works a forfeiture and not merely a temporary suspension. The Supreme Court of the United States in Imperial F. Ins. Co. v. Coos County, 151 U. S. 452, 14 S. Ct. 379, 38 U. S. (L. ed.) 231, had under consideration a clause rendering the policy void if "mechanics are employed in building, altering or repairing the premises," and in an exhaustive opinion held that the violation of this condition relieved the insurer from responsibility although the fire did not occur in consequence of the alterations or repairs. The reasons are stated as follows: "Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies, embodying the agreement of the parties. For a comparatively small consideration the insurer undertakes to guaranty the insurer against loss or damage, upon the terms and conditions agreed upon, and upon no other, and when called upon to pay, in case of loss, the insurer, therefore, may justly insist upon the fulfilment of these terms. If the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss. The terms of the policy constitute the measure of the insurer's liability, and in order to recover, the assured must show himself within these terms; and if it appears that the contract has been terminated by the violation on the part of the [283] assured, of its conditions, then there can be no right of recovery. The compliance of the assured with the terms of the contract is a condition precedent to the right of recovery. If the assured has violated, or failed to perform the conditions of the contract, and such violation or want of performance has not been waived by the insurer, then the assured cannot recovery. It is immaterial to consider the reasons for the conditions or provisions on which the contract is made to terminate, or any other provision of the policy which has been accepted and agreed upon. It is enough that the parties have made certain terms conditions on which their contract shall continue or terminate. The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made."

In Mead v. Northwestern Ins. Co. 7 N. Y. 530, the same doctrine was held applicable to the prohibited use of camphene, which had ceased before the fire, and upon the point of revival the court say: "The only question in my mind is, whether the use of the prohibited article at one period of the time for which the

policy should by its terms continue, will avoid the policy in a case where the loss occurred at a time subsequent to such use. For the purposes of this question, it should be treated the same as if the use of the camphene had been permanently discontinued before the occurrence of the fire which destroy the property. A warranty in a contract of insurance is in the nature of a condition precedent. It is settled by numerous decisions, that if the warranty is violated, it avoids the policy, and that it is immaterial whether the breach affects the risk or is connected with the loss or not. It would seem, in theory, that it was equally immaterial whether the act or thing to which the warranty related continued up to the time of the loss, or had ceased or been discontinued before. The amount of it is, the defendants undertook to idemnify the plaintiff against damage or loss by fire, etc., upon condition that certain stipulations were observed and kept by and on behalf of the plaintiff and not otherwise. If the plaintiff failed to perform those stipulations, the defendants' liability to idemnify ceased; could the plaintiff revive at pleasure by fulfilling his agreement—in this case by removing the camphene? If he could in one instance he could, for aught I see, in any number of cases. I incline to the opinion that this could not be done in any case without the [284] consent of the defendants, and that the only safe rule, is to hold the contract of insurance at an end, the moment the warranty is broken, and that it cannot be revived again without the consent of both parties, unless the insurer has by some act or line of conduct waived the breach or violation of the warranty."

In Reynolds v. German American Ins. Co. 107 Md. 116, 68 Atl. 262, 15 L.R.A.(N.S.) 345 (1907), a violation of a provision requiring an inventory to be taken within thirty days rendered the policy void even though one was taken within fourteen days after the expiration of the required time. "It may seem to be a hard rule," say the court, "to declare a policy forfeited for some act of omission or commission which in point of fact was not the cause of the fire, and actually did no injury to the insurer, but when parties enter into contracts which are not prohibited by law, and are declared by the courts to be reasonable regulations, upon what principle can a court revive a policy, which by its terms was null and void, simply because the insurer sustained no injury by reason of the insured's failure to do what is required of him? After this policy became null and void the insured could not by his act alone revive it so as to bind the insurer."

In Bemis v. Harborcreek Mut. F. Ins. Co. 200 Pa. St. 340, 49 Atl. 769 (1901); a provision avoiding the policy in case of a change of title was held to be violated by giving a warranty deed, although a reconveyance was made prior to the fire.

The earlier decisions in Massachusetts seem to favor the doctrine of suspension and revival on the ground of no increase of risk, but the later decisions have rather repudiated it and have taken the opposite view. In Hinckley v. Germania F. Ins. Co. 140 Mass. 38, 1 N. E. 737, 54 Am. Rep. 445, the court held that the temporary use of a bowling alley and pool room without a license, did not render the policy void but merely inoperative for the time being.

In Ring v. Phœnix Assur. Co. 145 Mass. 426, 14 N. E. 525, the same doctrine was applied to the insurance of chattels, in a house described as "occupied all the year round," when it appeared that for several weeks the house had been unoccupied, but was occupied at the time of the fire. Hinckley v. Germania F. Ins. Co. supra was cited with approval, but it should be noted that the effect of the non-occupancy upon the insurance on the house itself was not involved.

In Kyte v. Commercial Union Assur. Co. 149 Mass. 116, 21 N. E. 361, 3 L.R.A. 508, the increase of risk clause was under consideration, the insured having used the premises for [285] the illegal sale of intoxicating liquors during a substantial portion of the term of the policy, but afterwards, and before the fire, having obtained a license therefor. The court below instructed the jury that if the use of the premises which increased the risk, was merely temporary and ceased before the fire, the plaintiff could recover. The Law Court reversed this ruling and held that the policy was not merely suspended but might be treated by the company as wholly void. The court also took occasion to refer to Hinckley v. Germania Ins. Co. supra, and to say that the court in that case should have rested its decision upon another ground, "leaving it an open question whether a departure from the terms of the provision of a policy, without an increase of risk, may be deemed merely to suspend and not absolutely to avoid the policy." This rule that an increase of risk absolutely avoids the policy, even though it does not continue up to the time of the loss, applies in principle to a vacancy because under our decisions vacancy is presumptive proof of increase of risk, White v. Phoenix Ins. Co. 85 Me. 97, 26 Atl. 1049; Jones v. Granite State F. Ins. Co. 90 Me. 44, 37 Atl. 326.

Later Massachusetts decisions follow Kyte v. Commercial Union Assur Co. rather than Hinckley v. Germania F. Ins. Co.

In Walner v. Milford Mut. F. Ins. Co. 152 Mass. 335, 26 N. E. 877, 11 L.R.A. 598, the vacancy clause was under discussion, the disputed question being whether the policy took effect on January 23, 1889, or on March 13, 1889, it being admitted that the premises

were vacant up to April, 1, 1889, and occupied from that tme to the date of the fire May 12, 1889. The court unequivocally held that if the policy had been in force from January 23, it was rendered void, notwithstanding reoccupancy, but also held that it took effect from March 13, and therefore the vacancy had not existed for the prohibited and fatal period of thirty days.

Hill v. Middlesex Mut. Assur. Co. 174 Mass. 542, 55 N. E. 319, involved the material alteration clause and the fact that the alterations were completed long before the fire was held to have no curative power. "The fact that a breach of condition is past," say the court, "and did not contribute to the loss does not necessarily put an end to the right of the insurer to avoid the policy." This case was cited with approval in Stuart v. Reliance Ins. Co. 179 Mass. 434, 60 N. E. 929, where the temporary alienation of property was held to avoid the policy notwithstanding reconveyance. [286] It would seem that reoccupancy should have no greater power to rehabilitate the contract than reconveyance. The court in Massachusetts can therefore be considered as against the doctrine of temporary suspension in a case like the one at bar.

Without prolonging the discussion further it is sufficient to add that the following cases, all involving the question of vacancy and reoccupancy, hold that the policy is not revived; Moore v. Phœnix Ins. Co. 62 N H. 240, 13 Am. St. Rep. 556; East Texas F. Ins. Co. v. Kempner, 87 Tex. 229, 27 S. W. 122, 47 Am. St. Rep. 99 (1894); Hardiman v. Philadelphia F. Assoc. 212 Pa. St. 383, 61 Atl. 990 (1905); Hoover v. Mercantile Town Mut. Ins. Co. 93 Mo. App. 111, 69 S. W. 42 (1902); German Ins. Co. v. Russell, 65 Kan. 373, 69 Pac 345, 58 L.R.A. 234 (1902). See also 19 cyc. p. 709.

These authorities, in our opinion rest on the correct principle. It is not a question whether the insurer has been injured by the breach of the contract but whether the contract itself has in fact been broken. It either has or has not been. If not, the rights of the parties remain unchanged. If it has, then by its own terms the contract is rendered "void." And this word "void" being neither ambiguous, nor technical, should be "construed according to the common meaning of the language," R. S. ch. 1, sec. 6, Par. I. It means null, of no effect. The Legislature has seen fit to prescribe this as the form to be used. If a change is desirable or expedient that change should come by way of legislative amendment rather than by judicial wrenching. The insurer has the right to insist that the conditions surrounding and affecting the property shall continue and remain the same as at the date of insurance. If "void" means "temporarily suspended" then under a policy running three years, the premises might become vacant on the next day after its issuance, remain vacant for nearly the entire term, without the assent of the company, but if reoccupied on the day before the fire, the indemnity would again spring into existence. The contract prescribed by the Legislature clearly forbids any such intermittent rights, and liabilities.

We are, of course, not to be understood as holding that the insurer cannot waive this provision of the policy. It is well settled that he can so waive it, but that question needs no discussion here as there are no sufficient facts to warrant it.

The entry must be,

Judgment for defendant.

NOTE.

Revival of Fire Insurance Policy by Occupancy after Vacancy.

The earlier cases passing on the question of the revival of a fire insurance policy by the occupancy of the insured premises after they have been vacant for a length of time prohibited by the express terms of the policy, are collated in the notes to Insurance Co. of North America v. Pitts, 9 Ann. Cas. 54, and Born v. Home Ins. Co. 80 Am. St. Rep. 300. This note presents the recent cases on the subject.

Following the rule of construction that of the two parties to a fire insurance policy, the insured is always to be favored in determining whether there has been a compliance with the terms of the policy, it has been held in a few recent cases that the vacancy of the premises during the term for which the policy is issued merely operates to suspend the policy and a subsequent occupancy of the premises revives the policy and puts it in full force again. Athens Mut. Ins. Co. v. Toney, 1 Ga. App. 492, 57 S. E. 1013; Silver v. London Assur. Corp. 61 Wash. 593, 112 Pac. 666. Thus, in Silver v. London Assur. Corp. 61 Wash. 593, 112 Pac. 666, the court said: "The testimony shows that, after the policy was issued, both buildings were unoccupied for a period of more than ten days. As we have said, it also shows that one of the buildings was in the possession of a tenant at the time of the fire, and that there is no direct evidence that the other buildings were not in the possession of the watchman within ten days preceding that date. It is contended that a vacancy for the period of ten days terminates the policy, and that its operative force is not restored by a reoccupancy. Several authorities are cited which support that view. The question, however, is no longer an open one in this state. In Port Blakely Mill Co. v. Springfield Fire, etc. Ins. Co. 59 Wash.

501, 110 Pac. 36, this court, after an exhaustive review of the cases, announced the rule that a provision in a policy of insurance, to the effect that the policy shall be void upon the doing of a prohibited act or the failure to do an act agreed to be performed by the insured, only suspends the operation of the policy while the condition is broken, and has no application to a loss occurring at a time when there is no breach of the contract." And in Athens Mut. Ins. Co. v. Toney, 1 Ga. App. 492, 57 S. E. 1013, in holding that a policy was not rendered void by a vacancy which had been terminated before the occurrence of the fire, the court said: "We cannot believe that the parties to this insurance contract intended that a temporary vacancy for a reasonable periodical beyond the ten days should result in a forfeiture of the insurance The policy was taken out for a term of three years, from July 2, 1905, and the premium was paid for the entire three years in advance. The vacancy existed for thirty days, from December 7, 1905. The house was reoccupied from January 6, 1906, and fire occurred February 6, 1906, after the house had been reoccupied. This left over two years of the policy still in force. If the insured had thought that this temporary vacancy destroyed the value of his policy, he would unquestionably have taken some steps to have the forfeiture waived, or another policy written; and the insurer should have declared the forfeiture, if it had known of the vacancy, and should have tendered back to the insured the unearned portion of the premium. And if such temporary vacancy was to be treated by the insurer as a forfeiture of the policy, or it had been contemplated that such temporary vacancy would forfeit the policy, the policy should have made a provision for the return of the unearned portion of the premium." In Brashears v. Perry County Farmers' Protective Ins. Co. 51 Ind. App. 8, 98 N. E. 889, it appeared that a by-law of the insurance company provided that the "vacation of any insured property for a longer period than ten days shall suspend the action of the policy, but it shall revive again when reoccupied, provided the owner shall notify the secretary of such reoccupation." At the time the policy was issued the insured was given a copy of the by-laws. The house insured had been vacant for six weeks, was reoccupied, and a few days after reoccupancy was destroyed by fire. No notice of reoccupancy was given by the plaintiffs to the secretary of the company, and he had no information from other sources of the reoccupation until after the dwelling was destroyed. The court said, in holding that the policy had been suspended during the interval of vacancy, and not forfeited: "When the house had been vacant ten days, liability on the policy became suspended, and, under the contract, would continue suspended after reoccupation until the secretary was notified. However, the policy was not made void by the terms of the contract, and had it been, the effect would have been only to make it voidable at the option of the company. An affirmative act by the company was necessary to avoid the policy. After the company learned of the violation of the condition of the insurance contract, even though this was after the loss, it could have elected to avoid the contract. A failure to make this election must be construed as an election to hold the policy valid."

On the other hand, it has been held that where the policy plainly and expressly states that it shall be void in case the insured premises are allowed to become vacant and unoccupied without the consent of the insurer, the policy becomes void by the force of its own terms on the happening of the specified event, and subsequent occupancy does not operate to revive it. Couch v. Farmers' F. Ins. Co. 64 App. Div. 367, 72 N. Y. S. 95; Hardiman v. Philadelphia F. Assoc. 212 Pa. St. 383, 61 Atl. 990. And see the reported case. In the case first cited it appeared that at Thanksgiving time or about December first the plaintiff's intestate left the house and remained away until April 22 or 23; that during that time no one either occupied the house or went into it; that the back part of the house was nailed up; and that the key was left with a neighbor. The plaintiff's intestate testified that she intended to return to the house about the middle of January, following, but was prevented from doing so by sickness. The fire occurred the day after she returned or the day following. The court said: "Under these circumstances it would seem clear that by the express terms of the policy it had become void before the fire, and that in the absence of proof of waiver or a consent on the part of the insurer to a continuance of the risk, no recovery could be lawfully had upon the contract."

RECK
v.
WHITTLESBERGER.

Michigan Supreme Court—July 24, 1914.

181 Mich. 463; 148 N. W. 247.

Workmen's Compensation Acts — Review — Findings of Fact.

Under the Workmen's Compensation Act (Pub. Acts [Ex. Sess.] 1912, No. 10) p. 3, § 12, providing that the findings of fact by the

Industrial Accident Board acting within its powers, shall, in the absence of fraud, be conclusive, but that the Supreme Court may review questions of law, the facts found to be conclusive must be based on competent legal evidence, and not on bare supposition, guess, or conjecture, nor on rumor or incompetent evidence; as to so determine the rights of the parties would be to act outside the authority conferred by the statute, and without jurisdiction.

[See Ann. Cas. 1916B 475.]

Applicability of Rules of Judicial Procedure.

While the Workmen's Compensation Act (Pub. Acts [Ex. Sess.] 1912, No. 10) contemplates the prompt adjustment of controversies by summary proceedings under a simplified procedure, unhampered by the technical forms and intervening steps of regular litigation, it indicates clearly an intent that the fundamental principles of a judicial inquiry shall be observed.

[See Ann. Cas. 1915A 741.]

Admissibility of Evidence — Declarations of Injured Workman as to Cause of Injury.

In a proceeding under the Workmen's Compensation Act (Pub. Acts [Ex. Sess.] 1912, No. 10), hearsay evidence should not be admitted and made the basis of findings of fact and accordingly a self serving declaration by an injured workman as to the cause of his injury is not admissible.

[See note at end of this case.]

Harmless Error — Admission of Evidence.

In a proceeding under the Workmen's Compensation Act (Pub. Acts [Ex. Sess.] 1912, No. 10), the determination of the Industrial Accident Board will not be reversed because of the admission of hearsay evidence, where competent evidence making a prima facie case is uncontradicted.

Report by Employer to Commission — Effect as Evidence.

In a proceeding under the Workmen's Compensation Act (Pub. Acts [Ex. Sess.] 1912, No. 10), a report to the Industrial Accident Board by the employer, made before the death of the employee, and at a time when he had ample opportunity to investigate, and all sources of information were fresh and available, stating that the employee was injured by running a nail into his hand while throwing wood into a furnace, and a second report after the death stating that he was injured by scratching his hand on a nail, constitutes prima facie evidence that the accident and injury occurred as reported, and supports a finding of the board that such injury arose out of, and in the course of, the employment.

Certiorari to Industrial Accident Board.

Claim for compensation under workmen's compensation act. Mrs. Rudolph Reck, claimant, and Frank B. Whittlesberger, defendant. Claim allowed by Industrial Accident Board. Defendant brings certiorari. The facts are stated in the opinion. AFFIRMED.

Bowen, Douglas, Eaman & Barbour for appellant.

John Dohrman for appellee.

[464] STEERE, J.—This case is before us upon a writ of certiorari to review a decision or determination of the industrial accident board of Michigan affirming an award of $2,250 made by a committee of arbitration against Frank B. Whittlesberger, the appellant, in favor of the widow of Rudolph Reck, whose death is charged to have resulted from an injury sustained while in appellant's employ. The proceedings were instituted and conducted under and by virtue of Act No. 10, Pub. Acts 1912 (Extra Session).[1]

Pursuant to section 11 of said act the industrial accident board reviewed the decision of said committee of arbitration and such records as were kept by it, including the testimony it had taken. The return to this writ states, with some slight corrections which are made, that all the material testimony is correctly [465] and sufficiently set forth in appellant's petition for a consideration of the questions raised.

The record discloses that on January 12, 1913, said Rudolph Reck, a baker by trade, died at a hospital in Detroit of septic pneumonia, which resulted, as his physician testified, from systemic sepsis developed from an infected wound in his hand, claimed to have been caused, on December 26, 1912, by a nail in some fuel with which he was firing an oven in appellant's bakery on Randolph street, in said city, where deceased was then employed.

The bakeshop or room in which deceased was working at the time it is alleged he sustained the initial injury was about 100 feet long and 40 feet wide, and on that day two other bakers were at work in the room with him, a boy also being with them in the afternoon. Deceased finished his work for the day as usual, and left at the regular quitting time, which was about 7:30 p. m. His daughter testified that he arrived home that evening a little later than his customary time, and showed her an injury where he had hurt his hand at or near the thumb, stating that he chopped up a box and "ran a nail in his thumb." He worked full time at the shop the next day and until 4 p. m. the succeeding day. During this time the men with whom he worked saw and heard nothing of any accident; neither did they observe anything unusual in his work or conduct. He did not, however, return to work after December 28th, the day on which he quit at 4 o'clock.

Dr. Smith, the only medical witness who testified, first treated deceased on January 2, 1913. At that time his employer and fellow

[1] (2 How. Stat. [2d ed.] § 3939 et seq.).

bakers were first informed of the claim that he had sustained any injury while at his work. Dr. Smith testified, as before stated, that septic trouble originating with the wound in the hand spread generally throughout the system [466] and resulted in pneumonia, which ended fatally. This is not controverted, but it is urged that no competent evidence was produced showing where or how deceased injured his hand, or that the injury arose out of and in the course of his employment.

Following a claim regularly made for compensation by the widow under said Act No. 10, generally known as the workmen's compensation act, a committee of arbitration was selected, as provided by the act, and hearings were held. One of said hearings was at the bakery where the injury was claimed to have been received. None of the employees saw the accident or were shown to have personal knowledge of when or how it occurred. The committee then threw the door wide open for hearsay evidence, and, against objection, entertained any testimony offered as to what witnesses had heard deceased and others say about it.

Appellant's assignments of error are as follows:

"First. In holding that there was sufficient proof that Rudolph Reck received a personal injury arising out of and in the course of his employment to justify a decree in favor of the claimant.

"Second. In holding that hearsay evidence offered for the purpose of proving that the deceased received a personal injury arising out of and in the course of his employment was admissible, and denying the objection of your petitioner to its admission.

"Third. In determining and ordering your petitioner to pay the said widow the sum of $2,250, and costs, as compensation for the injury and attendant death of Rudolph Reck."

The third assignment is manifestly contingent on the other two, and calls for no separate consideration. The first and second present the two questions of whether this unrestricted admission of hearsay testimony was reversible error, and whether there was any competent evidence in the case on which to base a finding that the injury complained of arose out of, and in the course of, deceased's employment.

[467] At the threshold of this inquiry we are confronted with the proposition that the board is made by the law creating it the final tribunal as to the facts, and, it having made a finding of facts legally sufficient to support the award, its decision cannot be questioned by the court.

Section 12 of part 3 of said act provides:

"The findings of fact made by said industrial accident board acting within its powers, shall, in the absence of fraud, be conclusive, but the Supreme Court shall have power to review questions of law involved in any final decision or determination of said industrial accident board: *Provided*, that application is made by the aggrieved party within 30 days after such determination by certiorari, mandamus or by any other method permissible under the rules and practice of said court or the laws of this State, and to make such further orders in respect thereto as justice may require."

As a legal conclusion, no one will deny that in any judicial proceeding the competency of testimony offered in support of or against any material fact is a question of law. It does not follow, however, that the appellate court in all instances must set aside an adjudication because of erroneous admission or rejection of evidence. The doctrine that prejudice is always presumed from error is not accepted by all students of jurisprudence with complacency, even in those jurisdictions where the doctrine prevails. Neither do we conceive that in reviewing decisions of this board all technical rules of law, often made imperative by precedent in reviewing the action of regularly constituted trial courts, must be applied. The board is purely a creature of statute, endowed with varied and mixed functions. Primarily it is an administrative body, created by the act to carry its provisions into effect. Supplemental to this, in order that it may more efficiently administer the law, it is vested with quasi judicial powers, plenary within the limits fixed by the statute. [468] Along the lines marked out by the act it is authorized to pass upon disagreements between employers and claimants in regard to compensation for injuries, and to that end make and adopt rules for a simple and reasonably summary procedure. Hearings are to be held upon notice to parties in interest; compulsory process for attendance of witnesses and power to administer oaths is given; the parties in interest are entitled to notice, to be heard and to submit evidence; a review, findings, a decision, and an award of compensation are provided for, though in the final test resort must be had to the courts to enforce the awards. In those proceedings the board does not act solely as a mere arbitrator. It has various plenary powers well defined, and its status is unique in the particular that it performs in combination both administrative functions and certain of the duties of a court, a referee, and an arbitration board. Its findings of facts upon hearings are conclusive, and cannot be reviewed, except for fraud, provided, necessarily, that any competent, legal evidence is produced from which such facts may be found. Facts cannot be evolved from the inner consciousness of that tribunal on bare

supposition, guess, or conjecture, nor on rumor or incompetent evidence. To so determine the rights of parties would be to act outside the authority conferred by the act, and without jurisdiction.

While it was evidently the intent of this law that, by concise and plain summary proceedings, controversies arising under the act should be promptly adjusted, under a simplified procedure unhampered by the more technical forms and intervening steps which sometimes cumber and delay regular litigation, yet the language of the act, and provision for review of questions of law, indicate clearly an intent that the elementary and fundamental principles of a judicial inquiry should be observed, and that it was not the [469] intent to throw aside all safeguards by which such investigations are recognized as best protected.

The rule against hearsay evidence is more than a mere artificial technicality of law. It is founded on the experience, common knowledge, and common conduct of mankind. Its principles are generally understood and acted upon in any important business transaction or serious affair in life. In such matters men refuse to rely on rumor or what some one has heard others say, and demand the information at first hand. The common, instinctive weight usually given such evidence is illustrated by this statement of Dr. Smith, after relating what deceased told him as to how he hurt his hand, "I don't know anything about it;" and of Mrs. Taylor, a daughter of deceased, who, in connection with her testimony as to what she had been told, said, "I really don't know myself; . . . the only thing I know about this matter is that the night I went home they took him to the hospital." The danger and unreliability of hearsay testimony is well exemplified in her evidence. She testified that Haberstoh, a fellow workman in the shop, saw the accident and described it to her, as she related it while testifying. This, on the surface, would seem to be about as satisfactory and convincing hearsay evidence as could be produced. Had Haberstoh been unavailable, it would have been equally competent and uncontrovertible, but it was shown by Haberstoh himself that he saw nothing of any accident, and obtained his information from Charles Ruskei, the boy who worked in the shop afternoons, who himself saw nothing, but heard deceased state how he hurt his hand.

Coming directly to this line of testimony as applied to workmen's compensation cases, it is said in Boyd on Workmen's Compensation, p. 1123:

"The statements made by an injured man as to his bodily or mental feelings are admissible, but those [470] made as to the cause of his illness are not to be received in evidence. The rule applies to statements made by a deceased workman to a fellow workman as to the cause of his injury."

And more fully in Bradbury on Workmen's Compensation, p. 403, as follows:

"The statement made by an employee in the absence of his employer, by a deceased man, as to his bodily or mental feelings are admissible in evidence, but those made as to the cause of his illness are not admissible in evidence and where there is no other evidence of an accident arising out of and in the course of the employment than statements made by a deceased employee in the absence of his employer, an award cannot be sustained."

In Gilbey v. Great Western R. Co. 3 B. W. C. C. (Eng.) 135, where a workman at a meat market on arriving home told his wife that he had broken his rib when trying to save some meat from slipping into the dirt, the court said:

"To hold such statements ought to be admitted as evidence of the origin of the facts deposed is, I think, impossible. Such a contention is contrary to all authority."

This rule is emphasized to the extent of even holding admission of such evidence reversible error in Smith v. Hardman, 6 B. W. C. C. (Eng.) 719, because the mind of the trial court might have been "colored by his admitting statements which are inadmissible as evidence."

We do not think, however, that under the language used in our workmen's compensation act the decisions of its administrative board must be in all cases reversed under the rule of presumptive prejudice, because of error in the admission of incompetent testimony, when, in the absence of fraud, there appears in the record a legal basis for its findings, which are [471] made "conclusive" by statute when said board acts within the scope of its authority.

As a part of the plan for a practical administration of this law, section 17 of part 3 requires each employer who elects to come under the provisions of said act to keep a record of injuries "received by his employees in the course of their employment," and within ten days after an accident resulting in personal injury to report the same in writing to the industrial accident board, on blanks printed for that purpose.

The first knowledge which came to the board of this accident is contained in the report of appellant, made by an admitted agent. It is dated January 9, 1913, and marked "First Report of Accident." It states, amongst other things, that on December 26, 1912, Reck, a baker by trade, was injured; the "cause and manner of accident" being that he "was throwing wood in furnace

and a nail run in left hand inflicting a deep gash." This report was made three days before Reck's death, and indicates that the employer, or his representatives, had full notice of the injury, with ample opportunity to investigate while Reck was alive, and all sources of information were both fresh and available. A second report, after Reck's death, made on January 15, 1913, giving the same date of the accident, etc., states of its "cause and manner:"

"The injured was throwing wood in the fire and a nail scratched his left hand. He worked for two or three days after the accident, when the hand became infected, and he was sent to the hospital. After the hand had started to heal nicely he contracted broncho-pneumonia, which disease caused his death January 13, 1913."

We think that such reports from the employer, where all sources of information are at his command when the reports are made, and he has had ample opportunity to satisfy himself of the facts, can properly be taken as an admission, and, at least, as *prima facie* [472] evidence that such accident and injury occurred as reported.

No evidence was offered to impeach the reports or to show that the accident occurred otherwise than as stated in them. Eliminating from consideration the hearsay testimony erroneously admitted, which could not affect either way the legal significance of such reports, the record furnishes legal support for the findings of fact made. Consequently such findings are to be recognized as conclusive under the statute.

The decision of said industrial accident board is therefore affirmed.

McAlvay, C. J., and Brooke, Kuhn, Stone, Ostrander, Bird, and Moore, JJ., concurred.

NOTE.

Admissibility in Proceeding under Workmen's Compensation Act of Statement by Injured Employee Respecting Cause of Injury.

The reported case, which appears to be the only American case on the point, holds that a self-serving statement made by an injured workman as to the cause of the injury is not, after his death, admissible in a proceeding by his dependents to obtain the benefits of a workmen's compensation act. A few English cases maintain the same view. Gilby v. Great Western R. Co. 102 L. T. N. S. (Eng.) 202, 3 B. W. C. C. 135; Smith v. Hardman, 6 B. W. C. C. (Eng.) 719. Thus in Gilby v. Great Western R. Co. supra, it appeared that a workman returned to his home suffering from certain injuries from which he thereafter died. On entering the house he made a statement to his wife as to the cause and occasion of the injuries from which he was suffering. The court said: "In this case the only evidence on which the applicant rests her case consists of the statements made by the deceased workman as to his having had an accident, and as to the nature of that accident. I can find no case whatever which permits such declarations to be admitted as evidence of the truth contained in the facts of those declarations. We do give, in cases like the present, considerable latitude to parties in admitting the statements of deceased persons under the head of what is called res gestae. But to admit the statements in the present case as evidence of the cause of the injury to the deceased workman would be to go wholly beyond anything which the courts have ever sanctioned, and would be contrary to the English law." But in Wright v. Kerrigan, [1911] 2 Ir. R. 301, it appeared that an injured employee told his physician that certain abrasions on his body were the result of an accident. On that declaration, together with proof of the fact that the abrasions in question, from the result of which the employee subsequently died, were such as might readily have resulted from the employment, which consisted in lifting coffins out of vans, an award of compensation was sustained. Cherry, L. J., said: "It is said that there was no evidence in this case to justify the Recorder in holding that the injuries to the deceased workman were caused by an accident arising out of and in the course of his employment. The learned Recorder is said to have acted upon hearsay evidence; but hearsay evidence is in some cases admissible, and the learned Recorder appears to me to have acted strictly in accordance with the settled rules of evidence. There is no better authority on this branch of the law that the Recorder himself. He ruled out statements as to the circumstances of the accident. He admitted the statements made by the deceased man to his medical attendant, Dr. Crinion, as to his symptoms and their cause. Such statements are usually held to be admissible upon the ground that there are no other means possible of proving bodily or mental feelings than by statements of the person who experiences them. The decisions in workmen's compensation cases show, especially where death occurs, that very slender evidence may be sufficient to justify an inference that an injury has been caused by an accident in the course of the employment."

A statement as to the cause of an injury made by the injured employee who died before the hearing has been excluded though it was against his interest. Tucker v. Oldbury Urban Dist. Council, [1912] 2 K. B. (Eng.)

317. In that case the claim of the dependents was based on the theory that in the course of the employee's work a piece of steel was driven under his thumb nail from which blood poisoning resulted. It appeared that the employee came to work with his thumb bound up and that the manager asked what was the matter. Sustaining the exclusion of his answer to that question the court said: "Counsel for the appellants sought to support the appeal on two grounds, i. e., (1) that the statements of the deceased workman were admissible as admissions, and (2) that they were admissible as declarations against interest. With regard to the first of these grounds, I am of opinion that it is untenable. The applicants in the present case have as dependents a direct statutory right against the employer under Sched. I. (1844) (1.) (a); the deceased workman is not a party to the litigation, nor do they derive their title to compensation by derivation from him. No admission therefore made by him can be evidence against the present applicants. The second objection gives rise to more difficulty. To decide whether it applies one must of course know the nature of the declaration in order to judge whether or not it was a declaration against interest on the part of the deceased. We were informed that the statements were to the effect that he had a whitlow on his thumb, and that on the witness further asking him whether he had been hammering his thumb the deceased said 'No.' This ground of admissibility has nothing whatever to do with the fact that the deceased was the workman himself. It would apply equally to a declaration against interest on the part of any witness. Such declarations are admitted as evidence in our jurisprudence on the ground that declarations made by persons against their own interests are extremely unlikely to be false. It follows therefore that to support the admissibility it must be shown that the statement was to the knowledge of the deceased contrary to his interest. And it is now settled that the declaration must be against pecuniary interests (or against proprietary interests, which is much the same thing): see Perrage Case 11 Cl. & F. 85 and the judgment of Blackburn, J. in Smith v. Blakey, L. R. 2 Q. B. 326, 332. In my opinion the proposed statements fail to satisfy the requirements of the law and the evidence was rightly rejected. At the date when they were made no claim had been made, and there is no reason to believe that the workman knew that he ever would be able to make a claim. Up to that moment there had been no incapacity. He had continued working as usual and he undoubtedly was unable at that time to forsee the rapid and fatal development of the mischief. It must be remembered that if the incapacity lasts less than two weeks no compensation is payable in respect of the first week. But apart from this I am of opinion that the statements themselves were not necessarily against the interest of the deceased. The description of the trouble in his thumb as a whitlow was in the mouth of an ordinary workman, a natural description which does not seem to me to be, when properly understood, contrary to the facts of the case or inimical to a claim on his part, if he had lived to make one. A whitlow is a septic condition resembling very much the early stages of such an affection as that of which the workman died. Nor does the statement that he had not been hammering his thumb appear to me to militate against the success of any such claim. It certainly does not amount to a statement that he had not while working run a piece of iron or steel under his nail."

WOLVERTON

v.

MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY.

Colorado Supreme Court—July 8, 1914.

58 Colo. 58; 142 Pac. 165.

Telegraphs and Telephones — Duty to Serve Public without Discrimination.

Telephone companies are public service corporations, and their instruments and apparatus are devoted to a public use, and must serve the public generally, without discrimination, on compliance with their reasonable rates and regulations, being bound to conduct their business in a manner conducive to the public benefit, and subject to legislative regulation and control.

[See note at end of this case.]

Contracts — Termination.

Under a contract for telephone service at a residence not extending to any definite time, and which plaintiff, the subscriber, could terminate at any time, the court was without power to perpetuate it for business purposes at the agreed rate for residence purposes, which might or might not be reasonable, since such contracts for fixed periods are impractical, if not impossible, from their very nature.

Regulation of Rates.

Contracts with public service corporations for specific rates, and for definite periods, are subject to legislative regulation.

[See Ann. Cas. 1912D 308.]

Same.

The power to fix a rate or regulation for a public service corporation is exclusively a leg-

islative function, and the court may not fix a rate, but may determine the question of reasonableness only.

Error to District Court, Boulder county: GRAHAM, Judge.

Action for injunction. Edward Wolverton, plaintiff and Mountain States Telephone and Telegraph Company, defendant. Judgment for deefndant. Plaintiff brings error. The facts are stated in the opinion. AFFIRMED.

Howard L. Honan and *W. G. Houston* for plaintiff in error.

Milton Smith, Charles R. Brock, W. H. Ferguson, Joseph Sampson and *Elmer L. Brock* for defendant in error.

[60] SCOTT, J.—The complaint in this case alleges that the plaintiff, a citizen of the city of Boulder, had a residence telephone installed in his dwelling by the Colorado Telephone Company, on the 9th day of March, 1904. That later the defendant, the Mountain States Telephone Company succeeded to the business and rights of the Colorado Telephone Company.

The telephone remained in the house, and so in use of the plaintiff, until the 14th day of February, 1912. On that day the plaintiff removed to another place of residence, and the defendant refused to install another telephone at the new place of residence under the terms of the original contract.

The telephone was installed originally under the usual application and contract. The price to be paid under this contract was one dollar and fifty cents per month, or four dollars and fifty cents per quarter, with additional pay for excess calls, and a fee of five dollars for installation. It was provided in the contract that:

"The Colorado Telephone Company may terminate the subscriber's rights by written notice served on the subscriber or any occupant of the premises and sever his connection and remove the instrument for non-payment of the rental provided for herein or for any use of the telephone by the subscriber contrary to this request, etc."

The complaint also alleged that the defendant presented a bill for the use of the telephone on the 1st day of February, 1912, for service for that full month which plaintiff then paid, and further, that the plaintiff has complied with all the conditions of the contract.

It was further alleged in the complaint:

"That the plaintiff is engaged in the life insurance business, and during a great portion of said time maintained an agency at his residence at 1728 Grove Street, in the said city of Boulder, where said telephone service [61] was rendered as aforesaid; and that at said residence Vera Wolverton, his wife, for the joint benefit of herself and this plaintiff, maintained a fire insurance agency, and that both this plaintiff and his wife, Vera Wolverton, have built up a large business in their respective agencies in the cities, town, and localities included within the territory covered by said contract as aforesaid. That this plaintiff, and the said Vera Wolverton, and also their customers have become accustomed to transact much of the business in regard to their insurance and other business, by means of the telephone, and that this plaintiff and the said Vera Wolverton have frequent occasion to call up customers, and to transact various other kinds of business in the several towns and adjacent communities covered by said contract, and people within said territory have frequent occasion to call up plaintiff and his wife on matters of business. That the character of the business being carried on by plaintiff and his wife is such that quick, prompt and reliable service and communication is essential, and that the discontinuance of said telephone service, and the disconnection and removal of said telephone, and the refusal to furnish service under the said contract, is working and will continue to work irreparable injury to this plaintiff, by causing dissatisfaction among said customers and inevitable loss of business."

There are further allegations of repeated requests to install and maintain the telephone in accordance with the terms of said contract, and at the new place of residence.

It is also alleged that the defendant is a public utility corporation, and that there is no other service of like character being rendered to the citizens of Boulder, and none other available to the plaintiff and his wife in carrying on their business.

The prayer was for a temporary mandatory injunction to compel the defendant to install and maintain a [62] telephone instrument at the new place of residence, and render service to the plaintiff in accordance with the terms of said contract, for damages and costs.

A general demurrer was sustained to the complaint, and this is assigned as error.

It will be seen that the demand of the plaintiff is for the installation of a telephone for business purposes, and the damage claimed is for injury to plaintiff's business.

The contract with the Colorado Telephone Company was for residence purposes alone, and shows this to be an entirely different class, with different charges than for business purposes.

The complaint does not allege that the plaintiff has tendered or offered to pay, the usual and customary rate for such purpose,

or the reasonable value of such service, or a reasonable rate for any service whatsoever.

Telephone companies are public service corporations and their instruments and apparatus are therefore devoted to a public use, and by reason of various valuable rights and franchises granted by the public are subject to certain well understood duties and obligations, without discrimination, to the public generally, and are bound to conduct their business in a manner conducive to the public benefit. They are likewise subject to legislative regulation and control. These companies may not arbitrarily refuse their facilities to any person desiring them, and offering to comply with their regulations, subject to the provision that rates and regulations must be reasonable.

That there is reasonably a difference in the value of such services, as between business and residence purposes, and that such difference in the rates charged by such public service companies, is common and usual, is well understood. So that in this case, even if we were [63] to hold the contract binding, for continued use as a residence phone, it cannot apply in case of use for business purposes, which appears to be the clear demand of the plaintiff.

The complaint does not allege public regulation as to rates, nor a customary rate charged for the service demanded, nor what is a reasonable rate therefor, nor a tender of any such sum. The right of the plaintiff, as a resident of the city of Boulder to have a telephone installed in his home or place of business, and to the use thereof, is not dependent upon contract, but upon the fact that the defendant is a public service corporation, with its attendant obligations to the public by reason thereof, and the plaintiff's willingness to pay the reasonable rates for such service, and to otherwise comply with the defendant's reasonable regulations, applicable to all alike, and without discrimination.

But it must be conceded that the plaintiff could at any time have terminated the contract, under its own terms, at will. There is no agreement that the contract will continue for any definite period.

It requires no argument to show that such contracts with public service corporations, for fixed period are impracticable, if not impossible from their very nature. The service is a public service and subject to a constant change of conditions.

It is clear that if the telephone company should reduce its rates for service to the public generally, it could not continue to hold the plaintiff indefinitely, under a contract for a higher rate.

The rule as to the enforcement of contracts wanting in mutuality was stated by Judge Cooley in Rust v. Conrad, 47 Mich. 449, 11 N. W. 265, 41 Am. Rep. 720; to be:

"But the court will also refuse to interfere in any case where if it were to do so, one of the parties might nullify its action through the exercise of a discretion [64] which the contract or the law invests him with. The refusal in such a case does not depend of necessity upon any irregularity, inequality or unfairness, but is sufficiently based upon the impropriety of imposing upon the judge, the labor and upon the public, the expense, of an investigation of reports, when the circumstances are such as to preclude any judgment that may be rendered from being final. No court can with reason be called upon to do a vain thing. All contracts where the party has reserved to himself, or where the law gives him, the authority to render nugatory any decree that ought to be rendered in their enforcement rest upon the same principle. This was recognized in Rutland Marble Co. v. Ripley, 10 Wall. 339, 359, 19 U. S. (L. ed.) 955, and more distinctly asserted and decided in Southern Express Co. v. Western North Carolina R. Co. 99 U. S. 191, 25 U. S. (L. ed.) 319. In this last case the very strong assertion is made that a court of equity never interferes where the power of revocation exists."

As to the application of this rule in case of contracts with public utilities for service see Fowler Utilities Co. v. Gray, 168 Ind. 1, 79 N. E. 897, 7 L.R.A.(N.S.) 726, 120 Am. St. Rep. 344.

2, Wyman on Public Service Corporations well states the reason for the rule of nonenforcement of such contracts with public service corporations as follows:

"A troublesome problem arises when the continuing to render service at certain rates fixed by a contract which was legal when it was made, comes into conflict with new rates later scheduled, by which the public generally are called upon to pay higher rates. It once seems to have been thought that a continuing contract to take shipments must be respected when rates generally are raised. In those days it will be remembered any concessions for which anything could be said was held justifiable. But of late with the stringent law against all discrimination, [65] and the insistent enforcement of it, even a definite contract still continuing by its terms is held no justification for giving to the particular customer lower rates than those called for from all, by the present schedule. Once the policy against discrimination is well established there is no difficulty in saying that for reasons of public policy no further obligation attaches to such a contract. To the argument that the contract may have been valid when made, if it fixed the rate then charged all, and that therefore the subsequent action of the railroad in advancing rates generally could not invalidate it, the United States Supreme Court replied recent-

ly: 'This contention loses sight of the central and controlling purposes of the law, which is to require shippers to be treated alike, and that the filed and published rate, shall be equally known by and available to every shipper.'"

And it is now held that even in case of such contracts with public utilities for specific rates and for definite periods of time, these are subject to legislative acts of regulation. Louisville, etc. R. Co. v. Mottley, 219 U. S. 467, 31 S. Ct. 265, 55 U. S. (L. ed.) 297, 34 L.R.A. (N.S.) 671; Southern Wire Co. v. St. Louis Bridge, etc. Co. 38 Mo. App. 191.

In addition to what has been said, it has been held that such a judgment as is prayed for in this case, would be in effect the fixing of a rate by the court. Nebraska Telephone Co. v. State, 55 Neb. 627, 76 N. W. 171, 45 L.R.A. 113.

It is universally held that the power to fix a rate or regulation in such case is exclusively a legislative function, and that the courts may determine the question of reasonableness alone.

It is quite clear in this case that the court is asked to perpetuate a contract between the parties as it relates to a rate once agreed on, for residence purposes, and also to make it apply to a business purpose, and which [66] may or may not be at this time reasonable. Courts have no such power. Colorado Tel. Co. v. Wilmore, 53 Colo. 591.

The judgment is affirmed.

Musser, C. J. and Garrigues, J., concur.

NOTE.

The reported case holds that from the status of a telephone company as a public service corporation arises an obligation to furnish service without discrimination. Applying that rule it is held that a service contract whose continued performance would be discriminatory cannot be enforced. The earlier cases discussing the duty to supply telephone connections and facilities without discrimination are reviewed in the notes to Yancey v. Batesville Telephone Co. 11 Ann. Cas. 135; Cumberland Telephone, etc. Co. v. Kelly, 15 Ann. Cas. 1210; Vaught v. East Tennessee Telephone Co. Ann. Cas. 1912C 132 and Central Union Telephone Co. v. Falley, 10 Am. St. Rep. 114.

JACKSON

v.

STATE.

New York Court of Appeals—November 10, 1914.

213 N. Y. 34; 106 N. E. 758.

Eminent Domain — Relation of Parties.

"Condemnation" is an enforced sale, and the condemnor stands toward the owner as buyer toward seller.

Compensation for Fixtures.

The state condemning a warehouse for the use of a barge canal may not reject the machinery therein attached as fixtures in computing compensation, where there was nothing in the notice of appropriation excepting such fixtures.

[See note at end of this case.]

Jackson v. State, 160 N. Y. App. Div. 110, reversed.

Appeal from Appellate Division of Supreme Court, Third Judicial Department.

Claim for compensation for condemnation of property. John J. Jackson, claimant, and State of New York, defendant. Award of Board of Claims affirmed by Appellate Division of Supreme Court. Claimant appeals. The facts are stated in the opinion. REVERSED.

Charles Hickey for appellant.

Thomas Carmody and *Joseph P. Coughlin* for respondent.

[35] CARDOZA, J.—The State appropriated the claimant's warehouse in the village of Middleport for the use of the barge canal. The Board of Claims found that the value of the building was $9,000 and that of the land $1,300. The claimant had an award for those amounts. The board also found that the building contained machinery, shafting, elevators and conveyors of the value of $4,353.20. The form in which these articles were annexed to the freehold, and the purpose of the annexation, were such that, as between vendor and vendee, they would have constituted fixtures. For the enhancement of value due to the presence of these fixtures, the Board of Claims refused to award compensation to the claimant. The ruling has been affirmed at the Appellate Division on the ground that the State, after appropriating the warehouse, had the right to reject the fixtures and refuse to pay for them.

We think that the power of the State is not so great, nor the plight of the citizen

so helpless. Condemnation is an enforced sale, and the State stands toward the owner as buyer toward seller. On that basis the rights and duties of each must be determined. It is intolerable that the State, after condemning a factory or warehouse, should surrender to the owner a stock of second-hand machinery and in so doing discharge the full measure of its duty. [36] Severed from the building, such machinery commands only the prices of second-hand articles; attached to a going plant, it may produce an enhancement of value as great as it did when new. The law gives no sanction to so obvious an injustice as would result if the owner were held to forfeit all these elements of value. An appropriation of land, unless qualified when made, is an appropriation of all that is annexed to the land, whether classified as buildings or as fixtures, and so it has frequently been held. (Matter of New York, 118 App. Div. 865, 103 N. Y. S. 908, *affirmed* 189 N. Y. 508, 81 N. E. 1162; Matter of New York, 39 App. Div. 589, 57 N. Y. S. 657; Phipps v. New York, 69 Misc. 295, 127 N. Y. S. 260; Allen v. Boston, 137 Mass. 319.) We say "unless qualified when made," because we do not need at this time to decide whether the State, in giving notice of appropriation, may except fixtures that would retain, after severance from the soil, a substantial value as personalty, and thus restrict the payment to the difference between the value of the detached articles and the value added to the building when they were used in connection with it. (Price v. Milwaukee, etc. R. Co. 27 Wis. 98; Philadelphia, etc. R. Co. v. Getz, 113 Pa. St. 214, 6 Atl. 356.) If that may be done in any case, it can only be when the purpose is made plain in the act of appropriation. The rights of the parties became fixed at that time, and must then be reciprocal. If the State has the right, under a general notice of appropriation, to insist that title to the fixtures has passed to it with the land, the owner has the correlative right to insist upon payment. The law does not leave the title in a state of suspense. The value of the fixtures ought, therefore, to have been considered in estimating the total value of the property appropriated by the State.

We have not ignored the suggestion in behalf of the respondent that some of the fixtures were afterwards removed by the claimant, and by common consent were treated as personal property. (Tyson v. Post, 108 N. Y. [37] 217.) No finding on this subject was either made or requested, and the evidence is too vague to enable us to ascertain the truth of the transaction. The claimant's position is that he did not remove anything, but acquired by purchase from a contractor some of the fixtures which the contractor had purchased from the State. Upon another hearing this element of the controversy may be more fully developed.

The judgment should be reversed and a new trial granted, with costs to abide the event.

Willard Bartlett, Ch. J., Hiscock, Chase, Collin, Hogan and Miller, JJ., concur.

Judgment reversed, etc.

NOTE.

Value of Fixtures as Element of Damages Sustained by Appropriation of Property in Eminent Domain Proceeding.

General Rule, 780.
Application of Rule:
Fixtures Attached by Owner, 781.
Fixtures Attached by Tenant, 782.
Rule in Massachusetts, 782.

General Rule.

The general rule is, as affirmed in the reported case, that the value of fixtures attached to property condemned for a public use is to be considered in the assessment of damages for the appropriation of the property. Gibson v. Hammersmith Ry. 9 Jur. N. S. (Eng.) 221, 32 L. J. Ch. 337; Lefebore v. Reg. 1 Can. Exch. 121; Kansas City Southern R. Co. v. Anderson, 88 Ark. 129, 16 Ann. Cas. 784, 113 S. W. 1030; White v. Cincinnati, etc. R. Co. 84 Ind. App. 287, 71 N. E. 276; Warren Mfg. Co. v. Baltimore, 119 Md. 188, 203, 86 Atl. 502; In re New York, 192 N. Y. 295, 84 N. E. 1105, 127 Am. St. Rep. 903, 18 L.R.A.(N.S.) 423, *modifying* 122 App. Div. 890, 106 N. Y. S. 1117; In re New York, 101 App. Div. 527, 92 N. Y. S. 8, *affirmed* 182 N. Y. 281, 74 N. E. 840; Phipps v. State, 69 Misc. 295, 127 N. Y. S. 260; Matter of New York, 39 App. Div. 589, 57 N. Y. S. 657; Matter of North River Water Front, 118 App. Div. 865, 103 N. Y. S. 908, *affirmed* 189 N. Y. 508, 81 N. E. 1162; Price v. Milwaukee, etc. R. Co. 27 Wis. 98. See also Chicago, etc. R. Co. v. Ward, 128 Ill. 349, 18 N. E. 828, 21 N. E. 562; Missouri, etc. R. Co. v. Schmuck, 79 Kan. 545, 100 Pac. 282; Diamond Mills Emery Co. v. Philadelphia, 22 Pa. Co. Ct. 9. And see the cases cited infra in the subdivision *Application of Rule*. *Compare* Pause v. Atlanta, 98 Ga. 92, 26 S. E. 489, 58 Am. St. Rep. 515. "We are inclined to the opinion that in condemnation proceedings, where the property is taken in invitum, the rule which obtains is analogous to that between vendor and vendee and not that between landlord and tenant." In re Post Office Site, 210 Fed. 832, 127 C. C. A. 382. "I conceive the true rule to be that, when property is taken by the right of eminent domain, the doctrine of fix-

tures and erections, as applicable to the relation of landlord and tenant, have no application; the question being, is the property taken of the character of real estate, and is it inherently real property? If it is, then it becomes the subject of appropriation, and not only may, but must, be taken as an entirety, as it then exists, without reference to the respective ownerships or parts of such real property. This property being of a character which is the subject of appropriation, it became the duty of the commissioners to determine its value, and award that sum to the respective parties in interest. . . . No consideration was given to the value of the fixtures in the building. As appears by the testimony, the engine and boiler were placed in a separate structure attached to the main building, resting partially upon piles driven into the ground, and partially upon the soil. There was brick-work around the boiler, with a brick arch and a brick floor,—the whole set in permanently. The engine is set upon timbers, and is connected with the shafting which is fitted into the building, and through this the power is applied which draws the ice up the galleries. All of these fixtures were placed in this structure with reference to the building, and for the particular use to which it is put. The same is true with respect to the scales for weighing ice. Within the authorities, this property is inseparable from the building, and forms an element of damage to be considered." In re Park Com'rs, 1 N. Y. S. 763.

As to the right of damages in condemnation proceedings for injury to personal property or the expense of removing it from the premises, see the notes to Blincoe v. Choctaw, etc. R. Co. 8 Ann. Cas. 689; Kansas City Southern R. Co. v. Anderson, 16 Ann. Cas. 784.

Application of Rule.

Fixtures Attached by Owner.

In the case of In Matter of New York, 39 App. Div. 589, 57 N. Y. S. 657, it appeared that land on which a gas plant was situated was taken by the city for park purposes. The city contended that although the machinery as it stood on the land would be a fixture as between vendor and vendee, that rule did not apply in condemnation cases, and that it was the duty of the owner to remove all machinery that could be removed without its practical destruction. The court in answering this contention said: "There is practically no dispute upon the evidence that, as between vendor and vendee, a very large portion of this machinery would have been regarded as a fixture, and, therefore, if the premises had been sold by contract between two individuals the machinery would go with the land. Does this law of fixtures apply to this class of cases? . . . The same rule exists in proceedings to take land under the right of eminent domain, and the commissioners of estimate have no right to restrict the assessment to the simple value of the land, compelling the owner to retain the fixtures on the premises, and exempting the city from an obligation to take and pay for them as a part of the land. Schuchardt v. New York, 53 N. Y. 202, 208."

In Kansas City Southern R. Co. v. Anderson, 88 Ark. 129, 16 Ann. Cas. 784, 113 S. W. 1030, it appeared that a building had been erected for the purpose of installing machinery for a planing mill and that the machinery was securely fastened to the building and was intended to be a permanent accession to the freehold. In a proceeding by a railroad company for the condemnation of the land on which the building stood it was held that "the machinery became a part of the realty" so as to be considered in assessing the damages.

In Price v. Milwaukee, etc. R. Co. 27 Wis. 98, it appeared that the plaintiff had placed certain fixtures on his premises to adapt his property to use as a water-cure. Part of the premises were condemned for a railroad right of way by the defendant, its charter requiring it to pay the value of the land actually taken for the use of its road, and also the damage or injury which the owner sustained by reason of the taking. It was held that "if the defendant entered upon the plaintiff's premises in such a way as to destroy the fixtures he had put upon them for use as a water-cure, he was entitled to compensation."

In the case of In re Post Office Site, 210 Fed. 832, 127 C. C. A. 382, it appeared that an engraving plant was situated on premises which were condemned for a post office site. Compensation was allowed for the machinery of the plant, it appearing that the machinery was affixed so as to become a part of the realty and not removable without damage to it.

In White v. Cincinnati, etc. R. Co. 34 Ind. App. 287, 71 N. E. 276, it was held that where the machinery of a plant is so attached as to become a fixture and a part of the land only is taken under eminent domain all of the machinery must be considered as a part of the land in determining the compensation to be paid. The court said: "The case at bar seems to have been tried upon the theory that a part of this machinery should be considered a part of the land, while a part of the machinery might not be so considered. It is clear from the record that the improvement upon the real estate consists, not simply of certain buildings containing various pieces of machinery, but of a paper-mill—a thing complete within itself.

Such machinery as is necessary and essential to a paper-mill plant would be without value except as a part of a paper-mill. Means were provided for utilizing the water-power, buildings erected, and the machinery placed in position for the purpose of establishing a paper-mill. It is not questioned that the buildings should be regarded as a part of the land. In such case there is no more reason for saying that the machinery necessary and essential for carrying out the purpose of the mill is a mere incident or accessory to the buildings than there is for saying that the buildings are incidents or accessories to the machinery. . . . As the machinery is permanent in its character, and, being essential to the purpose for which the buildings are used, is a fixture, it must be regarded as realty, and go with the buildings. The land, water-power, buildings and machinery constitute a paper-mill plant—a unit. It has or has not a value as such, just as a building is valued, not by fixing a value on the different materials composing it but as a building. By the instrument of appropriation no building situated on the real estate is to be removed or destroyed, but it is proposed to pass over a part of the mill by means of a bridge. If a part of the land is taken, appellant is entitled to the fair market value of the land so taken. And if the market value of the remaining portion with the improvement as above indicated—that is, the market value of the paper-mill plant—after the appropriation is less than it was before the appropriation, she is entitled to that difference."

Fixtures Attached by Tenant.

The prevailing rule is that the value of fixtures attached by a tenant and removable by him at the expiration of his term is to be considered as an element in assessing the damages sustained by the appropriation of property in eminent domain proceedings during the term of the tenancy. Gibson v. Hammersmith Ry. 9 Jur. N. S. 221, 8 L. T. N S. 43, Drew & S. 603, 11 W. R. 209, 1 N. R. 305, 32 L. J. Ch. 337; In re New York, 192 N. Y. 295, 84 N. E. 1105, 127 Am. St. Rep. 903, 18 L.R.A. (N.S.) 423, *modifying* 122 App. Div. 890, 106 N. Y. S. 1117; Matter of Avenue A. 66 Misc. 488, 122 N. Y. S. 321; In re New York, 101 App. Div. 527, 92 N. Y. S. 8, *affirmed* 182 N. Y. 281, 74 N. E. 840; Matter of Willcox, 142 App. Div. 680, 127 N. Y. S. 777; Matter of Willcox, 165 App. Div. 197, 151 N. Y. S. 141; Matter of North River Water Front, 118 App. Div. 865, 103 N. Y. S. 908, *affirmed* 189 N. Y. 508, 81 N. E. 1162. See also Sheehan v. Fall River, 187 Mass. 356, 73 N. E. 544; Phipps v. New York, 69 Misc. 295, 127 N. Y. S. 260. *Compare* Schreiber v. Chicago, etc. R. Co. 115 Ill. 340, 3 N. E. 427; Matter of Public Parks, 53 Hun 280, 6 N. Y. S. 750; New York Cent. etc. R. Co. v. Albany Steam Trap Co. 161 App. Div. 329, 146 N. Y. S. 674.

"The city took the entire buildings as they stood, including the trade fixtures therein, and for the purposes of this proceeding they must all be regarded as real property. That is, as between the tenant and the city, the trade fixtures were real property and must be paid for by the city the same as a building, and the tenant was under no more obligation to remove them than he would be to remove a building if he were the owner. As between the tenant and the owner, however, the trade fixtures were personalty, and could be removed, and therefore any award made for them would go to the tenant. . . . For the purpose of this proceeding the trade fixtures were . . . real property and were properly the subject of condemnation and award." Matter of Avenue A. 66 Misc. 488, 122 N. Y. S. 321.

In the case of Matter of North River Water Front, 118 App. Div. 865, 103 N. Y. S. 908, *affirmed* 189 N. Y. 508, 81 N. E. 1162, it was held that a tenant who had erected a building on land which was condemned by a city for the improvement of a water front was entitled to compensation to the extent of the reasonable value of machinery which he had put in the building so as to become a real part thereof.

In Schreiber v. Chicago, etc. R. Co. 115 Ill. 340, 3 N. E. 427, it appeared that a railroad company instituted a proceeding to condemn land occupied by a tenant. The tenant had erected buildings and installed machinery on the land. It was held that as between the owner of the land and the tenant the buildings and the machinery were trade fixtures and that the tenant was not entitled to compensation. The court said: "The proceeding is not to condemn personal property, and the buildings, etc., could only be affected by it when they became legally a part of the soil to which they are attached, so as to pass with the title to it, as realty."

Rule in Massachusetts.

In Massachusetts the rule seems to be that the value of fixtures in assessing damages for property taken in eminent domain proceedings can be considered only in so far as they enhance the market value of the property. Edmands v. Boston, 108 Mass. 535; Allen v. Boston, 137 Mass. 319; Williams v. Com. 168 Mass. 364, 47 N. E. 115. In Williams v. Com. supra, it was said: "So far as the improvements come within the description of fixtures, they also, as between the Commonwealth and the parties owning or interested in the land and building, must be regarded, till severance at least, as part of the real

estate. . . . There is nothing to show that they have been severed, or that they were not included in the taking. If they were included in the taking, then, of necessity, they must form a part of the market value of the land and building taken, and the petitioner gets all that he is justly entitled to, under the statutes or otherwise, when he receives the income of property whose value has been arrived at by taking them into account, though they may not have been regarded as enhancing it."

It has been held that where a wharf was taken under the right of eminent domain the damages which a lessee could recover for the loss of "tenant's fixtures" was the damage caused by being forced to vacate the premises before the expiration of the lease, the tenant having had the right to remove the fixtures but failing to do so. Emery v. Boston Terminal Co. 178 Mass. 172, 59 N. E. 768, 86 Am. St. Rep. 473. In Sheehan v. Fall River, 187 Mass. 356, 73 N. E. 544, the statute involved provided for the payment of damages sustained by the alteration of the grade of a street. The petitioner was the owner of a building on land held under a ground lease. A settlement had been made between the condemnor and the owner of the land for damages resulting to the property, but in the settlement nothing was paid for the injury to the petitioner's property. The court, in holding that the petitioner was entitled to damages, said: "The settlement made with the landowner did not include her damages, for he asserted no title to the building, which could have been removed at any time before her estate terminated, and she is not precluded from recovery on the ground that it had become a part of the realty. . . . On principle no sufficient reason appears why the owner of a building of the description, and held under the conditions disclosed by the report, and where it is agreed that substantial damages have been sustained by a change of grade in a public way on which it abuts, should not be treated as between herself and the public as possessing a sufficient interest in real estate to enable her to maintain a petition under the terms of a statute broad enough to include compensation. . . . We are of opinion that the words 'all damages sustained' in the statute under consideration, when applied to a change of grade in an established public way, should be held to compensation for injuries caused to a building located on the line of the street, and substantially annexed to the soil, though as between the owner of the fee and the owner of the building it is a tenant's fixture which may be removed, and thus give the petitioner a remedy to recover the damages she has suffered." See also Ashby v. Eastern R. Co. 5 Metc. (Mass.) 368.

JOHNSON ET AL.

v.

WHILDEN.

North Carolina Supreme Court—May 30, 1914.

166 N. Car. 104; 81 S. E. 1057.

Judgments — Personal Judgment against Nonresident.

Despite the ordinary rule that no judgment in personam can be recovered against a nonresident, except upon appearance, unless personally served within the jurisdiction, a valid judgment may be obtained where the property of a nonresident is attached, in which case the court may, for the purpose of adjudicating the rights to the property, consider claims against the nonresident.

Attachment — Property Subject — Equitable Interest in Land.

Under Revisal 1905, §§ 767, 784, providing that the officer to whom a warrant of attachment is directed and delivered shall take into his possession the personal property of the defendant, and shall levy on so much of the real estate of the defendant as prescribed for executions, an attachment can be levied only upon property subject to execution; and hence an attachment upon the equitable interest of a nonresident defendant in lands held in trust is void, and will not support any judgment.

[See note at end of this case.]

Executions — Property Subject — Land Held in Trust.

Land held in trust for the defendant is not subject to sale under execution.

Judgments — Matters Concluded — Jurisdictional Facts.

Where a judgment in personam against a nonresident was sought to be sustained on the ground that property interests of the nonresident had been attached, the judgment is not conclusive upon the validity of the attachment for, if the attachment were invalid, the court had no jurisdiction.

Taxation — Notice of Redemption — Sufficiency.

A tax deed issued is not valid where the notice of the time for redemption was not published in accordance with Revisal 1905, § 2903, requiring such notices, and was not directed to the trustee, in whose name title was held, even though the purchaser's affidavit showed his knowledge of the fact of the trust.

Judgments — Conclusiveness — Failure to Appeal.

Where plaintiff, who held land as trustee, did not appeal from the judgment in a suit to remove a cloud from his title, he is concluded by the verdict which found that defendant was the owner of the equitable interest of plaintiff's cestui que trust.

Appeal from Superior Court, Graham county: CARTER, Judge.

Action to remove cloud on title. Fred S. Johnson et al., plaintiffs, and H. B. Whilden, defendant. Judgment for plaintiffs. Defendant appeals. MODIFIED.

[105] Civil action to remove cloud from title to certain lands situate in Graham County, N. C.

On the hearing, it was properly made to appear that grants for the land in question were taken out by one D. F. Goodhue, in his own name, and he having died, the legal title thereto descended to his son, Willie F.; that the Tuckaseegee Mining Company et al. instituted suit in Superior Court of Graham County, alleging that the lands had been paid for with company's money and same taken and held for the company's benefit, and, on the facts in evidence, it was, at Fall Term, 1900, among other things, decreed that Willie F. Goodhue held the lands in trust for the Tuckaseegee Mining Company, and same should be conveyed by him to one Jacob S. Burnette, as trustee for said company, in terms as follows: "It is further considered, ordered, adjudged, and decreed by the court, that Jacob S. Burnette be and he is hereby appointed a trustee with full power [106] and whose duty it is to hold the legal title to said tracts of land herein described, with full power to sell said tracts of land at private sale upon such terms as he may think best and to convey the title to the same to the purchasers of the same by deeds in fee simple, and out of the proceeds of such sales to first pay off and discharge indebtedness of the Tuckaseegee Mining Company incurred both before and since the bringing of this action, and to pay over to the stockholders any surplus which may remain in his hands after discharging said indebtedness of the Tuckaseegee Mining Company, according to the respective holdings." And it was adjudged that the decree in question should operate as a conveyance of title on the trusts above stated.

Jacob S. Burnette having died, this present plaintiff, by decree of Superior Court, February, 1911, was duly appointed his successor in office, "to carry out and discharge the trust imposed upon the lands therein mentioned and to execute and perform any and all duties devolving upon the original trustee by said judgment of 1900.

In this decree it was found as one of the pertinent facts that the trustee, Burnette, had made a valid contract to sell the land to one M. E. Cozad, and that the same was outstanding and existent in favor of said bargainee, and reference was made to the claim of defendant in said land and to the proceedings by which same had been acquired, but no decision was made on the validity of the claim.

On the part of the defendant, it was shown that A. M. Frye, having a claim for services against the Tuckaseegee Company for legal services rendered to said company in 1903, instituted an action against it and J. S. Burnette, trustee, under and by virtue of the decree aforesaid, to Superior Court of Swain County, and not being able to obtain personal service of process on the company within the jurisdiction of the court or on the trustee, who was a nonresident, sued out an attachment in the cause and had same levied on the lands in controversy as the lands of the defendants, the Tuckaseega Company and Burnette, trustee and having also caused publication of the summons and warrant of attachment to be made and filed his complaint [107] alleging that the company was indebted to him for legal services in the sum of $2,500 and that he had caused attachment to be issued and levied in the cause.

At July term, Swain Superior Court, no answer having been filed or appearance made, the issue of indebtedness was submitted to the jury and the following verdict rendered: "Are defendants indebted to plaintiffs for legal service? If so, what amount? Answer: $1,500, with interest from 7 August, 1903." And, on the verdict, after reciting the recovery, the levy of attachment, etc., it was adjudged, the present writer presiding, that defendants had been duly served with process, and, further, as follows:

"It is further considered, ordered, and adjudged by the court that the defendants, the Tuckaseegee Mining Company and J. S. Burnette, trustee, are indebted to the plaintiffs in the sum of $1,500, with interest on the same from 7 August, 1903, for legal services.

"It is further considered, ordered, and adjudged by the court that the several tracts of land above described, which were levied on by the sheriff of Graham County under the warrant of attachment, be condemned and sold for the payment of this judgment, or so much thereof as may be necessary to pay the same, with costs, and that execution issue on this judgment to the sheriff of Graham County, N. C., commanding such sale."

On execution issued, said lands were sold and purchased by A. M. Frye and deed taken from the sheriff in ordinary form, etc., referring to attachment proceedings, judgments, etc., bearing date May, 1905, and A. M. Frye and wife, by deed, with special warranty, bearing date 7 May, 1906, conveyed to defendant, H. B. Whilden, all the right, title, interest, and estate of said A. M. Frye, etc.

Defendant further offered in evidence a deed from J. A. Ammons, sheriff and tax collector, reciting a sale of lands for taxes, same having been listed in the name of the Tuckaseegee Mining Company, and failure to re-

deem, etc., conveyed the land to defendant, the deed dated 13 June, 1907; also an affidavit by defendant to the effect that the land having been listed for taxes in the name of the Tuckaseegee Company, and failure to [108] pay, same had been sold and purchased by defendant for $89.74, amount of taxes due, etc., and not being able upon diligent inquiry to find either the Tuckaseegee Mining Company or J. S. Burnette, the trustee, in Graham, and there being no tenant or agent of the company residing on the lands, etc., defendant had caused a notice to be published in the Cherokee Scout, a newspaper in an adjoining county, there being none published in the county of Graham, in form as follows:

To the Tuckaseegee Mining Company:

Take notice that at a sale of real estate for nonpayment of taxes, held on 7 May, 1906, in the town of Robbinsville, the following real estate was sold by J. A. Ammons, sheriff and tax collector of said county, towit: 4,130 acres, more or less, listed in the name of the Tuckaseegee Mining Company, said lands lying in Yellow Creek Township, Graham County, being the lands embraced in State Grants Nos. 3529, 3530, 3543, 3425, 3521, 3528, 3519, 3518, 3530, 3526, 3527, 3532, 3531, 3533, 3522, 3534, 3535, and 3520, which said lands were sold for the taxes due for the year 1905, amounting to $89.74, including the cost of sale, at which sale the undersigned became the purchaser of said land.

The owner of said land will take notice that the time of redemption of said lands will expire on 7 May, 1907.

This 8 January, 1907. H. B. WHILDEN, *Purchaser.*

The court charged the jury, if they believed the evidence, to answer the issues as shown, and the following verdict was rendered:

1. Is the plaintiff, Fred S. Johnston, the owner of the lands described in the complaint, as trustee for the purpose set out in the decree of Spring Term, 1900, of Graham County Superior Court, in the case of Tuckaseegee Mining Company v. Willis F. Goodhue et al.? Answer: Yes.

2. Has the defendant, H. B. Whilden, any interest in said lands? Answer: No, except as to the equitable interest of the Tuskaseegee Mining Company under the decree aforesaid.

[109] Judgment on the verdict for plaintiff, and defendant excepted and appealed.

Beyson & Black for appellant.

Zebulon Weaver and T. A. Morphew for appellees.

HOKE, J. (*after stating the facts*):—It is now the well settled principle that no valid judgment *in personam* can be obtained against a nonresident or *other* for an ordinary money demand except on personal services of process within the territorial jurisdiction of the court or unless there has been proper acceptance of service or a general appearance, actual or constructive, by which the party submits his cause to the court's jurisdiction. The position is modified, or, rather, a different rule obtains, where in such an action, duly instituted and on attachment issued, there has been a valid levy of property of defendant in the jurisdiction, bringing the same within the custody of the court, in which case the question of indebtedness may be considered and determined in so far only as the value of the property may be made available in satisfaction of the claim by sale under final process or further decree in the cause; beyond this value, no judgment *in personam* may be entered or enforced. Pennoyer v. Neff, 95 U. S. 714, 24 U. S. (L. ed.) 565, and 9 Rose's notes thereon, pp. 338–39 et seq.; Warlick v. Reynolds, 151 N. C. 606, 66 S. E. 657; Bernhardt v. Brown, 118 N. C. 701, 24 S. E. 527, 715, 36 L.R.A. 402.

These and other authoritative decisions are to the effect that a court may acquire jurisdiction by publication of the summons to hear and decide suits to fix the status of property situate within its territorial jurisdiction or to determine the rights or interest of parties therein, when the action is brought and prosecuted directly for that purpose.

An interesting and instructive case of this kind appears in 134 U. S. 316, 10 S. Ct. 557, 33 U. S. (L. ed.) 918; Arndt v. Griggs, that being an action to quiet title to realty, and the principle has been frequently recognized and applied in this jurisdiction, as in Bernhardt v. Brown, supra; Vick v. Flournoy, 147 N. C. 209, 60 S. E. 978, an action to redeem land under a mortgage, and Lawrence v. Hardy, 151 N. C. 123, 65 S. E. 766, 134 L.R.A. (N.S.) 976, a suit for partition, etc.

[110] It will be noted that when the action is one *in personam* and the jurisdiction is dependent solely on the attachment, there must be a valid levy on the property, and where, as in this State, this writ is only regarded as process ancillary to the main or ultimate relief sought, unless the statutes regulating the matter otherwise provide, there can be no valid levy except on property which can be made available by sale under final process, and while the North Carolina statutes have very much extended the scope and vigor of the writ in reference to real estate, there has been no change as to the character of the property liable to levy and sale, made by the statute, but, on perusal of sections 767 and 784, it appears that the writ, both in reference to the species of property and as to the levy and ultimate sale, is to be regarded as in the nature of an execution. This being true,

it is the recognized position here and in other States having statutes of like purport, and both before and since the existence of our present civil procedure, that an attachment can only be levied on property which could be levied on and sold under execution, as the final process in the cause. Post-Glover Electric Co. v. McEntee-Peterson Engineering Co. 128 N. C. 199, 38 S. E. 831; Davis v. Garrett, 25 N. C. 459; Gillis v. McKay, 15 N. C. 172; Courtney v. Carr, 6 Ia. 238; Burns v. Lewis, 86 Ga. 591, 13 S. E. 123; Hillman v. Werner, 9 Heisk. (Tenn.) 586; Lane v. Marshall, 1 Heisk. (Tenn.) 30; and see note in 11 Ann. Cas. 669, on case of Pelzer Mfg. Co. v. Pitts, 76 S. C. 349, 57 S. E. 29, at page 669; Drake on Attachments, sec. 235; Shinn on Attachment, p. 415.

In the case before us it appears that the suit of A. M. Frye against the Tuckaseegee Mining Company and its trustees was one strictly *in personam* to recover a sum for legal services rendered the company. No personal service was obtained upon either defendant, and the only basis of jurisdiction is the levy of an attachment on real property held by J. S. Burnette, one of the defendants in trust, to "sell, make title to purchasers by deeds in fee, and of the proceeds to pay, first the indebtedness of the Tuckaseegee Mining Company incurred both before and since the bringing this action, and to pay over to the stockholders any surplus, etc., etc."

[111] Under our statutes, and decisions construing same, such an interest is not the subject of levy and sale under execution. Mayo v. Staton, 137 N. C. 670, 50 S. E. 331; Tally v. Reed, 72 N. C. 336; McKeithan v. Walker, 66 N. C. 95. Nor could there be any valid levy made thereon under the ancillary process of attachment, and according to the authorities heretofore cited, and the principles they uphold and illustrate, the judgment in case of Frye v. Manufacturing Co. was a nullity, and no title passed to the purchaser at the sale under final process in the cause.

It is urged for defendant that plaintiff and those under whom he claims are concluded by the judgment entered in the cause, which establishes the indebtedness, declares the land levied on subject to same, and adjudges that the interest of defendants be sold and applied to payment of the judgment. The position would be undoubtedly correct if the court had jurisdiction of the parties and had acquired any right to consider and pass upon the interest of the defendants in that suit; but the action was not one *quasi in rem* and in which plaintiff sought to establish his debt and enforce his right against the property as a *cestui que trust*, or one of them, under the terms of the deeds. It was, as we have seen, a suit strictly *in personam*, and there having been no personal service of process on either defendant within the jurisdiction, and the levy on the attachment being of no effect, the property not being liable to service under that process, the court was entirely without jurisdiction to establish any debt in favor of plaintiff or to determine in any way the rights or interests of the nominal defendants. And the claim under and by virtue of the alleged tax title is without merit.

The affidavit filed by the purchaser shows that he was fully aware that the property was owned by J. S. Burnette, the trustee, and the notice, made an exhibit in the record, not only does not purport to give notice to the trustee, the owner, but there is nothing in the record to show that the publication was made either on the dates or the number of times required by section 2903 of the Revisal. In several recent decisions of the Court it has been held that the requirements imposed by this and cognate sections of the statute must be strictly complied with, and [112] that a failure on the part of the purchaser to give the proper notices to the owner would avoid the deed. Rexford v. Phillips, 159 N. C. 213, 74 S. E. 337; King v. Cooper, 128 N. C. 347, 38 S. E. 924; Thomas v. Nichols, 127 N. C. 319, 37 S. E. 327.

Under the principle established by these and other decisions of like kind, we must hold, therefore, that the tax deed is void, and carries no title to the purchaser. It may be well to note that the verdict on the second issue seems to establish by correct interpretation that defendant is owner of the beneficial interest of the Tuckaseegee Mining Company, under the decree establishing the trust, and plaintiff, not having appealed, is concluded by such finding, and the judgment below will be so far reformed as to declare and adjudge that such interest is had and owned by defendant. The costs of appeal will be paid by appellant.

Modified and affirmed.

NOTE.

Equitable Interest in Real Property as Subject to Attachment.

Introductory, 786.
General Rule, 787.
Interests Subject to Attachment, 787.
Interests Not Subject to Attachment, 789.

Introductory.

This note discusses the right to attach an equitable interest in real property. The cases dealing with the liability to attachment of an equitable interest in personal property, are treated in the note to Pelzer Mfg. Co. v. Pitts, 11 Ann. Cas. 665.

General Rule.

As a general rule, an equitable interest in real property is subject to attachment. Pratt v. Law, 9 Cranch, 456, 3 U. S. (L. ed.) 791 (construing Md. Statute); Fish v. Fowlie, 58 Cal. 373; Davenport v. Lacon, 17 Conn. 278; Laclede Bank v. Keeler, 103 Ill. 425; Wallace v Monroe, 22 Ill. App. 602; Bullene v. Hiatt, 12 Kan. 98; Shanks v. Simon, 57 Kan. 385, 40 Pac. 774; Louisville Bank v. Barrick, 1 Duv. (Ky.) 51; Campbell v. Morris, 3 Har & McH. (Md.) 535; Wright v. Franklin Bank, 59 Ohio St. 80, 51 N. E. 876; Tucker v. Denico, 27 R. I. 239, 61 Atl. 642. And see Travis v. Topeka Supply Co. 42 Kan. 625, 22 Pac. 991; Aldrich v. Boice, 56 Kan. 170, 42 Pac. 695; Kentucky Northern Bank v. Nash, 1 Handy (Ohio) 153. *Compare* Lowry v. Wright (decided under previous statute) 15 Ill. 95; Warner v. York, 25 Ohio Cir. Ct. Rep. 310. In Louisville Bank v. Barrick, supra, the court said: "But the proposition that an equitable interest in real estate owned by a non-resident is not subject to levy and sale under a general attachment is not maintainable. The provision of the Code mainly relied on by counsel for the appellee is as follows: 'An order of attachment binds the defendant's property in the county, which might be seized under an execution against him, from the time of the delivery of the order to the sheriff, in the same manner that an execution would bind it; and the lien of the plaintiff is completed upon any property or demand of the defendant, by executing the order upon it in the manner directed in this article.' (Sec. 233.) Now, it is clear that this section was intended to apply two classes of property: First, such property as might be seized under execution; and, second, any other property or demand of the defendant which is not liable to seizure under execution. The attachment binds the first class in the same manner that an execution would bind it; the lien of the plaintiff upon the second class is completed by executing the order upon it. It would be singular that the framers of the Code should have provided for a lien upon a demand of the defendant, and should have made no provisions for a lien on an equitable interest in land, or on any other property not subject to execution. In the entire chapter regulating attachments, it is evident that the word property is used in its most comprehensive sense, and is intended to embrace everything of value belonging to the defendant which by any mode of proceeding might be subjected to the payment of his debts. The plaintiff may have an attachment against the property of the defendant. (Sec. 221.) Subsequent sections—especially sec. 228—show that the word is intended to comprehend—1. Real property; 2. Personal property, capable of manual delivery. 3. Other personal property, including debts, demands, stock in a corporation, etc., etc. The words 'real property' mean lands, tenements, and heriditaments (sec. 858); and can it be doubted that the holder of an equitable title of lands, for which the purchase money has been fully paid, is the owner of land within the meaning of the law, and, as such, liable to the summary proceeding by attachment? But furthermore, by section 474, the plaintiff in an execution returned, no property found, may institute an action for the discovery of any money, chose in action, equitable or legal interest, and all other property to which the defendant is entitled. And in such action the plaintiff may have an attachment against the property of the defendant similar to the general attachment provided for in chapter 3 of title 8. (Sec. 476.) These provisions provisions demonstrate that equitable interests must be regarded as property, and that they are subject to levy under a general attachment. There is no escaping this conclusion."

In *Tennessee*, it has been held that an equitable interest in real property is attachable, but only by the process of a court of equity. Lane v. Marshall, 1 Heisk. (Tenn.) 80; Hillman v. Warner, 9 Heisk. (Tenn.) 586.

Under the *Nebraska* statute, it has been held that where the interest of the attachment debtor in real estate is purely equitable, uncoupled with possession, an attachment cannot be validly levied on that interest. Shoemaker v. Harvey, 43 Neb. 75, 61 N. W. 109. And see Westervelt v. Hagge, 61 Neb. 647, 85 N. W. 852, 54 L.R.A. 333.

In *New York*, it has been held that an attachment is leviable only on legal interests and does not extend to equitable interests. Fiske v. Parke, 77 App. Div. 422, 79 N. Y. S. 327. *Compare* Higgins v. McConnell, 130 N. Y. 482, 29 N. E. 978.

Interests Subject to Attachment.

The interest of the vendee under a contract for the sale of real property is attachable. Thus in Fish v. Fowlie, 58 Cal. 373, the court said: "Fowlie had not the legal title to the land. He had nothing more than an interest derivable under a contract of sale made on the 15th of June, 1875, between himself and one W. J. Gunn, who was the legal owner. By that contract Gunn contracted to convey the land to 'Fowlie, his heirs or assigns,' upon payment of a balance of unpaid purchase money 'on or before the 15th of September, 1876.' No personal obligation was given by Fowlie for the payment of the purchase money; and it does not appear that Fowlie obtained possession under the contract, or that he was in possession at the time of the levy or sale. Yet he had agreed to purchase the property, and had paid part of the purchase

money, and covenanted to pay the balance at a stipulated time; and he thus became vested with such an equitable interest in the land as was the subject of sale or transfer by himself; or of appropriation by execution, or in any other mode prescribed by law, by his creditors. And in Higgins v. McConnell, 130 N. Y. 482, 29 N. E. 978, the court said: "The question presented by the demurrer to the complaint is whether the interest of a defendant under a contract for the purchase of the land upon which he has made partial payments, and is in possession, and entitled to a conveyance of the land upon completing his payments, can be levied upon by virtue of an attachment duly issued in an action against him in the Supreme Court. We think it can. Section 644, Code C. P., provides that the sheriff must execute the warrant of attachment 'by levying upon so much of the personal and real property, of the defendant, within his county, not exempt from levy and sale by virtue of an execution, as will satisfy the plaintiff's demand, with the costs and expenses.' This, in terms, provides for a levy upon real property, and admits of the distinction between the property itself and an interest in the property, and suggests that the authority to levy upon the real property of the defendant is no authority to levy upon the real property of another in which the defendant has only some interest less than a legal estate. But section 645 was added; it was a new provision, and declared that 'The real property which may be levied upon by virtue of a warrant of attachment, includes any interest in real property, either vested or not vested, which is capable of being aliened by the defendant.' The interest of the defendant under this contract for the purchase of the land comprises the actual possession, the right of possession, and the right to acquire the right of property. It is a valuable interest, and is alienable." But see Sheehy v. Scott, 128 Ia. 551, 104 N. W. 1139, 4 L.R.A. (N.S.) 365. The interest of a debtor who holds a contract for the conveyance of real property may be attached, but not if he has assigned the contract to a bona fide purchaser before attachment. Lambard v. Pike, 33 Me. 141. While any of the purchase money remains unpaid, the vendor has a beneficial estate in the lands to that extent, and this equitable interest is subject to attachment. Coggshal v. Marine Bank Co. 63 Ohio St. 88, 57 N. E. 1086.

In Wallace v. Monroe, 22 Ill. App. 602, in holding that an equitable estate for life, was attachable, the court said: "It cannot be doubted, we think, that at the time of the service of the writ of attachment, Mrs. Wallace had an equitable estate for life in the land in question. Said land was conveyed to the trustee to be held by him in trust 'for the sole and separate use of the said Celia Whipple (now Mrs. Wallace) during her natural life.' Language could scarcely have been chosen manifesting more clearly an intention to vest Mrs. Wallace with the entire equitable estate for life. While the legal estate was conveyed to the trustee, the entire beneficial interest was given to her. The subsequent portions of the deed contain various provisions directing and regulating the manner in which the trust was to be executed, but they in no way change the character of the interest vested in Mrs. Wallace as an equitable estate in the land. There can be no doubt then that her interest in said land was an equitable interest or title within the meaning of the Attachment Act, and that it was subject to attachment."

The interest of a cestui que trust in real property is attachable. Davenport v. Lacon, 17 Conn. 278. *Compare* Fiske v. Parke, 77 App. Div. 422, 79 N. Y. S. 327.

In Cecil Bank v. Snively, 23 Md. 253, wherein it appeared that the property, though nominally sold to a certain person, was in fact purchased for two others, who paid the purchase money in so far as it was paid at the time, and also paid the installments subsequently falling due, it was held that the latter had an attachable interest in the property to the extent of the payments made by them, as the facts established a resulting trust in their favor.

In Atwater v. Manchester Sav. Bank, 45 Minn. 341, 48 N. W. 187, 12 L.R.A. 741, the court, while holding that, a reversion in land was a legal estate and therefore subject to attachment, said obiter that, had it been an equitable interest it would have been attachable. The court said: "At common law the rule undoubtedly was that a mere equitable estate in land could not be sold on execution, for the familiar reason that courts of law did not recognize equitable estates, and could not deal with them. But a judgment creditor was not in such cases without remedy. He could file his bill in a court of chancery, which always held that, for its purposes, these equitable interests were just as much bound by the judgment as legal estates, and could be subjected to its satisfaction by equitable process; and in adjusting the conflicting rights of creditors it always followed by analogy, the rules of the common law. It is true that the courts of chancery held that the lien or right to obtain satisfaction out of the specific property sought to be subjected to sale for that purpose dated from the filing of the bill. But this was also in strict analogy with the law, for at common law the judgment was not a lien on real property, but it was the judgment creditor who first extended the land by elegit, or whose execution was

first begun to be executed, who was entitled to priority; and a bill in equity to reach the property for the satisfaction of a judgment was considered as being in the nature of an equitable execution. But when the law was changed so as to make judgments liens from the date of their docketing there can be no reason why a court of equity, still following the analogy of the law, should not and would not hold that equitable interests in land were subject to the liens of judgments in the order of their priority in date."

An equity of redemption is subject to attachment. Central Min. etc. Co. v. Stoven, 45 Ala. 594; British, etc. Mortg. Co. v. Norton, 125 Ala. 522, 28 So. 31; Franklin v. Gorham, 2 Day (Conn.) 142, 2 Am. Dec. 86; Lyon v. Sandford, 5 Conn. 544; Campbell v. Morris, 3 Har. & McH. (Md.) 535; Ford v. Philpot, 5 Har. & J. (Md.) 312; Bigelow v. Willson, 1 Pick. (Mass.) 485; Reed v. Bigelow, 5 Pick. (Mass.) 281; Wiggin v. Heywood, 118 Mass. 514; Kittredge v. Bellows, 4 N. H. 424; Eastman v. Knight, 35 N. H. 551; Bryant v. Morrison, 44 N. H. 288; Templeton v. Mason, 107 Tenn. 625, 65 S. W. 25; Chandler v. Dyer, 37 Vt. 346. And see Davenport v. Lacon, 17 Conn. 278; Bacon v. Leonard, 4 Pick. (Mass.) 277. In Ford v. Philpot, supra, the court said: "It appears in itself but just, that the interest which a mortgagor has in property mortgaged by him should be liable, as well at law as in equity, for his debts, and there appears no force in the objection, that it is not at law subject to a fieri facias, because it is not tangible; for the right itself, whether legal or equitable, is not tangible, but the land is; and by the sale, the interest of the party either legal or equitable, may well pass; if a legal interest, and the party in possession will not give it up, the purchaser is driven to his ejectment; and if only equitable, to get possession he must resort to a Court of equity, where, if the sale under the fieri facias passed the right, he would not only obtain the possession, but the legal estate also." Likewise, in Reed v. Bigelow, 5 Pick. (Mass.) 281, where it appeared that an equity of redemption had been sold under execution, it was held that the mortgagor had an interest remaining which he might mortgage, and that the right to redeem this second mortgage was attachable. The court said: "It was a mere equitable interest, it is true, but it was a right to redeem a mortgage of an equitable interest in real estate, and as such was made liable to attachment by the obvious construction of the statute. The right of redeeming the first mortgage, and that of redeeming the second, were distinct rights, and the sale of one was not inconsistent with the sale of the other; for although the whole legal estate passed by the first sale, an equitable interest remained, which might be mortgaged, and being mortgaged, was subject to the right of redemption; and there seems no good reason why such a right, when it is deemed valuable, may not be taken in execution for the benefit of creditors." And see Clark v. Austin, 2 Pick. (Mass.) 528. In Godfrey v. Monroe, 101 Cal. 224, 35 Pac. 761, it appeared that the owner of land conveyed the same by a deed of trust, authorizing the trustee to sell the same and out of the proceeds to pay the indebtedness of the grantor to an improvement company. The trustee subsequently executed a deed thereof to the improvement company, but as part of the same transaction the grantor trustee and improvement company entered into an agreement providing that as soon as the grantor's indebtedness was paid out of the receipts of the sale of the lands, the improvement company should deed to the grantor the balance of the property remaining unsold. It was held that the second deed and the agreement accompanying the same constituted a mortgage with a power of sale and that the interest of the mortgagor in the property thus conveyed was subject to attachment. In Herndon v. Pickard, 5 Lea (Tenn.) 702, it was held that the right of a person whose land had been sold under judicial sale to redeem the same, was such an estate or interest as could be reached by attachment.

Interests Not Subject to Attachment.

A levy of attachment for a debt of a grantor is ineffectual where the property has been conveyed, even though the deed has not been recorded. Plant v. Smythe, 45 Cal. 161; Cox v. Milner, 23 Ill. 476; Kelly v. Mills, 41 Miss. 267. See also Dumas v. Geer, 144 Mich. 377, 108 N. W. 84; Morrison v. New Haven, etc. Min. Co. 143 N. C. 250, 55 S. E. 611.

In Adams v. Mills, 126 Mass. 278, it was held that the right to redeem land from a tax sale was not an interest which was attachable in an action at law.

In Crocker v. Pierce, 31 Me. 177, in holding that an attachment was ineffectual against subsequently acquired property, the court said: "The purpose of an attachment upon mesne process is simply to secure to the creditor the property which the debtor has at the time it is made, so that it may be seized and levied upon in satisfaction of the debt, after judgment and execution may be obtained. The title to the property remains unchanged by the attachment. An attachment can operate only upon the right of the debtor existing at the time it is made. No interest subsequently acquired by the debtor can in any manner be affected by the return thereof, when none was in him at the time. If the levy of an execution would not be effectual

to pass any title to the creditor at the time of the return of the attachment upon the original writ, the latter could have no effect."

In Garlick v. Robinson, 12 Ga. 340, it was held that the defendant had no interest in land subject to attachment where the title to the land was still in the state. The court said: "The defendant in execution had no interest in the land which the subject to levy and sale. All the interest he had in it, was the equitable right to acquire a title by paying the grant fees and taking a grant. That was not done at the time of the sale. The state had not at that time parted with the title. She had the sovereign right to it. The subjecting of the land to lottery was in the nature of a contract between the state and the drawer; by virtue of which, the state retaining the title, consented to convey it to the drawer, upon payment of a certain sum as a grant fee. The payment of this fee was a condition precedent to his getting a title. Whilst that was unpaid, he had no title; it was still in the state—nor had he an interest in the land, springing out of any advances, or money expended. His only right was the right to acquire a title by fulfilling a prescribed condition. That right, it is perfectly obvious, is not such an interest as was the subject-matter of a levy."

In Grover v. Fox, 36 Mich. 453, in holding that at common-law a contingent right to a conveyance was not attachable, the court said: "We then come to the other interest, the contingent right to a conveyance. This was not a legal interest. It was a mere equity, and incapable of being held by levy at common law. If liable to be subjected upon attachment and execution, it could only be so through compliance with the statute for supplementing the levies by proceedings to ascertain and determine the interest seized,—sec. 4628, C. L. The right was not proceeded against, however, as an equity." In Young v. Young, 89 Va. 675, 17 S. E. 470, 23 L.R.A. 642, it was held that a contingent remainder in real property, which was a mere possibility, was not attachable. And in Kendall v. Gibbs, 5 R. I. 525, it was held that a contingent equitable interest in real property, under an express trust, was not attachable. But see Wood v. Watson, 20 R. I. 223, 37 Atl. 1030.

In the reported case, it is held that an interest in land held by a trustee for the purpose of sale, the proceeds of which are to be applied first to the payment of the indebtedness of a certain company and the surplus to be paid to the stockholders of the company, is not such an interest as is the subject of levy and sale under an attachment.

The purchaser of an equity of redemption sold under execution has no attachable interest in the same during the year in which it may be redeemed. Thornton v. Wood, 42 Me. 282; Rogers v. Wingate, 46 Me. 436.

In Kidder v. Orcutt, 40 Me. 589, it was held that the interest which an execution creditor had in the lands on which he had levied his execution, before the expiration of a year from the date of his levy, the time allowed by statute for its redemption, was not subject to attachment.

In Chase v. York County Sav. Bank, 89 Tex. 316, 36 S. W. 406, 59 Am. St. Rep. 48, 32 L.R.A. 785, it appeared that the persons furnishing the money to purchase land, caused to be vested in a trustee the "absolute title" to the property with full power of sale, and provided that the word "trustee" as used in the deed with reference to him, should not have the ordinary effect of limiting his title or right to sell, but that he was to be trustee "for the purpose only of accounting for the proceeds arising from any sale or sales of said lands or any part thereof," and that he "should not be released from his personal obligation to account to each of them and to their assigns for the proceeds of any sale or sales of said lands or any part thereof according to their respective interests in such proceeds." The court said: "It is clear that it was the intention of all parties to so place the entire title, legal and equitable, to the land in the trustee that it would be absolutely beyond the control of either of the cestui que trusts, such cestui que trust to have only the right to demand an accounting of the trustee. The legal effect of the arrangement was to leave in each cestui que trust, not any title legal or equitable in the land, but a mere right in equity to demand an accounting of the proceeds of the sales of the land. Doubtless a court of equity would, in certain contingencies not contemplated by or provided for in the agreement of the parties, such as fraud on the part of the trustee, or a total failure of the objects contemplated by the trust, such as inability to sell the land for sufficient to defray probable expenses, or any other state of facts justifying disolution of the trust, treat this mere equitable right of demanding an accounting under the agreement, as entitling each cestui que trust to a participation in the division of the trust property itself upon such dissolution; but in the absence of such a contingency equity could not recognize the cestui que trust as having any interest in the land, as such, without doing violence to the lawful agreement by which the cestui que trust and the trustee respectively restricted and regulated the rights of each party interested in the trust and without which it probably would not have been created. We have found no case holding such an interest subject to execution and to so hold would be going beyond the authorities."

In Piatt v. Oliver, 2 McLean 267, 19 Fed. Cas. No. 11, 115, wherein it appeared that the legal title to certain lands was in the govern-

ment, and that the trustee held only an equity, subject to the equities of her cestui que trusts, the court said: "There is believed to have been no statute or rule of decision in the territory at the time, which made such an interest liable, at law, to the claims of creditors. And, by the rules of the common law, we think it could not be levied on by an execution or an attachment."

BROOKLYN HEIGHTS RAILROAD COMPANY

v.

STEERS ET AL.

New York Court of Appeals—November 10, 1914.

213 N. Y. 76; 106 N. E. 919.

Street Railways — Power to Construct Side Tracks.

Where a street railroad company's franchise does not grant the right to construct spur tracks connecting with private property abutting on the street on which the tracks are laid, such right cannot be conferred by a license issued by the city's engineer of highways.

[See note at end of this case.]

Same.

A license issued by a city's highway engineer to a street railway company authorizing it to construct a spur track connecting it with private property, even if lawful in its origin, is a revocable privilege, and is revoked by a resolution of the board of estimate and apportionment directing the railway company to remove the siding, and by the revocation of the permit by the president of the borough.

[See note at end of this case.]

Same.

Under Const. art. 3, § 18, and Railroad Law (Laws 1890, c. 565) art. 4, §§ 90–93, and amendatory statutes prescribing the matters requisite for the granting of a street railway franchise, a franchise to maintain and operate a street railroad "across, along and upon" a certain avenue and other connecting streets does not confer on the railroad company the right to construct and maintain a spur track leading from its main track in the street to abutting private property for the sole benefit of the owner and the railway company.

[See note at end of this case.]

Construction of Franchise.

A franchise granted to a street railway company must be construed strictly against the grantee.

[See 12 R. C. L. tit. *Franchises*, p. 194.]

Brooklyn Heights R. Co. v. Steers, 158 N. Y. App. Div. 948, affirmed.

Appeal from Appellate Division of Supreme Court, Second Judicial Department.

Action by Brooklyn Heights Railroad Company, plaintiff, against Alfred E. Steers et al., defendants. Judgment for defendants at Special Term of Supreme Court. Judgment affirmed by Appellate Division of Supreme Court. Plaintiff appeals. The facts are stated in the opinion. AFFIRMED.

Charles L. Woody and *George Yeomans* for appellant.

Frank L. Polk, *Edward A. Freshman* and *James D. Bell* for respondents.

[78] CARDOZO, J.—The plaintiff, a street railroad corporation, has built a spur between its main tracks and a factory held in private ownership. The city of New York has ordered that the spur be removed. The question is whether it constitutes an illegal obstruction of the highway.

The Arabol Manufacturing Company is a corporation engaged in the manufacture and sale of paste and similar products. It has a factory at 56 Nostrand avenue, Brooklyn. The spur or siding in controversy connects this factory through a curved turnout with the tracks in the centre of the street. It was built in 1904 by the plaintiff, the Brooklyn Heights Railroad Company, under a permit issued by the chief engineer of highways in the borough of Brooklyn. Shipments of the Arabol Manufacturing Company's products are made to its customers through the use of this siding. Shipments of goods purchased by the company are made through the same means. That is the extent of its use. The finding is that the station at 56 Nostrand avenue is not a public freight station, but a private one, maintained for the use and convenience of the Arabol Manufacturing Company exclusively.

The case of Hatfield v. Straus, 117 App. Div. 671, 102 N. Y. S. 934, 189 N. Y. 208, 82 N. E. 172, though similar in some of its features, is not decisive of this controversy. In that case the city of [79] New York had granted to R. H. Macy & Co. a license to lay a siding in the highway. R. H. Macy & Co. was not a street railroad corporation. It held no franchise empowering it to operate a railroad in the city's streets. In the language of this court: "no railroad applied for the consent in question, and no right was granted to any such corporation." The consent did not constitute, and was not claimed to constitute, a franchise. The question, therefore, was whether a license to maintain tracks in the city streets could lawfully be granted to a business corporation, and it was that question which this court then answered in the negative.

We are confronted in this case by a different problem. Here it is a street railroad corporation, holding a lawful franchise to occupy the city streets, which is before the court, insisting upon its right to maintain the siding, both by force of the license granted to it in 1904, and, irrespective of the license, as an incident to its franchise to operate its road. Recognizing the force of the distinction, as we do, we think it does not avail to make the obstruction legal.

The plaintiff's argument that it is lawfully in the highway by force of express license, apart from its rights under its franchise, may be answered in a few words. If the franchise does not carry with it the right to lay these tracks, no license granted by the engineer of highways can enlarge the plaintiff's powers. That conclusion follows as a necessary deduction from the decision in Hatfield v. Straus (supra). A license, moreover, even if lawful in its origin, is a revocable privilege. (Lincoln Safe Deposit Co. v. New York, 210 N. Y. 34, 103 N. E. 768, L.R.A.1915F 1009; Gushee v. New York, 42 App. Div. 37, 48, 58 N. Y. S. 967.) By resolution of the board of estimate and apportionment, the plaintiff has been directed to remove the siding, and the president of the borough, under the authority of that resolution, has revoked the permit. The force of the license has thus been spent.

[80] The question then remains whether the franchise to operate a street railroad carries with it the right to maintain spur tracks for such a purpose. We hold that it does not. We assume, as we did in Hatfield v. Straus, 189 N. Y. 216, 82 N. E. 172, that street railroads have the power to transport merchandise as well as passengers. We are concerned at this time, not with the things to be carried, but rather with the path of carriage. The statutes have surrounded the grant of franchises to street railroad corporations with many safeguards and limitations. (Constitution, art. 3, § 18; Railroad Law, L. 1890, ch. 565, art. IV, sections 90, 91, 92, 93, and amendatory statutes.) The route must be described; the consent of owners must be obtained; in default of consent, there must be an approval by commissioners appointed by the court; these and like conditions must be satisfied before a valid franchise can be obtained. To describe a route as passing along or through a stated avenue does not give notice to the public that offshoots will connect the tracks with the property of abutting owners. If the plaintiff under the franchise to maintain a railroad "across, along and upon" Nostrand avenue and other connecting streets, had the right to construct a siding between its tracks and the factory of the Arabol Manufacturing Company, it had an equal right to construct a siding between its tracks and every other factory. There would then be a network of lines that would engross the highway. It is incredible that property owners consenting to the presence of a street railroad could have contemplated the grant of such a franchise. The presence of spurs over which cars are run into a building, from which at times they suddenly emerge, is a serious obstruction to travel, and a menace often to the safety of the traveler. A railroad corporation cannot deduce from words of general or uncertain import a privilege so extraordinary. "It is elementary law that public grants must be strictly construed against the grantee." (Lincoln [81] Safe Deposit Co. v. New York, 210 N. Y. 34, 38, 103 N. E. 768, L.R.A.1915F 1009.) We are not dealing here with a situation akin to the one considered in Brooklyn Heights R. Co. v. Brooklyn, 152 N. Y. 244, 46 N. E. 509. There the spur was necessary to enable the railroad to connect with a storehouse for its cars, without which its line could not be operated at all. Undoubtedly the grant of a street railroad franchise carries with it by implication the right to maintain sidings and switches under those conditions. The point of the decision was that there was a reasonable necessity for the connecting tracks in order to permit the railroad to discharge its duties to the public. We cannot find that the use of this siding bears a relation so direct and necessary to the fulfillment of the plaintiff's functions as to bring it by fair implication within the scope of the grant.

The case of Clarke v. Blackmar, 47 N. Y. 150, is without application to the facts before us. It held that under the charter of the city of Buffalo the common council had the power by apt words of grant to authorize a connection between a private grain elevator and the main tracks of a railroad. The court found that in view of the extent of the business done by the railroad as a common carrier upon the connecting line, the purpose was a public one. It was a question of the power of the common council to make the grant. It was not a question of the interpretation of a grant already made. We are not required at this time to say that a franchise which distinctly authorized the construction of sidings such as the one complained of, would be illegal. It is enough at this time for us to hold, as we do, that no such franchise has been granted.

The judgment should be affirmed, with costs.

Willard Bartlett, Ch. J., Werner, Chase, Collin, Hogan and Miller, JJ., concur.

Judgment affirmed.

NOTE.

Power of Street Railway to Construct Side Tracks.

Without Direct Legislative Permission.

Whether a street railway company has the power to construct side tracks depends largely on the wording of the particular statute, ordinance or franchise under which the company is operating. For that reason the courts have not been able to lay down a definite rule on the subject. However, it has been held generally that where a street railway company is duly enfranchised or authorized to construct its line and operate its cars through certain designated streets, it has the implied power to construct side tracks or turnouts which are necessary to the maintenance of the road. Powell v. Macon, etc. R. Co. 92 Ga. 209, 17 S. E. 1027; Romer v. St. Paul City R. Co. 75 Minn. 211, 77 N. W. 825, 74 Am. St. Rep. 455; Stroudsburg v. Stroudsburg Pass. R. Co. 2 Pa. Dist. 35, 12 Pa. Co. Ct. 124; Wyoming v. Wilkes-Barre, etc. R. Co. 8 Kulp (Pa.) 113; Wilkes-Barre v. Coalville Pass. R. Co. 8 Kulp (Pa.) 298; Houston v. Houston Belt, etc. R. Co. 84 Tex. 581, 19 S. W. 786. Thus in Powell v. Macon, etc. R. Co. supra, it was held that a street railway company which had been enfranchised to construct its line across, along, and on certain streets, etc., was impliedly authorized to construct a spur track in connection with the operation of the line. The court said: "Every electric railway needs a power-house and a shed for the storage of its cars when not in use, and of course, has a right to erect the same at a convenient place or places. They cannot be located in the streets of a city, and yet would be useless to the company unless connected with its main line. These things being so, we think the General Assembly intended that this company should have the right to construct along the street of a city a suitable spur-track for this purpose, and that the language of the charter is sufficient to effectuate this intention. To deny the right in question would be to practically prevent the company from having a power-house and car-shed within the limits of the city, and force it to erect these structures outside of the corporate limits, a result which, in our opinion, could not be reached under a fair and reasonable construction of the charter." In Brooklyn Heights R. Co. v. Brooklyn, 152 N. Y. 244, 46 N. E. 509, *affirming* 18 N. Y. S. 876, it appeared that a street railway company was authorized to operate its line through a certain street and to construct a storehouse with the necessary sidings, switches, etc., the location of the car barn or store house being subject to certain restrictions. The nearest practicable car barn was 1270 feet away. The court held that the company could construct the spur or connecting tracks from the main line to the power house.

But in Concord v. Concord Horse R. Co. 65 N. H. 30, 18 Atl. 87, wherein it appeared that the charter of a street railway company gave it permission to construct its road on approval of its plans by the governing body of the city and the abutting property owners, the court held that while a turnout or switch was impliedly authorized to be constructed, it could not be constructed without the sanction of the mayor and council and the abutting owners. The reported case, while recognizing the rule that a street railway company is impliedly authorized to construct such side tracks, turnouts, etc., as are incidental to the proper maintenance and operation of the road, denies to the railway company in question the right to construct a side track connecting with a private factory and not necessary to the operation of the road, in the absence of express statutory or municipal authorization. To practically the same effect as the reported case is the decision in Percy v. Lewiston, etc. R. Co. 113 Me. 106, 93 Atl. 43, wherein it was held that a street railway company could not extend a turnout or switch for the purpose of enabling a private corporation to run its freight cars over the street railway line and to connect with a railroad depot. The court said: "Lastly, the plaintiff contends that, even if the defendant has the authority to transport property in steam railroad freight cars, it has no right to use the public highway as a switching yard, and that it is not entitled to a turnout for that purpose, nor for the purpose of affording a standing place for cars. We think the contention is sound. Streets are subject only to public uses. They are made to travel in. They are not made as places for public trade or business, except business necessarily incident to travel. They are made to enable the public, on foot, in carriages, or carts, or cars, with or without their wares and merchandises, to pass and repass. For these public uses the public has compensated the owner of the land, has constructed the road, and maintained it. To permit the transportation of passengers and freight along the way is not an additional use, but an extension of the use for which the way was laid out. But to permit the way to be used for the mere business convenience of persons or corporations would be a perversion of its proper use. It might be convenient for the defendant to use the street as a switching or shifting place for its motors and cars. It might be that its business would be facilitated thereby. But a public way was not constructed, and is not maintained, for that purpose."

Some courts have adhered to the view that specific authorization is necessary to permit a street railway company to construct side tracks. Thus in Irvine v. Atlantic Ave. R. Co. 10 App. Div. 560, 42 N. Y. S. 1103, it was held that a street railway company had no authority to construct a siding or side track unless expressly authorized by the city authorities. In that case it appeared that a street railway company, incorporated under the general railroad act, while engaged in repairing its tracks constructed a side track or turnout. This the court declared to be unauthorized, saying: "We assume, however, that under the General Railroad Act the company would have power to construct necessary sidings or turnouts, provided it obtained authority therefor from the city authorities. But such authority was a necessary prerequisite, for by sections 23 and 28 of the General Railroad Act neither could a railroad be constructed within a city, nor its location therein be changed, except by the consent of the corporation or common council; that, at least, this company could not exercise such a privilege without that consent is apparent, for section 2 of the act of 1870, granting the original franchise, provides that 'the road shall be subject to the same laws and ordinances of the city of Brooklyn as apply to horse railroads generally in said city.' Section 2, article 9 of the ordinances of the city of Brooklyn directs: 'No permit shall be granted to any railroad company for the purpose of laying any railroad tracks, sidings, switches or turnouts in the streets or avenues of said city, except upon the consent of this common council.' It is not claimed by the defendant that any such consent has been obtained from the common council." In Specht v. Central Pass. R. Co. 68 Atl. 785, *affirmed* 76 N. J. L. 631, 72 Atl. 356, it appeared that the defendant street railway company, was enfranchised as a single track railway under a statute providing for the construction of street railways if the consent of the abutting property owners was procured. It was held that a resolution of the city council authorizing the construction of turnouts from the track, was sufficient to authorize the railway company to build same, and that it was unnecessary to obtain the further consent of the abutting property owners. The court said: "The putting in of turnouts on a single-track road does not operate to change it to a double-track road to any extent, for turnouts are a necessary part of a single-track system. Without them the company would be limited in its operation to the running of one car back and forth upon its road, for there would be no place where cars running in opposite directions could pass one another. The power of the governing body of a municipality to authorize incidental changes in the character of a street railway, without public notice and hearing, and without the consent of abutting property owners, has been affirmed by this court in the case of Moore v. Haddonfield, 33 Vroom 386." But in that case, because of a defect in the regularity of the resolution, in that it was not submitted to the mayor, for his approval, the entire resolution was declared a nullity and the construction of the turnouts was held to be unauthorized. In Denison v. Denison, etc. R. Co. 103 Tex. 344, 127 S. W. 804, *reversing* 119 S. W. 115, it appeared that a street railway line, authorized by the terms of its franchise to construct double tracks but not a switch without the consent of the city, built a double track for a short distance which connected two ends of a single track and was virtually a switch or passing track. This the court held was not permissible, saying: "In Houston, etc. R. Co. v. Campbell, 91 Tex. 551, 45 S. W. 2, 43 L.R.A. 225, the meaning of the word 'switch' was presented for decision. The object of the suit was to recover penalties for a refusal or failure of the railroad company to furnish cars at 'Campbell's switch,' to be loaded with wood for transportation. In passing upon the question Chief Justice Gaines for the court defined the word 'switch' as follows: 'A switch is a mere sidetrack, so constructed as to permit the passage of cars from and to the main track; and it is a matter of common knowledge that railroads have many switches where freight is neither received nor discharged.' This definition of a switch conforms to the testimony of the experts introduced by the city in this case and also conforms to the common knowledge of men with reference to the ordinary use of that word. . . . We are of opinion that independent of all parol evidence the very terms of the contract itself are of such definite character as to make it susceptible of but one construction, which is, that the double tracks permitted by the contract were to consist of two independent tracks, just what the language means, so as to accommodate the service of the railroad upon that street. The provisions of the contract absolutely forbid the idea that such arrangements of the rails as is represented in the design presented here should be considered 'double tracks.'" In Davis v. International R. Co. 89 Misc. 489, 152 N. Y. S. 88, it was held that a street railway company could not operate a "Y" in connection with the operation of its road in such a manner as to become a private nuisance to abutting property owners.

Under Legislative Permission.

Where there is express legislative sanction for the construction of side tracks by a street

railway company, the courts have generally pursued a policy of liberal construction in enforcing the rights of the company. Thus in Eastern Wisconsin R. etc. Co. v. Hackett, 135 Wis. 464, 115 N. W. 376, *rehearing denied* 135 Wis. 501, 115 N. W. 1139, it appeared that a street railway company had been authorized by a city ordinance to construct switches or turnouts on a bridge over which the street cars were operated. Subsequently this bridge was torn down and a new bridge was erected and the city passed an ordinance prohibiting the erection of switches or turnouts on the new bridge or its approaches. The court held that this was an unreasonable regulation in view of the circumstances of the case, and that the traction company had the right to maintain its turnouts on the new bridge, saying: "It is no answer to this to say that the city had power, by the enactment of reasonable regulations, to compel the removal of this turnout or passing track from the bridge whenever the public interest demanded such action. Conceding the power, still it must be exercised reasonably and impartially, and an unjust or oppressive or partial exercise of such power cannot be justified merely upon the plea that the city determined that the time had arrived when the public interests demanded such action. Such determination is not conclusive because it goes to the reasonableness of the regulation in question. Such a regulation might be reasonable at one time or under one set of circumstances, and unreasonable at a time or under circumstances when it made havoc of private interests. It is a somewhat prevalent error that property devoted to public use and subject to public regulation is thereby quite out of law, or, as Blackstone says, *caput lupinum*. The use of such property is subject to regulation and subject to interference by the public authorities with the dominion of the owner to a far greater degree than private property because of its quasi-public character and because of the tendency to abuse or extortion in its use and management. But subject to this limitation the owner of such property has the same rights in his property as any other owner. He may insist upon his own price therefor, except as against the power of eminent domain. He may insist upon all the advantages of location and all the advantages of existing contracts so long as he does not run counter to reasonable and lawful regulations concerning the use of such property. So the Winnebago Traction Company had, as against the Eastern Wisconsin Railway & Light Company, the right to exact such compensation as it could obtain from the latter for using the east track in question in crossing Main-street bridge. And the latter company has the right to refuse it if it considers the same excessive, and by the law now existing to resort to condemnation proceedings. But the city had no right to intervene in such an exigency and in effect annul and take away such rights of the Traction Company, even if the public interest did require that the passing track or turnout be removed from the bridge, because such exercise of its police power would be unreasonable under the circumstances above shown." In Taylor v. Erie City Pass. R. Co. 37 Pa. Super. Ct. 292, wherein it appeared that a street railway company was authorized by a charter granted by the state to erect a single track street railway and the necessary turnouts, a subsequent extension of a switch from 253 feet in length to 360 feet in length was said to be reasonable exercise of the authority granted the railway company. To substantially the same effect see Detroit Citizens' St. R. Co. v. Board of Public Works, 126 Mich. 554, 85 N. W. 1072, wherein it was held that a street railway company authorized to construct all necessary and convenient tracks for turnouts, was not limited to the construction of such turnouts as were necessary at the time of the passage of the ordinance, but that it could lay out such turnouts or side tracks as the growth of the road called for. In State v. Hartford St. R. Co. 76 Conn. 174, 56 Atl. 506, it was held that a street railroad company which was authorized to construct a double track road and switches according to a certain plan, could locate a switch at a spot different from the one specified in the plan. In Cape May, etc. R. Co. v. Cape May, 58 N. J. L. 565, 34 Atl. 397, it was stated that where an ordinance permitted the laying of turnouts and sidings in connection with the construction of a street railway line, the city could not pass an ordinance condemning a small variation in the construction of the turnouts, without giving the company notice and an opportunity for hearing.

But in Harner v. Columbus St. R. Co. 11 Ohio Dec. (Reprint) 807, 29 Cinc. L. Bul. 387, it was held that a street railway company which originally constructed certain turnouts and switches under a franchise for the construction of its road, could not extend the switches without an additional franchise. The court said: "The question presented is whether or not a street railway company, under the authority granted to construct a street railway, and having exercised that right by laying its track, and constructing such switches or turnouts as were then deemed sufficient for its operation, can afterward extend and enlarge these switches without further municipal authority, and without obtaining the consent of abutting lot owners who may be affected by the alteration. We are clearly of the opinion that it cannot, and that neither the consent of the city au-

thorities to change its motive power from horses to electricity, nor the assumed demand of the public for increased facilities for travel, furnishes any ground for the exercise of such right. . . . It was contended by counsel for defendant that the right to make these extensions was incident to the grant conferred to construct its track in the first instance, and the implied authority to construct such switches or side-tracks as were necessary or convenient for the proper exercise of its franchise, and especially so, under its right to operate its cars by electricity, as subsequently conferred by the city council, inasmuch as the company had the right to have constructed such switches as it now purposes to construct, in the first instance if they had been deemed necessary and convenient. Whether this is so or not, we hold that it was within the contemplation of both the city and the company under the franchise then conferred, that the company should construct its railway and switches in the manner in which they were then constructed, and having done so, it cannot make a substantial change in their location and construction, by extending its switches several hundred feet without first acquiring a new grant, and obtaining the consent of a majority of the property owners who may be affected by the proposed extension, any more than a railroad company can relocate its road, after it has once been located and constructed, and for manifest reasons—principal among which is the fact that many persons may have purchased lots and built houses, for business or residence, and made improvements with reference to this road as already located and constructed." And in Rapid R. Co. v. Mt. Clemens, 118 Mich. 133, 76 N. W. 318, wherein it appeared that a street railway company was authorized by a city to construct a "Y" on its line on condition that it should be removed later if so required, it was held that the company must observe this condition and remove the switch when ordered by the city to do so.

TUCKER

v.

BLEASE ET AL.

South Carolina Supreme Court—April 21, 1914.

97 S. Car. 303; 81 S. E. 668.

Civil Rights — Who Is "Colored" Person.

In view of Const. art. 3, § 33, declaring void the marriage of a white person with a negro or mulatto having one-eighth or more negro blood, the child of a union of a white person and one having less than one-eighth negro blood is entitled to exercise all the legal rights of a white man, except those arising from a proper classification, when equal accommodations are afforded.

[See Ann. Cas. 1912D 457.]

Schools — Separate Schools for White and Colored Children.

While the child of a white person and one having less than one-eighth negro blood is entitled to exercise the rights of a white man, in view of Const. art. 3, § 33, authorizing the marriage of such persons, school trustees, under Civ. Code, 1912, § 1761, subd. 3, providing that the trustees shall have authority and it shall be their duty to suspend or dismiss pupils when the best interest of the schools make it necessary, may, upon providing a school for children of this class, distinct from both the white and negro schools, suspend such child from the white schools when for the best interest of the other white pupils, who would be withdrawn if it was allowed to remain, notwithstanding section 1780, declaring that it shall be unlawful for pupils of one race to attend the schools provided for another, and Const. art. 11, § 7, providing for separate schools for whites and negroes.

[See note at end of this case.]

Original petition for certiorari. G. W. Tucker, petitioner, and Cole L. Blease et al., constituting Board of Education, respondents. PETITION DISMISSED.

[304] The petition was as follows:

"The petition of the undersigned, G. W. Tucker, respectfully shows to the Court:

I. That the Honorable Cole L. Blease, by virtue of his office, J. E. Swearingen, D. M. O'Driscoll, C. J. Ramage, D. W. Daniel, A. G. Rembert, Lueco Gunter, D. T. Kinard and A. J. Thackston, are, and constitute the State board of education in and for the State of South Carolina, and at the times hereinafter mentioned, were performing their duties and acting in their capacity as members of said board.

II. That heretofore, to wit, on or about the 24th day of January, 1913, the wards of your petitioner were, and for a number of years prior thereto had been, in attendance upon the white schools in and for the county of Dillon, and were in such capacity pupils on the date mentioned, in the Dalcho public school, in said county, when they were, without cause, summarily dismissed from the said school and prohibited from further attending the same.

III. That thereafter, to wit, on the 20th day of January, 1913, your petitioner filed his petition with the county board of education in and for the county of Dillon, asking that his said wards be reinstated in said school, and be allowed to attend thereon, a copy of which petition is as follows:

"The petition of the undersigned, George W. Tucker, respectfully shows to the board:

I. That Dalcho public school is a school duly formed and organized under and by virtue of the public school law of the State of South Carolina, and John W. Coleman, Lawrence E. Dew and J. F. Williams, are the duly appointed and acting trustees thereof. That your petitioner has been duly appointed guardian, by the probate Court for Dillon county, of the person and estate of the above named children, Herbert Kirby, Eugene Kirby and Dudley Kirby, being fourteen, twelve and ten years of age, respectively. And at the present time and since such appointment he has had the children in his custody and charge.

[305] II. That upon the said children becoming old enough to enter the public schools of the State they immediately began attendance at the white public schools. The older one, Herbert Kirby, attending the white public school at Dothan, in the county of Dillon, for a period of about two sessions; that about four years ago the parents of the said children moved to the town of Dillon and the said children attended the public school for white children in the town of Dillon for two sessions; that upon the death of the parents of the said children your petitioner, as guardian, took them to live with him and placed them in the public school for white children at Dalcho, which said school they have been attending for two sessions and a part of the third.

III. That the wards of your petitioner have been attending the said public school at Dalcho during the present session; that they have always properly conducted themselves, and were in the proper pursuit of their duties as pupils of the said school up to and inclusive of Friday, January the 24th, when the said children were by the trustees above named summarily and without cause and without the children or guardian being given a hearing, dismissed from the school and notified that they would not be received back into the school.

IV. That the said children are entitled to attend the said school; that they have all the time been properly dressed, have properly conducted themselves, and there was no excuse for their being dismissed; that they are of the age that it is of the utmost importance that they should attend school to prepare them for their duties in life; that there is no other convenient schol to which your petitioner can send the said children and by their being disbarred from the said school great and irreparable damage and injury will be done to them.

Wherefore, your petitioner prays, that this board do issue its order requiring the said John D. Coleman, Lawrence E. Dew and J. F. Williams, constituting a board of trustees for [306] Dalcho public school, to show cause before your honorable board why the said children should not be forthwith reinstated in the said school. G. W. Tucker. Gibson & Muller, Petitioner's Attorneys."

Which petition was duly verified, and thereupon the county board issued its order authorizing and directing the board of trustees to show cause why the relief prayed for should not be granted.

IV. That the said cause came on for a hearing and the testimony was taken, upon the conclusion of which the said board filed their decision thereon, sustaining the acts of the board of trustees in dismissing the wards of your petitioner, but requiring the said trustees to furnish school facilities for children of the class to which it was claimed the wards of your petitioner belonged.

V. That within the time provided by the rules of the State board of education your petitioner duly appealed from the finding of said board, and asked that the same be reversed upon the following grounds, to wit:

(I) "Because the county board was in error in holding that according to the testimony produced at the hearing, the board of trustees of Dalcho public school district had the power and authority under the law to dismiss from the said Dalcho public school the wards of petitioner, Herbert Kirby, Eugene Kirby and Dudley Kirby.

(II) Because the county board of education was in error in holding that section 1761 of vol. I, of the Code of Laws of South Carolina of 1912, gave the said trustees power and authority in their discretion to dismiss or suspend from the public school without legal cause any child or children. The error being that the law distinctly provides for a school for the races, white and black, shall be separate, and there being no testimony in the case at bar sufficient to establish the fact that the children in question were the children of the colored race, and there being no testimony showing, or tending to show, that the children in question acted improperly or disobeyed [307] the rules and regulations of the school, they had the right to attend the white public school, and the action of the board in dismissing them was arbitrary and not in accordance with law.

(III) Because the county board of education was in error in holding and finding that the return of the trustees in this proceeding shows that the action taken by them was for the best interest of the school district and that the allegations of the return were sustained by the testimony. The error being that the testimony shows conclusively that there was no reason why the said children themselves should have been dismissed, but, on the contrary, shows that they were children

of good behavior and intelligence, and there was no valid reason why they should have been so dismissed.

(IV) Because the law of the State of South Carolina with regard to the free public school provides that separate schools shall be maintained for the white and colored races, and the testimony shows conclusively that the children did not belong to the colored race, but were white and associated with white people. Their dismissal from the school, therefore, amounts and amounted to a denial to them of the benefit of the public school guaranteed to all by law, and the board was in error in not so holding.

(V) Because the testimony shows that the children in question own considerable property in the county and pay taxes thereon, including the school taxes levied in the district, and hence have the right to enjoy the benefit to be derived therefrom, and the county board of education was in error in sustaining the action of the trustees of the school district in depriving them of this right.

(VI) Because the board were in error in holding and providing that the trustees should provide separate educational facilities for the wards of petitioner and other children of like situation in the district, the error being that the testimony shows that there are only a very few, or no other children, of the same class, as the wards of petitioner, in the [308] district and such facilities could not be put into practical operation, and hence amounts to nothing more than depriving the children of their rights under the law.

(VII) Because the Constitution provides that any person with not over one-eighth of negro blood in him shall be in contemplation of law a white person and entitled to the privileges of such person, and the statutes provide that white children shall attend the white school, and the testimony showing that the children in question here were white and were of proper character to attend the white school, it was error on the part of the board to sustain the trustees of the school district in depriving them of this right.

(VIII) Because the uncontradicted testimony shows that the parents of the wards of petitioner have always associated with white people, that the father owned in his lifetime considerable property in the county and exercised all the privileges of white citizenship; that both parents were members of the first white Baptist church of Dillon; that some of the children were members of that church and others of Catfish Baptist church, also a church of white people; that the children have been attending the school in question for several sessions; that some of them attended the white public school in the town of Dillon, and other white schools in the county; all of which establishes conclusively that the children were recognized as and associated with white people, and the board was in error in not so finding and in refusing to allow them to re-enter the school.

(IX) Because the testimony shows that on several occasions the trustees of the school district have attempted to provide what they designate as separate facilities for education of children of a class alleged to be of the same class as the wards of petitioner, but in such attempts have resulted in failure, and if petitioner's wards have no other opportunity of obtaining the rights of a school to which they are entitled they will be entirely deprived of their rights and required to grow up in ignorance.

[309] (X) Because there is no sufficient testimony to sustain the action of the board of trustees, such testimony as was offered being largely from the trustees themselves and tenants on their farms and from few, if any, of the landowners in said school district, all of which shows mere arbitrary action on the part of the trustees not supported by the public sentiment of the community, and the county board was in error in not so holding."

VI. That upon the hearing of said cause by the said State board of education, the said board, without making any formal written decision in the matter, notified your petitioner, through his attorneys, that the said finding of the county board was affirmed and the appeal was, therefore, dismissed.

VII. Your petitioner further respectfully submits that the State board of education erred as a matter of law in holding and deciding:

(1) That the county board of education was not in error in holding that according to the testimony produced at the hearing the board of trustees of Dalcho public school district had power and authority under the law to dismiss from the said Dalcho public school the said wards of your petitioner.

(2) In holding that the said county board of education was not in error in finding that section 1761 of vol. I of the Code of Laws of South Carolina of 1912, gave the said trustees power and authority, in their discretion, to dismiss or suspend from the public school without legal cause any child or children when the error was clear, in that the law distinctly provides for a school for the races of white and black, and that they shall be separate and distinct, and there being no testimony in the case sufficient to establish the fact that the children in question were children of the colored race, and there being no testimony tending to show that the children in question acted improperly or disobeyed the rules and [310] regulations of the school, they had the right to attend the white public school.

(3) That the State board erred in not finding the county board of education in error in holding and finding that the return of the

trustees in the proceeding shows that the action taken by them was for the best interest of the school district, and that the allegations of the return were sustained by the testimony; the error being that the testimony shows conclusively that there was no reason why the said children themselves should have been dismissed; but, on the contrary, shows that they were of good behavior and intelligence, and there was no valid reason why they should have been dismissed.

(4) Because the State board of education erred as a matter of law in holding that the trustees of school districts in any district could provide as many white or colored schools as they saw fit and could require any pupil in said district to go to any specific school without regard to the rights, convenience or qualifications of said child.

(5) Because the Constitution provides that any person with not over one-eighth of negro blood in him shall be in the contemplation of law a white person and entitled to the privileges of such persons; and the statutes provide that white children shall be entitled to attend white schools, and the testimony showing that the children in question were white and of proper character to attend the white schools, and it was, therefore, an error, as a matter of law on the part of the State board of education, to sustain the trustees of said school district in depriving the said children of this right.

(6) Because the uncontradicted testimony shows that the parents of the wards of the petitioner have always associated with white people; that the father owned, in his lifetime, considerable property in the county and exercised all the rights and privileges of white citizenship; that both parents were members of the first white Baptist church of Dillon; [311] that some of the children were members of that church and others of Catfish Baptist church, also a church for white people; that the children have been attending the school in question for several sessions, and some of them attended the white public school in the town of Dillon and other white schools of the county; all of which established conclusively that the children were recognized as and associated with white people, and it was an error of law on the part of the State board of education to hold, when both under the Constitution and by association, that the said children were white, that they were not entitled to attend the white schools in said district.

(7) Because the State board erred in sustaining the finding of the county board that separate school facilities should be provided for the children in question, when the testimony shows conclusively that no such facilities could be provided, and that the school in question which the children had been attending was most convenient and most beneficial for them, and in so sustaining the said finding deprived them of the rights to which they are entitled under the law.

VII. The petitioner further shows, that because of the errors of law above set forth, his wards have been deprived of their legal rights, and he has no other remedy save and except that this Court grant to him a writ of *certiorari* to the said State board of education, directing the said board to send up the record in said cause to the Supreme Court of the State of South Carolina to review the same as provided by law.

Wherefore, your petitioner respectively prays that a writ of *certiorari* be issued out of this Court to the said State board of education to the end that the Supreme Court of the State of South Carolina may be informed of all of the proceedings had in said matter, and may investigate the legal questions arising therein and determine the same in accordance with law. Geo. W. Tucker, Petitioner. Gibson & Muller, Attorneys of Petitioner."

[312] The synopsis of the testimony prepared by petitioner's attorney is as follows:

"John D. Coleman, being duly sworn, says: 'I am chairman of the board of trustees, and have held the position for about 14 years; that the facts set up in the petition are true; that the matter was brought to the attention by other children in the class attempting to come in and the petition that was filed with the trustees. The names to the petition are citizens of the community and patrons, and I know a majority of them personally. Upon the petition being filed, we called a meeting of the board of directors. Every phase was gone over, and we decided it was for the best interest of the school to dismiss them. The children nor their guardian were notified until the day they were dismissed. We had a talk afterwards with Mr. Tucker, and gave the reason for dismission, "that the children were not white." Mr. Tucker stated that they had never been considered anything but white. It is generally known that they are not pure Caucasian blood. I knew their father for 22 or 23 years, but have only seen the children going to and from school. If these children were allowed to attend school others of the class would seek to come in, and our position was that we could not exclude others without these. Since I have been a member of the board of trustees, the trustees have been paying the tuition of children of this class anywhere they could get in school. We also established a separate school, had three teachers, one taught 2 or 3 years, and the other two a year each. The last one stayed only a week. It was not successful, and we decided to adopt the old plan. We are willing to establish a separate school. There are 10 or 12 in the class.'

"On cross-examination, he testified that they were neither white nor black, but were Croatan or mulatto. 'In dismissing them we did not investigate what mixture of blood was in them. We didn't have to do that. I have known that they are mixed for 20 years, from what I have heard people [313] say. I knew the mother of John Kirby and his brothers and sisters; most of them were only half brothers and sisters. John Kirby was the oldest of these children. Eliza Foxworth was their mother. John Godbolt was the father of John Kirby, but I could not give the lineage further back. The alleged taint in the blood came in through the Godbolts, there being two separate and distinct families of this name. From John's appearance we judge that the mixture was not very far back. These children have the appearance of white children. We had general information on which we acted in reaching this conclusion. I am a member of Catfish Baptist church, of which some of the Kirby children are members. George Tucker is not a member of this church, but goes there some time. Mr. Tucker owns some property in the school district. The children own in the county a tract of land containing 300 acres, and perhaps own some property in the town of Dillon. This is the third session they have been in school, and I have never heard of them giving any trouble. They are always properly clad as far as I know, and are average pupils. Ed Kirby went to Dalcho school about 10 years ago. It has been at least 3 years since we have attempted to have a separate school. No provision was made for these children except that we offered them the same chance we made others.'

"On redirect examination, he testified that John Kirby had sisters and half brothers who associated with him who were not white. 'Mrs. Kirby had one half brother and sister who were colored. John Kirby associated with colored people. We told Mr. Tucker if he could get enough children of this class we would build another schoolhouse. As there seemed to be such a few, it would not justify us to do so. He said he would help us, but would not patronize it. Some years ago people of this class has a space set apart for them in Catfish Baptist church, as did also the negroes. We told Mr. Tucker on more than one occasion that we had raised no objection to his children. I have had John Kirby [314] work for me, and have associated with Mr. Tucker in a business way. I have known Mr. Tucker to have one of the half brothers to live with him and work for him. There are 80 some odd children in the Dalcho district and 10 or 12 of this class. When these children first entered, because of Mr. Tucker, we thought it a business thing to do to let them go to school, unless their going would in some way become detrimental. We finally decided it was not for the best interest, because other children of the class would come in. Four others attempted to enter, some of whom were a good deal darker. We thought it was not best that the Kirby children should attend school, as the patrons would not want their children raised up with them.'

"J. F. Williams, being sworn, testifies: 'I have lived in this community for 18 years, and have been a trustee since last spring. I know the Kirby children and knew their father. I have always heard that he was not clear-blooded. Mr. Coleman's statement of the situation in the matter is correct. I was not on the board when these children were originally admitted. I had a talk with Mr. Tucker, and told him why we had dismissed the children, on account of their ancestry, associations, and reputation in the community. I am willing to provide another school for children of this class. No such provision has been made. The petition did not mention the Kirby children. I have heard that John Kirby owned a good deal of property in the county. I know Ed Kirby, the oldest child, and all of the children are practically of the same appearance. We did not act from appearance; so far as I know, these children have always properly behaved. They have been going to school for several sessions, and are ordinary pupils. George Tucker is a white man. The Kirby children attend Catfish church. The action taken was decided by the reputation and petition. Some of the brothers and sisters of John Kirby could not be considered white. They sometimes associated together. I think it would be detrimental to the school to reinstate them. [315] Sam Edwards carried the petition around. He had a brother who killed John Kirby. I do not know of these children associating with negroes.'

"L. E. Dew, being sworn, says: 'I have been a trustee of the school for two or three years. We considered the matter carefully when we dismissed the children. We were led into the action by frequent objections raised to these children and by others attempting to come in. I know the signers of the petition, and, to the best of my knowledge they are patrons of the school. Objections were made besides the petition. I had a talk with Mr. Tucker, and explained to him why the children were dismissed, which was because they had the reputation of not being pure-blooded. John Kirby had the same reputation. He had some brothers and sisters who had more colored blood in them than white blood. I do not know whether they associated together or not. I am willing to make provisions for these children. I think it would be detrimental to the school to

allow them to be reinstated. A separate school was established, but the teacher came down and refused to teach. There were two or three of these attempted schools, but the attempts have never been successful, owing to the fact that the patrons will not stick together. We did not give their guardian a hearing. So far as I know they have always conducted themselves properly. I did hear a report that one of the children carried a pistol to school, but no investigation was made, and I have never heard of any other misconduct. We didn't have any special kick against these children. John Allen, who is not a patron of the school, made some complaint, as did Sam Edwards, who carried the petition around. I think it was mentioned by others, who claimed that we were not properly exercising our office in allowing these children to remain in school on account of their color, reputation, and family. Mr. Tucker is a white man, and owns property in the district. I have never heard of the children exercising any bad influence in school. Mrs. Tucker is an aunt of the [316] children. As a result of the reinstating of the children there would be a wholesale resigning of the trustees and a tearing up of the school. I think the only teacher we could get to teach a separate school would be one of their class.'

"Chancler Hatchell, being sworn, says: 'I have lived in the school district about 14 months, and the reputation of the Kirby children is that they are not white. I objected to these children attending school because they were not clear-blooded. I do not know the ancestry of John Kirby, but by his looks he was not pure white. His boy Ed is as white as any one in the room. I heard from my children of their rowing once. Never heard of them breaking any rules in the school and of them being punished for conduct. I don't know who was to blame for the row. If the children were reinstated, I would take my children out of school and put them to work. I do not own any land, but live on a rented place.'

"Will Baxley, being sworn, says: 'I am one of the patrons of Dalcho school and object to the Kirby children going back, because they are not white. I do not own any property in the district, but run a share crop for Mr. Coleman; am his brother-in-law. Pay $6.50 taxes in Dillon and $5 in Marion. If these children were put back, I would keep mine at home and let them plow. My objection to the children is that people say they are not white. One of them cut my boy's coat about two years ago. I don't know how or who was to blame. Mine might have been. I have never heard of them being punished at school, and, as far as I know, they are good pupils.'

"S. T. Godbolt, being sworn, says: 'I knew Mrs. Kirby. She lived below Marion and had three brothers, who admitted that they were colored. They associated with her before she was married. She was the daughter of Liza Foxworth. She was a white woman. I am no kin to John Kirby. I did not know anything about Mrs. Kirby after she [317] was married; she moved away. I never heard of her or her children associating with negroes.'

"Ben Foxworth, being sworn, says: 'I am a half brother to Mrs. Kirby. We resided in Marion county together. She was a white woman.'

"Henry Kirby, being sworn, says: 'I am a half brother of John Kirby. We had the same mother, and were raised together. Sue Kirby was our mother. She was a white woman. John Godbolt was John Kirby's father.'

"J. E. Henry, being sworn, says: 'I am mayor of Latta, and have known John Kirby a good many years. I don't think he was considered a white man. I do not know who his father was. Sue Kirby was his mother. He associated with white people in a business way. He did not attend the white church I attended.'

"Sam Edwards, being sworn, says: 'I live in Dalcho school district; am a patron and property owner. Own some land out of the district. I took the petition around, but did not have anything to do with the killing of John Kirby, and took no part in the trial. I knew him for several years. His reputation was that he was not clear-blooded. I do not know Kirby's children, but signed the petition, for I do not think they should attend this school. It would not be for the best interest of the school to reinstate them. I dictated the petition and circulated it. I send my children to this school. I took the petition to all who would sign it. I do not know whether all who signed it had children in the school. I turned the petition over to Lawrence Dew, a member of the board of trustees. The petition was not directed at the Kirby children, who had been going to school about two years. This is the first year I have been interested in the school. I do not know how near John Kirby was a white man or whether he attended white churches.'

"John C. Hayes, being duly sworn, says: 'I have lived in this school district all of my life, and knew John Kirby before he was grown. He was not considered clear-blooded. [318] Have been patronizing the school eight or ten years, or maybe longer. Have been interested in its welfare. Am a taxpayer, and own property in the district. I signed the petition, and do not think it would be to the advantage of the school to reinstate the Kirby children. They have been attending

the school for several years. I do not know of John Kirby attending a white school. I don't know John Kirby's wife, nor whether he was a member of the First Baptist church at Dillon.'

"Stephen Bethea, being sworn, says: 'I live in the district, but have no children in school. However, I am interested in its welfare. I signed the petition, and knew John Kirby for several years. He was not considered a clear-blooded white man. I do not think it would be for the best interest of the school to reinstate these children. I do not know the extent of the mixture. He associated with white people in a business way, and I have seen him at white churches. I didn't know his children were going to school until the petition was circulated. I don't remember whether Ed Kirby was attending school at Catfish when I was or not. I have seen Henry Kirby. I am a taxpayer, own real and personal property in the district.'

"G. F. Bethea, being sworn, says: 'I live in Dalcho district. Knew John Kirby, and he was considered a Croatan. I do not know what the mixture of blood was, nor whether he associated with white people, except in a business way, nor whether his children attended the white schools. Did not know his father or mother.'

"John C. Allen, being sworn, says: 'I live in this school district. Am a taxpayer, and own property in it. Have children going to school, and am interested in its welfare. I knew John Kirby, and he was not considered white. That it would be of the best interest of the school that the children be excluded. I do not remember whether John Kirby attended white schools and white churches or not, nor whether his children did so. I know his children have [319] attended the white school recently. Do not know whether they attended school at Dothan or Dillon, or whether they were members of the white churches at Catfish and Dillon. I don't know how much he lacked of being clear-blooded.'

"John C. Sellers, being sworn, says: 'I am 65 years old, son of W. W. Sellers, who wrote a history of Marion county. I helped him do the work. I knew John Kirby. His father was Big John Godbolt. He was one-eighth mixed blood. He was a soldier in the Confederate War and was badly wounded, and is now drawing a pension. His father was Long Billy Hayes, a white man. He died soon after the war. John Godbolt's mother was Martha Godbolt. Her mother was Polly Godbolt and sister of old John Godbolt, who was a white man. The family tree offered in evidence was made under my directions. I do not know who the mother of Sally Owens was. One-Arm Godbolt was the father of Martha Godbolt. He was a white man. Sally Owens was the mother of Polly Owens; she was a white woman. The mother of the Kirby children was a Foxworth; she was a white woman. The per cent. of the colored blood in the Kirby children is one-thirty-second. I knew John Kirby, and he didn't associate with negroes. I have heard that these children attended white schools and churches. My knowledge is not based entirely on tradition. I remember old John Godbolt, who died since I was married. He was my neighbor, and lived near me. I knew the Foxworth family. I did not know that John Godbolt had children who were colored. I knew Henry Kirby when he was a boy. I knew that the family was pretty badly mixed.'

"George W. Tucker, being sworn, says: 'I am guardian of the Kirby children. Live in Dalcho school district. Have had them more than 2 years. They have been attending white schools; this makes a part of the third session. Their father patronized the white schools 10 or 12 years ago, sending Ed and Lucy. I am their uncle; I married John Kirby's sister. I own a little property in Dalcho school district, and [320] the children own a plantation worth about $15,000, and a house and lot in the town of Dillon. I have known John Kirby about 25 years. I first knew John Kirby when he was a boy. He went to school very little, but attended the white school at Kirby's Crossroads when he did go. I knew his wife, and she was said to be a white woman. What little association John Kirby had was with white people. He was a hard worker. Sent his children to Dalcho public school for 3 years about 12 years ago, and until he moved away, and then sent to Dothan white school for 5 years, and moved to the town of Dillon, where his children attended the white graded school. Six of them attended for 2 years. He and his wife were both members of the First Baptist church, and were buried by their pastor, Rev. H. A. Willis. Two of the children died while they were in Dillon, and Mr. Willis buried both of them. Ed Kirby belongs to Catfish church, which is a white church, and on the same grounds that the white school is. So far as I know, there was never any objections to the children until they were dismissed. Nothing was said to me about it until they were instructed not to return. I have seen Henry Kirby and Ben Foxworth, and they are both colored men. Henry worked for me awhile 7 or 8 years ago. He boarded in the kitchen, and ate at the table with me some of the time. I have not seen Ben Foxworth since he was a boy. I do not know Julius Foxworth, but know William, who, I think, is colored. I have been living in the Dalcho district 10 years. I have been married 22 years. My wife is a full sister of John Kirby. The property owned by the children is in the Dothan dis-

trict. I talked with the trustees about dismissing the children, and told them they had nothing like an eighth (⅛) colored blood in them. I did not agree to leave the matter to the patrons. I think at the meeting the vote taken stood 13 to 1 for dismissal. All of the names signed to the petition were not patrons; 11 are. I notified some of the patrons of a meeting [321] to consider the question of reinstating the children that had been dismissed.'

"Ed Kirby, being sworn, says: 'I am 20 years old, brother of the children in question. Am not now attending school, but with my brothers attended Dalcho and Dillon schools. I am a member of the Catfish Baptist church. My father and mother were members of the First Baptist church of Dillon. My sister, Lucy, who is dead, was a member of Catfish church. Mr. Willis performed the funeral rites over my father and mother.'

"H. W. Langford, being sworn, says: 'I am president of the cotton mills of Dillon, and am clerk of the First Baptist church. The membership record shows that John and Annie Kirby were members of the First Baptist church. The names of no other Kirbys appear thereon.'

"Rev. H. A. Willis, being sworn, says: 'I am pastor of the First Baptist church in Dillon, and John Kirby and wife were received by letter a short time after I came here, about four years ago. I performed the rites over them when they were buried. I am a native of Virginia, and came here from Weldon, N. C. I never hesitate to conduct funeral services. I know the Catfish church only through association acquaintance.'"

Gibson & Muller for petitioner.
L. D. Lide and *Joe P. Lane* for respondents.

[322] GARY, J.—This is an application for a writ of *certiorari* for the purpose of determining by what authority the trustees summarily dismissed Herbert Kirby, Eugene Kirby, and Dudley Kirby from attending as pupils the Dalcho school, of Dillon county, for white children.

The facts out of which the controversy arose, and the action taken by the county board of education, will appear from the following decision rendered by them: "On or about the 24th day of January, 1913, John D. Coleman, Lawrence [323] E. Dew, and J. F. Williams, constituting the board of trustees of Dalcho public school, dismissed Herbert Kirby, Eugene Kirby, and Dudley Kirby from the white public school of that district. This proceeding was commenced by George W. Tucker, as guardian of the above named children, by petition to this board for a rule to show cause why the wards of petitioner should not be reinstated in the white public school of the district. The rule, as prayed for, was issued by the chairman of the county board, and the trustees of said school appeared on the 14th day of February, 1913, and filed their return to the rule, on which day the hearing of the matter was commenced, and same was completed on the 24th day of February, 1913. We deem it unnecessary to discuss in detail the questions raised by the testimony. Subdivision 3 of section 1761, vol. I, Code of Laws of 1912, give school trustees the power 'to suspend and dismiss pupils, when the best interest of the school makes it necessary.' We understand, of course, that this section does not confer upon school trustees any power or authority to arbitrarily suspend or dismiss from school any child or children within their district. To the trustees of a school district is intrusted the welfare and best interests of their school, and this power to suspend or dismiss can be exercised by them in a proper case only when the welfare and best interest of such school renders such action absolutely necessary. Also the exercise of such power is always under the supervision of, and subject to review by, the county board of education, as, indeed, are all of the official acts of the trustees of a district. The return of the trustees to the rule shows, we think, that the action taken by them in this matter was for the best interest of the schools in the district. We find that all the material allegations set forth in the return are sustained by the testimony. After having given the matter careful consideration, we are of the opinion that the action of the trustees should be sustained. We think, however, proper school facilities should be provided for the wards of petitioner, and [324] all other children of the district in like situation, as soon as practicable. The return to the rule to show cause herein having been adjudged sufficient, the rule should be discharged, and it is so ordered. It is further ordered herein that the trustees of the district be required to furnish and provide proper school facilities for the wards of petitioner, along with any and all other children similarly situated within the district."

The return of the trustees shows that these children had been attending the Dalcho school two sessions prior to the session during which they were dismissed; that objection had been made at various times to their presence in the school, but, as there were no others of that class attending, the trustees had been loath to take action; that, shortly before they were dismissed, other children of the same class were attempting to enter the said school, and complaints were being made by its patrons; the trustees saw that, unless all children of that class were dismissed from the school, it would be materially injured. The return

further shows that the trustees, in dismissing these children, were not actuated by any feeling of animosity towards them, but that their action was based upon what they deemed to be for the best interest of the school. They further alleged that they were ready and willing to provide a school for all children of this class in that district; that such a school had been provided in the past, but had been discontinued, because of friction among the patrons, and that, since the discontinuance of said school, the trustees had provided for the attendance of such children in other districts where they were allowed to enter the schools. The return also contains the following language: "That respondents are informed and believe that the wards of petitioners are not of pure Caucasian blood, and that this fact is generally known to the citizens of the community, and that it would not be right or proper, or for the best interest of the schools in said district, for the children to attend the white public schools, and for the further [325] reason that the environment and antecedents of the said children, and the knowledge of the public thereof, place them in a separate class from the white people of the community."

There was an appeal to the State board of education, which decided: "That the action of the Dillon county board of education be sustained, and the appeal be dismissed."

The synopsis of the testimony, prepared by the petitioner's attorneys will be incorporated in the report of the case.

Section 385 of the Criminal Code, which embodies the provisions of an act passed in 1879, is as follows: "It shall be unlawful for any white man to intermarry with any woman of either the Indian or negro races, or any mulatto, mestizo, or half-breed, or for any white woman to intermarry with any other person than a white man, or for any mulatto, half-breed, negro, Indian, or mestizo to intermarry with a white woman; and any such marriage or attempted marriage, shall be utterly null and void, and of none effect; and any person who shall violate this section . . . shall be guilty of a misdemeanor, and, on conviction thereof, shall be punished."

Section 33, art. III, of the Constitution, provides that: "The marriage of a white person with a negro or mulatto, or person who shall have one-eighth or more negro blood, shall be unlawful and void."

Section 7, art. XI, of the Constitution, is as follows: "Separate schools shall be provided for children of the white and colored races, and no child of either race shall ever be permitted to attend a school provided for children of the other race."

Section 1780, Code of Laws 1912, provides that: "It shall be unlawful for pupils of one race to attend the schools provided by boards of trustees for persons of another race."

The first question for consideration is whether section 33, art. III, of the Constitution, which provides that "the marriage of a white person with a negro or mulatto, or person who shall have one-eight or more of negro blood, shall be [326] unlawful and void," entitles the child or parents, where one of them was a white person, and the other had *less* than one-eighth of negro blood, to be classed as white person, in the exercise of his legal right.

The most sacred relation into which a man and woman may enter by contract with each other is that of marriage; yet the framers of our Constitution made it a part of our organic law that it should be lawful for a white person to marry another with negro blood, provided it was *less* than one-eighth. Such being the case, we are unable to discover any good reason why the child of such parents should not be entitled to exercise all the legal rights of a white person, except those arising from a proper classification, when equal accommodations are afforded. As, however, the right to classify is denied, the next question which naturally suggests itself for consideration is that relating to the power of classification in such cases.

We therefore proceed to determine whether the law allows a proper classification to be made between those without negro blood and those with *less* than one-eighth, when there is a provision for equal accommodation.

The law recognizes that there is a social element, arising from racial instinct, to be taken into consideration between those with and those without negro blood. The statutes and provisions of the Constitution hereinbefore quoted show that the law not only recognizes a classification, but makes it mandatory, and provides a penalty for failure to observe the laws in this respect, in the instances therein mentioned. The decisions prior to the abolition of slavery show that the classification between white and colored persons did not depend upon the extent of the mixed blood.

The rule was thus stated by Chancellor Harper, who delivered the opinion of the Court, in State v. Cantey, 2 Hill (S. C.) 614: "We cannot say what admixture of negro blood will make a colored person, and by a jury one may be found a colored [327] person white while another of the same degree may be declared a white man. In general, it is very desirable that rules of law should be certain and precise; but it is not always practicable, nor is it practicable in this instance, nor do I know that it is desirable. The status of the individual is not to be determined solely by the distinct and visible mixture of negro blood, but by reputation, by his reception into

society, and his having commonly exercised the privileges of a white man. But his admission to these privileges, regulated by the public opinion of the community in which he lives, will very much depend on his own character and conduct; and it may be well and proper that a man of worth, honesty, industry, and respectability, should have the rank of a white man, while a vagabond of the same degree of blood should be confined to the inferior caste. It will be a stimulus to the good conduct of these persons, and security for their fidelity as citizens."

The following language was used by the Court in the case of White v. Keenan, Dist. 3 Rich. L. (S. C.) 136: "It may happen that persons in equal degree from the African stock may present such different complexions and features that they would readily be assigned to different castes. Habit and education have so strongly associated with the European race the enjoyment of all the rights and immunities of freedom that color alone is felt and recognized as a claim. On the contrary, a strong repugnance prevails against a participation in the rights of citizenship by any who bear in their persons the traces of their servile origin. This aversion is, however, mitigated by the deference which honesty, sobriety, and industry, and the qualities that unite in a respectable character, enforce on the mind. . . . Whatever rules may be adopted, the question of the reception of colored persons into the class of citizens must partake more of a political than a legal character, and, in a great degree, be decided by public opinion, expressed in the verdict of a jury."

[328] In the case of Flood v. News, etc. Co. 71 S. C. 112, 50 S. E. 637, 4 Ann. Cas. 685, this Court quoted with approval, the following charge of his Honor, the presiding Judge, in Smith v. Chamberlain, 38 S. C. 529, 17 S. E. 371, 19 L.R.A. 710: "Among the citizens of South Carolina we have two distinct races. Before the law they are equal. The colored race, in our Courts of justice, stand on the same plane as the white race. Our laws bear equally on all, without regard to race, color, or previous condition. Our social conditions, however, are very different. Friends, companions, neighbors must be of our own choice. There relations and associations the law does not undertake to make or regulate for us. If we do not wish to associate with one class of society, there is no law that I know of which compels us to do so."

We also quote as follows from Flood v. News, etc. Co. 71 S. C. 112, 50 S. E. 637, 4 Ann. Cas. 685: "Now, it must be apparent from consulting the texts of these amendments (thirteenth, fourteenth, and fifteenth to the Constitution of the United States), that there is not the slightest reference to the social conditions of the two races, and nothing can be imported into these amendments to give any such effect. All take pleasure in bowing to the authority of the United States in regard to these three amendments, but we would be very far from admitting that the social distinction subsisting between the two races has been in any way affected." The Court then quoted with approval the following language, used by the Court of Appeals of New York in the case of People v. Gallagher, 93 N. Y. 438, 45 Am. Rep. 232: "This end can neither be accomplished nor promoted by laws which conflict with the general sentiment of the community upon whom they are designed to operate. When the government, therefore, has secured to each of its citizens equal rights before the law and equal opportunities for improvement and progress, it has accomplished the end for which it was organized and performed all of the functions [329] respecting social advantages with which it is endowed." The Court also immediately thereafter quoted the following language from Plessy v. Ferguson, 163 U. S. 537, 16 S. Ct. 1138, 41 U. S. (L. ed.) 256: "Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal, one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the Constitution of the United States cannot put them on the same plane."

In the case of Plessy v. Ferguson, 163 U. S. 537, 16 S. Ct. 1138, 41 U. S. (L. ed.) 256, the Court further says: "The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theaters, and railway carriages has been frequently drawn by this Court. . . . A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races. . . . The object of the fourteenth amendment was undoubtedly to enforce the absolute equality of the two races before the law, but, in the nature of things, it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally

if not universally, recognized as within the competency of the State legislatures, in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for the white and colored children, which has been [330] held to be a valid exercise of the legislative power even by Courts of States where the political rights of the colored race have been longest and most earnestly enforced."

One of the earliest decisions in such cases is that of Roberts v. Boston, 5 Cush. (Mass.) 198, in which Chief Justice Shaw said: "The great principle, advanced by the learned and eloquent advocate for the plaintiff (Mr. Charles Sumner), is that, by the Constitution and laws of Massachusetts, all persons, without distinction of age or sex, birth or color, origin or condition, are equal before the law. . . . But, when this great principle comes to be applied to the actual and various conditions of persons in society, it will not warrant the assertion that men and women are legally clothed with the same civil and political powers, and that children and adults are legally to have the same functions and be subject to the same treatment; but only that the rights of all, as they are settled and regulated by law, are equally entitled to the paternal consideration and protection of the law for their maintenance and security."

In the case of Ex p. Plessy, 45 La. Ann. 80, 11 So. 948, 18 L.R.A. 639, the Court says: "Even were it true that the statute is prompted by a prejudice on the part of one race to be thrown in such contact with the other, one would suppose that to be a sufficient reason why the pride and self-respect of the other race should equally prompt it to avoid such contact, if it could be done without the sacrifice of equal accommodations. It is very certain that such unreasonable resistance upon thrusting the company of one race upon the other, with no adequate motive, is calculated, as suggested by Chief Justice Shaw, to foster and intensify repulsion between them, rather than to extinguish it."

While the testimony shows that the children are entitled to be classed as white, nevertheless the action of the board of trustees was neither capricious nor arbitrary, as they are willing to provide equal accommodations for the Kirby children and those in the same class with them. The testimony [331] also shows that the decided majority of the patrons would refuse to send their children to the Dalcho school if the Kirby children were allowed to continue in attendance. Tested by the maxim, "The greatest good to the largest number," it would seem to be far better that the children in question should be segregated than that the large majority of the children attending that school should be denied educational advantages.

Subdivision 3 of section 1761, Code of Laws 1912, which provides "that the board of trustees shall also have authority, and it shall be their duty to suspend or dismiss pupils, when the best interest of the schools make it necessary," shows that the action of the trustees in dismissing the said children, was justified by the law of the land, and that the petition should be dismissed.

Petition dismissed.

NOTE.

Separation of White and Colored Pupils for Purposes of Education.

Introductory, 306.
In Absence of Statute, 306.
Statute Requiring Separation, 307.

Introductory.

The earlier cases discussing the question of the separation of white and colored children for the purposes of education are reviewed in the notes to Berea College v. Com. 13 Ann. Cas. 337, and Board of Education v. Purse, 65 Am. St. Rep. 312. This note presents the recent cases on the subject.

The reported case presents the novel question of the disposition for educational purposes of a child having so small a proportion of negro blood as to be entitled to the legal rights of a white person. The statutory and constitutional provisions involved provided for the establishment of separate schools for white and colored pupils and made it unlawful for pupils of one race to attend the schools provided for the other. It appeared that great dissatisfaction among the patrons of the school for white children would result from the attendance thereat of children having any negro blood. Under those circumstances the court holds that the board of school trustees were authorized to establish a third school for children of mixed blood and exclude them from the school for whites.

In Absence of Statute.

In the absence of statutory authority a school board has no power to separate white and colored children for the purposes of education. Crawford v. School Dist. 68 Ore. 388, Ann. Cas. 1915C 477, 137 Pac. 217, 50 L.R.A. (N.S.) 147, wherein the court said: "The question whether school districts in this state can establish separate schools for Indian children and compel them to attend such schools is not necessarily involved in this appeal, for the reason that the amended writ fails to show that school district No. 7 had provided a separate school for Indian chil-

dren. However, this question was argued at the hearing, and, if the defendants should answer the writ, setting up the supposed fact that the school board had provided a separate school for Indian children and those that are partly of Indian blood, this question will then be directly involved. For this reason, and to obviate the necessity for another appeal, we will express an opinion on this subject. . . . The states may enact laws providing for the establishment of separate schools for colored children, whether black or red, but such schools must be equal in equipment and efficiency to the schools provided for white children; but in this state we have no statute expressly providing for the establishment of separate schools for colored children. Section 4052, subdivision 18, L. O. L., specifying the duties of school boards, says: 'They shall admit free of charge to the schools of their districts all persons between the ages of 6 and 21 residing therein, and all other persons may be admitted on such terms as the district may direct.' It is the imperative duty of all school boards of our public school system to admit to the schools within their districts all children residing therein, between the ages of 6 and 21, without discrimination as to color or race. When the state legislature has not passed an act expressly authorizing them to do so, school boards, created for carrying on the public schools of the state, have no lawful power to provide separate schools for the education of white and colored children. . . . There is no statute in this state expresaly granting authority to school boards to establish separate schools for black or red children, and to exclude the colored children from the schools intended for white children; nor can this power be implied from any power that has been granted to school boards. We are satisfied that school boards have no such power in this state under existing laws."

In Booker v. Grand Rapids Medical College, 156 Mich. 95, 120 N. W. 589, 24 L.R.A.(N.S.) 447, in holding that a private institution might exclude negro students, the court said: "The statute imposes no general public duty upon respondent to admit as students any and all citizens to its capacity. There is no specific duty imposed by law to admit relators. It seems clear that private institutions of learning, though incorporated, may select those whom it will receive, and may discriminate by sex, age, proficiency in learning, and otherwise. Probably no reason need be given for refusing in the first instance to admit any student. Relators have been denied no privilege or immunity resting in positive law protected or guaranteed by the Federal or the State Constitution. Such rights as they have grow out of the relations they have established with respondent, and are no other or different than those of any citizen who has established like relations with a similar institution."

Statute Requiring Separation.

Statutes requiring or permitting the establishment of separate schools with equal educational facilities for the education of the children of different races, are constitutional. Dameron v. Bayless, 14 Ariz. 180, 126 Pac. 273; Wall v. Oyster, 36 App. Cas. (D. C.) 50, 31 L.R.A.(N.S.) 180; Johnson v. Board of Education, 166 N. C. 468, 82 S. E. 832, L.R.A.1915A 828; Board of Education v. Kingfisher County, 14 Okla. 322, 78 Pac. 455. See also Prowse v. Board of Education, 134 Ky. 365, 120 S. W. 307. And see the reported case. In Prowse v. Board of Education, supra, the act of the legislature involved provided that within two years after its passage there should be established, by the county board of education of each county, one or more county high schools, provided there was not already existing in the county a high school, and that, in this event, the high school might be considered as meeting the purposes of the act, without the establishment by the board of a high school. It was insisted that the act was void because it did not require a separate high school for whites and blacks, and that, if a high school was established for whites, there would be a discrimination against the blacks. The court said: "But it will be observed that the act requires the board to establish one or more high schools. The act also provides that the money derived from the taxes shall be spent by the board according to its best judgment to promote the cause of education in the county. When the board of education shall discriminate against either race, then the race discriminated against may raise that question. The act does not contemplate that there shall be any discrimination. The act is passed under the provision of the Constitution requiring the Legislature to provide an efficient system of common schools, and to maintain separate schools for white and colored children. The duty imposed by the Constitution upon the Legislature is the same as to both white and colored children, both as to separate schools and as to the efficiency of the schools. The county board holds office under the Constitution, and in discharging their duties they should administer the funds as provided by the Constitution, according to their best judgment. There is nothing in the act authorizing any discrimination."

The fact that colored children are required to travel to school further than if they attended a school for white children does not affect the validity of a statute of this nature. Thus in Dameron v. Bayless, 14 Ariz. 180, 126 Pac. 273, the court said: "The matter

court said: "When the act in question is read in the light of the fourteenth amendment to the Constitution of the United States, its violation of same is too plain for argument. By section 1 of the act of 1908 provision is made for the establishment of an agricultural high school for the white youth only, and by section 2 of the same act this school is to be sustained by taxation on all 'taxable property'—that is, by taxes raised on the property of both white and black for the use of the white citizen only. We are not to be understood as holding that a statute could be passed which provided that the revenue raised for the support of the school could be raised by taxation only on the property of the white citizen for the white school and not be in violation of this provision of the Constitution of the United States; but we cite the method of taxation to emphasize the inequality of the law. If the fourteenth amendment of the Constitution of the United States means anything at all, it certainly means that all citizens of the United States shall stand equal before the law, and that no special privilege or benefits shall be given to one class of citizens to the exclusion of the other as a matter of statutory enactment. This does not mean that the legislature of the state cannot pass laws the object of which is to prevent a social commingling of the races; nor does it mean that an act of a legislature which in its administrative effect fails to work out an exact proportion of benefit to the two races is in conflict with this amendment to the United States Constitution; but a law is only void when its object or necessary effect is to abridge the privileges or immunities of a certain class of citizens, or deny them the equal protection of the laws. . . . Civil rights do not mean social rights, and the courts, both state and federal, recognizing this, and further realizing that no man-made law can force this condition of affairs, have steadily upheld all laws that merely had for their object this disassociation of the two races as promotive of the peace and welfare of all the citizens. . . . But, while this is true, no decision of any federal or state tribunal has yet been called to our attention, nor do we think it will be so long as the fourteenth amendment is in existence, upholding a statute taxing the property of the two races for the benefit of the one." But in Bonitz v. Ahoskie School Dist. 154 N. C. 375, 70 S. E. 735, the court said: "The Constitution of this state, art. IX, sec. 2, in providing for a 'uniform system of public schools wherein tuition shall be free of charge to all the children of the state between the ages of 6 and 21 years,' contains the requirement, 'That the children of the white race and the children of the colored race shall be taught in separate schools,' and further, 'but there shall be no discrimination in favor of or to the prejudice of either race.' In numerous and well-considered decisions this court has held that these provisions of our constitution, in regard to the two races, are mandatory, and may be disregarded neither by legislatures nor by officials charged with the duty of administering a given law. . . . If, therefore, the act in question here, in designating a certain boundary as a 'school district for the white race,' can only be construed as requiring that the funds to be raised under its provisions should be applied exclusively to the white schools within such boundary and the additional facilities afforded only enjoyed by the white children attending such schools, it would be clearly unconstitutional; but, in our opinion, such is not the necessary nor proper construction of the act. . . . The act before us (chapter 210, Laws 1909) is entitled "An act to incorporate the Ahoskie School District and allow it to vote on a special tax for schools and to issue bonds,' and in the body of the act it is designated as 'Ahoskie School District, No. 11.' Then follows a description of the district by clearly defined boundaries, designating it as 'a school district for the white race.' Elaborate and specific provisions are then made for taking a vote of the district on the question of a special tax, and a separate and distinct provision for taking the sense of the voters as to the issue of bonds. Both of these provisions have been acted on, the tax voted and the bond issue approved. . . . A perusal of the act gives clear indication that its controlling purpose and, in several places, its expressed intent is to establish a special taxing district for the purpose, by increase of taxation and issue of bonds, of affording additional education facilities within the prescribed district, . . . and this beneficent purpose should not be frustrated because, in one of the sections, it is designated as a 'school district for the white race.' In view of the authorities cited and the principles upon which they rest, the correct construction of the statute is to uphold it in its principal purpose and declare, as we do, that, disregarding this special feature of the act, contrary, as it is, to our constitution, the money raised by taxation and by the issue and sale of bonds shall constitute a fund applicable to the school work of the district, to be administered according to law and having full regard to the constitutional provisions bearing upon it." And in Whitford v. Craven County, 159 N. C. 160, 74 S. E. 1014, the court said: "The plaintiffs attack the validity of the tax levy and the bonds proposed to be issued, upon the ground that in section 17 of the act it is provided that not more than one farm-life school shall be established in any county, and by this prohibi-

tion it is argued that the local authorities are deprived of the power to provide equal facilities for the two races; but we do not think this follows. What the statute means is that there shall not be more than one school of this kind for the instruction of both races, in separate buildings, with equal facilities. Having two or more buildings for the purpose of racial separation does not constitute two legally distinct schools. It is all one school, though consisting of two divisions, one for each race. The plaintiff contended that the principle announced in Williams v. Bradford, 158 N. C. 36, applies to this case, but we think the two cases are widely different. In the Williams case it was clear that provision was made for one race only; but in this case the statute does not provide for each race exclusively, and it might just as reasonably be argued that the benefit of the school was confined to the colored race, as it can be that it is restricted to the white race. We are not at liberty to declare a legislative act void, as being unconstitutional, unless it is clearly so beyond any reasonable doubt. There is always a strong presumption in favor of the validity of legislation, which must be overcome by some convincing reason to induce a court to declare it void. The act under consideration makes no discrimination between the races, and there is no expression in it which leads us to think that the school was intended for the exclusive benefit of the one race or the other."

In Crosby v. Mayfield, 133 Ky. 215, 117 S. W. 316, wherein it was claimed that an effort to maintain a white school by the taxation of the property owned by white persons, and to maintain a colored school by the taxation of the property owned by colored persons was a discrimination between the races, in violation of the fourteenth amendment to the Constitution of the United States, the court said: "The state divides equally among all the children of the state, without regard to race or color, the funds raised by taxation for school purposes. But, when the question is submitted to a local community as to whether or not the community will vote an additional tax for the betterment of its local school, this being a voluntary matter is submitted as to the white school to the white voters, and as to the colored school to the colored voters. The question of supplementing the state funds is left wholly to the vote of the locality. The voter is simply allowed to vote a tax upon himself if he wishes to do so to support his own school. While this precise question is not referred to in any of the opinions, we have in a number of cases sustained schools organized under the act and taxes on white people voted under it."

In Columbia Trust Co. v. Lincoln Institute, 138 Ky. 804, 129 S. W. 113, 29 L.R.A. (N.S.) 53, the question was raised whether the General Assembly could prohibit the institution and maintenance of such a school as that maintained by the appellee, which was a charitable corporation organized under the laws of the Commonwealth of Kentucky, with power to establish a normal and industrial school for colored people. The court said: "If the teaching of the young to be useful, upright, Christian citizens is not inimical to the public safety, public morals, or the public health, then it must follow that an act which seeks either to prohibit it altogether or to authorize others to prohibit it must be invalid. It is difficult to find language to make plainer that which is so obvious as is the proposition before us. The purposes of the institution under discussion include the whole circle of the solid virtues with which youth may be endowed. Undoubtedly, it is a substantial good to educate the youth of the state; and such is the declared policy of the Constitution. . . . It cannot, then, be in any way injurious to the public to aid in forwarding the great educational policy which the people themselves have declared in their fundamental law—the giving of every young man and woman in the commonwealth a sound education. And, when academic education is supplemented by religious training and special instruction in the agricultural and mechanical arts and sciences, it seems to us that it is contrary to the most obvious public policy that an institution which affords such an education should be in any way blocked or impeded. It is not doubted that the legislature, under the police power, may regulate education in many respects. It may prohibit the mingling of white and colored children in the same schools, or in schools of immediate proximity. Perhaps, it may be within the police power to prohibit coeducation of the sexes, or to in any other reasonable way regulate the mere manner of educating the youth of the state; but to arbitrarily prohibit education is in direct violation of the Bill of Rights above quoted. . . . We conclude, then, on this branch of the case, that religious and scientific education, instead of being in any wise injurious or dangerous to the public safety, morals, health or welfare, on the contrary, is promotive of public virtue, intelligence, and good citizenship, and is therefore to be desired and promoted rather than prohibited or impeded; and, this being true, the act under discussion, which puts it within the power of the voters of any precinct to prohibit the establishment of such a school as that contemplated by appellee, is unconstitutional, and therefore void. Nor can the act be upheld as an amendment to the charters of such corporations as appellee."

For a discussion of the meaning of the word "Colored" as used in a separate school law, see the note to Mullins v. Belcher, Ann. Cas. 1912D 456.

HOYT

v.

GILLEN ET AL.

Michigan Supreme Court—July 24, 1914.

181 Mich. 509; 148 N. W. 163.

Gifts — Parol Gift of Mortgage — Validity.

A valid gift inter vivos of a mortgage may be made without a writing.

[See note at end of this case.]

Sufficiency of Evidence of Gift.

A finding of a gift inter vivos of a note and mortgage affirmed by equally divided court.

Appeal from Circuit Court, Washtenaw county: KINNE, Judge.

Action to recover note and mortgage. Gideon L. Hoyt, administrator, plaintiff, and Ella Gillen et al., defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. AFFIRMED.

Cavanagh & Burke for appellant.
Arthur Brown for appellees.

[509] BROOKE, J.—The bill in this case is filed by the administrator of the estate of Matthew Shittenhelm for the purpose of securing possession of a certain note and mortgage for $1,600, made by defendant Egbert Gillen to complainant's intestate. The said note and mortgage are claimed by the defendant Ella Gillen as a gift *inter vivos* from complainant's intestate. Defendant Ella Gillen files a cross-bill praying that she be declared to be the lawful and absolute owner of said note and mortgage. The record shows that Matthew Shittenhelm died on the 8th day of August, [510] 1913, being at that time about 75 years of age; that he had lived in the household of defendant Ella Gillen for a great many years prior to his death. Though unrelated to her, he appears to have occupied a position in the family somewhat akin to that of a member of the household. He, however, paid board to her at the rate of $3.50 per week. In the summer of 1913 he fell ill, and it is the claim of the defendant Ella Gillen that on a day about two or three weeks prior to his death the note and mortgage in question were given to her by the complainant's intestate in part payment for the care she had bestowed upon him during the latter years of his life. The evidence of the gift is confined to the testimony given by Ruth Gillen, a young woman 21 years of age, and a daughter of the defendant Ella Gillen. It is as follows:

"Q. Some time previous to his having died, do you remember of his giving your mother any papers?

"A. One afternoon.

"Q. Do you remember the occasion?

"A. Oh, yes; I remember the occasion.

"Q. Do you remember when it was, about how long before he died?

"A. It was about two or three weeks; I don't remember the exact date.

"Q. And where had he been? Where were you sitting?

"A. I was sitting in the sitting room. Mother and I were busy sitting there sewing, and Matt was sitting in the rocking chair in the bay window, where he always sat, and he got up and went upstairs, and when he came back he had some papers in his hand.

"Q. Do you know what the papers were?

"A. No; I didn't see them. They were all together, and he handed them to Ma. I noticed they were yellow papers, but that is all.

"Q. What did he say?

"A. He said, 'Take those papers; I want you to have them.' I don't remember exactly, but he said something about their never having been put on record. 'Take these; I want you to have them.'

[511] "Q. And what time of the day was that, about?

"A. It was along after dinner, about 2 or 2:30, somewhere along there.

"Q. And where did he go to get these papers?

"A. He left the room and went upstairs."

On cross-examination the witness testified:

"Mr. Shittenhelm died in August, 1913. I do not know the date. This paper, the abstract, and other papers were delivered two or three weeks before his death. My mother and I and Mr. Shittenhelm were the only parties present at that time. He said to her that he wanted her to have those papers. He stated they were not on record. I do not remember his words. My mother took them. I saw them after she had them two or three days. Mr. Shittenhelm paid his board to my mother. He didn't work any for about, I guess it was, three or four years; he had the whooping cough, and after that he had not worked at all. He worked around to amuse himself around the house. He was a thrifty man, and the only thing I ever heard him say

about giving the papers to Mrs. Gillen is what I have said.

"*The Court:* It seems to me that you do not repeat the language exactly, but you repeat it in substance. What was said when he handed these papers to your mother?

"A. I don't remember the exact words, but he brought them out and told her he wanted her to have them now, and said something about their not being on record."

The record shows that complainant's intestate was accustomed to keep his valuables, papers, moneys, etc., in an unlocked trunk located in the closet of his bedroom in the Gillen house. After his death an examination of this trunk was made by his brother and others, and there was discovered therein a certificate of deposit for about $1,700 and something like $600 in cash. This property afterwards came into the possession of the complainant administrator, and, according to the inventory filed in the probate court, amounted to $2,797.98; this sum being exclusive of [512] the $1,600 note and mortgage in question. The decree of the court below dismissed complainant's bill and confirmed the title to said note and mortgage in defendant and cross-complainant, Ella Gillen, according to the prayer of her cross-bill. From this decree, complainant appeals.

In his principal brief complainant raises but one question, which is stated in the following language:

"In the present case, assuming that a manual delivery of the papers was actually made, it is admitted that no assignment was ever made of the mortgage and no indorsement upon the note. Therefore the element of the delivery of the legal title is absent. Also, under the evidence in this case, the donor might have revoked the gift at any time before his death; and further, as a matter of record and without the intervention of a decree of a court, it was not a gift executed, but required the contingency of a decree to give it even semblance of a legal transfer."

We are satisfied that the position of the complainant upon this point is untenable. There is no doubt that a valid gift of a chose in action may be made *inter vivos* without writing. In the case of Kimball v. Green, 148 Mich. 298, 111 N. W. 761, cited and relied upon by complainant, the evidence was examined and held to be insufficient to establish the gift, but the opinion does not hint that a written assignment of the mortgage or indorsement of the note in writing was necessary.

In Shepard v. Shepard, 164 Mich. 183, 129 N. W. 201, Mr. Justice Stone, speaking for the court, says:

"All that is necessary to constitute a valid transfer of property by parol is an expression to that effect by the donor, accompanied by a delivery of the thing to be done."

See, also, Grover v. Grover, 24 Pick. (Mass.) 261, 35 Am. Dec. 319; Hackney v. Vrooman, 62 Barb. (N. Y.) 650; Watson v. Watson, 69 Vt. 243, 39 Atl. [513] 201; Travelers' Ins. Co. v. Grant, 54 N. J. Eq. 208, 33 Atl. 1060; Rinard v. Lasley, 143 Ill. App. 450; Brown v. Crafts, 98 Me. 40, 56 Atl. 213; Com. v. Crompton, 137 Pa. 138, 20 Atl. 417. Many other authorities to the same effect could readily be cited.

In his supplemental brief complainant raises for the first time the question that, as a matter of law, the evidence fails to establish a gift. That evidence we have already quoted. The rule as laid down in Cyc. is as follows:

"To constitute a valid gift *inter vivos*, the purpose of the donor to make the gift must be clearly and satisfactorily established, and the gift must be complete by actual, constructive, or symbolic delivery, without power of revocation." 20 Cyc. p. 1193.

The question to be determined, then, is whether the evidence of the gift is such as to warrant the decree made.

In the case of Kimball v. Green, supra, an examination of the record in this court discloses the fact that the evidence of the gift was much stronger than it is in the case at bar. There were, however, other circumstances in that case which tended to throw doubt upon the credibility of that testimony, chief among which was the fact that the person claiming the gift herself made application for the appointment of an administrator for the estate of the donor, in which she stated that the donor was at the time of his death possessed of personal property to the amount of $500 and upwards, and it appeared that, exclusive of the property claimed as a gift, the donor died possessed of less than $50. The decree of the court below in that case did not sustain the gift, and that decree was affirmed in this court. In the instant case the evidence of Ruth Gillen, inexact as it is, stands undisputed by any other testimony in the case or any fact [514] or circumstance which would tend to cast doubt upon its credibility. The history of complainant's decedent likewise lends color to the verity of her testimony. The learned chancellor who heard her testimony evidently gave it full credence, and with him we are disposed to agree.

The decree is affirmed.

Bird, Moore, and Steere, J.J., concurred with Brooke, J.

KUHN, J. (*dissenting*).—I am unable to agree with the conclusions reached by Mr. Justice Brooke in this case. A careful examination of the testimony of Ruth Gillen,

the only witness sworn as to the gift, leads me to the conclusion that under the authority of Kimball v. Green, 148 Mich. 298, 111 N. W. 761, it is insufficient to establish a gift *inter vivos*. Assuming that she testified absolutely truthfully, there is yet a lack of certainty in her evidence, which, in my opinion, is fatal. Nowhere in her testimony does she identify the mortgage and note in question with the papers delivered by complainant's intestate to her mother, and nowhere does she say that said intestate used language which necessarily imported a gift. In one place in her testimony she states the language of said decedent to have been: "Take these; I want you to have them." In another place she says, in answer to the court: "I don't remember the exact words, but he brought them out and told her he wanted her to have them now, and said something about their not being on record." In my opinion, neither statement necessarily implies a gift from complainant's decedent to Ella Gillen. While the circumstances surrounding the case are such as to perhaps indicate the truthfulness of Ella Gillen's claim, it should be remembered that the complainant's decedent kept the papers in question and all his other valuables in an unlocked trunk in his room, to which any member of the family [515] had ready access. It is unnecessary to impute dishonest motives to Ella Gillen or her daughter in this case, but I am of opinion that to hold a gift *inter vivos* was made out by the very meager, unsatisfactory, and inconclusive testimony of the single witness Ruth Gillen under the circumstances of this case would be to set a precedent extremely dangerous.

I think the decree of the court below should be reversed, and a decree entered in this court granting the prayer of complainant's bill.

McAlvay, C. J., and Stone and Ostrander, JJ., concurred with Kuhn, J.

NOTE.

Validity of Gift of Mortgage Inter Vivos without Writing.

The general rule is that a valid gift inter vivos of a mortgage may be made without a writing. Martin v. Martin, 170 Ill. 18, 48 N. E. 694, *reversing* 68 Ill. 169; Johnson v. Eaton, 51 Kan. 708, 33 Pac. 597; Donnell v. Wylie, 85 Me. 143, 26 Atl. 1092; Hagerman v. Wigent, 108 Mich. 192, 65 N. W. 756; Hackney v. Vrooman, 62 Barb. (N. Y.) 650; Mack v. Mack, 5 Thomp. & C. (N. Y.) 528; Gannon v. McGuire, 160 N. Y. 416, 55 N. E. 7, 73 Am. St. Rep. 695, *reversing* 22 App. Div. 43, 47 N. Y. S. 870 (gift of bond and mortgage); Bouton v. Welch, 170 N. Y. 554, 63 N. E. 539; Andrews v. Nichols, 116 App. Div. 645, 101 N. Y. S. 977 (gift of bond and mortgage); Burt v. Harris, 152 N. Y. S. 956 (gift of bond and mortgage); Funston v. Twining, 202 Pa. St. 88, 51 Atl. 736 (gift of bond and mortgage). See also Giselman v. Starr, 106 Cal. 651, 40 Pac. 8; Reynolds v. Thompson, 161 Ky. 772, 171 S. W. 379; Bellis v. Lyons, 97 Mich. 398, 56 N. W. 770; Chaddock v. Chaddock, 134 Mich. 48, 95 N. W. 972, 10 Detroit Leg. N. 387; Kingsbury v. Gastrell (Miss.) 69 So. 661; Thompson v. West, 56 N. J. Eq. 660, 40 Atl. 197; Morgan v. Freeborn, 68 Hun 296, 22 N. Y. S. 982; Thomas v. Fuller, 68 Hun 361, 22 N. Y. S. 862; Robinson v. Carpenter, 77 App. Div. 520, 79 N. Y. S. 283; Deussen v. Moegelin, 24 Tex. Civ. App. 339, 59 S. W. 51; Travis v. Travis, 12 Ont. App. 438. And see the reported case. "Mortgages of real estate may be equitably transferred by gift and delivered, the same as notes, bonds or chattels." Donnell v. Wylie, 85 Me. 143, 26 Atl. 1092. "It seems to me that whether the gift be inter vivos or causa mortis, the donee acquires a legal as well as equitable title to the bond and mortgage which are the subject of the gift, by mere delivery without writing." Hackney v. Vrooman, 62 Barb. (N. Y.) 650.

In Mack v. Mack, 5 Thomp. & C. (N. Y.) 528, it appeared that the holder of notes and mortgages gave them to his wife with the intention of making a gift of them to her and her daughter. The court, in holding that there was a valid gift inter vivos, said: "The objection that the judgment and mortgages were not assigned in writing, we think not well taken." In Martin v. Martin, 170 Ill. 18, 48 N. E. 694, *reversing* 68 Ill. App. 169. It appeared that the holder of three notes and mortgages had given his niece a number of securities which she placed in a box rented by her in a safe deposit vault. Subsequently he recorded in his diary that he had put the notes and mortgages in her box. He regarded his niece with great affection, appreciated what she had done for him as a servant and companion, and expressed his intention to make ample provision for her. It was held that the notes and mortgages passed with the other securities. In Hagerman v. Wigent, 108 Mich. 192, 65 N. W. 756, it appeared that the donee delivered a mortgage to her husband with instructions to deliver it to the donees at her death and it was held that there was a valid gift inter vivos. In Johnson v. Eaton, 51 Kan. 708, 33 Pac. 597, it appeared that a father paid off a mortgage on land belonging to his daughter and had an assignment of the mortgage made to him. After the death of the father a suit was brought to recover on a note secured by the mortgage by his widow who claimed that the mortgage was given to her, but the evidence

showed that it was never in her possession until after the death of the father. The daughter contended that her father paid off this mortgage voluntarily for her benefit, and as a gift to her, and that he retained possession of the papers in order to prevent her husband, from whom she had separated, from deriving any benefit from the payment, and evidence was introduced at the trial of declarations made by the deceased supporting her claim. It was held that it was the purpose of the father when he paid the amount of the mortgage, to make the payment for the benefit of the daughter, and that he took the assignment in blank of the papers merely to hold them in trust for his daughter's benefit, and that it amounted to a valid and completed advancement to her.

In each of the following cases it was held that there was no valid gift of a mortgage without writing either because no intention of the donor to make a gift was shown or because the delivery of the mortgage was sufficient. Reynolds v. Thompson, 161 Ky. 772, 171 S. W. 379; Bellis v. Lyons, 97 Mich. 398, 56 N. W. 770; Chaddock v. Chaddock, 134 Mich. 48, 95 N. W. 972, 10 Detroit Leg. N. 387; Kingsbury v. Gastrell (Miss.) 69 So. 661; Thompson v. West, 56 N. J. Eq. 660, 40 Atl. 197; Robinson v. Carpenter, 77 App. Div. 520, 79 N. Y. S. 283; Travis v. Travis, 12 Ont. App. 438.

In Giselman v. Starr, 106 Cal. 651, 40 Pac. 8, it was contended that the interest of the assignee of a note and mortgage had passed by a gift to his daughter. It appeared that the daughter was incompetent, and that the father applied for and obtained letters of general guardianship. In the inventory of her estate, the note and mortgage were entered as the property of the incompetent. The note was exhibited to the appraisers by or at the instance of the father, and by them appraised at a valuation suggested by him. The clerk of the court testified that at the time of the application for letters of guardianship the father expressed sympathy and anxiety for his afflicted child, and said he was making provision for her and desired to make such provision while he was living. "He said he had not yet turned over any thing, but expressed his desire to do so." It was established that on one occasion, under oath, he declared the note and mortgage to be her property. It was held that there was no valid gift under a statute providing that "a verbal gift is not valid, unless the means of obtaining possession and control of the thing are given, nor, if it is capable of delivery, unless there is an actual or symbolical delivery of the thing to the donee."

In Deussen v. Moegelin, 24 Tex. Civ. App. 339, 59 S. W. 51, it was held that the gift of a note without writing to a mortgagee of the mortgage securing the note, extinguished the mortgage. See to the same effect Thomas v. Fuller, 68 Hun 361, 22 N. Y. S. 862.

In *Alabama* the rule seems to be that the gift of a mortgage by delivery merely is not valid where there is no delivery of the note which the mortgage secures. McHugh v. O'Connor, 91 Ala. 243, 9 So. 165. It seems also to be the rule in that jurisdiction that the gift of a note and mortgage without writing passes merely an equitable interest. O'Connor v. McHugh, 89 Ala. 531, 7 So. 749, wherein it was said: "A transfer of a note by delivery, secured by a mortgage of lands, will, in a court of equity, be deemed a transfer or assignment of the mortgage also, and effect will be given to it according to the intention of the parties. But, unless the mortgage is assigned with suitable words of conveyance, either on a separate paper, or indorsed on the mortgage, it does not operate to pass the legal estate in the lands. . . . It is apparent from the bill that both note and mortgage were transferred by delivery merely. This entitled complainant to foreclose the mortgage for her benefit, either in equity, or under the power of sale contained therein; but she acquired no estate in the land. The legal title remained in the mortgagee, clothed with a trust for the benefit of complainant. . . . Complainant obtained thereby the beneficial interest in the note, and an equity to the mortgage as an incident."

RYALL

v.

KIDWELL AND SON.

England—Court of Appeal—April 28, 1914.

[1914] 3 K. B. 135.

Landlord and Tenant — Liability of Landlord — Injury to Third Person.

The provisions of the Housing, Town Planning, etc., Act of 1909, by virtue of which a landlord is required to keep the premises in habitable condition, are for the sole benefit of the tenant, and the landlord is not liable to a third person injured by reason of the defective condition of the premises.

[See note at end of this case.]

[135] Appeal by the plaintiff from the decision of a Divisional Court affirming a judgment of the judge of the county court of Kent holden at Rochester; reported [1913] 3 K. B. 123, Ann. Cas. 1915B 163.

[136] The plaintiff, Frances Alice Ryall, an infant, by Henry Charles Ryall, mason, her father and next friend, brought an action in the county court against the defendants to recover damages for personal injuries sustained by her on October 31, 1912, owing to the alleged negligence of the defendants in allowing the floor of a bedroom in a house known as 35, Britton Street, Gillingham, to be in a defective and dangerous condition.

Henry Charles Ryall was tenant and the defendants were landlords of the house in question, which was let by the defendants to the said Henry Charles Ryall at a weekly rent of five shillings. On October 31, 1912, the plaintiff, who had been standing on a window-sill cleaning windows, stepped from the window-sill on to a chair. One leg of the chair slipped into a hole in the floor. The plaintiff fell and sustained the injuries complained of.

The county court judge gave judgment for the defendants, holding, upon the authority of Cavalier v. Pope [1905] 2 K. B. 757 [1906] A. C. 428, 5 Ann. Cas. 715, that the relation created by the statute was contractual and between the landlord and the tenant only, and therefore that the plaintiff had no cause of action. The plaintiff appealed, and the Divisional Court (Ridley and Avory JJ.) affirmed the judgment of the county court judge.

The plaintiff appealed.

C. T. Williams for appellant.
A. H. Richardson for respondents.
O. L. Richardson solicitor for appellant.
Hair and Co. solicitors for respondents.

[138] LORD READING C. J.—This is an appeal from the decision of the Divisional Court affirming the decision of the county court judge that the plaintiff had made out no cause of action, and that therefore the defendants were entitled to judgment. The case was presented before the county court judge and in the Divisional Court upon facts which are shortly as follows: The father of the injured girl was tenant of premises which came within the operation of Housing, Town Planning, etc. Act, 1909, and his daughter, who was living with him in the house, was injured in consequence of the want of repair in the condition of the premises tenanted by him. It was contended on behalf of the injured girl that she had a right of action against the landlord.

There is, prima facie, no such right of action at common law, nor can it be implied from the fact of the letting of the house by the landlord to the father. The point was discussed in Cavalier v. Pope [1905] 2 K. B. 757 [1906] A. C. 428, 5 Ann. Cas. 713, where the following passage from the judgment of Erle C. J. in Robbins v. Jones (1863) 15 C. B. (N. S.) 221, at p. 240, 109 E. C. L. 220, 239, was quoted by Lord Macnaghten in giving judgment in the House of Lords: "A landlord who lets a house in a dangerous state, is not liable to the tenant's customers or guests for accidents happening during the term; for, fraud apart, there is no law against letting a tumbledown house; and the tenant's remedy is upon his contract, if any."

Now, that being the common law, the Housing of the Working Classes Act, 1890, in substance and within certain limits was incorporated into the Housing, Town Planning, etc., Act, 1909, whereby the Legislature thought fit to impose upon landlords a condition which otherwise would not have existed, namely, that in any contract of letting premises for habitation within the limits mentioned either in s. 75 of the Housing of the [139] Working Classes Act, 1890, or in s. 140 of the Act of 1909, there should be an implied condition (which has been construed in the broader meaning of a promise by the landlord) that he will keep the premises in repair. The effect of those statutory amendments is that a promise by the landlord is imported into the contract of letting which otherwise would not be in that contract. Further than that the Housing and Town Planning Act, 1909, does not go, except that it provides a remedy which is one altogether apart from the remedy given to the tenant of one of these dwellings. It seems to me quite plain that a resident tenant of such a dwelling would have the right by virtue of this statute to bring an action against his landlord for breach of the covenant implied by the statute to keep the premises in a state reasonably fit for human habitation. The promise which is imported into the contract enures for the benefit of the tenant with all the obligations it places upon the landlord, except in so far as it may be said that they are limited or restricted by the statute. No doubt Parliament saw great practical difficulty in the enforcing of such a remedy by a member of the working classes against his landlord. It may be that it was thought that he might be rather careless and would not take the trouble to enforce it, or that the costs would be too heavy for a working man to incur, and possibly also that he might not like to sue his landlord for fear of losing his right of living there by having his tenancy determined. Parliament certainly thought that it was necessary to give some other remedy, and therefore it enacted that in addition to the remedies which are implied in this statutory condition which it imposed upon the landlord, the local authority should have the right to enter the premises under certain conditions and in certain circumstances to examine them, and if it thinks the premises are not in a fit state of repair, to call upon the landlord to put them into a fit state of repair. The landlord has an option

under the statute, within twenty-one days of notice given to him, to say, if he chooses, that he will close the premises absolutely as a place of habitation. If he does not do that, and if he does not put the premises into repair, then the local authority has the right to do the repairs, notwithstanding that the landlord does not wish [140] to or has not agreed to it, and to charge him with the expense. All those provisions are means given by the Legislature for the purpose of enabling the tenant to obtain the benefit of the condition which it has seen fit to impose in the letting of premises which are within the statute. Mr. Williams, who has argued this case with ability, ingenuity, and courage on behalf of the appellant, admitted that if the obligation upon the landlord is simply contractual the Divisional Court was right and this appeal must fail; but he asked the Court to come to the conclusion, upon the language of the statute and having regard to the object which the Legislature had in mind when it so enacted it, that Parliament meant to impose a statutory obligation upon the landlord arising altogether apart from contract. If he could have established that contention, he would, in my opinion, have gone far, if not the whole way, towards success in this appeal. But there lies his difficulty. In my judgment there is imposed by this statute upon the landlord no duty, such as is imposed by the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), upon an employer to keep his premises in a fit state of fencing or protected and guarded. That is not the character of the obligation placed upon the landlord. That obligation is limited entirely to imposing upon him the promise to keep the premises in a state of repair. That is purely contractual, and there is no further duty such as it is sought to impose upon him by the contention on behalf of the appellant. Moreover, even if the Court came to a different conclusion it would not, in my judgment, be able to give effect to it; it would be bound to follow the decision in Cavalier v. Pope [1905] 2 K. B. 757 [1906] A. C. 428, 433, 5 Ann. Cas. 713. That decision—see especially Lord Atkinson's judgment in the House of Lords—makes it perfectly plain that there is no such duty on the landlord as is contended for in this case. There is also the further case of Middleton v. Hall, 108 L. T. N. S. 804, which was tried last year before my brother Bankes, in which he gave a judgment to the same effect as that of the Divisional Court in the present case, resting his decision upon Cavalier v. Pope [1905] 2 K. B. 757 [1906] A. C. 428, 5 Ann. Cas. 713, as did the Divisional Court. In truth, Cavalier v. Pope [1905] 2 K. B. 757 [1906] A. C. 428, 433, 5 Ann. Cas. 713, is a fence which it is impossible to [141] get over; it stands there as an insurmountable obstacle to all the arguments which have been put forward upon behalf of the appellant, and I do not therefore propose to repeat the reasoning contained in the speeches of the noble Lords in that case in the House of Lords, or in the judgments of the Court of Appeal, in which it was made clear by the majority of the Court that even if the Court might wish to impose such an obligation upon the landlord, it could not do it. We are confined, whatever our own views may be, to giving effect to the statute, and however sympathetic we might be to such a claim as that advanced on the appellant's behalf, it does not rest with judges to extend and stretch an Act of Parliament to something beyond that which Parliament has itself declared If it was the intention of Parliament to give such an extended right as is contended for in this case, it could have done it quite simply, and without difficulty. It would not have been necessary to import a condition into the contract; Parliament could have said—as it has said in the Factory and Workshop Act, 1901, and in many other statutes—that the landlord shall keep the premises in repair, and if so there would have been an obligation imposed upon him by statute which would, as it appears to me, have justified the argument which has been put before us to-day. But those are not the words of the statute, the language of which is very different. Therefore in my judgment the decisions of the county court judge and of the Divisional Court were right, and Cavalier v. Pope [1905] 2 K. B. 757 [1906] A. C. 428, 5 Ann. Cas. 713—which is on all fours with this case—is a binding authority upon us in the application of its principles, and therefore I think that this appeal must fail and should be dismissed.

PHILLIMORE, L.J.—I am of the same opinion. The social or economical mischief which seemed to me to arise in certain cases, and against which I struggled unsuccessfully to provide in Cavalier v. Pope [1905] 2 K. B. 757 [1906] A. C. 428, 5 Ann. Cas. 713, is very largely removed by the provisions of the Housing Town Planning, etc. Act, 1909, on which the appellant relies, and I have therefore little reluctance in complying with my obvious duty of following the principle laid down in Cavalier [142] v. Pope [1905] 2 K. B. 757 [1906] A. C. 428, 5 Ann. Cas. 713, in the House of Lords. I only now desire to observe that it is worthy of consideration that, having regard to s. 15 of the Act, there might be a very serious hardship upon a perfectly innocent landlord if the construction sought for by Mr. Williams on behalf of the appellant were to be applied. It is one thing to say that a landlord shall not let a house which is not fit for habitation, but quite an-

other to say that he continuously undertakes to keep it reasonably in repair. If that is an undertaking in covenant with the tenant there is no harm done, because if the tenant complains that it is not reasonably fit the landlord puts it in repair, and if the tenant brings an action without first making a complaint to the landlord no Court would enforce the duty upon him, at any rate, without safeguarding him as to costs, because the tenant who is in possession, and who has knowledge of the want of repair, ought to give the landlord notice of it. But if third persons are to be entitled to avail themselves of this section the landlord might be in this position: he might have let the house in perfectly good repair, but it might have got out of repair by reason of the acts of the tenant, his guests, or licensees, and the landlord might know nothing about the want of repair. Then if some third person (not the individual who put it out of repair by, for instance, breaking the windows, or pulling down the ceiling, in such a case as I have tried at Liverpool, using chunks of a mantelpiece to throw at his neighbour) other than that misdoer suffered in consequence of the house being out of repair, the landlord would not be able to say, if that third person made a claim, that he (the third person) ought to have told him of the want of repair, because that third person has not a duty to do so, and it might be that the landlord would then be held responsible for something which he could not have prevented. I only throw out that consideration as a further reason why I do not feel reluctant to decide in favour of the defendant in the present case as I am compelled to do.

LUSH, J.—The appellant, in order to succeed, must shew two things: first, that the Housing, Town Planning, etc. Act, 1909, [143] imposes an absolute duty upon the landlord to repair, and secondly that the person injured is within the class of persons for whose benefit that duty is imposed. Now, the plaintiff fails to establish the first of those two propositions. All that the Act of 1909 does is to enact that if the contract between the landlord and tenant contains no warranty (I think the word "condition" is used in that sense in ss. 14 and 15 of the Act of 1909) that the house is reasonably fit for human habitation, and no undertaking on the part of the landlord that it shall be kept in a state reasonably fit for human habitation, those two terms shall be implied. But the character and quality of the obligation which is imported by the statute are none the less contractual, although the contract is derived from and owes its existence to the statute. Therefore the obligation on the part of the landlord in the present case is purely a contractual one. That is all that the statute has effected.

Now, it was decided in Cavalier v. Pope [1905] 2 K. B. 757 [1906] A. C. 428, 5 Ann. Cas. 713, that no action lies for the breach of the contractual obligation at the suit of a stranger to the contract, and that decision seems to me to dispose of the contentions which have been placed before us on behalf of the appellant. For these reasons I think that the appeal should be dismissed.

Appeal dismissed.

NOTE.

The reported case, which affirms the decision of the Kings Bench Division Ryall v. Kidwell (Ann. Cas. 1915B 163) holds that the implied covenant of a lessor that the premises shall be kept reasonably fit for human habitation runs to the lessee only and that a third person, such as an employee of the tenant, is not entitled to recover from the lessor for injuries sustained by reason of a defective condition of the premises permitted by the lessor to continue. The earlier cases are reviewed in the notes to Brady v. Klein, 2 Ann. Cas. 464; Cameron v. Young, 12 Ann. Cas. 47; Ryall v. Kidwell, Ann. Cas. 1915B 163, and Griffin v. Jackson Light, etc. Co. 92 Am. St. Rep. 496.

WHITTEMORE ET AL.

v.

BAXTER LAUNDRY COMPANY.

Michigan Supreme Court—July 24, 1914.

181 Mich. 564; 148 N. W. 437.

Nuisances — Definition.

A private nuisance is anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another.

Judicial Notice — Properties of Gasoline.

The court will take judicial notice of the dangerous character and explosive qualities of gasoline.

Nuisances — Storage of Gasoline.

For defendant to sink storage tanks on the extreme edge of its property and within a few feet of complainant's residence, in which over 20,000 gallons of gasoline were to be stored, constitutes a private nuisance, in view of the dangerous character of gasoline and the liability to explosion.

[See note at end of this case.]

Appeal from Circuit Court, Kent county: BROWN, Judge.

Action for injunction. Arthur W. Whittemore et al., plaintiffs, and Baxter Laundry Company, defendant. Judgement for plaintiffs. Defendant appeals. The facts are stated in the opinion. AFFIRMED.

Wilson & Johnson for appellant.
Corwin & Souter for appellees.

[564] KUHN, J.—The defendant is the owner of a laundry and dry-cleaning establishment in the city of Grand Rapids, occupying the easterly portion of a block bounded on the north by Hawthorne street, on the east by Eastern avenue, on the south by Fountain street, and on the west by Grand avenue. The complainants are the owners of property, and reside, in the westerly [565] portion of the block. With the exception of defendant's plant, the location is strictly a residence district, and the complainant Arthur W. Whittemore owns and occupies a house and lot immediately adjoining defendant's premises on the west, and the defendant's property is practically surrounded by residences costing from $3,500 to $4,500 each. In its business of dry cleaning the defendant uses about 15,000 gallons of gasoline annually, and, just previous to the filing of the bill in this case, the defendant had placed in its yards two large steel tanks of the capacity of 10,000 gallons each, and had commenced excavating preparatory to burying them in the northwest corner of its premises, which was the farthest possible point on its premises from its own buildings and immediately adjoining the property of the complainant Whittemore, the nearest tank being about 11 feet from his house. The bill of complaint filed asked for a temporary injunction restraining defendant from storing gasoline in the tanks, for the reason that such storage, under the circumstances of this case, would be a private nuisance, and also that it would be in violation of certain ordinances of the city of Grand Rapids. When the bill was filed an injunction was issued restraining the defendant from storing gasoline in the tanks, which was made permanent when the case was heard on its merits.

In Heeg v. Licht, 80 N. Y. 579, 582, 36 Am. Rep. 654, the court speaking of private nuisances said:

"A private nuisance is defined to be anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another. 3 Bl. Com. 216. Any unwarrantable, unreasonable, or unlawful use by a person of his own property, real or personal, to the injury of another, comes within the definition stated, and renders the owner or possessor liable for all damages arising from such use. Wood's Law of Nuis. § 1, and authorities cited. The cases which are regarded as private nuisances are numerous, and the [566] books are full of decisions holding the parties answerable for the injuries which result from their being maintained. The rule is of universal application that, while a man may prosecute such business as he chooses on his own premises, he has no right to erect and maintain a nuisance to the injury of an adjoining proprietor or of his neighbors, even in the pursuit of a lawful trade. Aldred's Case, 9 Coke (Eng.) 58; Brady v. Weeks, 3 Barb. (N. Y.) 159; Dubois v. Budlong, 15 Abb. Pr. (N. Y.) 445; Wier's Appeal, 74 Pa. St. 230."

We may grant that the storage of gasoline on premises adjacent to or adjoining the premises of another is not a private nuisance *per se*. It might, however, become such, considering the locality, the quantity, and the surrounding circumstances, and would not necessarily depend upon the degree of care used in its storage. Heeg v. Licht, supra; 29 Cyc. p. 1117. We may also concede that in the instant case every precaution that human ingenuity has conceived has been made use of in the construction of the tanks as testified to by defendant's experts. Considering, however, the dangerous character of the substance and its power as an explosive, of which in this age of its wonderful development as a power to propel automobiles, traction engines, and airships, we can well take judicial notice, and also considering human fallibility, that accidents in the operation of the most perfect mechanism will occur, and all that it needs to change what is, when properly protected, a harmless agency to a most dangerous explosive is a careless person, can it be said that to have 20,000 gallons of such an agency stored within but a few feet of one's dwelling house is not sufficient to be an unreasonable interference with the comfortable enjoyment of that home? This is a purely residence district of the city, and was such before the defendant began operating its dry-cleaning business, and it must be apparent to any fair-minded person that the location of these tanks in such immediate proximity to complainant Whittemore's [567] house would necessarily damage his property. It also appears that tanks for storage purposes could have been placed on the Fountain street side of defendant's property, which would have removed them from proximity to any residence. The reason for not doing this is thus stated in defendant's brief:

"Complainants called attention to the fact that there was room enough to place them on the Fountain street side of the property. A good and sufficient reason for not placing them there is that this ground is devoted to lawn and shrubbery, upon which the company has spent considerable money, and for which it took the prize in the contest for the best-appearing manufacturing grounds."

If defendant was desirous of installing tanks to more economically conduct its business, it would seem to have been more reason-

able to have disturbed and damaged its own lawn and shrubbery, however beautiful, rather than to disturb its neighbor in the enjoyment of his home and to damage his property.

Considering all the surrounding circumstances in this case, we are satisfied that the chancellor who heard the case reached a proper and equitable conclusion in determining that the storage of gasoline in the tanks was a private nuisance. In view of this conclusion, it will be unnecessary to review the ordinances of the city of Grand Rapids and determine whether the construction of these tanks and the storage of gasoline therein in the manner alleged in the bill of complaint is in violation thereof.

The decree of the court below is affirmed.

McAlvay, C. J., and Stone, Ostrander, Bird, Moore, and Steere, JJ., concurred. Brooke, J., did not sit.

NOTE.

Storage of Gasoline or Other Explosive as Nuisance.

Scope of Note, 820.
Nuisance per se, 820.
Nuisance from Violation of Statute or Ordinance, 820.
Nuisance from Circumstances:
Generally, 821.
Gasoline, Kerosene or Naptha, 821.
Oils or Gas, 821.
Powder, 821.
Dynamite, 822.
Nitroglycerine, 823.

Scope of Note.

It is intended in this note to review those cases in which the storage of gasoline or other explosives as constituting a nuisance has been considered. The liability of a person keeping and storing explosives for injuries caused by an explosion is discussed in the notes to Kerbaugh v. Caldwell, 10 Ann. Cas. 453, and Whaley v. Sloss-Sheffield Steel, etc. Co. 20 Ann. Cas. 822.

Nuisance Per Se.

The storing or keeping of powder, dynamite or nitroglycerine has been said to constitute a nuisance per se. State v. Excelsior Powder Mfg. Co. 259 Mo. 254, 169 S. W. 267, L.R.A. 1915A 615; McAndrews v. Collerd, 42 N. J. L. 189, 36 Am. Rep. 508; Bradford Glycerine Co. v. St. Marys Woolen Mfg. Co. 60 Ohio St. 560, 54 N. E. 528, 71 Am. St. Rep. 740, 45 L.R.A. 658; Cheatham v. Shearon, 1 Swan (Tenn.) 213, 55 Am. Dec. 734. See also Heeg v. Licht, 80 N. Y. 579, 36 Am. Rep. 654; Lounsbury v. Foss, 80 Hun, 296, 30 N. Y. S. 89, *judgment affirmed* 145 N. Y. 600, 40 N. E. 164. Thus in Cheatham v. Shearon, 1 Swan (Tenn.) 213, 55 Am. Dec. 734, the court said tersely: "The only question in this case is, whether the erection of a powder magazine in a populous part of the city, and keeping stored therein large quantities of gun powder, is per se, a nuisance. And without doubt we think it is."

However, the storage of gasoline or other explosives has been held not to constitute a nuisance per se. Kinney v. Koopman, 116 Ala. 310, 22 So. 593, 67 Am. St. Rep. 119, 37 L.R.A. 497 (powder and dynamite); Simpson v. Du Pont Powder Co. 143 Ga. 465, 85 S. E. 344 (powder, dynamite and nitroglycerine); Harper v. Standard Oil Co. 78 Mo. App. 338 (gasoline and coal oil); O'Hara v. Nelson, 71 N. J. Eq. 161, 63 Atl. 836 (gasoline); Cuilo v. New York Edison Co. 85 Misc. 6, 147 N. Y. S. 14 (gasoline.); Forster v. Rogers, 247 Pa. St. 54, 93 Atl. 26 (dynamite.) See also Cook v. Anderson, 85 Ala. 99, 4 So. 713 (oils); McGregor v. Cadmen, 47 W. Va. 193, 34 S. E. 936 (oils and gas). Thus in Harper v. Standard Oil Co. 78 Mo. App. 338, the court said: "It is not believed any well considered case holds that the storage of gasoline and coal oil in suitable tanks constitutes a nuisance per se."

Nuisance from Violation of Statute or Ordinance.

The storage and keeping of gasoline or other explosives in violation of a statute or ordinance is regarded as a nuisance. Hazard Powder Co. v. Volger, 58 Fed. 152, 12 C. S. App. 665, 7 C. C. A. 130; Kinney v. Koopman, 116 Ala. 310, 22 So. 593, 67 Am. St. Rep. 119, 37 L.R.A. 497; Laflin etc. Powder Co. v. Tearney, 131 Ill. 322, 23 N. E. 389, 19 Am. St. Rep. 34, 7 L.R.A. 262; Moeckel v. Cross, 190 Mass. 280, 76 N. E. 447; Cameron v. Kenyon-Connell Commercial Co. 22 Mont. 312, 56 Pac. 358, 74 Am. St. Rep. 602, 44 L.R.A. 508; Ricker v. McDonald, 89 App. Div. 300, 85 N. Y. S. 825. See also Texas Co. v. Fisk (Tex.), 129 S. W. 188; Houston, etc. R. Co. v. Cavanaugh (Tex.) 173 S. W. 619. *Compare* Fillo v. Jones, 2 Abb. App. Dec. (N. Y.) 121. Thus in Laflin, etc. Powder Co. v. Tearney, 131 Ill. 322, 23 N. E. 389, 19 Am. St. Rep. 34, 7 L.R.A. 262, the court said: "The fact, that the explosion destroyed plaintiff's buildings, shows, that the keeping of gunpowder in the magazine, considered with reference to 'the locality, the quantity and the surrounding circumstances,' constituted a nuisance per se." And in Moeckel v. Cross, 190 Mass. 280, 76 N. E. 447, wherein it appeared that the defendant maintained a build-

ing for the storage of gasoline and kerosene in violation of a statute, the court held that the jury were warranted in finding that the defendant was maintaining a nuisance. So in Cameron v. Kenyon-Connell Commercial Co. 22 Mont. 312, 56 Pac. 358, 74 Am. St. Rep. 602, 44 L.R.A. 508, the court said: "We have before us a corporation guilty of a nuisance, by having kept in a frame warehouse within the limits of an incorporated city, in the vincinity of railroad depots and other buildings, an amount of Hercules powder in excess of the quantity—50 pounds—allowed to be stored therein by the laws of the state."

Nuisance from Circumstances.

GENERALLY.

Whether the storing or keeping of gasoline or other explosives is a nuisance by reason of its proximity to dwelling houses, places of business, public streets or railroads is a question of fact for the jury. Kerbaugh v. Caldwell, 151 Fed. 194, 10 Ann. Cas. 453, 80 C. C. A. 470; Remsbery v. Iola Portland Cement Co. 73 Kan. 66, 84 Pac. 548; Flynn v. Butler, 189 Mass. 377, 75 N. E. 730; Heeg v. Licht, 80 N. Y. 579, 36 Am. Rep. 654; Prussak v. Hutton, 30 App. Div. 66, 51 N. Y. S. 761; Emory v. Hazard Powder Co. 22 S. C. 476, 53 Am. Rep. 730; Barnes v. Zettlemoyer, 25 Tex. Civ. App. App. 468, 62 S. W. 111. See also Rudder v. Koopman, 116 Ala. 332, 22 So. 601, 37 L.R.A. 489; O'Hara v. Nelson, 71 N. J. Eq. 161, 63 Atl. 836; Ft. Worth, etc. R. Co. v. Beauchamp, 95 Tex. 496, 68 S. W. 502, 93 Am. St. Rep. 864, 58 L.R.A. 716. And see the cases cited in the following subdivisions of this note.

GASOLINE, KEROSENE OR NAPHTHA.

The storage of gasoline, kerosene or naphtha in proximity to dwelling houses and places of business has been held to be a nuisance. Reg. v. Lister, 3 Jur. N. S. (Eng.) 570, 26 L. J. M. C. 196; 5 W. R. 626, 7 Cox C. C. 342; Dears. & B. 209; Hendrickson v. Standard Oil Co. 126 Md. 577, 95 Atl. 153; O'Hara v. Nelson, 71 N. J. Eq. 161, 63 Atl. 836. And see the reported case. See also Com. v. Kidder, 107 Mass. 188. Thus in O'Hara v. Nelson, supra, wherein it appeared that the defendant operated a garage in a thickly built up portion of a large city the court held that he "should be restrained from introducing gasoline into the tanks of the automobiles inside the building and from storing automobiles with gasoline in their tanks inside of the building." So in Regina v. Lister, 3 Jur. N. S. 570, 26 L. J. M. C. 196, 5 W. R. 626; 7 Cox C. C. 342; Dears. & B. 209, wherein it appeared that naphtha, was kept in an important part of London, the court said that "to manufacture, or to keep in large quantities, in towns or closely inhabited places, gunpowder (which for this purpose cannot be distinguished from naphtha) is by the common law of England a nuisance and an indictable offense."

But the storage of gasoline or kerosene has been held not to be a nuisance, in view of the nature of the surroundings. Harper v. Standard Oil Co. 78 Mo. App. 338; Cuilo v. New York Edison Co. 85 Misc. 6, 147 N. Y. S. 14. See also Texas Co. v. Fisk (Tex.) 129 S. W. 188. Thus in the case first cited it was decided that the maintenance of tanks for gasoline and other oils seventy-five feet from property belonging to plaintiff did not constitute a nuisance, there being no evidence to excite reasonable apprehension of fire from sparks of passing locomotives, the only alleged source of danger. And in Texas Co. v. Fisk, supra, it was held that the location of a tank in a section of a city where several such receptacles, owned by others engaged in the same business, were already in existence and use could not properly be enjoined.

OILS OR GAS.

The keeping of oils or gas in the heart of a city or in close proximity to dwelling houses is considered a nuisance. Levin v. New York Cent. etc. R. Co. 133 N. Y. S. 467; McGregor v. Camden, 47 W. Va. 193, 34 S. E. 936. See also Cook v. Anderson, 86 Ala. 99, 4 So. 713. Thus in McGregor v. Camden, supra, the boring of an oil well seventy feet from a dwelling was held to be restrainable because of the explosive and dangerous properties of the oil and gas issuing from the well if productive. See also Cook v. Anderson, supra. And in Levin v. New York Cent. etc. R. Co. supra, wherein it appeared that the defendant maintained in its yards in the heart of a city a tank containing combustible gas the court held the tank to be a nuisance.

But in Cleveland v. Citizens' Gaslight Co. 20 N. J. Eq. 201, it was held that the danger of explosion was not sufficient to restrain as a nuisance the erection of a gas manufactory where the complainant's buildings were not sufficiently near to be endangered by an explosion if one should occur. See also Harper v. Standard Oil Co. 78 Mo. App. 338.

POWDER.

The storage of powder in the vicinity of dwellings, stores, churches, railroad lines or public roads is regarded as a nuisance.

England.—Rex v. Taylor, 2 Stra. 1167. See also Reg. v. Lister, 26 L. J. M. C. 196; 3 Jur. N. S. 570; 5 W. R. 626; 7 Cox C. C. 342; Dears. & B. 209.

United States.—Kerbaugh v. Caldwell, 151 Fed. 194, 10 Ann. Cas. 453, 80 C. C. A. 470.

Alabama.—Rudder v. Koopman, 116 Ala. 332, 22 So. 601, 37 L.R.A. 489. *Compare* Collins v. Alabama, etc. R. Co. 104 Ala. 390, 16 So. 140.

California.—Fisher v. Western Fuse, etc. Co. 12 Cal. App. 739, 108 Pac. 659. *Compare* Kleebauer v. Western Fuse, etc. Co. 138 Cal. 497, 71 Pac. 617, 94 Am. St. Rep. 62, 60 L.R.A. 377, *reversing* 69 Pac. 246.

Illinois.—Chicago, etc. Coal Co. v. Glass, 34 Ill. App. 364.

Kentucky.—*Compare* Dumesnil v. Dupont, 18 B. Mon. 800, 68 Am. Dec. 750.

Massachusetts.—Flynn v. Butler, 189 Mass. 377, 75 N. E. 730. See also Com. v. Kidder, 107 Mass. 188.

Missouri.—State v. Excelsior Powder Mfg. Co. 259 Mo. 254, 169 S. W. 267, L.R.A.1915A 615; Schnitzer v. Excelsior Powder Mfg. Co. 160 S. W. 282.

New Jersey.—McAndrews v. Collerd, 42 N. J. L. 189, 36 Am. Rep. 508.

New York.—Myers v. Malcolm, 6 Hill. 292, 41 Am. Dec. 744; Heeg v. Licht, 80 N. Y. 579, 36 Am. Rep. 654; Lounsbury v. Foss, 80 Hun 296, 30 N. Y. S. 89 *judgment affirmed*, 145 N. Y. 600, 40 N. E. 164; Prussak v. Hutton, 39 App. Div. 66, 51 N. Y. S. 761; Gibulski v. Hutton, 47 App. Div. 107, 62 N. Y. S. 166; Bradley v. People, 56 Barb. (N. Y.) 72; Booth v. Rome, etc. R. Co. 140 N. Y. 267, 35 N. E. 592, 37 Am. St. Rep. 552, 24 L.R.A. 105. *Compare* People v. Sands, 1 Johns. 78, 3 Am. Dec. 296.

Oklahoma.—*Compare* E. I. Dupont DeNemours Powder Co. v. Dodson, 150 Pac. 1085.

Pennsylvania.—Wier's Appeal, 74 Pa. St. 230. *Compare* Tuckachinsky v. Lehigh, etc. Coal Co. 199 Pa. St. 515, 49 Atl. 308.

South Carolina.—Emory v. Hazard Powder Co. 22 S. C. 476, 53 Am. Rep. 730.

Tennessee.—See Cheatham v. Shearon, 1 Swan 213, 55 Am. Dec. 734.

Texas.—Comminge v. Stenvenson, 76 Tex. 642, 13 S. W. 556; Ft. Worth, etc. R. Co. v. Beauchamp, 95 Tex. 496, 68 S. W. 502, 93 Am. St. Rep. 864, 58 L.R.A. 716.

Washington.—See State v. Paggett, 8 Wash. 579, 36 Pac. 487.

West Virginia.—Wilson v. Phœnix Powder Mfg. Co. 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890; Huntington, etc. Land Development Co. v. Phœnix Powder Mfg. Co. 40 W. Va. 711, 21 S. E. 1037.

Thus in Rex v. Taylor, 2 Stra. (Eng.) 1167, the court granted an information against the defendant for a nuisance, on affidavits of his keeping large quantities of gunpowder to the endangering of a church and houses in his neighborhood. And in Schnitzer v. Excelsior Powder Mfg. Co. (Mo.) 160 S. W. 282, the court held that "in keeping explosives on its premises in quantities to constitute a perpetual menace to the safety of persons rightfully using the several public highways within the radius of the destructive force of such explosives, defendant maintained a public nuisance." So in State v Excelsior Powder Mfg. Co. 259 Mo. 254, 169 S. W. 267, L.R.A.1915A 615, the court said: "A powder magazine, as to all property and residents in such proximity to it that they are subject to danger from its explosion, is a nuisance regardless of the question as to negligence in the manner of keeping it." Likewise in Wilson v. Phœnix Powder Mfg. Co. 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890, the court held that a mill manufacturing powder and other explosives located near two railroads and a public road was a nuisance. See to the same effect Huntington, etc., Land Development Co. v. Phœnix Powder Mfg. Co. 40 W. Va. 711, 21 S. E. 1037, and in Heeg v. Licht, 80 N. Y. 579, 36 Am. Rep. 654, the court said: "The keeping or manufacturing of gunpowder or of fire-works does not necessarily constitute a nuisance per se. That depends upon the locality, the quantity, and the surrounding circumstances, and not entirely upon the degree of care used."

However in Kleebauer v. Western Fuse, etc. Co. 138 Cal. 497, 71 Pac. 617, 94 Am. St. Rep. 62, *reversing* 69 Pac. 246, it was held that the storage of gunpowder and other explosives by a manufacturing company for use in the making of fuses and other high explosives was not necessarily a nuisance where the business was originally located in an isolated place and the neighborhood built up around it. To the same effect, see Tuckachinsky v. Lehigh, etc. Coal Co. 199 Pa. St. 515, 49 Atl. 308.

Dynamite.

Storing dynamite in a place dangerous to the person and property of those living near by is a nuisance.

United States.—Kerbaugh v. Caldwell, 151 Fed. 194, 10 Ann. Cas. 453, 80 C. C. A. 470; Henderson v. Sullivan, 159 Fed. 46, 14 Ann. Cas. 590, 86 C. C. A. 236, 16 L.R.A.(N.S.) 691. *Compare* Actiesselskabet Ingrid v. Central R. Co. 216 Fed. 72, 132 C. C. A. 316, L.R.A.1916B 716.

California.—*Compare* Kleebauer v. Western Fuse, etc. Co. 138 Cal. 497, 71 Pac. 617, 94 Am. St. Rep. 62, *reversing* 69 Pac. 246.

Alabama.—Rudder v. Koopman, 116 Ala. 332, 22 So. 601, 37 L.R.A. 489; Sloss-Sheffield Steel, etc. Co. v. Prosch, 190 Ala. 290, 67 So. 516.

Illinois.—See Chicago, etc. Coal Co. v. Glass, 34 Ill. App. 364.

Kansas.—See Remsberg v. Iola Portland Cement Co. 73 Kan. 66, 84 Pac. 548.

Missouri.—State v. Excelsior Powder Mfg. Co. 259 Mo. 254, 169 S. W. 267, L.R.A.1915A 615.

New York.—Reilly v. Erie R. Co. 177 N. Y. 547, 69 N. E. 1130, *affirming* 72 App. Div. 476, 76 N. Y. S. 620.

North Carolina.—*Compare* Fanning v. White, 148 N. C. 541, 62 S. E. 734.

Oklahoma.—*Compare* E. I. Dupont DeNemours Powder Co. v. Dodson, 150 Pac. 1085.

Pennsylvania.—McDonough v. Roat, 8 Kulp 433; Forster v. Rogers, 247 Pa. St. 54, 93 Atl. 26. *Compare* Tuckachinsky v. Lehigh, etc. Coal Co. 199 Pa. St. 515, 49 Atl. 308.

Texas.—Ft. Worth, etc. R. Co. v. Beauchamp, 95 Tex. 496, 68 S. W. 502, 93 Am. St. Rep. 864, 58 L.R.A. 716; Barnes v. Zettlemoyer, 25 Tex. Civ. App. 468, 62 S. W. 111.

Washington.—See State v. Paggett, 8 Wash. 579, 36 Pac. 487.

West Virginia.—Huntington, etc. Land Development Co. v. Phœnix Powder Mfg. Co. 40 W. Va. 711, 21 S. E. 1037.

Canada.—See Rex v. Michigan Cent. R. Co. 10 Ont. W. Rep. 660.

In Fanning v. White, 148 N. C. 541, 62 S. E. 734, it was held that the storing of dynamite used in the instruction of a railroad fifty feet from the track, one hundred and eighty feet from a road, twenty feet from a river and one mile from a village did not constitute a nuisance.

NITROGLYCERINE.

The storage of nitroglycerine in the vicinity of dwellings, railroads or public roads is considered a nuisance. Tyner v. People's Gas Co. 131 Ind. 408, 31 N. E. 61; Flynn v. Butler, 189 Mass. 377, 75 N. E. 730; McAndrews v. Collerd, 42 N. J. L. 189, 36 Am. Rep. 508; Wilson v. Phœnix Powder Mfg. Co. 40 W. Va. 413, 21 S. E. 1035, 52 Am. St. Rep. 890. See also Chicago, etc. Coal Co. v. Glass, 34 Ill. App. 364; Cuff v. Newark, etc. R. Co. 35 N. J. L. 17, 10 Am. Rep. 205; State v. Paggett, 8 Wash. 479, 36 Pac. 487. *Compare* Kleebauer v. Western Fuse, etc. Co. 138 Cal. 497, 71 Pac. 617, 94 Am. St. Rep. 62, 60 L.R.A. 377, *reversing* 69 Pac. 246.

CITY AND COUNTY OF DENVER
v.
HOBBS ESTATE ET AL.

Colorado Supreme Court—December 7, 1914.

58 Colo. 220; 144 Pac. 874.

Statutes — Construction — Legislative Intent.

The court, in construing a statute, cannot give to the language used any different meaning from that plainly expressed, on the theory of a contrary legislative intent.

Taxation — Property Subject — Stock in Foreign Corporation.

The proviso in Rev. St. 1908, § 5687, that corporate stock shall be deemed to represent the corporate property, and except in cases of banking corporations shall not be taxed, applies to domestic and foreign corporations alike.

[See note at end of this case.]

Same.

The revenue act, of which Rev. St. 1908, § 5687, declaring that corporate stock shall be deemed to represent the corporate property, and except in cases of banking corporations shall not be taxed, is a part, must be considered as a whole in construing section 5687, and, when so considered, stock of domestic and foreign corporations, not banking corporations, is not taxable.

[See note at end of this case.]

Same.

The provisions of Rev. St. 1908, § 5584, that no deduction shall be allowed on account of any indebtedness on or for the capital stock of any corporation or other exempt property, indicates that corporate stock shall not be taxed separate and apart from the corporate property, as it would be unfair to permit deduction of debts for property not taxable.

[See note at end of this case.]

Same.

Rev. St. 1908, §§ 5591, 5592, making stock and bonds of corporations competent evidence of the value of plants of corporations, foreign or domestic, and providing that the entire business, plant, or enterprise of a corporation shall be valued as a unit, and that every element which gives to the corporation property an added value shall be considered in fixing the value for taxable purposes, are guides to the assessor in fixing the value of property owned by any corporation foreign or domestic, but do not indicate that corporate stock itself shall be taxed, except as covered by the property of the corporation.

[See note at end of this case.]

Same.

Rev. St. 1908, § 5659, requiring the assessor to make out an abstract of the assessment in his county, stating in detail specified things, including the assessed valuation of shares in banking corporations, without requiring the abstract to show the value of other corporate stock, discloses a legislative intention that there shall be no distinction between stock in foreign and domestic corporations, and is in harmony with the proviso in section 5687, declaring that corporate stock shall be deemed to represent the corporate property, and except in case of the banking corporations shall not be taxed, construed to apply to domestic and foreign corporations.

[See note at end of this case.]

Situs of Corporate Stock.

Where stock in a foreign corporation is deemed the personal property of the owner, separate and distinct from the capital of the corporation, its situs for purpose of taxation

is a matter of legislative control, as is also the method to be provided for its assessment.

Power to Exempt Stock in Foreign Corporation.

The proviso in Rev. St. 1908, § 5687, that corporate stock shall be deemed to represent the corporate property, and except in cases of banking corporations shall not be taxed, construed to apply to domestic and foreign corporations, is not in conflict with Const. art. 10, § 3, requiring that all taxes shall be uniform, and shall be levied and collected under general laws prescribing regulations securing a just valuation for taxation of all property, but is a valid exercise of the constitutional power to prescribe regulations.

Error to County Court, City and County of Denver: DIXON, Judge.

Action for taxes. City and County of Denver, plaintiff, and the estate of Charles M. Hobbs et al., defendants. To review judgment rendered, plaintiff brings error. The facts are stated in the opinion. AFFIRMED.

Benjamin Griffith, Theodore M. Stuart, Jr., H. A. Lindsley, Thomas R. Woodrow, I. N. Stevens, George Q. Richmond and *Charles A. Prentice* for plaintiff in error.

Goudy & Twitchell and *J. H. Burkhardt* for defendant in error.

Edward C. Stimson and *Henry C. Rogers, Macbeth & May, Julius C. Gunter, Malcolm Lindsey, Hughes* and *Dorsey, John Q. Dier, John A. Ewing* and *Frazer Arnold, amici curiæ.*

[220] HILL, J.—This is an action for taxes. The property is stocks in corporations of sister states, other than banking institutions, [221] which, at the time of his death, was owned by Charles M. Hobbs, a resident of this state. It was inventoried here as a part of his estate. It is claimed on the part of the taxing officers that these stocks are subject to taxation, separate and apart from the assets of the corporation. This position is challenged on the part of the estate. No question of inheritance tax is involved. The court held that pursuant to the provisions of the section 5687, Revised Statutes 1908, the stocks were not thus taxable. In addition to the oral argument, elaborate briefs have been filed covering the entire field of taxation, including numerous papers of recognized students of ability upon the subject, numerous authorities, etc., a great deal of which, while instructive, is of but slight value in the disposition of this contention, for the reason the question is not what the legislature might do, or should have done in this respect, but what it has done by the enactment of section 5687, supra.

It is urged that the latter part of this section, which reads:

"Provided, however, That corporate stock shall be deemed to represent the corporate property, and except in case of banking corporations, shall not be taxed. The taxpayer need not return such stock in his schedule."

applies only to domestic corporations by reason of the constitutional provision which requires equal taxation of property, and forbids exemptions other than as therein specified. We cannot agree that the legislature thus intended; when tested by the language used it would be violative of elementary rules of construction. It would be to hold that they meant to say that which they did not say, and that they did not intend to say that which, in the clearest and plainest language possible, they have said. In such case it is not for the courts to give to the language any different meaning from that plainly expressed:—[222] Hause v. Rose, 6 Colo. 24; People v. May, 9 Colo. 80, 10 Pac. 641; Uzzell v. Anderson, 38 Colo. 32, 89 Pac. 785, 1056; Lake County v. Rollins, 130 U. S. 662, 9 S. Ct. 651, 32 U. S. (L. ed.) 1060; Denver v. Domedian, 15 Colo. App. 36, 60 Pac. 1107; Hazelton v. Porter, 17 Colo. App. 1, 67 Pac. 170.

We agree with counsel that the Revenue Act of which Section 5687, supra, is a part, should be considered as a whole. When thus done, it furnishes other evidence that the legislature intended this proviso to mean what it says, and that it was not intended thereby, or otherwise, that the capital stock of corporations either domestic or foreign, except banking institutions, should be taxed other than as the tax imposed upon the property of the corporation makes it a tax upon the stock. Sections 5575–5581, R. S. make specific provisions for the listing of lands, merchandise, manufactures, notes, bonds and book accounts, besides shares of stock in banking corporations, both state and national, but do not make any provisions for the listing of other corporate stock. Section 5584 provides for the deduction of debts from notes and credits in fixing the value upon the latter, but expressly provides that no such shall be allowed on account of any indebtedness payable upon, or for the capital stock of any corporation, or for the purchase of bonds, treasury notes or other securities of the United States not taxable, or other exempt property. The purpose of this is apparent; as corporate stock was not to be taxed separate and apart from the corporate property, it would be unfair to permit a deduction of debts for things which are not taxable by themselves, but this is not to say that the value of corporate stock is not competent to be considered by the assessor, for the purpose of ascertaining the value of the property of the corporation; to the contrary. Section 5591 makes the stock and bonds competent [223] evidence of the value of the

entire plant of a corporation, either foreign or domestic, while Section 5592 provides that:

"The entire business, plant or enterprise, of such corporation shall be valued as a unit, and every element, subject or consideration wherein the use is in inseparable combination with a whole, of which it forms a part, and which gives to the corporation property an added value for the purposes of income or sale, shall be considered in fixing the value for taxable purposes."

These sections are a guide to the assessor in arriving at the value of the property owned by any corporation, foreign or domestic, but contain nothing which indicates that the stock itself is to be taxed, except as covered by the property of the corporation. Section 5659 requires the assessor to make out an abstract of the assessment in his county, stating in detail certain things among which he shall set forth the total assessed valuation of all shares in banking corporations, but nowhere is it required that the abstract shall show the value of other corporate stock either foreign or domestic. This is in harmony with the proviso to Section 5687 and is further evidence that there was to be no distinction between stock in foreign and domestic corporations.

It is urged that shares of stock in a foreign corporation are the personal property of the owner separate and distinct from the capital of the corporation, for which reason they form separate and distinct subjects for taxation, and should be thus taxed at the residence of the owner. Assuming they are personal property, they are inconsequential property, they are merely tokens or evidence of ownership of an interest in corporate property or the corporation, or something of the kind unnecessary to determine. If destroyed the holder loses nothing, he is still the owner of what they purported to represent. [224] It is of that class of property that its *situs* for the purpose of taxation is a matter of legislative control as is also the method to be provided for its assessment. In Tappan v. Merchants' Nat. Bank, 19 Wall. 490, 22 U. S. (L. ed.) 189, the Supreme Court of the United States held that shares of stock in national banks are personal property, and though they are a species of personal property which in one sense is intangible and incorporeal, the law which created them could separate them from the person of their owner, for the purposes of taxation and give them a *situs* of their own. While this opinion pertains to stock in a national bank and sustains the validity of an Illinois law pertaining thereto, it recognizes that the *situs* of corporate stock for the purposes of taxation is a proper subject of legislation. At page 499 (22 U. S. (L. ed.) 189), the court says:

"Personal property, in the absence of any law to the contrary, follows the person of the owner, and has its *situs* at his domicile. But, for the purposes of taxation, it may be separated from him, and he may be taxed on its account at the place where it is actually located. These are familiar principles, and have been often acted upon in this court and in the courts of Illinois. . . .

Shares of stock in National Banks are personal property. They are made so in express terms by the act of Congress under which such banks are organized. They are a species of personal property which is, in one sense, intangible and incorporeal, but the law which creates them may separate them from the person of their owner for the purposes of taxation, and give them a *situs* of their own. . . . It is conceded that it was within the power of the State to tax the shares of non-resident shareholders at the place where the bank was located, but it is claimed that under the constitution of the State resident shareholders could only be taxed at the places of their residence.

[225] But it is said to be a violation of the constitutional rule of uniformity to compel the owner of a bank share to submit to taxation for this part of his property at a place other than his residence, because other residents are taxed for their personal property where they reside. It is a sufficient answer to this proposition to say that all persons owning the same kind of property are taxed as he is taxed. . . .

We have not felt called upon to consider whether the General Assembly could, under the provisions of the act of Congress, provide for the taxation of shareholders at any other place within the State than that in which the bank is located. It is sufficient for the purposes of this case that it might tax them there."

In Wright v. Southwestern R. Co. 64 Ga. 783, it was held that the *situs* of stock in a railroad company whose road lies outside of the state of Georgia is in the state where the road lies, and that although held by a resident of Georgia, it was not taxable there. Later, in Georgia R. etc. Co. v. Wright, 124 Ga. 596, 53 S. E. 251, it was held that by an act of the legislature approved after the former opinion that the former decision ceased to be the law, and for the purposes of taxation that the later act fixed the *situs* of such stock held by residents of that state in Georgia, for which reason it was properly taxable there. The substance of both opinions material to the present controversy is their recognition that the *situs* of such stock for the purposes of taxation is subject to legislative control. The latest declaration of that court upon the subject appears to be in the Georgia R. etc. Co. v. Wright, 125 Ga.

589, 54 S. E. 54, where, in commenting upon this subject, at page 595, the court says:

"The value of the shares depends upon the value [226] of the property of the corporation which issues them. Their *situs* for taxation is within limits subject to legislative declaration. The legislature may have even the right under our constitution to declare that the *situs* for taxation of shares of foreign stock held by a resident of Georgia is not in Georgia, but they clearly have the power to declare that shares of such stock have a *situs* for taxation in this State."

In commenting upon the answers to be made by taxpayers, the court at page 596 (54 S. E. 55), says:

"If the question calls for the disclosure of property which has an intrinsic value and is located within this State, then of course the property must be taxed, for the constitution imperatively requires that this shall be done. If, however, there is no question which compels the taxpayer to disclose the ownership of that which has no *situs* for taxation within this State, or which has no taxable value, when there is no legislative declaration to that effect, then the absence of the question indicates a legislative intent not to declare taxable that which has no intrinsic value, but which becomes taxable merely as a result of a law declaring it to have a taxable value."

In Smith v. Ramsey, 54 N. J. L. 546, 24 Atl. 445, it was held that stocks in foreign corporations owned by residents of New Jersey were exempt from taxation under the laws of that state. To the same effect are State v. Bentley, 23 N. J. L. 532; State v. Branin, 23 N. J. L. 484; State v. Jones, 38 N. J. L. 83; De Baun v. Smith, 55 N. J. L. 110, 25 Atl. 277; State v. Runyon, 41 N. J. L. 98; Jersey City Gaslight Co. v. Jersey City, 46 N. J. L. 194.

These cases are based upon the theory that a tax on the corporate property and on the stock of the corporation are identical, and was thus recognized by the legislature [227] in its acts which exempt from taxation the stock of foreign corporations held by resident taxpayers.

In People v. Campbell, 138 N. Y. 543, 34 N. E. 370, 20 L.R.A. 453, it was held that stocks in foreign corporations owned by residents of that state was capital employed out side the state and was not subject to taxation. In commenting at page 546 (34 N. E. 371, 20 L.R.A. 453), it is said:

"The stocks which the relator took in companies organized outside of this state stood for so much of the relator's capital, invested outside of the state. It took a portion of its capital to wit, a portion of its patent rights, and employed it outside of the state to purchase those stocks. Its property in those corporations, represented by its shares of stock was outside of this state, and was in no sense employed here. Those stocks had no *situs* here and were not taxable here under any system of taxation which has ever existed in this state."

This appears to have always been the rule in New York State.—People v. Tax Com'rs, 64 N. Y. 541; People v. Wemple, 133 N. Y. 323, 31 N. E. 238; People v. Wemple, 129 N. Y. 558, 29 N. E. 812; People v. Tax Com'rs, 4 Hun 595; People v. Tax Com'rs, 23 N. Y. 224; People v. Gardner, 51 Barb. 352; People v. Tax Com'rs, 5 Hun 200. The latest New York case called to our attention is People v. Knight, 173 N. Y. 255, 65 N. E. 1102.

Stock in two foreign corporations were purchased by a domestic corporation by an issue of bonds, the stock was also pledged to a trust company (a resident of that state) as collateral for the payment of the bonds, held, it was not subject to tax. In commenting at page 260 (65 N. E. 1103), the court said:

"This stock was part of the relator's capital or [228] general assets. Both companies are foreign corporations, the former being partly within and partly without the state and the latter entirely without the state. . . . The relator being the owner of these stocks, they constituted part of its capital, but that part of its capital was not employed within this state, and so this court has held. (People v. Campbell, 138 N. Y. 543, 34 N. E. 370, 20 L.R.A. 453; People v. Wemple, 148 N. Y. 690, 43 N. E. 176.)"

The case of State v. Kidd, 125 Ala. 413, 28 So. 480, *affirmed* by the Supreme Court of the United States (188 U. S. 730, 23 S. Ct. 401, 47 U. S. (L. ed.) 669), recognizes that the *situs* of corporate stock for the purposes of taxation is a matter that can be fixed by legislation; its holding is that unless fixed by statute its *situs* for the purposes of taxation is at the domicile of the owner. Other cases which sustain our conclusion in this respect are.—Dundee Mortgage, etc. Co. v. School Dist. No. 1, 19 Fed. 359; Savings, etc. Soc. v. Multnomah County, 169 U. S. 421, 18 S. Ct. 392, 42 U. S. (L. ed.) 803; Mumford v. Sewall, 11 Ore. 67, 4 Pac. 585, 50 Am. Rep. 462; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 19, 11 S. Ct. 876, 35 U. S. (L. ed.) 613; Coe v. Errol, 116 U. S. 517, 6 S. Ct. 475, 29 U. S. (L. ed.) 715; Detroit v. Board of Assessors, 91 Mich. 78, 51 N. W. 787, 16 L.R.A. 59; Thompson's Commentaries on Corporations, vol. 2, § 2846; Chesebrough v. San Francisco, 153 Cal. 559, 96 Pac. 288; Gillespie v. Gaston, 67 Tex. 599, 4 S. W. 248.

We are not intimating that the state cannot tax stocks of foreign corporations held by its residents and elliminate it from that of domestic corporations except as it is burdened by the taxes upon the property of the

corporation; that question is not before us. In some states [229] such laws have been sustained but the cases thus holding are based upon statutes to that effect, or to the absence of any statute fixing their *situs* when they are made the subject of taxation by either constitutional or statutory provision. State v. Kidd, 125 Ala. 413, 28 So. 480; Kidd v. Alabama, 188 U. S. 730, 23 S. Ct. 401, 47 U. S. (L. ed.) 669; Wright v. Louisville, etc. R. Co. 195 U. S. 219, 25 S. Ct. 16, 49 U. S. (L. ed.) 167; Bradley v. Bauder, 36 Ohio St. 28, 38 Am. Rep. 547; Lee v. Sturges, 46 Ohio St. 153, 19 N. E. 560, 2 L.R.A. 556; Sturges v. Carter, 114 U. S. 511, 5 S. Ct. 1014, 29 U. S. (L. ed.) 240; San Francisco v. Fry, 63 Cal. 470; San Francisco v. Flood, 64 Cal. 504, 2 Pac. 264; Seward v. Rising Sun, 79 Ind. 351; Com. v. Lovell, 125 Ky. 491, 101 S. W. 970.

We cannot agree that the proviso to section 5687, supra, when applied to stocks of foreign corporations is in conflict with the constitution wherein it provides that all laws exempting from taxation property other than that mentioned, shall be void. Stocks in foreign corporations are no more potential than those in domestic corporations, and if this section conflicts with the constitution when applied to stocks in foreign corporations, it must in many cases fall when applied to those in domestic corporations. In addition to the authorities which hold that for the purposes of taxation the *situs* of stock in both foreign and domestic corporations is a matter which can be regulated by legislation, others disclose that such regulations are in no sense an exemption of any property from taxation. It is common knowledge that when our present revenue law was enacted, we had in this state, and probably always will have, many domestic as well as foreign corporations, with all their property within the state, many domestic corporations with practically no property within the state, others of each class with [230] part of their property within, and part without the state. The stocks of some of these corporations, both foreign and domestic, are all held by residents of this state; in others, all by non-residents; in others, part by residents and the remainder by non-residents. It follows that if the failure to tax the stock of a foreign corporation held by residents would create an exemption within the meaning of the constitution because it has no property within this state, it would apply as well to the stock of a domestic corporation when its property is without the state. Other illustrations could be made which disclose the unjustness of such a position in making it double taxation, etc., for instance, where the property of a foreign corporation is all within this state; in such case, when the stock is owned here, taxes would be paid upon both, while the domestic corporation and its stockholders residents of this state with practically all its property without the state, would pay no taxes upon either its stock or property in this state and only upon its property in the foreign jurisdiction.

Our constitution provides that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws which shall prescribe such regulations as shall secure a just valuation for taxation of all property real and personal. If the position that Section 5687, supra, creates an exemption when applied to stock in a foreign corporation is correct, it would equally apply to stock in many domestic corporations for city and county taxes. Stocks owned by a resident of one city and county, when the domestic corporation and all its property is situate in another city and county, is not taxed to the owner at the city and county of his residence, and pays no taxes there for city and county purposes. If the corporation and its property [231] are situate outside of any city, although the owner of the stock is a resident of a city, he pays no city tax thereon at all, and while we concede that the limits of a city or county are different from state lines, yet to this extent, if it is an exemption of personal property prohibited by the constitution, the result would be the same when applied to such local taxes; but we cannot agree that it is an exemption within the meaning of the constitution. Counsel overlook the latter part of this section wherein it provides that the legislature shall prescribe such regulations as shall secure a just valuation for taxation of all property real and personal. This is what the legislature has attempted by providing that corporate stock shall be deemed to represent corporate property, etc. This is a regulation for the purposes of taxation and is of that class contemplated by the constitution.—Stanley v. Little Pittsburg Min. Co. 6 Colo. 415; Arapahoe County v. Rocky Mountain News Printing Co. 15 Colo. App. 189, 61 Pac. 494; Carlisle v. Pullman P. C. Co. 8 Colo. 320, 7 Pac. 164, 54 Am. Rep. 553; Arapahoe County v. Denver Union Water Co. 32 Colo. 382, 76 Pac. 1060; In re Taxation of Mining Claims, 9 Colo. 635, 21 Pac. 476; People v. Henderson, 12 Colo. 369, 21 Pac. 144; Ames v. People, 26 Colo. 83, 56 Pac. 650; American Refrigerator Transit Co. v. Adams, 28 Colo. 119, 63 Pac. 410.

A somewhat similar regulation is that which provides for the deduction of debts from credits in the case of the individual taxpayer. Such deductions might be considered as meaning an exemption, but it has generally been accepted as constitutional, as being a

Whether the owner resides where the corporation is organized or takes them to another state, all of the essential incidents of personal property attach to them in his hands. If he is wrongfully deprived of them, he may maintain an action for their conversion, as he would for the conversion of a horse or a promissory note. Doyle v. Burns, 123 Ia. 488. If he dies intestate, their distribution to his heirs is governed by the law of his domicile, and not by the law of the corporate domicile. McKeen v. Northampton County, 49 Pa. St. 519, 88 Am. Dec. 515.' If such shares be personalty in the nature of chose in action, representing valuable rights personal to the owner, no good reason can be assigned why they should not be governed by the usual rule, which makes such property taxable at the owner's domicile. With but very little discord in the cases, save as objection has been occasionally made in academic discussions, such taxation is upheld by all of the courts. . . . True it is that, in granting a charter or in providing a general law for the organization of corporations, the Legislature may reserve the right to tax the shares of stock direct to the corporation, as is done by our own statute with reference to state banks; and by force of the statute in such cases the situs of the shares for taxation by such state remains in the place of the corporate domicile, without regard to the residence of the holder; but in the absence of such restriction the state has no power to lay a tax upon shares owned by persons residing out of its territorial jurisdiction. . . . It is urged, however, that even if the general rule be conceded to be as stated, still, where the effect of its application is to impose double taxation, the courts will refuse to apply it. Few will be disposed to deny that double taxation, within the proper meaning of that expression, is not favored in law. . . . But the trouble with the appellee's case is in the fact that the taxation which they are here resisting is not double within the rule to which they appeal. Each state is sovereign within its own territorial jurisdiction, and its power to tax any and all property therein, except such as is in actual transit through it, cannot be taken away, limited, or lessened by the act of the taxing authorities of any other state. . . . When a state finds property within its jurisdiction, it is not necessary, before taxing it, to investigate and ascertain whether any other state has already taxed it or asserts the right so to do; and if it happens that two or more jurisdictions have levied a tax upon the same item or description of property for the same period it is not double taxation within the condemnation of the law. A double taxation, obnoxious to the rule, is where the second or additional burden is imposed by the same sovereignty which imposed the first." In Appeal Tax Court v. Gill, 50 Md. 377, the court said: "The property, owned by a shareholder in a corporation, is so different and distinct from the property owned by the corporation, that its distinctive character is not affected by the nature of the property of the corporation. The property of the corporation may be wholly real estate. The shares of its stock are personal property only. . . . The necessary conclusion would seem to be, that shares in a corporation, incorporated by another state, owned by residents of this state, constitute a separate and special property, belonging to the respective shareholders, wholly distinct from the capital of the corporation, and from the property in which that capital is invested. . . . The most complete proof that the property belonging to the corporation, and the shares in such corporation in the hands of the holders of such shares, are distinct and separate properties, is the conclusion reached by the Supreme Court of the United States in the recent case of Farrington v. Tennessee, 95 U. S. 687 [24 U. S. (L. ed.) 560], that the property of a corporation and the shares of a corporation may both be taxed in the hands of their respective owners, by the state in which such corporation has its situs, and in which also such shareholders reside, and that such taxation is not double. In that case it was declared to be 'settled beyond doubt,' that a tax upon a corporation was a different thing from a tax upon the individual shareholders of stock in the corporation; that the property of the corporation, and the shares of stock of that corporation in the hands of stockholders were different properties, and were consequently distinct subjects for taxation; and that an exemption of the one was not itself an exemption of the other, nor the taxation of the one a tax upon the other in such a sense as to interfere with any exemption the latter might have from taxation. The ruling, thus made, has been affirmed in the recent case of Dewing v. Perdicaries, 96 U. S. 196 [24 U. S. (L. ed.) 656]. If shares of stock in a corporation, incorporated by this state, owned by a shareholder residing in this state, constitute a property separate from that owned by the corporation, and are liable to taxation as the property of such shareholder, whether the property of the corporation be taxed by this state, or not, it certainly follows that shares of stock in a corporation incorporated by another state are when owned by a resident of this state, liable to taxation by this state, whether the property of such non-resident corporation be taxed by the state in which it has its situs, or not." So in State v. Nelson, 107 Minn. 319, 119 N. W. 1058, the court said: "The statute in question does not violate the mandate of our

constitution as to uniformity and equality in taxation nor deny to a resident holder of shares of stock in a foreign corporation the equal protection of the laws, in that such stock is taxed, but stock of a domestic corporation is not. The constitutional provisions of this state as to equality and uniformity of taxation have reference only to property within this state, and neither the statutes of another state nor the action of its taxing officers can affect the question. In the case of a stockholder in a domestic corporation, he is taxed in this state on his interest in the corporation when the corporation pays the tax on its property; but in the case of a foreign corporation, a resident holder of its stock is not and cannot be taxed in this state on his interest in the property of such corporation, except by taxing therein his shares of stock. The result is that each of such stockholders is taxed once, and once only, on his property within the state, and that the statute, eliminating the laws and acts of taxing officers of other states, is equal and uniform in its operation as to persons and property within the state. Similarly it was said in Bradley v. Bauder, 36 Ohio St. 28, 38 Am. Rep. 547, "The argument is: that the capital of the corporation is invested in property which is taxed in the name of the corporation, and that the shares in the capital stock, when owned by individuals, only represent proportions in the ownership of such property, and hence, to tax the shares in another mode of taxing the property of the corporation, and that a tax upon both, although the tax upon one is imposed by another state, violates the rule or principle of equality established by the constitution. This argument, however plausible it seems, has never met with favor from the courts. Double taxation, in a legal sense, does not exist, unless the double tax is levied upon the same property within the same jurisdiction. Here the property owned by the plaintiffs is not only not the same as that owned by the corporation, but its situs, so far as shares of stock are capable of one, is in a different state."

It is permissible for a state to tax the stock of a foreign corporation owned within its borders and exempt from taxation, the stock of a domestic corporation. Kidd v. Alabama, 188 U. S. 730, 23 S. Ct. 401, 47 U. S. (L. ed.) 669, wherein it was said: "We see nothing to prevent a state from taxing stock in some domestic corporations and leaving stock in others untaxed on the ground that it taxes the property and franchises of the latter to an amount that imposes indirectly a proportional burden on the stock. When we come to corporations formed and having their property and business elsewhere, the state must tax the stock held within the state if it is to tax anything, and we now are assuming the right to tax anything, and we now are assuming the right to tax stock in foreign corporations to be conceded. If it does tax that stock it may take into account that the property and franchise of the corporation are untaxed, on the same ground that it might do the same thing with a domestic corporation. There is no rule that the state cannot look behind the present net values of different stocks. See American Sugar Refining Co. v. Louisiana, 179 U. S. 89 [21 S. Ct. 43, 45 U. S. (L. ed.) 102]. We say that the state in taxing stock may take into account the fact that the property and franchises of the corporation are untaxed, whereas in other cases they are taxed; and we say untaxed, because they are not taxed by the state in question. The real grievance in a case like the present is that, more than probably, they are taxed elsewhere. But with that the state of Alabama is not concerned. No doubt it would be a great advantage to the country and to the individual states if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided. But the constitution of the United States does not go so far." And see Sturges v. Carter, 114 U. S. 511, 5 S. Ct. 1014, 29 U. S. (L. ed.) 240.

Applicability of Tax Laws.

General Rule.

According to the great weight of authority a tax law subjecting to taxation in general terms all personal property within the state renders shares of stock in a foreign corporation owned by a resident of the state liable to taxation.

United States.—Wright v. Louisville, etc. R. Co. 195 U. S. 219, 25 S. Ct. 16, 49 U. S. (L. ed.) 167 (Georgia Statute); Central of Georgia R. Co. v. Wright, 166 Fed. 153 (Georgia Statute).

Alabama.—State v. Kidd, 125 Ala. 413, 28 So. 480, *overruling* Varner v. Calhoun, 48 Ala. 178.

California.—San Francisco v. Fry, 63 Cal. 470; San Francisco v. Flood, 64 Cal. 504, 2 Pac. 264; In re Fair, 128 Cal. 607, 61 Pac. 184; Mackay v. San Francisco, 128 Cal. 678, 61 Pac. 382; Stanford v. San Francisco, 131 Cal. 34, 63 Pac. 145.

Georgia.—Central of Georgia R. Co. v. Wright, 124 Ga. 630, 53 S. E. 207.

Illinois.—Greenleaf v. Board of Review, 184 Ill. 226, 56 N. E. 295, 75 Am. St. Rep. 168.

Kentucky.—Com. v. Peebles, 134 Ky. 121, 20 Ann. Cas. 724, 119 S. W. 774, 23 L.R.A. (N.S.) 1130.

Maine.—Holton v. Bangor, 23 Me. 264.

Maryland.—Appeal Tax Court v. Gill, 50 Md. 377.

Massachusetts.—Dwight v. Boston, 12 Allen 316, 90 Am. Dec. 149; Great Barrington v. Berkshire County, 16 Pick. 572; Frothington v. Shaw, 175 Mass. 59, 55 N. E. 623, 78 Am. St. Rep. 475; Hawley v. Malden, 204 Mass. 138, 90 N. E. 415, *affirmed* in Hawley v. Malden, reported in full post, this volume, at page 842; Welch v. Burrill, 111 N. E. 774; Bellows Falls Power Co. v. Com. reported in full, post, this volume, at page 834.

Michigan.—Graham v. St. Joseph Tp. 67 Mich. 652, 35 N. W. 808; Bacon v. State Tax Com'rs, 126 Mich. 22, 85 N. W. 307, 86 Am. St. Rep. 524, 60 L.R.A. 321; Thrall v. Guiney, 141 Mich. 302, 104 N. W. 646, 113 Am. St. Rep. 528.

Missouri.—*Compare* State v. Lesser, 237 Mo. 310, 141 S. W. 888, *distinguishing* Ogden v. St. Joseph, 90 Mo. 522, 3 S. W. 25, which was based on a provision of a city charter.

New York.—*Compare* People v. Tax Com'rs, etc. 4 Hun 595, *affirmed* 62 N. Y. 630; People v. Tax Com'rs, 5 Hun 200, *affirmed* 64 N. Y. 541; People v. Campbell, 88 Hun 544, 34 N. Y. S. 801.

North Carolina.—Worth v. Ashe County, 82 N. C. 420, 33 Am. Rep. 692, 90 N. C. 409.

Pennsylvania.—In re Short, 16 Pa. St. 63, *affirmed* in Carpenter v. Pennsylvania, 17 How. 456, 15 U. S. (L. ed.) 127; McKeen v. Northampton County, 49 Pa. St. 519, 88 Am. Dec. 515; Whitesell v. Northampton County, 49 Pa. St. 526.

Rhode Island.—Dyer v. Osborne, 11 R. I. 321, 23 Am. Rep. 460; Rhode Island Hospital Trust Co. v. Tax Assessors, 25 R. I. 355, 55 Atl. 877.

Tennessee.—*Compare* McKennon v. McFall, 127 Tenn. 393, 155 S. W. 158.

Virginia.—Allen v. Com. 98 Va. 80, 34 S. E. 981.

The argument adduced against the taxability of shares in a foreign corporation is that since the property of the corporation, and in many cases its stock, is taxed at its domicil, a construction exempting the stock is required to prevent a double taxation. In answer to such a contention it was said in Dwight v. Boston, 12 Allen (Mass.) 316, 90 Am. Dec. 149: "But our whole system of taxation, as established and practiced, is to disregard the liability of shares in foreign corporations to taxation in the states where they are situated. Thus shares in foreign railroad corporations held by citizens of this state are fully taxed here, and no deduction is made for any taxation to which the corporations are subject in the states where they are situated. So it is in regard to shares held by our citizens in banks, insurance companies and other moneyed corporations, situated in other states. Such shares, when held by our citizens, are here treated as so much personal estate, following the person of the owner, and taxable at their full value in this commonwealth, regardless of what may be the foreign law as to taxation of the capital or any part of it elsewhere." So in Holton v. Bangor, 23 Me. 264, the court said: "If a person chooses to employ his visible and tangible personal property within a jurisdiction, where he has no domicil, thereby receiving, it may be, peculiar favor from its laws, and subjecting them to the charge of its protection, it may not be unjust or unreasonable, that it should be subjected to taxation within that jurisdiction, although it may be considered as following the person of the owner, and subject to taxation there also. The state must be the judge of its rights and duties in such cases; and the persons may relieve themselves from the possibility of a double burden by a disposition of their property, or by a change of their domicil." Similarly in the case of Greenleaf v. Board of Review, 184 Ill. 226, 56 N. E. 295, 75 Am. St. Rep. 168, it was said: "A share of stock in a corporation is personal estate, and in the absence of any statute to the contrary is taxable to the owner as other personal estate, at the place of his residence, whether the corporation be foreign or domestic." In Bacon v. State Tax Com'rs, 126 Mich. 22, 85 N. W. 307, 86 Am. St. Rep. 524, 60 L.R.A. 321, the court said: "We think the determination of this question is for the legislature, and not subject to review by the courts. It appears from the statute itself that shares in foreign corporations are taxed in this state but once, and the shares in domestic corporations or their representatives are also taxed. The question of the effect of statutes of foreign states cannot be considered, nor can such statutes have any effect in this state upon the question of the uniformity of the rules of taxation. The stock has a situs in this state, and is subject to the control of the legislature for the purpose of taxation."

The few cases which are contrary to the general rule heretofore stated base their refusal to follow that rule on a denial of the proposition that the stock of a corporation is a property right of the stockholder separate and distinct from the property of the corporation. State v. Lesser, 237 Mo. 310, 141 S. W. 888; People v. Tax Com'rs, etc. 4 Hun 595, *affirmed* 62 N. Y. 630; People v. Tax Com'rs, 5 Hun 200, *affirmed* 64 N. Y. 541; People v. Campbell, 88 Hun 544, 34 N. Y. S. 801; McKennon v. McFall, 127 Tenn. 393, 155 S. W. 158. Thus in People v. Tax Com'rs, etc. 4 Hun 595, *affirmed* 62 N. Y. 630, it was said: "Such corporations are taxable, and we must presume, in the absence of proof, that taxes in

their respective home states, are duly assessed and collected upon their capital stock or property. The stocks in such corporations, held by individuals here, are simple representatives of capital or property employed in business in other states, the title of which is vested in, and controlled by, the artificial person created by and residing in such states. They represent an interest which is, or may become a membership in the corporation, and evidence of a right to participate in divided profit, and in the ultimate dividend of surplus, after the payment of all debts and obligations of the corporation. The stock certificates are not themselves the property, but are evidences of the rights just mentioned, to be possessed, enjoyed and enforced, under and in conformity with the laws of the state which created the body corporate." The authorities maintaining the contrary view as to the nature of corporate stock, many of which are beyond the scope of the present discussion are collated in Morrill v. Bentley, 150 Ia. 677, 130 N. W. 734, wherein the view accepted in most jurisdictions was tersely stated as follows: "The expression 'shares of stock,' when qualified by words indicating number and ownership, express the extent of the owner's interest in the corporation property. The interest is equitable, and does not give him the right of ownership of specific property of the corporation. But he does own the specific stock held in his name, and under the rules of law the property of the corporation is held by the corporation in trust for the stockholders. It will be readily seen that a share of stock is a thing owned by the stockholder."

The fact that the foreign corporation has some property within the state on which it pays taxes does not exempt its stock in the hands of a resident. Hunt v. Allen County, 82 Kan. 824, 109 Pac. 106; Com. v. Lovell, 125 Ky. 491, 101 S. W. 970. Neither does an exemption of property in another state which is fully taxed therein exempt locally owned shares in a foreign corporation. Lockwood v. Weston, 61 Conn. 211, 23 Atl. 9. But stock in a foreign corporation whose entire property is within the state is exempt. See infra the subdivision *Limitations of Rule.*

Limitations of Rule.

If all the property of a foreign corporation is within the state and is subject to taxation, shares of stock in that corporation stand on the same footing with respect to taxation as stock in a domestic corporation. Patterson v. Wilson County, 83 Kan. 224, 109 Pac. 790; Com. v. Ledman, 127 Ky. 603, 106 S. W. 247; Stroh v. Detroit, 131 Mich. 109, 90 N. W. 1029; Hubbard v. Brush, 61 Ohio St. 252, 55 N. E. 829. A like rule has been applied with respect to stock in a foreign corporation paying a franchise tax in the state. Com. v. Walsh, 133 Ky. 103, 106 S. W. 240, 117 S. W. 398.

It has been held that a statutory exemption of corporate stock from taxation is applicable to stock in a foreign corporation. Tennessee Fertilizer Co. v. McFall, 128 Tenn. 645, 163 S. W. 806; State v. Leuch, 156 Wis. 121, 144 N. W. 290. And see the reported case. In State v. Leuch, supra, it was said: "It must be borne in mind that domestic corporations and all other corporations 'in the state' are by this statute grouped together and the same rule fixed for all of that group. Besides, the legislation of a state is presumed to be regulatory of persons and property in that state unless otherwise expressed. Black, Interp. of Laws (2d ed.) pp. 91, 92, and cases cited. The statute in question including any corporation must include a foreign corporation which is for the purpose of taxation in this state. Indeed, that is the change made by the act of 1868. The exemption is limited to the shares of domestic corporations and to the shares of foreign corporations in this state, not foreign corporations generally, and to these two classes only when their property in this state is by the laws of this state taxed in the same manner as individuals."

In other cases the contrary view has been taken. Sturges v. Carter, 114 U. S. 511, 5 S. Ct. 1014, 29 U. S. (L. ed.) 240 (Ohio Statute); Worthington v. Sebastian, 25 Ohio St. 1; Lee v. Sturges, 46 Ohio St. 153, 19 N. E. 560, 2 L.R.A. 356; Lander v. Burke, 65 Ohio St. 532, 63 N. E. 69. See also San Francisco v. Fry, 63 Cal. 470; San Francisco v. Flood, 64 Cal. 504, 2 Pac. 264; Morril v. Bentley, 150 Ia. 677, 130 N. W. 734. So in State v. Kidd, 125 Ala. 413, 28 So. 480, in holding that an exemption of corporate stock applied to stock in domestic corporations only the court said: "The exemption of those shares is, doubtless, for the reason that elsewhere special provisions are made for taxing the property and privileges of the last named corporations, which provisions could have no application to foreign corporations having no property and doing no business here. As to shares in them, we find nothing in either Code which should be construed as an exemption. By subjecting them the state does not infringe its general policy of avoiding double taxation, for the property is not doubly taxed by its own laws; and it is not found, by comity or otherwise, to conform to laws elsewhere in order to shelter property from burdens which, but for such foreign laws, would not have come upon it."

A statute expressly exempting corporate stock which is taxed in another state, is applicable to stock in a corporation of a foreign country which is there taxed. Foster

v. Stevens, 63 Vt. 175, 22 Atl. 78, 13 L.R.A. 166.

In *New Jersey* the earlier cases supported the rule that stock of a foreign corporation owned by a resident is subject to taxation. State v. Branin, 23 N. J. L. 484; State v. Bentley, 23 N. J. L. 532; Newark City Bank v. Assessor, 30 N. J. L. 13; Mechanics', etc. Bank v. Bridges, 30 N. J. L. 112. But by the tax law of 1903 such stock is exempted if it is taxed in the state of the corporate domicil. State v. Ramsey, 54 N. J. L. 546, 24 Atl. 445; DeBaun v. Smith, 55 N. J. L. 110, 25 Atl. 277; Trenton v. Standard F. Ins. Co. 77 N. J. L. 757, 73 Atl. 606.

BELLOWS FALLS POWER COMPANY

v.

COMMONWEALTH.

Massachusetts Supreme Judicial Court—September 16, 1915.

222 Mass. 51; 109 N. E. 891.

Taxation — Property Subject — Stock in Foreign Corporation.

Shares of stock in a foreign corporation are taxable as property to the owner, where he is resident within the commonwealth, although the place of business and the whole property of the corporation are in another jurisdiction.

[See note at end of this case.]

Stock in Domestic Corporation.

The state of Vermont has the power to tax all the shares of corporations organized under its laws, whether owned by its residents or those of other states or countries.

[See 13 Ann. Cas. 636.]

States — Relation to Each Other.

The several states of the Union are foreign to each other, except so far as the United States is the paramount government as to each, binding them to recognize the fraternity among their sovereignties established by the Constitution of the United States.

Taxation — Extraterritorial Effect of Laws.

No state taxation laws can have extraterritorial effect, since each state, except as to the United States, is an independent sovereignty, so far as relates to the power of taxation.

Property Subject.

All property within the jurisdiction of a state, which is capable of being taxed, may be subjected to taxation, unless exempted under federal or state law; but no state can assess to its residents a tax upon their realty or tangible personalty in a foreign jurisdiction.

Same.

Although no state can give extraterritorial effect to its laws exempting the property of its subjects from taxation, except as restrained by federal or state constitutional provisions, its power as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within its jurisdiction.

Situs of Property.

Shares in a corporation are "personal property," with its various incidents and attributes, attaching to and following the person of the owner for purposes of taxation in the jurisdiction of his domicile; his right of ownership in such stock being a property right distinct from the various contractual rights to participate in the corporation's profits and assets which his ownership gives him.

Same.

Property may constitutionally have a situs in two different jurisdictions for taxation purposes, when the nature of the property requires or permits it, such as the nature of corporate stock, since the federal Constitution does not prevent the conflict of state laws whereby taxation of the same property in two jurisdictions is possible.

Shares in Foreign Corporation.

The taxation of shares in a Vermont corporation, already taxed in Vermont to such corporation, owned by a resident of this jurisdiction, is not unconstitutional, as infringing the principle against double taxation of the same property, since such principle is confined in operation to double taxation in the same jurisdiction.

[See note at end of this case.]

Same.

Tax Act (St. 1909, c. 490) part 3, § 41, provides that the tax commissioner shall ascertain the market value of corporate shares, and shall estimate therefrom the fair cash value of all the shares constituting the capital stock, which shall be taken as the true value of each corporation's corporate franchise, and that from such value there shall be deducted, in the case of a domestic business corporation, the value of its property situated in another state or country and subject to taxation therein. P. S. Vt. c. 30, § 516, provides that taxes assessed on corporate stock of nonresidents shall be paid by the corporation, which may hold such stock and the dividends thereon as security for the payment. A Massachusetts corporation, which owned shares in a Vermont corporation, was taxed thereon, and, suing to recover the tax, contended that the shares of stock which had been assessed to it were "property situated in another state and subject to taxation therein," within section 41, and so exempt from taxation. It is held that such shares were not such property, since the context in which the words occurred in the tax law demonstrated that they referred to the kind of property which, if owned by an individual and situated and taxed in another state, would be exempt from taxation in this

commonwealth, such as real estate and "merchandise, machinery, and animals."

[See note at end of this case.]

Same.

The imposition of a property tax upon shares of stock in a Vermont corporation, owned by a domestic corporation, does not conflict with the constitutional guaranty of equal protection of the laws.

[See note at end of this case.]

Same.

The imposition of a property tax upon the shares of a Vermont corporation, also taxed in Vermont, owned by a domestic corporation, does not conflict with the provision of the federal Constitution providing for the giving in full faith and credit to the public acts of other states.

[See note at end of this case.]

Same.

The imposition of a property tax upon shares of a Vermont corporation, owned by a domestic corporation, is not a deprivation of property without due process of law.

[See note at end of this case.]

Same.

The imposition of a property tax upon shares of a Vermont corporation, already taxed there, owned by a domestic corporation, is no impairment of any obligation of contracts, since it must be inferred that the tax law was in effect before the acquisition of stock by the domestic corporation.

[See note at end of this case.]

Same.

The imposition of a property tax upon shares of a Vermont corporation, owned by a domestic corporation, is constitutional.

[See note at end of this case.]

Securities Owned by Domestic Corporation.

Tax Act (St. 1909, c. 490) part 3, § 43, provides that every corporation shall annually pay a tax upon its franchise, but the said tax shall not exceed a tax levied at a certain rate upon an amount 20 per cent. in excess of the value, as found by the tax commissioner, of its works, structures, real estate, machinery, poles, underground conduits, wires, pipes, merchandise, "and all securities which if owned by a natural person resident in this commonwealth would be liable to taxation." A domestic corporation owned a bond of a Vermont corporation, and contended that such bond was a debt due to it, and that if it were owned by a natural person resident in the commonwealth who owed money in excess of the value of the bond, as the corporation did, such natural person could not be taxed on the bond. It is held, that such domestic corporation could be taxed on the bond, since the expression of the statute, "securities which if owned by a natural person resident in this commonwealth would be liable to taxation," was not intended to establish the same standard of taxation for the corporation as for an individual; the reference to such securities being merely to determine the taxable character of the securities, which, if they possess such character, are to be taken into account in estimating the value of the corporate franchise, while, from its total assets as determining such value, the corporation is entitled, upon making proper return, to deduct its debts, and so cannot have them deducted a second time by utilizing them, after they have reduced its franchise value, to extinguish the taxable character of particular items of the corporation's property.

Same.

"Securities," as used in Tax Act (St. 1909, c. 490) part 3, § 41, providing that the tax upon the value of a corporate franchise of a domestic business corporation shall not exceed a tax levied at a certain rate upon an amount 20 per cent. in excess of the value of the works, etc., "and of the securities which if owned by a natural person resident in this commonwealth would be liable to taxation," is a word of sufficiently broad import to include bonds and other evidences of indebtedness.

On report from Supreme Judicial Court, Suffolk county.

Petition for recovery of tax. Bellows Falls Power Company, petitioner, and Commonwealth defendant. The facts are stated in the opinion. PETITION DISMISSED.

Richard Y. Fitzgerald for petitioner.
Roger Sherman Hoar for defendant.

[52] RUGG, C. J.—This is a petition under St. 1909, c. 490, Part III, § 70, for the recovery of the amount of an excise alleged to have been excessive, which was levied upon a domestic business corporation under §§ 41 and 43 of Part III of the tax act, St. 1909, c. 490, as amended by St. 1914, c. 198, § 6. The questions presented are whether certain stocks and bonds of Vermont corporations are "securities which if owned by a natural person resident in this Commonwealth," by § 41 "would not be liable to taxation," or by § 43 "would be liable to taxation," and also whether such stock is "property situated in another State or country and subject to taxation therein" by § 41. The pertinent parts of the statute are printed in a footnote.[1]

[52] [1] "Section 41. . . The tax commissioner shall ascertain from the returns or otherwise the true market value of the shares of each corporation subject to the requirements of the preceding section, and shall estimate therefrom the fair cash value of all of said shares constituting its capital stock on the preceding first day of April, which, unless by the charter of a corporation a different method of ascertaining such value is provided, shall, for the purposes of this part, be taken as the true value of its corporate franchise. From such value there shall be deducted:

. . . . . .

"Third, In case of a domestic business corporation, the value of the works, struc-

[53] The petitioner owned a large number of shares of stock in a Vermont corporation, the value of which the tax commissioner refused to deduct from the true market value of the corporate franchise of the petitioner, for the purpose of determining its excise tax. It is contended by the petitioner that the tax commissioner was in error for two reasons, (1) because the stock of the Vermont corporation would not be subject to taxation in this Commonwealth if owned by a natural person, and (2) because such stock is property situated in another State and subject to taxation therein. These two contentions rest on statutes of the State of Vermont, which are printed in a footnote.[1]

[54] Plainly these contentions would have no merit in law were it not for the special provisions of the Vermont statute. It was early decided in this Commonwealth that shares of stock in a foreign corporation were taxable as property to the owner resident here, although the place of business and the entire property of the corporation were in another jurisdiction. Great Barrington v. Berkshire County Com'rs, 16 Pick. (Mass.) 572. This principle of taxation has been repeatedly upheld, the latest instance being Hawley v. Malden, 204 Mass. 138, 90 N. E. 415. That decision was affirmed in 232 U. S. 1, where, at pages 12 and 13, 34 S. Ct. 201, 58 U. S. (L. ed.) 477, it was said by Mr. Justice Hughes in delivering the opinion: "Whether, in the case of corporations organized under State laws, a provision by the State of incorporation fixing the *situs* of shares for the purpose of taxation, by whomever owned, would exclude the taxation of the shares by other States in which their owners reside is a question which does not arise upon this record and need not be decided." We are not aware that this question ever has been determined by this court or by the Supreme Court of the United States. It now is presented. It must be taken as the settled purpose of our tax law to assess to the owners resident in this Commonwealth a tax upon all shares of foreign corporations. It is provided in the tax act (St. 1909, c. 490) in Part I, § 2, that "All property real and personal situated within the Commonwealth, and all personal property of the inhabitants of the Commonwealth wherever situated, unless exempted by law, shall be subject to tax-

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tures, real estate, machinery, poles, underground conduits, wires and pipes owned by it within the Commonwealth subject to local taxation, and of securities which if owned by a natural person resident in this Commonwealth would not be liable to taxation; also the value of its property situated in another State or country and subject to taxation therein. There shall not be deducted the value of securities which if owned by a natural person resident in this Commonwealth would be liable to taxation, nor shall there be deducted the value of any shares of stock of the corporation itself owned directly or indirectly by it or for its benefit; and the tax commissioner in determining [53] for the purposes of taxation the value of the corporate franchise of any debts of such corporation shall not take into consideration any debts of such corporation unless the returns required from it contain a statement duly signed and sworn to, setting forth that no part of such debts was incurred for the purpose of reducing the amount of taxes to be paid by it."

"Section 43. [Clause 1.] Every corporation subject to the provisions of section forty shall annually pay a tax upon its corporate franchise, after making the deductions provided for in section forty-one, at a rate equal to the average of the annual rates for three years preceding that in which such assessment is laid, . . . [Clause 2.] but the said tax upon the value of the corporate franchise of a domestic business corporation, after making the deductions provided for in section forty-one, shall not exceed a tax levied at the rate aforesaid upon an amount, less said deductions, twenty per cent. in excess of the value, as found by the tax commissioner, of the works, structures, real estate, machinery, poles, underground conduits, wires and pipes, and merchandise, and of securities which if owned by a natural person resident in this Commonwealth would be liable to taxation; and [Clause 3.] the total amount of the tax to be paid by such corporation in any year upon its property locally taxed in this Commonwealth and upon the value of its corporate franchise shall amount to not less than one tenth of one per cent. of the market value of its capital stock at the time of said assessment as found by the tax commissioner."

[1] "Extracts from chapter 30: Public Statutes of Vermont.

"Sec. 515. Listed how. Shares of stock in corporations, except railroad corporations, shall be set in the list like other personal estate to the owner thereof, in the town where he resides, if he resides in the State, otherwise in the town where the corporation issuing such stock has its principal place of business.

"Sec. 516. Tax on non-resident's stock. Taxes assessed on such stock of non-residents shall be paid by the corporation, and it shall hold such stock [54] and the dividends thereon as security for such payment and may deduct the amount from any dividends payable to such shareholders."

"Sec. 496. Property. The following property shall be exempt from taxation. . . .

"III. Shares of stock in a corporation situated in another State, when all the stock of such corporation is taxed in such State to the holders, whether residing within or without such State, or when the corporation is taxed in such State for all its stock."

ation." Part I, § 23, provides that "All personal estate, within or without the Commonwealth, shall be assessed to the owner in the city or town in which he is an inhabitant on the first day" of April, with exceptions not here material, save that by St. 1909, c. 516, § 1, "Merchandise, machinery and animals owned by the inhabitants of this Commonwealth, but situated in another State shall be exempt [55] from taxation." Part I, § 4, provides that "Personal estate for the purpose of taxation shall include . . . Third, Public stocks and securities, . . . bonds of railroads and street railways, stocks in turnpikes, bridges and moneyed corporations within or without this Commonwealth . . ." with exceptions not now of consequence. In substance, the only question is whether these provisions of the law, which plainly include in their scope stock such as is owned by this petitioner in the Vermont corporation, conflict as applied to such shares with any provision of the State or federal constitution.

Vermont has the power to tax all the shares of corporations organized under its laws, whether owned by its residents or by those of other States or countries. This expressly was decided in Corry v. Baltimore, 196 U. S. 466, 25 S. Ct. 297, 49 U. S. (L. ed.) 556, and in St. Albans v. National Car Co. 57 Vt. 68. The principle was applied in Tappan v. Merchants' Nat. Bank, 19 Wall. 490, 22 U. S. (L. ed.) 189. It was recognized in Greves v. Shaw, 173 Mass. 205, 208, 53 N. E. 372; Kingsbury v. Chapin, 196 Mass. 533, 535, 13 Ann. Cas. 738, 82 N. E. 700, and Kennedy v. Hodges, 215 Mass. 112, 114, 102 N. E. 432.

It may be urged on the one side that the nature and the incidents of the shares of stock are fixed by the law by which the corporation is created; that the provisions of that law are limitations upon the essential characteristics of shares and follow them wherever they may go; and that if the *situs* of the shares for purpose of taxation is declared by that law to be in the State of its domicil, that is an inherent restriction which everywhere must be recognized as an incident of the property represented by the shares; that this provision as to *situs* for tax purposes is contractual in substance and may be invoked by the owner in exoneration of liability as much as others which are obligatory are resorted to by creditors to establish a liability. Converse v. Ayer, 197 Mass. 443, 453, 84 N. E. 98; Whitman v. Oxford Nat. Bank, 176 U. S. 559, 20 S. Ct. 477, 44 U. S. (L. ed.) 587; that by virtue of the Vermont statute this stock is divested of its taxable character as intangible property and clothed with an immovable garment of tangibility located in Vermont alone, and hence, that these shares stand on the same footing as merchandise and other tactile personal effects which cannot be taxed to their owner in a jurisdiction other than that in which they permanently are placed. Delaware, etc. [56] Western R. Co. v. Pennsylvania, 198 U. S. 341, 25 S. Ct. 669, 49 U. S. (L. ed.) 1077; Old Dominion Steamship Co. v. Virginia, 198 U. S. 299, 3 Ann. Cas. 1100, 25 S. Ct. 686, 49 U. S. (L. ed.) 1059. Expressions by eminent judges are laid hold of as countenancing the soundness of these contentions. It was said by Chief Justice Waite in Tappan v. Merchants' National Bank, 19 Wall. 490, at page 499, 22 U. S. (L. ed.) 189. "Shares of stock in national banks are personal property. . . . They are a species of personal property which is, in one sense, intangible and incorporeal, but the law which creates them may separate them from the person of their owner for the purposes of taxation, and give them a *situs* of their own. This has been done. [Here is quoted the section of the national banking act to that effect.] This is a law of the property. Every owner takes the property subject to this power of taxation under State authority, and every nonresident, by becoming an owner, voluntarily submits himself to the jurisdiction of the State in which the bank is established for all the purposes of taxation on account of his ownership." In Covington v. Covington First Nat. Bank, 198 U. S. 100, at page 111, 25 S. Ct. 562, 49 U. S. (L. ed.) 963, it was said by Mr. Justice Day, "The *situs* of shares of foreign-held stock in an incorporated company, in the absence of legislation imposing a duty upon the company to return the stock within the State as the agent of the owner, is at the domicil of the owner." It is to be noted, however, that both these cases relate to shares in national banks. The subject of national banking is within the exclusive control of Congress and its mandate respecting any subject within its sphere is supreme and binding upon all the States. The national bank act is explicit as to the *situs* of shares of stock in national banks for taxation. These expressions, therefore, were directed to a different subject and are of slight value in considering the present question, which expressly was left open in Hawley v. Malden, 232 U. S. 1, 13, 34 S. Ct. 201, 58 U. S. (L. ed.) 477. See Grether v. Wright, 75 Fed. 742, 43 U. S. App. 770, 23 C. C. A. 498, 512.

Weighty as are the suggestions which have been noted above, we are of opinion that the constitutionality of the statute requiring the taxation of shares like these in question must be sustained. The fundamental ground is that the power to tax all property within its jurisdiction is a necessary attribute of sovereignty, and that there is a certain quality of property in these shares attaching

to the person of the owner and hence taxable at his domicil.

[57] It is too well settled to require the citation of authorities that the several States of the Union are foreign to each other except so far as the United States is paramount as the dominating government, and except so far as they are bound to recognize the fraternity among sovereignties established by the Constitution of the United States. No state taxation laws can have extraterritorial effect. Each State, so far as relates to the power of taxation, is an independent sovereignty. It is not concerned with what other States may do as to property within its jurisdiction, which may be made the subject of taxation by itself. Dwight v. Boston, 12 Allen (Mass.) 316, 90 Am. Dec. 149; Sturges v. Carter, 114 U. S. 511, 5 S. Ct. 1014, 29 U. S. (L. ed.) 240; Seward v. Rising Sun, 79 Ind. 351. Bacon v. State Tax Com'rs 126 Mich. 22, 85 N. W. 307, 86 Am. St. Rep. 524, 60 L.R.A. 321; Judy v. Beckwith, 137 Ia. 24, 15 Ann. Cas. 890, 114 N. W. 565, 15 L.R.A.(N.S.) 142; McKeen v. Northampton County, 49 Pa. St. 519, 88 Am. Dec. 515; State v. Branin, 23 N. J. L. 484, 496. Bradley v. Bauder, 36 Ohio St. 28, 38 Am. Rep. 547; Ogden v. St. Joseph, 90 Mo. 522, 529, 3 S. W. 25. Com. v. Lovell, 125 Ky. 491, 101 S. W. 970; Stanford v. San Francisco, 131 Cal. 34, 63 Pac. 145. All property within the jurisdiction of a State, which is capable of being taxed, may be made subject to taxation unless exempted under federal or State law. No State can assess to its residents a tax upon their real estate or tangible personal property situated in a foreign jurisdiction. Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 4 Ann. Cas. 493, 26 S. Ct. 36, 50 U. S. (L. ed.) 150. Neither can any State give extraterritorial effect to its laws exempting property of its subjects from taxation in other jurisdictions. But, except as restrained by federal or State constitutional provisions, "the power of the State as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction." Kirtland v. Hotchkiss, 100 U. S. 491, 497, 25 U. S. (L. ed.) 558.

There is a necessary element of property in shares in corporations which, although intangible, attaches to and follows the person of the owner, and is inseparable from it. Such shares are personal property and not real estate. They are subject to succession according to the law of the domicil of the owner. As was said in Hawley v. Malden, 232 U. S. 1, at page 9, 34 S. Ct. 201, 58 U. S. (L. ed.) 477. "It is well settled that the property of the shareholders in their respective shares is distinct from the corporate property, franchises and capital stock," and further at page 12, that shares of stock are "in the nature of contract rights or choses in action. Morawetz on Corporations, [58] § 225." It was held in Stanwood v. Stanwood, 17 Mass. 57, in an opinion written by Chief Justice Parker, that shares of stock in a bank were choses in action. The principle of that decision applies to shares of stock in all corporations. It is an incident of such shares that the owner is entitled to participate in the net profits earned, to enforce the use of its capital for its corporate purposes, to restrain abuses of corporate powers, and to receive his proportion of the property of the corporation remaining after the payment of its debts upon its dissolution. Van Allen v. The Assessors, 3 Wall. 573, 584, 18 U. S. (L. ed.) 229; Farrington v. Tennessee, 95 U. S. 679, 687, 24 U. S. (L. ed.) 558. In most corporations he has the further right in proportion to his ownership to participate in the election of officers and such direction of the corporate affairs as may be vested in stockholders. Certificates of stock may be the subject of contracts for sale or exchange under our laws. Opinion of Justices, 196 Mass. 603, 619, 621, 85 N. E. 545. Our laws may be invoked to enforce such contracts and other property rights, Herbert v. Simson, 220 Mass. 480, 108 N. E. 65, L.R.A.1915D 733, as well as to protect the owner and his property interest therein against theft or fraud. His property right as such owner may be attached and secured by his creditors by resort to our courts, and in many instances doubtless this is the only way of reaching such right in any jurisdiction. This property right follows the person of the owner, has its *situs* at his domicil and is there taxable regardless of any law of a sister State by whose authority the corporation itself may have been created.

Certificates of stock in a corporation have other of the characteristics of property. They may be converted, like corporeal personal property. Jarvis v. Rogers, 15 Mass. 389; Hagar v. Norton, 188 Mass. 47, 50, 73 N. E. 1073; McAllister v. Kuhn, 96 U. S. 87, 24 U. S. (L. ed.) 615. They are the subject of larceny and embezzlement. O'Herron v. Gray, 168 Mass. 573, 575, 47 N. E. 429, 60 Am. St. Rep. 411, 40 L.R.A. 498. They may be hypothecated, pledged and replevied. Kennedy v. Hodges, 215 Mass. 112, 115, 102 N. E. 432. They may be made by statute subject to attachment and garnishment. Puget Sound Nat. Bank v. Mather, 60 Minn. 362, 62 N. W. 396. Title passes by their delivery and assignment or endorsement. Sargent v. Essex Marine Ry. Corp. 9 Pick (Mass.) 202; Sargent v. Franklin Ins. Co. 8 Pick (Mass.) 90, 95, 19 Am. Dec. 306; Boston Music Hall Assoc. v. Cory, 129 Mass. 435. Certificates of stock are not in every respect the equivalent of the shares in the corporation which they [59] represent. Often they are spoken of as evi-

dence of title, Kennedy v. Hodges, ubi supra, Richardson v. Shaw, 209 U. S. 365, 378, 28 S. Ct. 512, 52 U. S. (L. ed.) 835; but they may be regarded as something more. Indeed, it was said in Hatch v. Reardon, 204 U. S. 152, 161, 27 S. Ct. 188, 51 U. S. (L. ed.) 415, respecting a certificate of stock, "That document was more than evidence, it was a constituent of title. No doubt, in a more remote sense, the object was the membership or share which the certificate conferred or made attainable. More remotely still it was an interest in the property of the corporation, which might be in other States than either the corporation or the certificate of stock." In Merritt v. American Steel-Barge Co. 79 Fed. 228, 49 U. S. App. 85, 24 C. C. A. 530, at page 537, is found this language: "Speaking technically, it is true that a stock certificate is written evidence of a certain interest in corporate property. . . . But in the business world such obligations or securities are treated as something more than mere muniments of title. They are daily bought and sold like ordinary chattels, . . . they have an inherent market value, and, while differing in some respects from chattels, they are generally classified as personal property." Said Cooley, C. J., in Daggett v. Davis, 53 Mich. 35, 18 N. W. 548, 51 Am. Rep. 91, respecting the characteristics of stock in a corporation, "the certificate itself is also property; standing as it does as the representative of the shares." In Simpson v. Jersey City Contracting Co. 165 N. Y. 193, 197, 198, 58 N. E. 896, 55 L.R.A. 796, occur these words: "Certificates of stock are treated by business men as property for all practical purposes. They are sold in the market and they are transferred as collateral security for loans, and they are used in various ways as property. They pass by delivery from hand to hand." In Cook on Corporations, (7th ed.) § 485, it is said, "certificates of stock have gradually grown to be more than mere receipts or evidence of stock, and have come to be the stock itself, practically, in business transactions . . . and, like a promissory note, a certificate of stock is property in itself." While some of these expressions go rather far, enough has been said to show a generally prevailing tendency to treat a certificate of stock as possessing incidents of property. These are a sufficient basis for taxation to the owner at his residence. The validity of a commercial usage whereby possession of a certificate of stock duly indorsed enables the holder to pass title good against the world has been recognized in numerous cases. Russell v. American Bell Telephone [60] Co. 180 Mass. 467, 62 N. E. 751; Andrews v. Worcester, etc. Co. 159 Mass. 64, 66, 33 N. E. 1109; Scollans v. Rollins, 173 Mass. 275, 53 N. E. 863, 73 Am. St. Rep. 284, 179 Mass. 346, 60 N. E. 983, 88 Am. St. Rep. 386; Clews v. Friedman, 182 Mass. 555, 66 N. E. 839; Baker v. Davie, 211 Mass. 429, 438, 97 N. E. 1094.

If the domiciliary State of the corporation has the right to establish the *situs* of its shares of stock for purposes of taxation, on principle it would seem that that power may be exercised to declare an entire exemption from taxation and to collect revenue in some other way from the corporation. If the power exists in the State creating the corporation to establish the *situs* of its shares of stock for the purpose of taxation, and is exercised, it must be absolute and no other State can inquire into the character or extent of that taxation in an effort to tax its own citizen who is a stockholder in such corporation. It hardly seems possible that the Fourteenth Amendment to the federal constitution can have such an effect.

The theory of taxation is that it is money exacted from the subject in return for the protection afforded by established government. It is the duty of governments to protect persons and property. These rights of the Massachusetts owner of shares of stock in the Vermont corporation pertain to his residence here and receive the protection of our laws. To that extent the shareholder resident here receives for the taxation imposed a return in governmental protection for the property rights incident to his ownership.

These are incidents of property which necessarily follow the person of the owner of shares in foreign corporations, even though the shares may be taxed at the foreign domicil of the corporation. For these purposes the *situs* of corporate shares follows the domicil of the of the owner. This is the general rule. There appears to us to be no ground for the establishment of an exception to that general rule in the instant case. Bristol v. Washington County, 177 U. S. 133, 20 S. Ct. 585; Ayer, etc. Tie Co. v. Kentucky, 202 U. S. 409, 6 Ann. Cas. 205, 26 S. Ct. 679, 50 U. S. (L. ed.) 1082; Southern Pac. Co. v. Kentucky, 222 U. S. 63, 69, 32 S. Ct. 13, 56 U. S. (L. ed.) 96; Darnell v. Indiana, 226 U. S. 390, 33 S. Ct. 120, 57 U. S. (L. ed.) 267; Frothingham v. Shaw, 175 Mass. 59, 55 N. E. 623, 78 Am. St. Rep. 475; Welch v. Boston, 221 Mass. 155, 109 N. E. 174. On this ground, if not on others also, Selliger v. Kentucky, 213 U. S. 200, 29 S. Ct. 449, 53 U. S. (L. ed.) 761, is distinguishable.

The case at bar closely resembles Bonaparte v. Tax Ct. [61] 104 U. S. 592, 26 U. S. (L. ed.) 845, where municipal and State bonds, some entirely exempted from taxation and others subject to taxation in the State of issue by the State laws under which they were authorized, nevertheless were held to be taxable at the domicil of the owner. In principle that case seems indistinguishable from the

case at bar. An express legislative declaration by the debtor State that its bonds either shall be exempt from taxation or shall be subject to taxation in its own jurisdiction, although not categorically an attempt to separate the *situs* of the debt from the person of the owner, yet is in substance the equivalent of a declaration to that end. It is a legislative effort to incorporate into the property as one of its essential qualities an exemption from taxation or a liability to taxation in the State of issue alone. It is hard to conceive of a purpose on the part of that State not to attach by strong inference and fair implication a separation of *situs* for taxation from the domicil of the owner to bonds so issued, if the effective exercise of such a function were within the scope of legislative power. Indeed, the Vermont statute is not a precise assertion of separation of *situs* of shares from the person of the non-resident owner. It is a simple exercise of the power of the sovereign to tax. That was the effect of one of the statutes under consideration in Bonaparte v. Tax Ct. 104 U. S. 592, 26 U. S. (L. ed.) 845. The barrier against accomplishing that purpose in such way as to compel recognition by the taxing power of a sister State was no greater in substance in that case than it is in the present case.

It has been held that the State having jurisdiction over the debtor has the constitutional power to assert and maintain for itself a *situs* of the debt for purposes of taxation and levy a tax thereon against the creditor domiciled in another State. This was decided as to debts secured by mortgage upon real estate in Savings, etc. Soc. v. Multnomah County, 169 U. S. 421, 18 S. Ct. 392, 42 U. S. (L. ed.) 803. It was decided as to unsecured credits, whether expressed by notes or existing as bald accounts current, in Liverpool, etc. Ins Co. v. Parish of Orleans, 221 U. S. 346, 31 S. Ct. 550, L.R.A.1915C 903; Bonaparte v. Tax Ct. upheld the power of the State having jurisdiction of the creditor owning the debt to tax him at his domicil upon the maximum *mobilia sequuntur personam*, despite the express tax or exemption from taxation by the State having jurisdiction where the debt was created and the debtor domiciled, [62] while the Multnomah County and Orleans cases sustained an exercise of the power to tax by the State having jurisdiction of the debtor regardless of what might happen in the State having jurisdiction of the creditor. The more comprehensive power of Congress as to taxation and exemption from taxation of subjects within its jurisdiction as compared with that of a State legislature is pointed out by Taft, J., in an opinion concurred in by Lurton, J., in Grether v. Wright, 43 U. S. App. 770, 23 C. C. A. 498, 512.

It is manifest from the adjudications by the United States Supreme Court mentioned above that under some circumstances the same property may be taxed to the same person in different jurisdictions without violating any right secured by the federal constitution. Put in other words, these decisions appear to mean that property may have a *situs* in two different jurisdictions for taxation purposes when the nature of the property seems to require or permit it. There may be a difference between bonds and shares of stock as to capacity for independent *situs*. Blackstone v. Miller, 188 U. S. 189, 206, 23 S. Ct. 277, 47 U. S. (L. ed.) 439; Selliger v. Kentucky, 213 U. S. 200, 204, 75 Fed. 742. But there appears to be no ground for distinction between shares of stock and accounts current so far as concerns the issue here involved. This principle governs the case at bar. It shows that Corry v. Baltimore, 196 U. S. 466, 25 S. Ct. 297, 49 U. S. (L. ed.) 556, is not inconsistent with this result, but that it bears the same relation to the present case as does Liverpool, etc. Ins. Co. v. Parish to Bonaparte v. Tax. Ct. As was said in Kidd v. Alabama, 188 U. S. 730, at page 732, 23 S. Ct. 401, 47 U. S. (L. ed.) 669, by Mr. Justice Holmes, as to taxation between sister States, "it would be a great advantage to the country and to the individual States if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided. But the Constitution of the United States does not go so far."

There is an analogy so far as concerns *situs* between the case at bar and the numerous cases holding that residence of the owner is sufficient ground for the imposition of a succession or inheritance tax upon various kinds of intangible property. Forthingham v. Shaw, 175 Mass. 59, 55 N. E. 623, 78 Am. St. Rep. 475; Buck v. Beach, 206 U. S. 392, 11 Ann. Cas. 589, 27 S. Ct. 712, 51 U. S. (L. ed.) 1106; Wheeler v. New York, 233 U. S. 434, 34 S. Ct. 607, 58 U. S. (L. ed.) 1030.

[63] The principle against double taxation of the same property has no application, because that is confined in operation to such taxation in the same jurisdiction.

Whether it would be wise to make exemptions in cases like the present is not a judicial but a legislative question. Knight v. Boston, 159 Mass. 551, 35 N. E. 86.

It follows from what has been said that the shares of stock are not "property situated in another State and subject to taxation therein." The context in which these words occur in our tax law and its other general provisions demonstrate that these words refer to the kind of

property which, if owned by an individual and situated and taxed in another State, would be exempt from taxation here, such as real estate, and "merchandise, machinery and animals." St. 1909, c. 516, § 1. Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 4 Ann. Cas. 493, 26 S. Ct. 36, 50 U. S. (L. e.) 150. There are substantial although intangible, elements of property in shares of stock in a corporation which attach to the owner resident in this Commonwealth.

The general statement in the decisions of many courts and of text writers is to the effect that shares of stock in foreign corporations may be assessed to the owner at the place of his domicil irrespective of taxes which may have been imposed on the corporation itself, even in respect of its capital stock. Greenleaf v. Board of Review, 184 Ill. 226, 228, 56 N. E. 295, 75 Am. St. Rep. 168; State v. Nelson, 107 Minn. 319, 322, 119 N. W. 1058; Appeal Tax Court v. Gill, 50 Md. 377, 396; Allen v. Com. 98 Va. 80, 84, 34 S. E. 981; State v. Bentley, 23 N. J. L. 532, 542; 27 Am. & Eng. Enc. of Law (2d ed.) 928, 929; 37 Cyc. 821, 864, 865.

Our decision upon this branch of the case is supported by direct adjudications upon the same point in Dyer v. Osborne, 11 R. I. 321, 23 Am. Rep. 460; Worth v. Ashe County, 90 N. C. 409; Appeal Tax Ct. v. Patterson, 50 Md. 354, 373; Judy v. Beckwith, 137 Ia. 24, 33, 15 Ann. Cas. 890, 114 N. W. 565, 15 L.R.A. (N.S.) 142; Seward v. Rising Sun, 79 Ind. 351, 353, 354; Bacon v. State Tax. Com'rs, 126 Mich. 22, 29, 30, 85 N. W. 307, 86 Am. St. Rep. 524, 60 L.R.A. 321; Central of Georgia Ry. Co. v. Wright, 166 Fed. 153, 159, appeal dismissed, 215 U. S. 617, 30 S. Ct. 408, 54 U. S. (L. ed.) 350. See 1 Cooley on Taxation, (3d ed.) 389. Although in some of these opinions the question of the power of the domiciliary State of the corporation to appropriate to itself an exclusive taxation *situs* of the shares of stock was not much discussed, the decisions are clear to the [84] effect that it cannot do so. The result seems to be supported by Kidd v. Alabama, 188 U. S. 730, 23 S. Ct. 401, 47 U. S. (L. ed.) 669, where at page 731 some of these cases are cited with approval. It conforms to the policy of our law touching a kindred point in Dwight v. Boston, 12 Allen (Mass.) 316, where it was said at page 322, 90 Am. Dec. 149, "our whole system of taxation, as established and practiced, is to disregard the liability of shares in foreign corporations to taxation in the States where they are situated." We are aware of no authorities to the contrary. Oliver v. Washington Mills, 11 Allen (Mass.) 268, involved quite different considerations.

The conclusion is, in the opinion of a majority of the court, that as matter of constitutional power the Legislature can impose a property tax upon the shares of stock in a Vermont corporation owned by a natural person resident in this Commonwealth. The exercise of such power does not conflict with constitutional guarantees for equal protection of the laws, full faith and credit to the public acts of other States, nor is it a deprivation of property without due process of law. Of course it does not impair the obligation of any contract, because it is to be inferred that our tax law was in effect long before the acquisition of the stock by the petitioner.

The petitioner contends that its bond of a Vermont corporation is not comprehended within "securities which if owned by a natural person resident in this Commonwealth would be liable to taxation," as these words are used in § 43, cl. 2. Its argument is that such a bond is a debt due to it and that if owned by a natural person resident here who owed money in excess of the value of the bond, as the petitioner does, then such natural person would not be taxed for it. Hale v. Hampshire County Com'rs, 137 Mass. 111. This argument is fallacious. These words in the statute were not intended to establish the same standard of taxation for a corporation as for an individual. The reference to securities which would be taxable if owned by a natural person is merely for the purpose of determining the taxable character of the securities. Farr Alpaca Co. v. Com. 212 Mass. 156, 162, 98 N. E. 1078. If the securities possess that taxable character, then they are to be taken into account. The debts owed by the petitioner are all considered in determining the fair market value of its shares, provided it makes proper return of them. It is not entitled [85] under the excise tax law to have them deducted a second time.

"Securities" is a word of sufficiently broad import to include a bond like that in question. It was said in Boston R. Holding Co. v. Com. 215 Mass. 493, Ann. Cas. 1914D 621, 102 N. E. 650, that "in its ordinary acceptation the word 'securities' includes bonds . . . and other evidences of indebtedness." There is nothing in any part of the tax law to show that it was used in this section in a narrow or constricted sense.

In this respect also no error is shown in the action of the tax commissioner in the determination of the excise tax upon the petitioner.

Petition dismissed with costs.

NOTE.

The reported case holds that the tax laws of a state are applicable to shares of stock in a foreign corporation owned by a resident of that state, though a statute of the state of the corporation's domicil imposes a tax

on all its stock, including that owned in other states. The liability to taxation within a state of shares of stock in a foreign corporation is treated in the note to Denver v. Hobbs' Estate, reported ante, this volume, at page 823.

HAWLEY

v.

MALDEN.

United States Supreme Court—January 5, 1914.

232 U. S. 1; 34 S. Ct. 201.

Taxation — Property Subject — Stock of Foreign Corporation.

The taxation of a resident of the state, under the authority of Mass. Rev. Laws, chap. 12, §§ 2, 4, 23, upon shares of stock held by him in foreign corporations which do no business and have no property within the state, does not take his property without due process of law.

[See note at end of this case.]

Error to Massachusetts Superior Court.

Action to recover taxes paid under protest. Truman R. Hawley, plaintiff, and City of Malden, defendant. Judgment for defendant. Plaintiff brings error. The facts are stated in the opinion. AFFIRMED.

Courtenay Crocker and *Nathan Matthews* for plaintiff in error.

H. L. Boutwell for defendant in error.

[8] HUGHES J.—The plaintiff in error, a resident of the city of Malden, brought this action to recover the amount of certain taxes which he had paid under protest. The taxes were assessed upon shares which he held in foreign corporations most of which did no business and had no property within the State of Massachusetts. It was alleged that the levy and collection were in violation of the due process and equal protection clauses of the Fourteenth Amendment. Demurrer to the declaration was sustained by the Superior Court and the case was reported to the Supreme Judicial Court of the Commonwealth which directed judgment for the defendant. 204 Massachusetts 138.

It is conceded that the objection that the statute authorizing the tax [Rev. Laws (Mass.) c. 12, §§ 2, 4, 23] denies to the plaintiff in error the equal protection of the [9] laws is not well taken; but it is contended that the shares were not within the jurisdiction of the State and hence that the enforcement of the tax constitutes an unconstitutional deprivation of property.

The power thus challenged, as the state court points out, has been continuously exercised by the State of Massachusetts for more than three-quarters of a century. Substantially the same statutory provision, derived from an earlier enactment, is found in Rev. Stats. (Mass.) c. 7, § 4, and its constitutionality has been sustained by repeated state decisions. Great Barrington v. Berkshire County Com'rs, 16 Pick. (Mass.) 572; Dwight v. Boston, 12 Allen (Mass.) 316, 90 Am. Dec. 149; Frothingham v. Shaw, 175 Mass. 59, 61, 55 N. E. 623, 78 Am. St. Rep. 475. And other States through a long period of years have asserted a similar authority. Union Bank v. State, 9 Yerg. (Tenn.) 490; McKeen v. Northampton County, 49 Pa. St. 519, 88 Am. Dec. 515; Whitesell v. Northampton County, 49 Pa. St. 526; State v. Branin, 23 N. J. L. 484; State v. Bentley, 23 N. J. L. 532; Worthington v. Sebastian, 25 Ohio St. 1; Bradley v. Bauder, 36 Ohio St. 28, 38 Am. Rep. 547; Dyer v. Osborne, 11 R. I. 321, 23 Am. Rep. 460; Seward v. Rising Sun, 79 Ind. 351; Ogden v. St. Joseph, 90 Mo. 522, 3 S. W. 25; Worth v. Ashe County, 90 N. C. 400; Jennings v. Com. 98 Va. 80, 34 S. E. 981; Appeal Tax Court v. Gill, 50 Md. 377; State v. Nelson, 107 Minn. 319, 119 N. W. 1058; Bacon v. State Tax Com'rs, 126 Mich 22, 85 N. W. 307, 86 Am. St. Rep. 524, 60 L.R.A. 321; State v. Kidd, 125 Ala. 413, 28 So. 480; Com. v. Lovell, 125 Ky. 491, 101 S. W. 970; Stanford v. San Francisco, 131 Cal. 34, 63 Pac. 145; Judy v. Beckwith, 137 Ia. 24, 15 Ann. Cas. 890, 114 N. W. 565, 15 L.R.A. (N.S.) 142; Greenleaf v. Board of Review, 184 Ill. 226, 56 N. E. 295, 75 Am. St. Rep. 168. It is well settled that the property of the shareholders in their respective shares is distinct from the corporate property, franchises and capital stock, and may be separately taxed (Van Allen v. Assessors, 3 Wall. 573, 584, 18 U. S. (L. ed.) 229; Farrington v. Tennessee, 95 U. S. 679, 687, 24 U. S. (L. ed.) 558; Tennessee v. Whitworth, 117 U. S. 129, 136, 137, 6 S. Ct. 645, 29 U. S. (L. ed.) 830; New Orleans v. Houston, 119 U. S. 265, 277, 7 S. Ct. 198, 30 U. S. (L. ed.) 411), and the rulings in the state cases which we have [10] cited proceed upon the view that shares are personal property and, having no situs elsewhere, are taxable by the State of the owner's domicile, whether the corporations be foreign or domestic.

It is said that the question of the constitutional validity of such taxation has not hitherto been raised definitely in this court and has not been directly passed upon. There is no doubt, however, that the existence of

the state authority has invariably been assumed. In Sturges v. Carter, 114 U. S. 511, 5 S. Ct. 1014, 29 U. S. (L. ed.) 240, the action was brought to recover taxes imposed under the law of Ohio upon shares of stock owned by a resident of Ohio in the Western Union Telegraph Company, a New York corporation. The right of the State to tax the shares was not questioned and as it was found that a statutory exemption which was relied upon in defense did not apply, the recovery of the tax was sustained. Again, in Kidd v. Alabama, 188 U. S. 730, 23 S. Ct. 401, 47 U. S. (L. ed.) 669, it was not disputed that the State was entitled to tax shares owned by its citizens in foreign corporations. The argument was that the statute in that case created an unconstitutional discrimination and, this point being found to be without merit, the tax was upheld. In Wright v. Louisville, etc. R. Co. 195 U. S. 219, 25 S. Ct. 16, 49 U. S. (L. ed.) 167, the question was whether shares of stock in a railroad corporation of another State, which were owned by a Georgia corporation were taxable under the constitution and laws of Georgia. The State's power to tax the shares was not denied, so far as the Constitution of the United States was concerned, but it was contended that this power had not been exercised. The constitution of Georgia provided that all taxation should "be uniform upon the same class of subjects, and *ad valorem* on all property subject to be taxed within the territorial limits of the authority levying the tax;" and should be levied and collected under general laws. The general tax act had authorized a tax on all of the taxable property of the State. It was clear that the [11] State had directed shares in foreign corporations to be taxed, provided these could be considered to be "property subject to be taxed within the territorial limits" of the taxing authority. And such shares when held by a resident being deemed to fall within this description, it was decided that the state officer was entitled to collect the tax. "Putting the case at the lowest," said the court (p. 222), "the above cited section of the constitution was adopted in the interest of the State as a tax collector, and authorizes, if it does not require, a tax on the stock." So also, in Darnell v. Indiana, 226 U. S. 390, 33 S. Ct. 120, 57 U. S. (L. ed.) 267, the authority of the State to tax the shares of its citizens in foreign corporations was recognized, the tax being sustained against objections urged under the commerce clause, Art. I, § 8, and the equal protection clause of the Fourteenth Amendment.

To support the contention that this familiar state action, hitherto assumed to be valid, is fundamentally violative of the Federal Constitution, the plaintiff in error invokes the doctrine that a State has no right to tax the property of its citizens when it is permanently located in another jurisdiction. Louisville, etc. Ferry Co. v. Kentucky, 188 U. S. 385, 23 S. Ct. 463, 47 U. S. (L. ed.) 513; Delaware, etc. R. Co. v. Pennsylvania, 198 U. S. 341, 25 S. Ct. 669, 49 U. S. (L. ed.) 1077; Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 4 Ann. Cas. 493, 26 S. Ct. 36, 50 U. S. (L. ed.) 150. But these decisions did not involve the question of the taxation of intangible personal property (Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 211, 4 Ann. Cas. 493, 26 S. Ct. 36, 50 U. S. (L. ed.) 150); nor do they apply to tangible personal property which, although physically outside the State of the owner's domicile, has not acquired an actual situs elsewhere. Southern Pac. Co. v. Kentucky, 222 U. S. 63, 68, 32 S. Ct. 13, 56 U. S. (L. ed.) 96. When we are dealing with the intangible interest of the shareholder, there is manifestly no question of physical situs, so far as this distinct property right is concerned, and the jurisdiction to tax it is not dependent upon the location of the lands and chattels of the corporation.

[12] The argument, necessarily, is that shares are to be deemed to be taxable solely in the State of incorporation. It is urged that these rights rest in franchise and that the principle of the decision in Louisville, etc. Ferry Co. v. Kentucky, supra, holding that a ferry franchise granted by Indiana to a Kentucky corporation was not taxable in Kentucky is applicable to shares of stock. But that case went upon the ground that the franchise was an incorporeal hereditament and hence had its legal situs in Indiana, 188 U. S. 398, 23 S. Ct. 463, 47 U. S. (L. ed.) 513. Shares fall within a different category. While the shareholder's rights are those of a member of the corporation entitled to have the corporate enterprise conducted in accordance with its charter, they are still in the nature of contract rights or *choses in action*. Morawetz on Corporations, § 225. As such, in the absence of legislation prescribing a different rule, they are appropriately related to the person of the owner, and, being held by him at his domicile, constitute property with respect to which he is under obligation to contribute to the support of the government whose protection he enjoys. Kirtland v. Hotchkiss, 100 U. S. 491, 25 U. S. (L. ed.) 558; Bonaparte v. Tax Ct. 104 U. S. 592, 26 U. S. (L. ed.) 845; Covington v. Covington First Nat. Bank, 198 U. S. 100, 111, 112, 25 S. Ct. 562, 49 U. S. (L. ed.) 963; Southern Pac. Co. v. Kentucky, supra; Cooley on Taxation (3d ed.) 26.

Undoubtedly, the State in which a corporation is organized may provide, in creating it, for the taxation in that State of all its shares whether owned by residents or non-residents. Corry v. Baltimore, 196 U. S. 466, 25 S. Ct.

297, 49 U. S. (L. ed.) 556. This is by virtue of the authority of the creating State to determine the basis of organization and the liabilities of shareholders. Id. 476, 477; Hannis Distilling Co. v. Baltimore, 216 U. S. 285, 293, 294, 17 Ann. Cas. 1112. So, by reason of its dominant power to provide for the organization and conduct of national banks, Congress has fixed the places at which alone shares in those institutions may be taxed. Rev. Stat. § 5219. Whether, in the case of corporations organized [13] under state laws, a provision by the State of incorporation fixing the situs of shares for the purpose of taxation, by whomever owned, would exclude the taxation of the shares by other States in which their owners reside is a question which does not arise upon this record and need not be decided. No such provision is here involved, and the present case must be determined by the application of the established principle which has been stated.

The real ground of complaint in this class of cases is not that the shares are taxed in one place rather than in another but that they are taxed at all, when presumably the property and franchises of the corporation which give to the shares their value are also taxed. As to this we may repeat what was said in Kidd v. Alabama, 188 U. S. 730, 732, 23 S. Ct. 401, 47 U. S. (L. ed.) 669, "No doubt it would be a great advantage to the country and to the individual States if principles of taxation could be agreed upon which did not conflict with each other, and a common scheme could be adopted by which taxation of substantially the same property in two jurisdictions could be avoided. But the Constitution of the United States does not go so far."

The judgment is affirmed.

Affirmed.

NOTE.

The reported case upholds the power of a state to tax shares of stock in a foreign corporation when owned by its residents, irrespective of the extent of the taxation of the assets of the corporation in the state of its domicil. The cases on this subject are collated in the note to Denver v. Hobbs' Estate, reported ante, this volume, at page 823.

SMITH ET AL.

v.

SELWYN.

England——Court of Appeal——April 7, 1914.

[1914] 3 K. B. 98.

Actions — Civil Action for Crime — Stay.

Proceedings in a civil action based on a felony will be stayed until the offender has been prosecuted criminally.

[See note at end of this case.]

[98] APPEAL from an order of Lord Coleridge J. at chambers.

The plaintiffs were husband and wife. The statement of claim alleged in substance, in paragraph 2, that the defendant intending and contriving to corrupt and violently or otherwise have criminal relations with the female plaintiff induced her to attend at a certain place, and that, while the said plaintiff was there, he induced her to partake of some liquid which he alleged and she believed to be brandy, but which, as the defendant well knew, was not brandy, but was brandy or a liquid mixed with some noxious narcotic or other drug, which was calculated and was by him intended to have the effect of rendering the plaintiff powerless and incapable of muscular control or resistance and of reducing her to a state of collapse and insensibility. Paragraph 3 alleged that the said plaintiff, being so induced by the defendant, drank part of the liquid, and almost immediately thereafter in consequence thereof became injuriously affected and was rendered powerless and incapable of muscular control or resistance, and was reduced to a state of collapse and insensibility, and while she was so affected as aforesaid and under the influence of the drug the defendant unlawfully and indecently assaulted her and violently against her will had or alternatively attempted to have carnal knowledge of and intercourse with her. Paragraph 4 alleged that in consequence thereof the said plaintiff became ill and suffered much mental and physical pain, and for a long time feared pregnancy, and was unable to discharge her [99] household duties as theretofore, and her marital relations with her husband became strained and impaired and she lost for a long time the consortium of her husband, and was unable to follow her occupation and was injured in her character and reputation; and the husband lost the services of his wife in the discharge of her household duties, and his marital relations with her became strained and impaired, and he lost the consortium of his wife. The plaintiffs claimed damages.

The defendant applied at chambers for an order to stay further proceedings in or to dismiss the action as being an abuse of the process of the Court, upon the ground that the statement of claim was based upon a felony for which the defendant had not been prosecuted.

Lord Coleridge J., affirming an order of the Master, dismissed the application. The defendant appealed.

C. W. Lilley for appellant.
C. E. Jones for respondents.

Walter Martin & Co., solicitors for appellant.

Surridge & Mullis, for *Mullis & Walmisley, Ilford*, solicitors for respondents.

[102] KENNEDY L. J.—This case raises a somewhat difficult, but at the same time an interesting, question. The appeal is against [103] an order of Lord Coleridge J., who affirmed an order of the Master refusing an application to stay or dismiss the action. The ground of the appeal is that the statement of claim on its face alleges facts which, if true, constitute a felony on the part of the defendant, that the claim to damages is based upon that alleged felony, and that, as the defendant has not been prosecuted, or a reasonable excuse shewn for his not having been prosecuted, as, for instance, his being out of the country, it is not open to the plaintiffs to claim damages in a civil action in respect of the felony.

It is not easy to find a statement in any case as to what is the course which the Court ought to adopt in a matter of this kind. Some of the decisions are not easy to reconcile. This, however, is certain, that the Court has a right, if not an imperative duty, to stay the proceedings in a civil action for damages, if it is clear that that which is the basis of the claim in the action is a felony committed by the defendant against the plaintiff. It is unnecessary to traverse the ground again by going through the authorities which have been so fully dealt with in the argument. In my opinion the result of them is this. It is in the power of the Court to grant a stay, and it is the duty of the Court to consider in each case whether in the circumstances it will grant a stay, if it sees that the claim for damages is based upon a felony committed by the defendant. I have come to the conclusion myself that, while portions of paragraphs 2 and 3 of the statement of claim, taken separately, might be construed as alleging facts upon which the plaintiffs will rely as giving them a claim for damages for such an assault upon the female plaintiff as constitutes only a misdemeanour, yet the scheme of the paragraphs is substantially to allege—and it is admitted that they are so intended—that the defendant induced the female plaintiff to go to a particular place with intent to have carnal knowledge of her, and when she was there, with the same intent or design, as the statement of claim calls it, he induced her to take some liquid with a drug in it so as to render her incapable of muscular control and resistance, and while she was in that condition he carried out his design of assaulting her, and against her will either had or attempted to [104] have carnal knowledge of her. In my opinion, apart from the allegation that the defendant had carnal knowledge of her, there is here a statement of facts which, if proved, would constitute a felony within s. 22 of the Offences against the Person Act, 1861. I do not think that s. 22 is in any way affected by s. 3, sub-s. 3, of the Criminal Law Amendment Act, 1885, whereby a somewhat similar act is made a misdemeanour. On the face of the statement of claim there is no allegation of felony upon which the claim for damages is based. That being so, it is within the power of the Court to stay the proceedings, and the fair result of the cases is that that is the proper course to adopt. We ought, however, to give the plaintiffs an opportunity of alleging, as the ground of their claim to damages, an assault on the female plaintiff which will amount to a misdemeanour only. It would not, in my opinion, be irrelevant to that action to allege and prove that the person assaulted was unable to resist owing to a drug having been administered to her. Though it may not, perhaps, be easy, I conceive it to be possible to state a good cause of action without at the same time alleging a felony as its basis. The plaintiffs are entitled to be allowed to put forward such a case and to have it tried. I should be very loth to exercise our power in such a way as absolutely to deprive the plaintiffs of all civil remedy. Of course if the defendant is prosecuted the bar to the further continuance of the action in its present form will disappear. I only wish to add that there are here two plaintiffs, husband and wife, and if any real distinction could be made between them it might be that the husband might maintain his claim upon the ground that the felonious act was not committed on him. I am not prepared to differ from the opinion expressed by Bramwell B. in Osborn v. Gillett, L. R. 8 Exch. 88, 93, and by Huddleston B. and Wills J. in Appleby v. Franklin, 17 Q. B. D. 93. But here the two claims are so interlaced as to make it difficult to separate them, and moreover the husband's claim is a mere bagatelle, the real claim being in respect of the injury to the wife. In these circumstances I cannot separate them, and I draw no distinction between them.

The order, therefore, will be in substance to stay all further proceedings in the action on the present statement of claim; [105] with leave to the plaintiffs to amend the statement of claim within twenty-one days; and if no amendment is made within that time, the action to be stayed until after criminal proceedings have been taken against the defendant.

SWINFEN EADY, L.J.—I am of the same opinion. It is well established that according to the law of England, where injuries are inflicted on an individual under circumstances which constitute a felony, that felony cannot be made the foundation of a civil action at the suit of the person injured against the person who inflicted the injuries until the latter has been prosecuted or a reasonable excuse shewn for his non-prosecution. In 1827 in Stothe v. Marsh, 6 B. & C. 551, at p. 564, 13 E. C. C. 249, 253, Lord Tenterden, delivering the judgment of the Court of King's Bench, stated the law thus: "There is, indeed, another rule of the law of England, viz., that a man shall not be allowed to make a felony the foundation of a civil action." That is the rule, and then he proceeds to state the ground of the rule. "The rule is founded on a principle of public policy. . . . Now public policy requires that offenders against the law shall be brought to justice, and for that reason a man is not permitted to abstain from prosecuting an offender, by receiving back stolen property, or any equivalent or composition for a felony, without suit, and, of course, cannot be allowed to maintain a suit for such a purpose." In White v. Spettigue, 13 M. & W. 603, at p. 608, the law was laid down in somewhat similar terms by Rolfe B., who said: "I think the true principle is, that where a criminal, and consequently an injurious act towards the public has been committed, which is also a civil injury to a party, that party shall not be permitted to seek redress for civil injury to the prejudice of public justice, and to waive the felony, and go for the conversion." The learned judge is there speaking of an injurious act which amounts to a felony. So too Cockburn C.J. in Wells v. Abrahams, L. R. 7 Q. B. 554, said (at p. 557): "No doubt it has been long established as the law of England that where an injury amounts to an infringement of the civil rights of an individual, and at the same time to a felonious wrong, the civil [106] remedy, that is, the right of redress by action, is suspended until the party inflicting the injury has been prosecuted." That being the established law, the question arises as to how it is to be enforced where an action is brought upon alleged facts which, if true, disclose a felony. Cockburn C.J. said in the same case: "But it may very well be that, if an action were brought against a person who was either in the course of being prosecuted for felony, or was liable to be prosecuted for felony, the summary jurisdiction of this Court might be invoked to stay the proceedings which would involve an undue use, probably an abuse, of the process of this Court, in which case the Court is always willing to interfere to prevent such abuse." Blackburn J. (at p. 559) took the view that the Court could in certain circumstances stay the proceedings. Lush J. (at p. 563) said: "It is undoubtedly laid down in the text-books that it is the duty of the person who is the victim of a felonious act on the part of another to prosecute for the felony, and he cannot obtain redress by civil action until he has satisfied that requirement; but by what means that duty is to be enforced we are nowhere informed."

We have now to lay down the proper course of procedure in such a case. The proper course is, in my judgment, that indicated by Cockburn C.J. in the passage I have cited, that is to say, to stay the action, if the present statement of claim is persisted in, until criminal proceedings have been taken against the defendant, with leave to the plaintiffs to amend their statement of claim, and thus give them an opportunity of stating a cause of action without alleging a felony. I agree with the form of order proposed by Kennedy, L.J.

PHILLIMORE, L.J.—I am of the same opinion. It is a well-established rule of law that a plaintiff against whom a felony has been committed by the defendant cannot make that felony the foundation of a cause of action unless the defendant has been prosecuted or a reasonable excuse has been shewn for his not having been prosecuted. The prosecution need not necessarily be at the suit of the injured person. We are enabled now to pronounce a decision as to the mode of enforcing that rule, because hitherto no mode of procedure has been [107] definitely laid down. I agree with the order which has been suggested. I only desire to add a few words as to the statement of claim. There seems to me to be two distinct felonies alleged therein. There is a charge of rape at the end of paragraph 3, and there is charge of felony in paragraphs 2 and 3 combined. It might be uncertain whether paragraph 2 alleged the administration of a drug to the female plaintiff with a view of making her unable to resist so that the defendant might have carnal knowledge of her. It is, however, frankly admitted that paragraphs 2 and 3 are intended to be read together and to have that meaning. It comes therefore within s. 22 of the Offenses against the Person Act, 1861, and it is none the less a felony within that section because it may

also be a misdemeanour within s. 3, sub-s. 3, of the Criminal Law Amendment Act, 1885. Various distinctions have been attempted to be drawn between the two sections, but it matters not, because there is a clear charge of felony under s. 22 of the Act of 1861 as the foundation of the action. The statement of claim therefore alleges two different felonies on the same facts. I agree that the proper order is that stated by my Lord.

Appeal allowed.

NOTE.

Merger or Suspension of Civil Action Predicated on Commission of Felony.

The early English rule that all civil remedies of a person injured by a felony were merged in the criminal offense, being based on the ground that the goods of a convicted felon were forfeited to the crown, later gave way to a doctrine based on public policy that all civil remedies are suspended until the offender has been prosecuted to conviction. 1 R. C. L. tit. *Actions*, p. 327. The later English cases show a tendency to disregard the rule, and in Midland Ins. Co. v. Smith, 6 Q. B. D. (Eng.) 561, wherein the authorities were reviewed at length, the court said: "The history of the question shows that it has at different times and by different authorities been resolved in three distinct ways. First, it has been considered that the private wrong and injury has been entirely merged and drowned in the public wrong, and therefore no cause of action ever arose or could arise. Secondly, it was thought that, although there was no actual merger, it was a condition precedent to the accruing of the cause of action that the public right should have been vindicated by the prosecution of the felon. Thirdly, it has been said that the true principle of the common law is that there is neither a merger of the civil right nor is it a strict condition precedent to such right that there shall have been a prosecution of the felon, but that there is a duty imposed upon the injured person, not to resort to the prosecution of his private suit to the neglect and exclusion of the vindication of the public law. In my opinion this last view is the correct one." The decision of the Court of Appeal in the reported case establishes, however, that in England, the court has the right, if not the imperative duty, to stay the proceedings in a civil action based on a felony where no criminal prosecution has been begun.

In the United States the English doctrine found little favor in the early cases and except in one jurisdiction (see Brady v. Messer, 27 R. I. 373) civil remedies in favor of a person injured by a felony are neither merged in the offense against public law nor suspended until after the termination of a criminal prosecution of the offender. 1 R. C. L. tit. *Actions*, p. 328. The leading American case on the subject is Boston, etc. R. Corp. v. Dana, 1 Gray (Mass.) 83, wherein the court stated the argument against the English doctrine as follows: "Without regard, however, to the causes which originated the doctrine, it has been urged with great force and by high authority, that the rule now rests on public policy; King v. Oxford County, 12 East 413, 414; that the interests of society require, in order to secure the effectual prosecutions of offenders by persons injured, that they should not be permitted to redress their private wrongs, until public justice has been first satisfied by the conviction of felons; that in this way a strong incentive is furnished to the individual to discharge a public duty, by bringing his private interest in aid of its performance, which would be wholly lost, if he were allowed to pursue his remedy before the prosecution and termination of a criminal proceeding. This argument is doubtless entitled to great weight in England, where the mode of prosecuting criminal offenses is very different from that adopted with us. It is there the especial duty of every one, against whose person or property a crime has been committed, to trace out the offender, and prosecute him to conviction. In the discharge of this duty, he is often compelled to employ counsel; procure an indictment to be drawn and laid before the grand jury, with the evidence in its support; and if a bill is found, to see that the case on the part of the prosecution is properly conducted before the jury of trials. All this is to be done by the prosecutor at his own cost, unless the court, after the trial, shall deem reimbursement reasonable. 1 Chit. Crim. Law, 9, 825. The whole system of the administration of criminal justice in England is thus made to depend very much upon the vigilance and efforts of private individuals. There is no public officer, appointed by law in each county, as in this commonwealth, to act in behalf of the government in such cases, and take charge of the prosecution, trial and conviction of offenders against the laws. It is quite obvious that, to render such a system efficacious, it is essential to use means to secure the aid and co-operation of those injured by the commission of crimes, which are not requisite with us. It is to this cause, that the rule in question, as well as many other legal enactments, designed to enforce upon individuals the duty of prosecuting offenses, owes its existence in England. But it is hardly possible, under our laws, that any grave offense of the class designated as felonies can escape detection and punishment. The officers of the law, whose province it is to prosecute criminals, require

no assistance from persons injured, other than that which a sense of duty, unaided by private interest, would naturally prompt. On the other hand, in the absence of any reasons, founded on public policy, requiring the recognition of the rule, the expediency of its adoption may well be doubted. If a party is compelled to await the determination of a criminal prosecution before he is permitted to seek his private redress, he certainly has a strong motive to stifle the prosecution and compound with the felon. Nor can it contribute to the purity of the administration of justice, or tend to promote private morality, to suffer a party to set up and maintain in a court of law a defense founded solely upon his own criminal act. The right of every citizen, under our constitution, to obtain justice promptly and without delay, requires that no one should be delayed in obtaining a remedy for a private injury, except in a case of the plainest public necessity. There being no such necessity calling for the adoption of the rule under consideration, we are of opinion that it ought not to be engrafted into our jurisprudence." The foregoing was quoted with approval in Leeman v. Public Service R. Co. 77 N. J. L. 420, 72 Atl. 8. In Downs v. Baltimore, 111 Md. 674, 19 Ann. Cas. 644, 76 Atl. 861, 41 L.R.A.(N.S.) 255, it was said: "Coming, however, to the specific contention of the appellant in this case it has been emphatically denied by so high authority as Judge Cooley, who says in his work on Torts, 1st ed. page 87: 'In this country the common law doctrine of the suspension of civil remedy in case of felony has not been recognized. The reason usually assigned is, that in this country the duty of prosecuting for public offenses is devolved upon a public officer chosen for the purpose, instead of being left as in England to the voluntary action of the party injured by crime. The civil and the criminal prosecution may therefore go on pari passu, or if the latter is not commenced at all, the failure to seek public justice is no bar to the private remedy.' This text of Judge Cooley's is sustained by numerous decisions among which is the case of Boston, etc. R. Corp. v. Daha, 1 Gray (Mass.) 83, in which the court concisely states: 'The doctrine of the English law, that for goods feloniously taken, no action lies against the felon before the institution of criminal proceedings against him, is not in force in this commonwealth.'"

MASON ET AL.

v.

BOARD OF MANAGERS OF MICHIGAN SOLDIERS' HOME.

Michigan Supreme Court—July 24, 1914.

181 Mich. 347; 148 N. W. 220.

Soldiers' Home — Nature of Institution.

The Michigan Soldiers' Home, established by Pub. Acts 1885, No. 152, is an eleemosynary institution for the purpose of dispensing a charity to a favored but dependent class, intended to furnish a home to honorably discharged veterans, disabled by disease, wounds, etc., from earning their living, and having no adequate means of support, who would otherwise become objects of common charity.

Pensions — Effect of Admission to Soldiers' Home.

Pub. Acts 1885, No. 152, establishing the Michigan Soldiers' Home, by section 2, vested the general government in a board of managers, by section 8, required the board to prepare a system of government, by section 11, declared that all honorably discharged and disabled soldiers and sailors otherwise dependent on charity should be admitted, subject to the regulations of the managers. Pub. Acts 1905, No. 313, provided that money accumulated in the post fund of the home might be used to benefit the home and its inmates, and Pub. Acts 1911, No. 102, that pensions of residents might be taken for disciplinary purposes to be held in trust for them. Held, that one whose pension was adequate for his support was not entitled to admission, and that a regulation imposed as a condition of admission that residents transfer their pensions in excess of $12 per month, to be permanently retained and ultimately turned over to a general state fund, was beyond the power of the board, and that the amounts so retained were held in trust, to be accounted for according to Act No. 102.

[See note at end of this case.]

Same.

In such accounting the amounts due to discharged or deceased soldiers, as to whom the trust had terminated, were payable, with interest at 5 per cent. per annum from the time of death or discharge; but, as to money held by the board under the disciplinary regulation, no interest was recoverable, unless the board had received interest thereon.

[See note at end of this case.]

Appeal from Circuit Court, Kent county: McDONALD, Judge.

Action for injunction, accounting and other relief. Orange S. Mason et al., plaintiffs, and Board of Managers of Michigan Soldiers' Home, defendants. Judgment for plaintiffs.

Defendants appeal. The facts are stated in the opinion. MODIFIED.

Grant Fellows and *David H. Crowley* for appellants.

A. A. Ellis and *S. Wesselius* for appellees.

[349] STEERE, J.—The ultimate question presented by this record is whether the board of managers of the Michigan soldiers' home at Grand Rapids ever had the right to take and retain permanently all or any part of the pensions of inmates of that institution.

Defendants have appealed from a decree of the circuit court of Kent county, in chancery, awarding $8,373.14 to 126 of the 206 complainants, in sums ranging from $4.95 to a maximum of $541.86 (principal and interest), being pension money received by said complainants from the United States government while residents of said soldiers' home, and retained by defendants under rules and general orders adopted and promulgated by said board of managers in cases where the individual pensions exceeded $12 per month.

The original bill of complaint herein was filed September 4, 1900, by Orange S. Mason, since deceased, in his own behalf and that of others, to restrain enforcement of a general order promulgated by the defendant board of managers, requiring all inmates of said home to surrender all pension money received by them in excess of $12, or in exceptional cases $15, per month to the authorities of the institution, to be permanently retained and ultimately turned into the general State fund. Subsequently all parties who are now complainants were made parties to said bill of complaint by an order of the court.

[350] Upon the filing of such bill a preliminary injunction was issued restraining the defendants from enforcing the provisions of said order. Defendants demurred to said bill, later amending said demurrer, alleging, among other reasons, that the suit instituted by complainants was in fact a suit against the State of Michigan, and therefore could not be maintained without the consent of the State; that said board of managers was an agency of the State, and defendants possessed only limited powers especially provided by law, not including the right to sue and be sued in the courts of the State of Michigan. Complainants' bill was later amended, and a plea was filed by defendants to said amended bill, followed by a replication of complainants. Thereafter a stipulation between the parties provided that the suit should be brought on for hearing upon the bill of complaint and plea on a date fixed, at which time, by permission of the court, complainants' replication was withdrawn, and an amended bill filed praying for an accounting by defendants for the moneys collected from complainants as alleged, and asking for an injunction restraining defendants from discharging any of complainants from said home until the further order of the court, from collecting or appropriating any money due complainants as pensioners of the civil war, from compelling them to sign receipts or transfers for any money due them as pensioners of the United States government, and from transferring or setting over any moneys received by defendants as aforesaid to the general fund of the State of Michigan. A plea was then filed by defendants to said amended bill fairly putting in issue all material questions raised by said amended bill and involved in this controversy, with a general denial of complainants' right to the relief asked. A later replication filed by complainants finally concluded the pretracted pleadings, and the [351] suit was brought to a hearing on March 4, 1913, upon pleadings and proofs taken in open court.

The trial court rendered an opinion that said board of managers of the Michigan soldiers' home had no authority, under the law creating such institution, to make rules by which any part of the soldiers' pensions received from the United States government could be permanently taken from the inmates of the home and appropriated by the board; the gist of said opinion being as follows:

"If soldiers, sailors, and marines come within that class which entitles them to the benefits of the home, they are entitled to the enjoyment of such benefits, without payment therefor. If not entitled to the benefits of the home, they should not be admitted. The State gave the board no authority to contract with those not eligible for admission to the home. It did not intend to give the board of managers any authority to deal with any except those entitled to the benefits of the home. It was not intended that the institution should be supported in an way by contributions from the pensioners."

The Michigan soldiers' home was established by Act No. 152, Pub. Acts 1885 (2 How Stat [2d ed.] § 31716 et seq.), entitled:

"An act to authorize the establishment of a home for disabled soldiers, sailors, and marines in the State of Michigan."

By section 2 of said act the general supervision and government of said soldiers' home is vested in a board of managers consisting of six members appointed by the governor by and with the advice and consent of the senate.

Section 8 provides:

"It shall be the duty of the board of managers to meet once in every three months, on their own adjournment, and oftener if they shall deem it advisable, at which meeting they shall prepare and carefully digest and mature a system of government for said [352] home, embracing all such rules, regulations, and general laws as they may deem necessary for

preserving order, for enforcing discipline, for preserving the health of such disabled soldiers, sailors, or marines as may be received at this home."

Other parts of the act, of minor importance here, provide for the selection by said board of a treasurer and clerk from their own body and a commandant for said home, with such subordinate officers and employees as may be necessary. Provision is also made by subsequent legislation for establishing upon the same premises and under the same management a home for the wives and mothers of such disabled soldiers.

Section 11 of said act provides in part as follows:

"All honorably discharged soldiers, sailors and marines, who have served in the army or navy of the United States in the late War of the Rebellion [or in the Mexican War], and who are disabled by disease, wounds, or otherwise, and who have no adequate means of support, and by reason of such disability are incapable of earning their living, and who would be otherwise dependent upon public or private charity, shall be entitled to be admitted to said home, subject to the rules and regulations that shall be adopted by the board of managers to govern the admission of applicants to said home."

This section also requires a previous residence of one year in the State, unless the applicant served in a Michigan regiment or was accredited to the State of Michigan, and subsequent amendments provide for the admission to said home of soldiers, sailors, and marines who have served in the Spanish-American or Philippine wars upon the same conditions.

This court, in construing the law creating the soldiers' home, has defined it as an eleemosynary institution; the purpose of its existence being to dispense to a favored but dependent class a well-bestowed and [353] deserving charity. The language of the act admits of no other construction. Its object was to furnish a home, which would be a more congenial and fitting refuge than the ordinary charitable institution, to that class of honorably discharged veterans who, disabled by disease, wounds, or otherwise from earning their living, and having no adequate means of support, would otherwise become objects of common charity. Wolcott v. Holcomb, 97 Mich. 361, 56 N. W. 837, 23 L.R.A. 215.

In its general scope the law does not contemplate, nor by its language does it permit, that the board of managers shall admit as inmates of the home any self-supporting, honorably discharged soldiers, however worthy, and allow them, in case they so desire, to pay for their care and maintenance in whole or in part, as is the law in some other States which extend the privileges of the home to veterans whose financial condition would bar them from regular admission. A soldier's pension is not a charity, but a reward won, or compensation earned, by services rendered to his country, to which he is entitled, wholly regardless of his financial circumstances, and which is paid alike to the rich and poor. Comparatively few of these entitled to, and who receive, soldiers' pensions are entitled to admission to the soldiers' home. If a soldier's pension is adequate to support him, or, added to his other resources, renders him self-supporting, he is not entitled to admission to the home as an inmate. If, though receiving a pension, his means of support are not adequate, and he is incapable of earning a living, and his status is such that, unless admitted to the home, he would have to be supported by charity in whole or in part, he is entitled to admission. That is the test. The statute creates no grades or degrees in that particular, and imposes no conditions beyond that. There is no suggestion in the law that those of [354] the class entitled to admission shall contribute from their pensions or other scant resources which they may have towards their maintenance. The legislature might have so provided; but it did not. In some of our sister States such conditions were imposed, and the Federal law creating national soldiers' homes first expressly provided that applicants must surrender their pensions as a condition of admission; but subsequent legislation to the contrary has removed those conditions for admission to the national soldiers' homes, and the same course has been followed by most of the States. A report of inspection of State soldiers' and sailors' homes for the year 1910, made by the inspector general of the national home for discharged soldiers, shows that of 54 such institutions scattered throughout the United States only 5 exact any part of the inmate's pension for his maintenance or the support of the home.

It is contended in behalf of defendants that under the provisions of sections 8 and 11, above quoted, power was delegated to the board by the legislature to include in the rules and regulations which it was authorized to adopt for a system of government of the home the condition of admission requiring contributions from pensions now in controversy, and that such authorized rules and regulations when adopted and promulgated have all the force and effect of a statute.

The question of what power was delegated by statute to the board came before this court in Loser v. Soldiers' Home, 92 Mich. 633, 52 N. W. 956. In that case a mandamus was asked to compel respondents to vacate a rule, numbered 14, and a general order based upon it, requiring every pensioner admitted to the home who received a pension in excess of $5

per month to turn the excess over to the commandant, subject to the disposal of the board of [355] managers, and providing that if an improper use was made of the $5 allowed to be retained leading to infractions of rules of the institution, such allowance should be suspended; also directing that the commandant ascertain as soon as possible the wife, dependent children, or parents of the inmates receiving pensions, and cause the money so received from the pensioners to be sent to them, or, in case no one was dependent upon any pensioner, the money so received from him should be held by the board and ultimately paid back to him upon his final discharge from the home. The position then taken by the board of managers is not in harmony with the present attitude of the board. It then, in effect, disclaimed any purpose or right to permanently retain or appropriate the money taken from pensioners, and urged in justification of the rule that it was adopted for the sole purpose of enforcing discipline and maintaining order, and that without such rule it would be impossible to do so. Approving this contention as well founded so far as it applied to temporarily taking control of the pensioner's money, the court said:

"We think it is within the power of the board to require the pension money of the inmates to be deposited, if, in the words of the statute, they deem it necessary to preserve order, enforce discipline, or preserve the health of the inmates."

The permanent retention of a former inmate's pension after he is dead or discharged could scarcely be urged as necessary to enforce discipline, preserve order or health.

The significance of that opinion as applied to this case is found in that portion dealing with the provision of rule 14 requiring the commandant to ascertain the dependent relatives of inmates who drew pensions, and to pay the deposited portions of the pensions to such relatives. While recognizing that the act lodged a broad discretion with the board, in the [356] management and government of the institution, which courts would not interfere with, unless a very clear case of abuse was shown, the court in that connection very plainly indicated the limit of such discretion in handling the pensions of inmates, as follows:

"We do not, however, think that the statute confers upon the board the right to determine what relatives are dependent upon the pensioner for support, and to direct how much of such money shall be sent to such relatives. To this extent, therefore, rule 14 is void, and must be vacated."

It is true, as claimed by defendants, that the question, directly in issue here, of the right of the board to for all time deprive the inmate of any part of his pension money and permanently appropriate it to support of the home was not raised, for the manifest reason that no such right was claimed or suggested; but when this court squarely held that the right of the board did not even extend to permanently depriving the inmate of his money for the apparently laudable and equitable purpose of applying it to the support of his dependent relatives, whom it was his natural and legal duty to support, if able, we see little room for argument as to the indicated limit of the board's authority in making final disposition of this money. To impose the condition requiring inmates to pay the institution in whole or in part for their maintenance, whether out of the pensions received or from other sources, is not to be treated as an abuse of discretion, but rather as an attempted exercise of a discretion which the law did not authorize.

It is urged in behalf of defendants that in other States, under similar statutes, the right of managing boards of soldiers' homes to take and appropriate the pensions of inmates has been universally upheld, citing, in support of this contention, the following cases: Ball v. Evans, 98 Ia. 708, 68 N. W. 435; Howell v. Sheldon, 82 Neb. 72, 117 N. W. 109; Treadway [357] v. Veterans' Home, 14 Cal. App. 75, 111 Pac. 111; Brooks v. Hastings, 192 Pa. St. 378, 43 Atl. 1075; O'Donohue v. New Jersey Soldiers' Home, 65 N. J. L. 484, 47 Atl. 452. These cases involve the question raised here has applied to the statutes of the respective States. To the extent they are in conflict with Loser v. Soldiers' Home, supra, they cannot be regarded as controlling. Some of them are distinguishable in marked particulars. In Ball v. Evans, supra, the distinction is pointed out in the opinion. The Iowa statute creating the home did not define who was entitled to admission. Section 2 of the act provided that:

"The board of commissioners shall determine the eligibility of applicants for admission to the home."

The Loser case is cited in the opinion, and, amongst other things, it is said:

"In that case the court sustained rules similar to those here in controversy. So much of one rule was declared invalid as determined what relatives were dependent upon the pensioners for support, and directed how much of his pension money should be sent to such relatives. This holding was based upon the ground that the statute of Michigan did not authorize the board to determine that matter. Even that holding would not obtain here, for our statute authorizes the board to determine the question of the eligibility of applicants for admission to the home."

Treadway v. Veterans' Home, supra, is devoted chiefly to construing the California statute; the rules of the board being of minor

significance. The following excerpt from the opinion indicates the principal question at issue, and the view of the court upon a condition relative to retaining any remaining pension money, of deceased inmates, expressly authorized by statute:

"The law does not purport to affect 'the estates of deceased persons' or 'change the law of descent or succession,' and was intended for no such purpose; it [358] merely extends to the class of persons indicated the benefits and privileges of the home on certain conditions. In the particular complained of applicants agree that their pension money shall be paid to the treasurer of the home from time to time as received to be held for their personal benefit and use while members, and without having made other disposition of it, any balance unexpended shall go to the home for the benefit of all the members, subject to the right of certain named persons to this balance if called for within a stated period—five years. It cannot be said that this regulation is harsh or burdensome or ungenerous, for the applicant is supposed to be in indigent circumstances when admitted, having no one under any legal obligation to support him, and it is only when the member dies intestate that the law operates to dispose of any balance to his credit, and to this he agreed when admitted as a member."

Howell v. Sheldon, supra, was based on the Nebraska statute, differing from that of Michigan in the particular that the board was not only required to prescribe rules for admission, but authorized to admit as inmates old soldiers, otherwise qualified, upon payment by them of their board if they so desired, thus giving the board a discretion not conferred by our statute. Though impelled to hold that the rule complained of was within the discretion of the board, the court suggested that:

"If the legislature believes the rule to be harsh, unnecessary, or inexpedient, it can limit the power of the board as to its right to require the payment of any part of the pensions of the inmates for the support of the institution, and thus conform the rule in this State to that in the majority of those States maintaining like institutions."

In the Pennsylvania and New Jersey cases special circumstances are shown under which the inequity of granting a recovery was emphasized, and the courts held that the payments were voluntarily made and could not be subsequently recovered, as the testimony [359] clearly disclosed that the pensioner when applying for admission distinctly understood and freely agreed to the arrangement. Those cases being, however, chiefly based on the doctrine of contract obligations, the courts necessarily held, in substance, that the managing boards had power to impose such conditions and, in effect, make contracts with applicants for permanent surrender of their pension money received while inmates. So far as those opinions disclose, their statutes are quite similar to that of Michigan, though not identical, and, to the extent the conclusions reached by those courts as to authority of the boards are at variance with the tenor of the Loser case, they cannot be followed; but, aside from that question, there is testimony in this case that much misunderstanding and confusion existed at times in the minds of inmates as to how their pensions were to be treated. They all signed an agreement, when making application for admission, to abide by the rules and regulations of the home, and knew they were required to deposit their pension money with the officials As to their further consent and understanding, the testimony is not clear and unquestioned, as it was in the New Jersey and Pennsylvania cases. In this case numerous changes in the rules and forms of application were made from time to time. Subsequent to the time of disavowing in this court any purpose to permanently appropriate any part of the pension money inmates were required to deposit, rules to the contrary were adopted, and the conditions of admission so indicating were, as a rule, printed on the back of applications, under headings, purporting to be portions of the law creating the home. The various complainants in this suit were admitted at different times, under several different forms of application. Inmates, as they were admitted, discharged, and readmitted from time to time, often paid little attention to and apparently did not have distinct knowledge or [360] clear understanding of the significance of the printed matter on the back of their applications. The records show that men were admitted, discharged, and readmitted as often as ten different times, or more. As a result of the varying forms of application and the manner in which inmates were received, complainants claim they did not voluntarily and understandingly consent to permanently surrender their pensions, but were misled or coerced into so consenting so far as it appears they did consent. In some instances they testify to being misled into signing their applications by the form used, believing that the rules were part of the statutes of the State; in others that attention was not called to the rules at all; in others that the rules were promulgated after their admission, and either not made clear to them, or, in cases where they were, and protest was offered, they were told that refusal to abide by the rules would result in dishonorable discharge, which would preclude admission to any other soldiers' home. The evidence shows opportunity for confusion and misunderstanding upon that question.

The board had authority under the statute to insist, as a police regulation, and did insist, that the applicant deposit his pension with it while he was an inmate, in this way coming lawfully into possession of his money. The inmate necessarily knew this. Upon that there could be no misunderstanding, and his consent to that course was binding. Beyond that, even if he did acquiesce in the proposal to thereafter retain and permanently appropriate part of the money so received to the purposes of the home, such consent, if imposed as one of the conditions of becoming or remaining an inmate under a mistaken belief that such was the law, was exacted without legal authority, and could not be sustained as a binding contract. We think this is a necessary conclusion from the construction of our statute and the limit fixed upon the authority [361] of the board in Loser v. Soldiers' Home, supra.

A claim is made of legislative authority to permanently appropriate this money under an act of the legislature passed in 1905 (Act No. 313), which provided that money accumulated in the "post fund" and "posthumous fund" might be used to furnish the hospital and for certain other purposes to the benefit of the home and its inmates. The testimony shows a somewhat confused condition of accounts in the books of the institution at times, and Charles P. Coffin, adjutant of the home, who was in charge of, or had access to, all the books, records, and documents, and during his incumbency made a portion of the records showing the different funds and the sources from which they came, furnished a list of the amounts of excess pension received from the different complainants, which are admitted by defendants, and are taken as the bases of the decree. He testifies to difficulties encountered in making up such list, and says he "spent nights and Sundays going through these books" to make his compilation; that he made mistakes—

"But, so far as I know, it is pretty near correct, and especially from data I could get hold of to compile it with. . . . I do not think the treasurer's report is kept in such a way that I can point out the amount of pension money taken from residents of the home."

Various fund accounts were kept from time to time, known as "post fund," "posthumous fund," "home pension fund" and "excess pension fund." The witness states that in 1905 the "post fund" was a small account, and in his opinion the money in it was received from other sources; said fund being made up from "money derived from sale of clothing, shoes, garbage, and sources of that kind." The "posthumous fund" was "made up largely of money that was on deposit belonging to pensioners at the time of their death." As a rule no receipts were given to [362] inmates for their pensions which were taken, and no report of the same was ever made by the board to any higher authority. We think, although the pension money of inmates was more or less mingled in these various funds, it is quite clearly shown that at the time the law in question was passed the excess pension money which had been collected was little, if any, of it in the "post fund" or "posthumous fund." No report of the excess pension fund was ever made to the State or legislature until some time after this suit was begun, when in 1911 the treasurer of the home, on request, reported that he had the adjutant go back as far as possible in order to satisfy the joint committee, and he accordingly reported a detailed statement of excess pensions taken from members of the home from 1897 to 1911, and there was then on hand "of this pension money, $7,980.15, having kept the same separately, that it is available for distribution and refunding if the legislature in their wisdom so desire to do." Subsequently, without any further authority or direction so far as shown, "the home pension fund" was turned into the "post fund." We are unable to find that the legislation referred to, or the subsequent transferring by the board of this money to the post fund, affects the legal status of defendants as trustees of this money.

Neither can the claim prevail that this suit cannot be maintained because it is against the State, which cannot be sued by a private individual. Defendants are not the State. They had not reported or accounted to the State for this money when this suit was begun. They had lawfully received it as a police regulation, and were holding it in trust for the owners. They only claim a right to convert it to the uses of an institution of the State, of which they are the managers. Indirectly and rather remotely, it can be admitted, the State may be interested in the result, and its legal representative [363] is entitled to be and has been heard; but defendants' claim of right as State officers to use this money for a State institution does not make this a suit against the State. Its purpose is not to take money from the State treasury, or to seize or interfere with State property.

For various reasons, not necessary to detail at length here, no excess pension money of inmates has been permanently appropriated since July, 1908, and the present management makes no claim of right to do so. This case only involves the right of those managing the home before that time to exercise such right. Act No. 102 of the Public Acts of 1911 made yet more clear the proper course to be pursued by requiring receipts to be given inmates for any of their property, including pensions, coming into the custody of the

board, except fines, and providing that the same could only be so taken for the purpose of discipline, to be held in trust for the "purpose of paying or turning the same over to said resident at the time of his discharge from the Michigan soldiers' home, and accounting for the same to the heirs or legal representativees of said residents after death."

We conclude it is in harmony with the intent of the statute and purport of the decision in Loser v. Soldiers' Home, supra, that these excess pension moneys under consideration, now in possession of defendants, or which should be, the amounts of which are conceded, must be decreed to be held in trust, and accounted for according to the provisions of said Act No. 102. The amounts due to discharged or deceased soldiers, in relation to whom the trust has terminated, should be paid, with interest computed at 5 per cent. per annum from the time of death or discharge. The money of those yet inmates can only be retained and held under control according to rules and regulations of the board promulgated for the purpose of discipline. [364] Interest cannot be exacted from the board for money so held in trust under an authorized rule, while the pensioner is an inmate, unless it be shown that while so holding the board received interest, in which case it should account for the same.

With these modifications, the decree is affirmed, with costs.

McAlvay, C. J., and Brooke, Stone, Ostrander, and Moore, JJ., concurred. Kuhn and Bird, J.J., did not sit.

NOTE.

Effect with Respect to Pension of Pensioner Becoming Inmate of Soldiers' Home.

The effect, with respect to a pension, of the pensioner becoming an inmate of a soldiers' home depends on the rules and regulations adopted by the board of managers of the institution and on the construction of the statutes under which the home has been established. Thus it has been held that where a board of commissioners of a Soldiers' Home are empowered by statute to "determine the eligibility of applicants for admission to said home" and to "make rules and regulations, not inconsistent with the laws and constitution of this state, for the management and government of said home, including such rules as they may deem necessary for the preserving of order enforcing discipline and preserving the health of its inmates," the commissioners may adopt a rule which requires inmates of the home to surrender thereto all of their pension money in excess of a certain sum per month, which excess is to be paid to any dependent relatives of the members if they have such, and if not, to a fund of the home. Ball v. Evans, 98 Ia. 708, 68 N. W. 435. To the same effect see Howell v. Sheldon, 82 Neb. 72, 117 N. W. 109; O'Donohue v. New Jersey Soldiers Home, 65 N. J. L. 484, 47 Atl. 452; Brooks v. Hastings, 192 Pa. St. 378, 43 Atl. 1075, 44 W. N. C. 333. *Compare* the reported case. So in a jurisdiction wherein such a rule has been held to be valid, an inmate who, in compliance with the regulation, makes payments to the home cannot recover from the institution the money so paid. Brooks v. Hastings, 192 Pa. St. 378, 43 Atl. 1075, 44 W. N. C. 333. See also Bryson v. Home for Disabled Soldiers, etc. 168 Pa. St. 352, 31 Atl. 1008. It is otherwise, however, where the rule has been held to be invalid. See the reported case. In Ball v. Evans, 98 Ia. 708, 68 N. W. 435, it was held that such a rule did not violate the federal statutes which declare void any pledge, mortgage, sale, transfer, or assignment of any right, claim or interest to or in any pension that has been or may be granted, and that no sum of money to become due any pensioner shall be liable to attachment, levy or seizure, but shall inure wholly to the benefit of such pensioner. And in Brooks v. Hastings, 192 Pa. St. 378, 43 Atl. 1075, 44 W. N. C. 333, it was held that a regulation of the kind mentioned did not violate the constitutional prohibition against the taking of property without due process of law and without making just compensation therefor. To the same effect see Loser v. Soldiers' Home, 92 Mich. 633, 52 N. W. 956. In Brooks v. Hastings, supra, the court said: "This is not the taking of property in any conceivable sense. It is the creation of a condition upon which charitable suport may be obtained under a contract which is voluntarily made, providing for the contribution of something towards the maintenance of the institution which furnishes the support. The applicant is under no obligation to make such a contract, but if he does make it and gets the benefit he must take it as it is given, and keep his contract like all other good citizens are obliged to do."

On the ground that it may be deemed necessary for the purpose of preserving order, enforcing discipline or preserving the health of the inmates of a soldiers' home, the board of managers thereof may adopt a rule requiring inmates to deposit their pension money with the commandant of the home, to be returned to the inmate on his discharge from the institution. Loser v. Soldiers' Home, 92 Mich 633, 52 N. W. 956, wherein it was held, however, that the board had no right to determine what relatives were dependent on the pensioner for support and to direct how much of an inmate's money on deposit

should be sent to such relatives, and that therefore a rule of this import was invalid.

In U. S. v. Bowen, 100 U. S. 508, 25 U. S. (L. ed.) 631, *affirming* 14 Ct. Cl. 162, there was involved a federal statute providing that "the fact that one to whom a pension has been granted for wounds or disability received in the military service has not contributed to the funds of the Soldiers' Home, shall not preclude him from admission thereto. But all such pensioners shall surrender their pensions to the Soldiers' Home during the time they remain there and voluntarily receive its benefits." In a suit by a pensioner inmate of the home who had contributed to its funds, for the recovery of pension money which he alleged was due to him but which had been paid to the treasurer of the institution, the court allowed recovery and said: "If the qualifying word 'such' is restricted to pensioners described in the sentence which immediately precedes it, then Bowen does not belong to that class, and is not bound to surrender his pension. There is no other class of pensioners described in that section to whom the word such can refer than those who have not contributed to the funds of the home, and Bowen does not belong to that class. The history of the institution affords good reason for that interpretation. The Soldiers' Home was bought and built, and is supported now very largely, by money deducted from the monthly pay of the soldiers of the regular army. But there is a class of persons who have received wounds in the military service, or incurred ill health while in such service, from whose pay no deduction was made as a contribution to the home, who received pensions as invalids, and, by virtue of this section, are entitled to be cared for at that place. There is a manifest propriety in a rule which requires of this class that, when supported out of the fund to which they did not contribute, their pensions should go to increase that fund; while those who have been giving of their monthly pay for years should receive its benefits when they come to need them, without giving also the pension which is the bounty of a grateful government."

Where a pensioner agrees when he becomes a member of a Veterans' Home to pay over to the treasurer of the home any pension money which he may, from time to time, receive, and to abide by all the rules and regulations made by the board of directors of the home, one of which is that "in case of the death of a pensioner or member of the home, any pension or other money due him and remaining in the hands of the treasurer shall be paid directly, and without probate, to his widow, minor children, or mother or father, in the order named, if demand is made within one year, otherwise the same shall escheat to the home, subject to future reclamation by the above relatives for a period of five years," it has been held that a trust is created subject to the pensioner's right to withdraw the money during his lifetime, but with specific directions that in case of his death intestate any balance in the hands of the treasurer shall be disposed of in accordance therewith, and that consequently the administrator of a member of the home cannot recover a balance in favor of his intestate remaining in the treasurer's possession. Treadway v. Veterans' Home, 14 Cal. App. 75, 111 Pac. 111.

In Brownlee v. Veterans' Home, 22 Cal. App. 207, 133 Pac. 1158, the statute involved provided that "any balance of pension money held by the board, or by its authority upon the death of the pensioner, or any moneys belonging to the members of the Home, shall, upon their death, be held as a trust fund, to be paid by the board, directly and without probate, or by its order, to the widow, minor children or mother or father of the pensioner or member in the order named; and should no widow, minor child, or parent be discovered within one year from the time of the death of the pensioner, or of the member, said balance, or moneys, shall be paid to the post fund of the Home, to be used for the common benefit of the members of the Home under the direction of the board, subject to future reclamation by the relatives hereinbefore designated in the order named, upon application filed by the one entitled to the same within five years after the death of said pensioner, or member." An inmate of the home died intestate and on his person was found a sum of money alleged to be pension money which was claimed by his administrator. It was held that the administrator was not entitled to it as the phrase "any moneys" in the statute included at least the pension money in the possession of the member at the time of his death which had not been disposed of by will, and it was not unfair to say that the intestate had agreed that his pension money should be subject to the trust when he, in his application for admission to the home, expressly agreed that his remaining pension money should go to a post fund for the common benefit of all the members of the home, provided no relative claimed it.

MIDDLETON

v.

WHITRIDGE.

New York Court of Appeals—January 12, 1915.

213 N. Y. 499; 108 N. E. 192.

Appeal and Error — Review of Decision of Intermediate Court of Appeal.

As under Code Civ. Proc. § 1346, as amended by Laws 1914, c. 351, providing that an appeal may be taken to the Appellate Division on question of law or on the facts or on both, from a judgment on a verdict, as from a judgment on a trial by referee or court without a jury, the appeal brings up the facts, as well as the exceptions, in all cases, a reversal by the Appellate Division, silent as to its grounds, will in a jury case, as in others, import that the findings of fact, by whomsoever made, were approved by the Appellate Division, so that its reversal will be reviewable by the Court of Appeals on that assumption.

Same.

The judgment of the Appellate Division, though unanimous, being one of reversal, appeal lies to the Court of Appeals without allowance of it, pursuant to Code Civ. Proc. § 191, subd. 2.

Same.

The decision of the Appellate Division that there was no evidence to sustain the verdict is not one that there was "evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court," which, if unanimous, is under Const. art. 6, § 9, and Code Civ. Proc. § 191, subd. 4, not reviewable by the Court of Appeals.

Same.

An original finding or decision by the Appellate Division, under the authority of Code Civ. Proc. § 1317, as amended by Laws 1912, c. 380, is not a decision that there is evidence to sustain a finding of the trial court or a verdict, which, being unanimous, is, under Const. art. 6, § 9, and Code Civ. Proc. § 191, subd. 4, not reviewable by the Court of Appeals.

Same.

That a judgment of the Appellate Division is entered on its unanimous decision that there is evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court does not, under Const. art. 6, § 9, and Code Civ. Proc. § 191, subd. 4, deprive the Court of Appeals of jurisdiction to review it, but that specific question of law alone is not reviewable.

Same.

A judgment of reversal in a jury case by the Appellate Division, granting a new trial, rendered before amendment of Code Civ. Proc. § 1346, by Laws 1914, c. 351, would not be reviewable, unless it affirmatively appeared that the findings of the jury had been affirmed.

Same.

A judgment of reversal by the Appellate Division in a jury case, granting a final judgment dismissing the complaint rendered before amendment of Code Civ. Proc. § 1346, by Laws 1914, c. 351, is reviewable at least to the extent of determining whether it had power to dismiss the complaint.

Power of Appellate Court to Make New Findings.

The power of the Appellate Division, under Code Civ. Proc. § 1317, as amended by Laws 1912, c. 380, to make new findings of fact and a final adjudication on the merits in a case triable of right by a jury, is limited by Const. art. 1, § 2, providing, "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever, but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law," so that in such a case the ultimate decision of all disputed questions of fact must be by a jury, absent consent to a decision of them by the court.

Jury — Guaranty of Jury Trial — Scope of Federal Constitution.

Const. U. S. Amend. 7, as to trial by jury, does not limit state action.

Final Judgment on Appeal as Denial of Jury Trial.

Const. art. 1, § 2, merely guaranteeing the substantial right of trial by jury, and not preserving ancient common-law forms and rules of procedure, is not contravened, where, as matter of law, dismissal of the complaint or direction of a verdict being proper, or disputed questions of fact being by consent submitted to the court for decision, as where both sides move for a direction of a verdict, without asking to go to the jury, the trial court determines the cause without taking a verdict of the jury, and so is not contravened, where, in such a case, the trial court having erred in submitting it to the jury, or in deciding a question of fact submitted to it for decision, the Appellate Division makes such final disposition of the case as the trial court should have made.

[See 8 Ann. Cas. 873.]

Same.

The final judgment of reversal and dismissal which the Appellate Division is empowered by Code Civ. Proc. § 1317, as amended by Laws 1912, c. 380, to render in a jury case, being required to be "on special findings of the jury or the general verdict, or on a motion to dismiss the complaint or to direct a verdict," is such only as the trial court should have rendered on such a verdict or motion; the error this corrected being that of the court and not of the jury, and the province of the jury not being invaded.

Carriers of Passengers — Duty to Passenger Taken Sick in Transit.

Where a passenger becomes sick and unable to care for himself, and the carrier's servants know, or have notice of facts requiring them, in the exercise of reasonable prudence, to

know, that he is sick and needs attention, it is their duty to give him such reasonable attention as the circumstances and their obligations to other passengers permit; and if they know, or should know, he is too ill to remain on the car, it is their duty, if practicable, to remove him and put him in the custody of an officer or some one who can look after him.

[See note at end of this case.]

Same.

Evidence in an action for death of a passenger, who, suffering a stroke of apoplexy while on a street car, was carried thereon for five hours, held to warrant a finding of negligence of the conductor in assuming, and continuing to indulge in the assumption, that the passenger was drunk, and not in a critical condition and in need of immediate medical attention.

[See note at end of this case.]

Same.

Evidence in an action for death of a passenger, who suffered a stroke of apoplexy while on a street car, and was carried thereon for hours afterwards, held sufficient to go to the jury on the issue of the omission of the carrier's duty to him being the proximate cause of his death.

[See note at end of this case.]

Appeal and Error — Final Judgment on Reversal.

The question of the sufficiency of the evidence to present a question of fact must be determined on appeal, as regards the right to finally dispose of the case by dismissal of the complaint, by the evidence actually admitted, including opinion evidence, given over proper objection that the hypothetical questions did not include all the facts which should have been put before the witnesses.

Same.

On appeal from a judgment of the Appellate Division, rendered before amendment, by Laws 1914, c. 351, of Code Civ. Proc. § 1346, reversing the judgment for plaintiff and dismissing the complaint, there being evidence from which the jury could draw inferences for plaintiff, and the record disclosing exceptions requiring a new trial, instead of remitting the case to the Appellate Division to consider it on the facts, a new trial will be granted.

Evidence — Hypothetical Questions — Assumption of Unproved Fact.

Plaintiff's hypothetical questions to experts, on which they are asked to give the opinion that had plaintiff's intestate had proper care within one or two hours after his first attack of apoplexy, while a passenger on defendant's street car, it was reasonably certain his life could have been saved, should not assume he was in good condition, or apparently in good condition, on boarding the car, without referring to the hardened condition of his arteries and the condition of his kidneys, as indicated by albumen and granulated casts in his urine, shown by plaintiff's witnesses to have existed.

Carriers of Passengers — Duty to Passenger Taken Sick in Transit.

Where the evidence is only that deceased's life could have been saved if he had received proper care within an hour or two after his first attack of apoplexy, while on defendant's car, defendant is entitled to an instruction that any omission of duty of its servants to him after that time cannot be made the basis of a finding of actionable negligence.

[See note at end of this case.]

Middleton v. *Whitridge*, 156 N. Y. App. Div. 154, reversed.

Appeal from Appellate Division of Supreme Court, First Judicial Department.

Action for death by wrongful act. Nellie G. Middleton, administratrix, plaintiff, and Frederick W. Whitridge, receiver, defendant. Judgment for plaintiff in trial court. Judgment reversed by Appellate Division of Supreme Court. Plaintiff appeals. The facts are stated in the opinion. REVERSED.

Frederick N. Van Zandt, Joseph A. Burdeau and *R. A. Mansfield Hobbs* for appellant.

J. Ralph Hilton and *James L. Quackenbush* for respondent.

[503] MILLER, J.—The respondent asks for a dismissal of the appeal, and, if I understand the grounds of the request, they are that under the authority of Wright v. Smith, 209 N. Y. 249, 103 N. E. 154, this court cannot entertain jurisdiction, that the appeal does not lie as of right, and that the unanimous decision of the Appellate Division upon which the final judgment was entered pursuant to section 1317 of the Code of Civil Procedure is not reviewable.

The appeal is from a final judgment dismissing the complaint, so Wright v. Smith (supra) has no application. Whilst the point is not directly involved, we consider it our duty in this connection to call the attention of the bench and bar to an important change in the practice effected by the amendment to section 1346 of the Code of Civil Procedure which took effect September 1st, 1914. In our opinion that amendment was sufficient to change the rule of that case and completely to assimilate the [504] practice on appeal in jury cases to that in actions tried by a referee, or the court without a jury. That was the obvious purpose of the amendment to section 1338 of the Code of Civil Procedure considered by us in that case. However, we were compelled to hold that the legislature had not succeeded in accomplishing its purpose by reason of the fact that said section 1338 as amended in 1912 applied only to appeals from judgment *reversing judgments* or from orders granting new trials on *such reversals*, and under section 1346, as it then

was; the appeal from a judgment rendered on the verdict of a jury brought up the exceptions only, the facts being still reviewable only on an appeal from an order denying a motion for a new trial. In that state of the practice it would still remain true, notwithstanding the amendment to section 1338, that the Appellate Division might reverse the judgment without considering the questions raised on the appeal from the order, and such a reversal would import nothing as to the disposition of those questions. Upon that distinction in the practice this court has uniformly since the decision of Wright v. Hunter, 46 N. Y. 409, based its refusal in jury cases to entertain jurisdiction of appeals from judgments or orders of the General Term or Appellate Division granting new trials when there was an appeal to that court both from the judgment and an order denying a motion for a new trial unless it affirmatively appeared that the order was affirmed or the appeal therefrom dismissed. That distinction was expressly made the basis of the decision in Wright v. Smith (supra). Presumably on account of that decision the legislature has abolished that distinction by amending section 1346 so as to provide that an appeal may be taken upon questions of law or upon the facts or upon both from a judgment rendered on the verdict of a jury precisely as from a judgment rendered upon a trial by a referee or by the court without a jury. As the appeal from the judgment now brings up the facts as well as [505] the exceptions in all cases, a reversal by the Appellate Division, silent as to the grounds thereof, will, perforce of section 1338, import in jury cases as well as in cases tried by a referee or the court without a jury that the findings of fact, whether made by the jury, the court or a referee, were approved by the Appellate Division, and such reversal will now be reviewed by us on that assumption. (Untermyer v. Yonkers, 188 N. Y. 594, 80 N. E. 1087; Lenox v. Lenox, 195 N. Y. 359, 88 N. E. 571.) It will thus be incumbent on the Appellate Divisions to review the findings of fact in all cases, and, if not satisfied therewith, to say so. Of course, the amendment to said section 1346 will not apply to judgments of the Appellate Division rendered, as this one was, prior to September 1st, 1914.

The appeal is from a judgment of reversal, not from a judgment of affirmance, so an allowance of it pursuant to section 191, subdivision 2, of the Code of Civil Procedure was not necessary.

The decision of the Appellate Division, though unanimous, was that there was no evidence to sustain the verdict, not that there was "evidence supporting or tending to sustain a finding of fact or a verdict not directed by the court" within the meaning of section 191, subdivision 4, of the Code of Civil Procedure, or article 6, section 9, of the State Constitution. That language seems plain. It imports a finding of fact by the trial court or a referee or a verdict of a jury not directed by the court, and a unanimous decision of the Appellate Division on appeal that there is "evidence supporting or tending to sustain" such finding of fact or verdict as the case may be. An original finding or decision by the Appellate Division pursuant to the practice inaugurated under section 1317 of the Code of Civil Procedure, as amended in 1912, is not a decision that there is evidence to sustain a finding of the trial court or a verdict of a jury. Moreover, the fact that a judgment is entered upon the unanimous decision of the Appellate Division that there is "evidence [506] supporting or tending to sustain a finding of fact or a verdict not directed by the court" does not, as seems too commonly to be supposed, deprive this court of jurisdiction to review it. The specific question of law is not reviewable and, if no others are presented, the appeal is frivolous, still the judgment is appealable.

If the Appellate Division had granted a new trial, its judgment would not be reviewable unless it affirmatively appeared, as it does not, that the findings of the jury had been affirmed (Wright v. Smith, supra); but it has granted a final judgment dismissing the complaint and its action is open to review by us at least to the extent of determining whether on reversing the judgment of the trial court it had the power to dismiss the complaint. That the Appellate Division has the power under section 1317 of the Code of Civil Procedure to make new findings of fact and a final adjudication on the merits in a case triable by the court has been definitely decided by this court. (Bonnette v. Molloy, 209 N. Y. 167, 102 N. E. 559; Lamport v. Smedley, 213 N. Y. 82, 106 N. E. 922.) The extent of the power in cases triable of right by a jury is limited by article 1, section 2, of the State Constitution which provides: "The trial by jury in all cases in which it has been heretofore used shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law." It is too plain to admit of doubt or to require discussion that in such cases the ultimate decision of all disputed questions of fact must be by a jury unless the parties have consented to a decision of them by the court, but it does not follow that the Appellate Division may never finally dispose of a jury case in which it disagrees with the trial court. The Seventh Amendment to the Federal Constitution does not limit state action, and so Slocum v. New York L. Ins. Co. 228 U. S. 364, Ann. Cas. 1914D 1029, 33 S. Ct. 523, 57 U. S. (L. ed.)

879, is not controlling. Moreover, the said provisions of the State and Federal Constitutions are dissimilar. The provision of the State Constitution guarantees [507] the substantial right of trial by jury, but it contains no language even suggestive of a purpose to preserve ancient common-law forms and rules of procedure. If as a matter of law a dismissal of the complaint or a direction of a verdict is proper, or if disputed questions of fact are by consent submitted to the court for decision, as where both sides move for a direction of a verdict without asking to go to the jury, no constitutional right is invaded by the determination of the cause by the trial court without taking a verdict of the jury. If in such case the trial court errs by submitting the case to the jury, or in deciding a question of fact submitted to it for decision, the purpose of the appeal is to correct such error, and the final disposition of the cause by the Appellate Division, in the manner in which it should have been disposed of in the first instance, does not violate a right which never existed or had been waived, to have the case submitted to the jury. (See Bothwell v. Boston Elevated R. Co. 215 Mass. 467, Ann. Cas. 1914D 275, 102 N. E. 665.) The framers of the amendment to said section 1317 were plainly mindful of the constitutional limitation upon their power. "When a trial has been before a jury," the section reads, "the judgment of the appellate court must be rendered either upon special findings of the jury or the general verdict, or upon a motion to dismiss the complaint or to direct a verdict." The final judgment then which the Appellate Division is empowered to render is the one which the trial court should have rendered either upon a special or a general verdict, or upon a motion to dismiss the complaint or to direct a verdict. The error thus corrected is the error of the court, not of the jury. The province of the jury is not invaded by the correction of such an error and the rendition of the judgment which ought to have been rendered by the trial court. The question on the merits then in this case is whether the evidence presented a question of fact for the jury. If it did not, the Appellate Division had the power [508] on the motion to dismiss the complaint to render the judgment appealed from. If it did, the Appellate Division on reversing the judgment should have granted a new trial.

The plaintiff's intestate died from a cerebral hemorrhage occurring while he was riding as a passenger on one of the defendant's surface street cars. The question is whether there was any evidence from which a jury could have found that the proximate cause of death was the violation of some duty which the defendant owed him. The facts are admitted by the answer or established by uncontradicted evidence, though it is possible to draw conflicting inferences from them. At about 2:40 or 2:45 P. M. on May 24th, 1910, the deceased boarded a north-bound open "pay-as-you-enter" car at One Hundred and Fortieth street in the borough of Manhattan. When last seen shortly before that he was apparently in good health. There was nothing in his appearance or manner to attract notice when he entered the car, and the conductor did not notice any one board the car who appeared to be sick or intoxicated. The answer admits that the attention of the conductor was called to the fact that there was something wrong with the deceased at or near One Hundred and Eighty-second street and Amsterdam avenue, and that upon entering the car the conductor found vomit upon his clothing, and permitted him to remain in the car in that condition until the end of the run was reached. The conductor testified that he observed the deceased change from the right to the left-hand side of the car at One Hundred and Eighty-fifth street and Amsterdam avenue, but did not notice vomit on his clothing and paid no further attention to him until the car reached the end of its run at Fort George, One Hundred and Ninety-fifth street; that there he "tried to rouse" the deceased, "tapped him on his shoulder and told him it was the end of the road, and we were going back down [509] town. He said 'All right, all right,' and he was starting to vomit;" that the deceased did not attempt to get up, but sat "right there in his seat;" that before starting back he (the conductor) told the starter that he had a "drunk" whom he "couldn't get off;" that the starter, without entering the car or investigating the condition of the deceased, said "to let him sleep it off and carry him down; that he would be all right at the end of the trip." No further attention was paid to the deceased, but he was taken from Fort George to the post office. The conductor says that on the way down town he observed the deceased adjusting his spectacles and vomiting from time to time; to quote his language, "It might have gone ten or twenty blocks once in a while and might have gone five. He seemed to be sick at his stomach." The conductor called no one's attention to the deceased at the post office, although there were starters and inspectors at that point, but started the car back up town. Before doing so he entered the car and asked the deceased for his fare. He says that he went in to "rouse the man up and tell him it was best to take a walk." It does not appear that the deceased made any audible response or any movement except to fumble in his pockets. A passenger, just boarding the car, paid the fare, saying: "I have been often in the same boat myself. I have often had a jag on myself. Here is

the fare. Let him go and he will be all right." The conductor took the fare and paid no more atention to the deceased. When the car reached Sixty-fifth street at 5:35 P. M. it was turned over to another crew, and with the deceased still on it was taken back to Fort George and again back to One Hundred and Twenty-fifth street, when the attention of an inspector being called to the situation, the car was ordered back to the car barn at One Hundred and Twenty-ninth street, a police officer was called, and at 7:45 P. M. the deceased was removed and taken to the police station. He was then in a state of complete coma. By the [510] direction of the lieutenant he was taken to the Harlem Hospital, where his trouble was diagnosed as cerebral hemorrhage. The next day he was removed to another hospital, where he died at 11:45 P. M. without having regained consciousness. The attention of the conductor of the second crew was called to the deceased by a passenger at Ninety-second street, and on entering the car the conductor observed vomit on his clothes and on the floor. At One Hundred and Seventy-fifth street a passenger picked up his pocketbook, which had fallen to the floor, and he was still able to put it in his pocket. The motorman of the second crew observed him, precisely when seems to be in doubt, lying back in his seat apparently helpless, his clothes covered with vomit, and water running down the side of his pants as though he had urinated. The answer admits that when the second conductor took charge of the car, and thereafter and until the end of the run at Fort George, he noticed the deceased "lying on one of the car seats and occupying the whole seat with his arms stretched out, his hat off, and vomit upon his clothing." There is medical evidence to the effect that the first hemorrhage was slight, and that if the deceased had received proper care within one or two hours after it first occurred a recovery would have been reasonably certain, but that carrying the deceased in the car under the conditions disclosed tended to increase the hemorrhage and ultimately produce coma and death.

It will be useful to determine at this point precisely what duty the defendant owed the deceased. If a passenger becomes sick and unable to care for himself during his journey, it seems plain that the carrier owes him an added duty resulting from the change of situation. That duty springs from the contract to carry safely. Of course, the carrier is not bound, unless it has notice of the fact, to observe that its passenger is ill, but if the defendant's servants knew, or had notice of facts [511] requiring them in the exercise of reasonable prudence to know, that the deceased was sick and in need of attention, it was their duty to give him such reasonable attention as the circumstances and their obligations to other passengers permitted, and if they knew, or under the rule stated should have known, that he was too ill to remain on the car with safety, it was their duty, if practicable, to remove him and put him in the custody of an officer or some one who could look after him. Whilst no case precisely like this has been found, the general obligation of the carrier in such cases has many times been recognized. (See Sheridan v. Brooklyn City, etc. R. Co. 36 N. Y. 39, 93 Am. Dec. 490; Wells v. New York Cent. etc. R. Co. 25 App. Div. 365, 49 N. Y. S. 510; Newark, etc. R. Co. v. McCann, 58 N. J. L. 642, 34 Atl. 1052, 33 L.R.A. 127; Lake Shore, etc. R. Co. v. Salzman, 52 Ohio St. 558, 49 Am. St. Rep. 745, 31 L.R.A. 261; Connolly v. Crescent City R. Co. 41 La. Ann. 57, 5 So. 259, 6 So. 528, 17 Am. St. Rep. 389, 3 L.R.A. 133; Hutchinson on Carriers [3d ed.] section 992.)

It was of course practicable to stop the car at almost any point of its route and without undue delay to put the deceased in the custody of a police officer. The conductor knew that his passenger had boarded the car without exhibiting, so far as he observed, the slightest evidence of sickness or intoxication, that thereafter he had become suddenly ill, and that at Fort George, after having been carried by his destination, his illness had so progressed as to make him apparently unconscious of his situation and practically helpless. Of course, I am drawing the most favorable inferences to the plaintiff which the evidence and the admitted facts justify.

Was the conductor's heedlessness of his passenger's condition excused by the fact that he assumed, honestly but without any investigation, that the passenger was drunk? If a rash assumption on the part of the conductor will excuse the discharge of the duty which the carrier owes to a passenger taken suddenly ill, then it might as well be said that no duty exists to render any [512] assistance in such case. The case turns not on what the conductor assumed or thought, but on what he should in the exercise of reasonable prudence have done in the light of the facts which were brought to his notice. Of course, the defendant is not to be charged with neglect of duty because of the conductor's failure to discover that his passenger had a stroke of apoplexy. The fault of the conductor was not in making a wrong diagnosis, but in rashly assuming that he was competent to make any diagnosis at all. The passenger's nausea might have resulted from a variety of causes other than intoxication, and his apparent helplessness by the time the car reached Fort George indicated a critical condition requiring immediate attention. It may be assumed that at the moment of first

noticing his passenger's nausea the conductor might reasonably have assumed that it was due to intoxication, although that assumption was opposed by the fact that the passenger had exhibited no evidence of intoxication upon boarding the car. The question is whether his continued heedlessness was justified by that assumption in view of what followed and had preceded. If a conductor is to be permitted to diagnose the condition of a passenger apparently taken suddenly ill and rendered helpless, he should at least in making the diagnosis exercise the judgment of a reasonably prudent conductor under the circumstances. There is no pretense that there was the slightest odor of liquor about the deceased, and it affirmatively appears that he had not been drinking. If he had drunk enough liquor to cause him to be in the condition described, it would seem that the odor of it could have been detected upon the most casual investigation. A jury could have found that the condition of the deceased grew worse, and from the description given by the conductor of what occurred at the post office that he was then utterly helpless. That condition, after he had ridden in an open car for two hours, vomiting every few blocks, was so extraordinary, if due to intoxication, as to [513] justify a jury in finding that it would have occurred to a conductor, not utterly heedless, that the passenger was seriously ill, especially in view of the fact that he was apparently sober when he boarded the car.

It is of little consequence what other passengers thought, who owed the deceased no duty and only casually observed his condition. What occurred after the car started back up town from the post office is mainly important as bearing on his apparent condition before that and on the proximate cause of his death, because it is speculative at the best whether any attention rendered after that time could have saved his life. My conclusion is that a jury could have found from the evidence that at some point before the car reached the post office on its trip down town it would have occurred to a reasonably prudent person in the position of the conductor that the deceased was in a critical condition and in need of immediate medical attention, and that it was imprudent to the point of rashness longer to indulge in the assumption, first made without any investigation whatever, that the passenger was drunk.

It remains to consider whether there was evidence from which the jury could have found that the omission of duty which the defendant owed the deceased was the proximate cause of his death. It is, of course, possible that the first hemorrhage might have produced death even with the best of care. It is rarely possible to establish with absolute certainty the fact to be proven in such cases. Reasonable certainty, however, is all that is required. The medical evidence, and all the surrounding circumstances, tend to show that the first hemorrhage was slight and not fatal, and that the result of carrying the deceased for five hours in an upright position in a street car with the attendant jolting increased the hemorrhage and thus produced complete coma and ultimately death. Medical experts gave their opinion that, if the deceased had had proper care within from [514] one to two hours after the first attack, it was reasonably certain that his life could have been saved. Whether the hypothetical questions included all of the facts which should have been put before the witnesses is not the question now under consideration. The evidence was received and, though perhaps weakened on cross-examination, its force and effect were for the jury. Had the objections been sustained any omissions might have been supplied. The question of the sufficiency of the evidence to present a question of fact must be determined on appeal by the evidence actually received, and we are of the opinion that that evidence presented a question for the jury, both as to the defendant's negligence and as to whether that negligence was the proximate cause of the death. The Appellate Division, therefore, erred in dismissing the complaint.

The question next arises how to dispose of this appeal. Logically the reversal of the judgment of the Appellate Division restores the judgment reversed by it. On that theory this court has uniformly declined to entertain appeals where the Appellate Division had granted new trials without approving of the findings of fact made by the jury. The appellant asks that the judgment of the trial court be restored. That course would deprive the defendant of the right to have the Appellate Division weight the evidence. I have stated the inferences which a jury would have the right to draw from the evidence, but the Appellate Division, having the final review of the facts, might hold that the weight of the evidence required other inferences or that the verdict was excessive and for either reason require the submission of the case to another jury. Only two other courses seem to be open, either, 1, to grant a new trial, or 2, to remit the case to the Appellate Division to consider it on the facts. The granting of a new trial would logically import a reversal by us of the judgment of the trial court. It so happens that the record discloses exceptions, which require a new trial. So it is [515] unnecessary to determine what course would be adopted, if there were no such exceptions. By reason of the amendment to section 1346 hereinbefore con-

sidered that question cannot arise with respect to judgments of the Appellate Division rendered after September 1st, 1914.

The hypothetical questions addressed to the medical experts assumed that the deceased was in good condition, or apparently in good condition, on boarding the car, and contained no reference whatever to conditions shown by the plaintiff's witnesses to have existed, especially to the hardened condition of his arteries and the condition of his kidneys indicated by the presence of albumen and granulated casts in his urine. The omission was persisted in though attention was called to it by the court. It may be that the error was cured, at least as to some of the witnesses, by their testimony on cross-examination that their answers made to the hypothetical questions would not be changed if the facts with reference to such conditions had been included in the hypothetical question. We refer to the matter to the end that upon a new trial the error may not be repeated. The court charged the jury on the question of defendant's negligence that they might take into consideration the evidence "that conductor Twomey [the conductor of the second crew] did not inform Sheehan, the police officer, to whom Mr. Middleton was turned over, as to the length of time he had been in the condition described by Twomey, or as to his condition at all, together with all the other evidence in the case." The court refused to charge, as requested, that "if the defendant's employees acted with reasonable care in permitting Mr. Middleton to ride upon the car on its first trip down town, then the defendant is entitled to a verdict." An exception was taken to that refusal and also to the charge which allowed the jury to consider the acts of Conductor Twomey in determining the negligence of the defendant. Those exceptions present reversible error. While the [516] evidence as to what occurred after the car left the post office was admissible for the purposes hereinbefore stated, it was error to permit the jury to base a finding of negligence on any act or omission of the defendant's servants after that time, because as already shown there was not sufficient evidence to justify a finding that such negligent act or omission, if it occurred, was the proximate cause of death. It was a serious question of fact whether any attention or care after the first hemorrhage would have saved the life of the deceased. The jury should have carefully been instructed on the point and their attention should have sharply been drawn to the period of time within which it was permissible for them to find the defendant's servants guilty of any negligence causing the death of the deceased.

The judgments should be reversed and a new trial granted, with costs to abide the event.

Willard Bartlett, Ch. J., Werner, Chase, Collin and Cuddeback, JJ., concur; Hiscock, J., dissents from the reversal of the judgment of the Appellate Division, but concurs in the opinion of Miller, J., so far as it deals with the questions of practice.

Judgments reversed, etc.

NOTE.

Duty and Liability of Carrier to Passenger Taken Sick during Transit.

Several recent cases support the holding in Central of Georgia R. Co. v. Madden, 135 Ga. 205, 21 Ann. Cas. 1077, that if a passenger becomes ill in transit and this is known to the servants of the carrier or is so apparent that they are charged with knowledge of it, it is their duty to give him such special care and attention as may be required in the exercise of the high degree of diligence due from a carrier to a passenger. Weirling v. St. Louis, etc. R. Co. 115 Ark. 505, 171 S. W. 901; St. Louis Southwestern R. Co. v. Adams (Tex.) 163 S. W. 1029. And see the reported case. In the case first cited, it appeared that a woman started on a journey in apparently good health, but during the journey became insane and attempted to throw her baby out of a car window. After being prevented from accomplishing her purpose by the porter she quieted down and was apparently all right again, but in a short while she threw herself and child out of a window on the opposite side of the car. In an action to recover damages for her death it was held that "instructions which, when construed together, in effect, told the jury that, if the employees of appellee failed to exercise the care that a reasonably prudent person would have exercised under the circumstances to prevent the injury and death of Mrs. Weirling, appellant would be guilty of negligence, otherwise it would not be . . . fairly submitted the issue of negligence to the jury." In St. Louis Southwestern R. Co. v. Adams (Tex.) 163 S. W. 1029, the court although recognizing the carrier's duty to a person becoming disabled during transit, held that no actionable negligence was shown. It was said: "The undisputed evidence shows that just before the accident appellee was sitting quietly in her seat in a reclining position, apparently asleep, with her hat over her face, and that suddenly, unexpectedly, and without any warning she jumped through the car window. It is true appellee testified on the trial resulting in the judgment from which this appeal is prosecuted, which she did not do on the former trial, that she told the conductor she intended to get off the train, but she made no effort to do so, at that time or at any other time prior to the accident, while the train was running. She did leave the train

at Greenville while it was standing still but under the direction of the conductor was put back upon it, and, according to her own testimony, she consciously walked into the car in which she had been traveling and took the seat she had theretofore been occupying, where she remained quiet and apparently asleep until she jumped through the car window. The testimony, taken in as favorable a light for appellee as we would be warranted in construing it, fails, we believe, to show that appellant's conductor should have anticipated that appellee would jump from the rapidly moving train; and that his failure to establish a guard over her or to forcibly restrain her was negligence proximately resulting in her injury. If the alleged negligent omissions of the appellant to guard and protect appellee from injury were not the proximate cause of the accident and her injury, then actionable negligence has not been shown. . . . We think it must be held that the appellant's employees could not reasonably have anticipated that appellee would jump out of the car window, or through some other opening throw herself from the train, and that appellant is therefore not liable for the injuries she sustained. The appellee at the moment she jumped through the car window was unconscious of what she was doing is evident, but that she was rational and conscious of the nature of her acts and of what was taking place the greater part of the time she was on appellant's train is manifest from her own and other uncontroverted testimony in the record; and, if her mental condition and conduct was so pronounced as to cause any one on the train to apprehend that she might, unless restrained, jump from the fast running train, it is not shown in the record."

In the reported case it is said that if the servants of a street railway company know, or have notice of the facts from which they should know, that a passenger is too ill to remain on the car with safety, it is their duty, if practicable, to remove him and put him in the custody of an officer or some one who can look after him.

In Chicago, etc. Steamship Co. v. Lynch, 201 Fed. 70, 119 C. C. A. 408, it appeared that a passenger on a vessel had become seasick, and was sitting in a chair which rested against the wall when a servant of the carrier removed her chair to the middle of the floor in order to open a stateroom door. The place where the chair was placed was slippery and in a short while she fell from the chair and injured herself. In an action for damages the court in holding that the liability for the injury was a question for the jury said: "The main question is whether plaintiff was injured by the rolling of the steamer and her own seasickness, over which defendant had no control, or by the negligence of the cabin watchman in moving her from a place of safety into an unsafe position. . . . Whether leaving her in the changed position would be likely to cause injury, or the watchman could reasonably have forseen the probability of injury, were questions for the jury, depending on the extent to which the boat was lurching or rolling, plaintiff's degree of helplessness, the condition of the floor, and other attending circumstances. All these conditions, not capable of being fully reproduced from the printed record, made the case peculiarly one for the jury. In this case we need go no further than to hold that if a sick or helpless passenger is, for the convenience of another passenger, taken from a place of comparative safety without his consent or volition, and put in another place found as a matter of fact to be less safe, liability for a resulting injury is a question for a jury."

As to the right of a carrier to eject a sick passenger for the nonpayment of his fare, see the note to Buckley v. Hudson Valley R. Co. Ann. Cas. 1915D 143.

DEEBLE
v.
ALERTON.

Colorado Supreme Court—November 2, 1914.

58 Colo. 166; 143 Pac. 1096.

Executors and Administrators — Widow's Allowance — Effect of Separation.

Where a husband and wife executed a separation agreement providing that neither should have nor claim any part of the other's estate, but containing no plain provision that the wife waived her widow's allowance in case of the husband's death, there is no waiver, and the separation agreement is no bar to its allowance.

[See note at end of this case.]

Nature of Allowance.

A widow's allowance out of her deceased husband's estate is not a distributive part of the estate, but a part of the cost of administration.

Appointment of Executrix — Person Appointed — Mistress of Testator.

Where testator, after separating from his wife, who became insane, entered into a meretritious relation with R., whom he appointed executrix of his will, but on testator's death it appeared that R. had no interest in the estate under the will or otherwise, that she

was unfriendly toward the insane widow, and that the estate was probably insufficient to pay its debts, including the widow's allowance, the court should have sustained a protest against the appointment of R. as executrix, under Rev. St. 1908, § 7111, providing that if any person named as executor shall appear incompetent for any reason, letters of administration may be granted in the same manner as if such person had not been named, etc.

Error to District Court, Montrose county: BLACK, Judge.

Proceeding in administration of estate of Henry Alerton, deceased. The facts are stated in the opinion. REVERSED.

Catlin & Blake for plaintiff in error.

Fink & Wood and *Walter P. Crose* for defendant in error.

[166] SCOTT, J.—Henry Alerton of the county of Montrose, in this state, and Lizzie Alerton, had lived together as man and wife for a period of more than thirty years, after which time and on the 19th day of January, 1904, they entered into an agreement that each should live separate and [167] apart from the other, which agreement provided for the division of their property, and the property was divided accordingly.

After describing the property so divided, the agreement recites: "And in pursuance of this agreement it is further mutually agreed that said parties may live separately and apart from each other and reside in such place or places, family or families, and with such relations, friends or other persons, and to follow and carry on such trade or business as he or she may from time to time choose or think fit; that neither will at any time compel the other to live with him or her, or molest, disturb or trouble the other for living separately and apart, nor sue, molest or trouble any other person whatsoever for receiving, entertaining or harboring each other; and except as hereinabove neither party shall or will at any time hereafter claim or demand from the other any money, jewels, plate, clothing, household goods, furniture or stock in trade, or any property whatever, which either now hath or may hereafter procure, or which may be devised or otherwise acquired by either." It was further agreed: "That each shall from and after this agreement pursue their own course and business, as though not married, and that neither shall be liable for the support or maintenance or debts of the other."

About one year after the execution of the agreement and division of property, Alerton executed his will in which and after reciting the said agreement, as to the separation and division of the property, and that he had no children of his own, he bequeathed all his property to the children of one George Reading, deceased, and appointed Sarah E. Reading, widow of the deceased George Reading as executrix of his will, and directed that no bond be required from her as executrix. On November 3, 1912, Alerton died, and upon application, John Deeble [168] was appointed and duly qualified as administrator of his estate. Later, and on the 21st day of November, 1912, there was filed with the county court of Montrose county, the will of Alerton and a petition for probate. Appraisers of the estate were appointed under the proceedings in administration, and on the 9th day of December, a report of these appraisers was filed reciting specific property, and the value thereof, described as property allowed by law to the widow for herself and family, in the aggregate of $2,000. The record discloses that at the time of the appointment of Deeble as administrator, Lizzie Alerton had been adjudged insane, and that the said Deeble had been appointed conservator of her estate.

On the 10th day of December, 1912, Deeble as conservator of the estate of Lizzie Alerton, and certain creditors of Alerton, filed their joint protest against the appointment of Sarah E. Reading as executrix of the will, and asking that Deeble be continued as administrator. The basis of the protest and petition was, that Sarah E. Reading was unfit and incompetent to administer the estate of the deceased, and that she is hostile to the interests of Lizzie Alerton, insane, widow of the deceased Henry Alerton. The validity of the will does not seem to be questioned.

On the 20th day of December, there was filed a petition upon the part of Lizzie Alerton, insane, by Deeble, as conservator of her estate, claiming a widow's allowance in the said sum of $2,000. Upon the hearing the County Court denied the protest, admitted the will to probate and confirmed the appointment of Sarah E. Reading as executrix, but ordered that she give a bond for the faithful performance of her duties as such executrix, in the sum of $5,000, and found that the article of separation is binding upon the parties, and that Mrs. [169] Lizzie Alerton has nothing in the estate, at this time, as widow. Plaintiff in error appealed to the District Court and there the judgment of the County Court was affirmed.

The refusal of the court to allow the protest, or to continue Deeble as administrator, and the action of the court in refusing to grant the petition for a widow's allowance, are questions raised in this controversy.

It appears probable, that no marriage ceremony was ever solemnized as between Henry and Lizzie Alerton, but that they had lived together and were recognized as husband and

wife for many years, and that Alerton so considered her, both in the separation agreement, and in the recitation in his will. The parties were never divorced. But there was a marriage certificate introduced in evidence showing the marriage of Alerton to Sarah E. Reading, the executrix of the will, in 1907. But the testimony shows that Alerton made his home at least, at the same house with Lizzie Alerton, up to the time of his death.

The court and counsel seem to have treated the marriage to Mrs. Sarah E. Reading as a nullity, and Lizzie Alerton as having been the wife of Henry Alerton at the time of his death. The learned judge in his written opinion speaks of these matters in the following language:

"This case is decided wholly upon what to the mind of the court the separation agreement shows on its face, and the will and subsequent marriage of Henry Alerton are mentioned as matters of corroboration. It is therefore considered and adjudged by the court that by reason of said separation agreement Lizzie Alerton has no interest in the estate of Henry Alerton, deceased, and that she is not entitled to a widow's allowance."

Upon the question, whether in view of the agreement of separation and division of the property, the [170] widow, Lizzie Alerton is entitled to a widow's allowance, there appears to be a division of opinion in this regard among the authorities, yet the question seems to be settled in this jurisdiction in favor of such allowance. In the case of Wilson v. Wilson, 55 Colo. 70, 132 Pac. 67, Mr. Justice Bailey entered into a very careful examination of our statutes, and the authorities generally upon this subject. While that case involved an anti-nuptial agreement, yet the principle there involved is not different from that of the case at bar. It will be noted that in the agreement in this case, there is no specific waiver of the right of Lizzie Alerton to claim a widow's allowance. In the case just cited it was held by this court that the widow's allowance is not a distributive part of the estate, and is nothing more nor less than a part of the costs of administration.

It is not contended in this case that Lizzie Alerton was not the lawful wife of Henry Alerton at the time of his death. At his death she then became his widow with all rights as such, provided by the statutes. The question of her right as a widow to inherit is not involved in this proceeding and therefore not determined.

It was said in the case of Wilson v. Wilson, supra, "Under all of the decisions of the courts which we have been able to find, a widow's allowance is not in the nature of an interest in an estate, it is not something which goes to the widow by descent; it is a preferred claim against the estate. This is well declared in the case of Claypool v. Jaqua, 135 Ind. 499, 35 N. E. 285. Upon a consideration of section 7206 R. S. 1908, which reads as follows: 'Third. All allowances to the widow, wife or orphans made as provided by law shall compose the third class.' It is noted that the allowance to the widow by express statutory provision is made a preferred claim against the estate, just as in the Indiana [171] case. This allowance is no part of the distributive share of the estate, but is rather, in a very just and proper sense, a charge or claim against the estate. It is, indeed, nothing more or less than a part of the costs of administration."

The divinely inspired and divinely commanded institution of marriage has ever had the favor of the law. The law has constantly before it this sacred relationship upon which rests primarily the home, society, country, and the cause of humanity. The law curbs the will of and prescribes a limit to bequests of testators where such relationship exists. The "widow's allowance," provided by our statute, is a gracious and deserved tribute of the law to wifehood. It is a first charge upon estates, and so made to provide for the comfort and sustenance of the widow and children, pending administration and before distribution. It therefore cannot be a part of that which is to be distributed. It is designed not only as a protection for the widow and children as against want or humiliation, but a protection for the State as well. It is a right that cannot be waived by presumption, assumption or construction. If it may be waived at all, it must be in terms that do not admit of doubt. In the absence of such a waiver, where the relationship of widow exists, the right is corresponding.

In the matter of confirming the appointment of Mrs. Reading as executrix, and discharging Deeble as administrator, it appears that Mrs. Reading can have no interest in the estate under the will or otherwise, and that from the circumstances of her relationship with Alerton in his life-time, together with the express proof of her antagonism toward Lizzie Alerton, the insane widow, she ought not in fairness and justice be continued as executrix. Particularly so when we consider the further fact that the estate appears not to be of sufficient value [172] to pay its indebtedness, including the widow's allowance, and that for such reason, there is scarcely a possibility that any property will remain for distribution, either under the terms of the will or otherwise. Further, it appears that Deeble is a man of high character and a long-time friend of Alerton and his wife. Under these circumstances, it would seem to have been the duty of the court under its statutory power, Sec. 7111 Rev. Stat. 1908,

to have allowed the protest and to have continued Deeble as administrator of the estate.

It is the policy of courts in so far as it may be within the limits of the law, and consistent with the interests of the estate, to carry out the expressed will of the testator. But a testator cannot foresee all circumstances and conditions that may afterward arise, and when such do arise as appear to endanger the estate of the deceased or to prevent its proper administration, it is the clear duty of the court, and within its undoubted power, to grant the necessary and proper protection. The law is a jealous guardian of the estates of deceased persons in the matter of their administration. To this end it had conferred upon courts of probate vast powers and wide discretion, though at the same time it has provided the almost unlimited right of review by appellate courts of the acts, conduct, orders and decisions of these courts in such matters.

As before stated, the question of distribution under the will is not before us.

The judgment is reversed with instructions to the court to enter a judgment in harmony with the views herein expressed.

Musser, C. J. and Garrigues, J., concurring.

NOTE.

Effect of Voluntary Separation on Right to Widow's Allowance.

I. In Absence of Written Agreement:
  1. Majority View:
    a. Abandonment by Wife, 866.
    b. Abandonment by Husband, 867.
    c. Separation by Mutual Consent, 868.
  2. Minority View, 869.
  3. Rule in Massachusetts, 870.
II. Effect of Written Agreement, 870.

I. In Absence of Written Agreement.

1. Majority View.

a. Abandonment by Wife.

It is held in a majority of jurisdictions that a wife, who has separated from her husband without legal cause and who has continued to live separate and apart from him, is not entitled to a widow's allowance from his estate. Daniels v. Taylor, 145 Fed. 169, 7 Ann. Cas. 352, 76 C. C. A. 139 (*reversing* 5 Indian Ter. 219, 5 Ann. Cas. 226, 82 S. W. 727); In re Byrne, Myr. Prob. (Cal.) 1; In re Bose, 158 Cal. 428, 111 Pac. 258; Richard v. Lazard, 108 La. 540, 32 So. 559; Nye's Appeal, 126 Pa. St. 341, 17 Atl. 618, 12 Am. St. Rep. 873; Odiorne's Appeal, 54 Pa. St. 175, 93 Am. Dec. 693; Welsh's Estate, 5 Pa. Dist. 675, 18 Pa. Co. Ct. 517, 39 W. N. C. 167; Creighton's Estate, 7 Pa. Dist. 251, 21 Pa. Co. Ct. 83; Scullins' Estate, 5 Pa. Co. Ct. 188; Martin's Estate, 5 Pa. Co. Ct. 504; Kahn's Estate, 16 Pa. Co. Ct. 72, 3 Pa. Dist. 806; McCanna's Estate, 25 Pa. Co. Ct. 657; Myers's Estate, 24 Pa. Super. Ct. 142; Adose v. Fessit, 1 Pearson 304; Ross's Estate, 6 Kulp 521; Sanders's Estate, 1 York Leg. Rec. 115; Tozer v. Tozer, 2 Am. L. Reg. 510; Earle v. Earle, 9 Tex. 630. See also In re Miller, 158 Cal. 420, 111 Pac. 255; Kelly's Estate, 1 W. N. C. (Pa.) 10. *Compare* Liddell's Succession, 22 La. Ann. 9.

In Odiorne's Appeal, 54 Pa. St. 175, 93 Am. Dec. 668, the court said: "Where a wife leaves her husband and renounces all conjugal intercourse a considerable time before his death, she becomes not such a widow, after his death, as was in the contemplation of the legislature when the Acts of Assembly were passed which entitle her to administer his estate and to appropriate three hundred dollars of it to her own use. . . . The acts contemplate the case of a wife who lives with her husband till his death and faithfully performs all her duties to his family, not one who voluntarily separates herself from him and performs none of the duties imposed by the relation." See to the same effect, Nye's Appeal, 126 Pa. St. 341, 17 Atl. 618, 12 Am. St. Rep. 873. In Daniels v. Taylor, 145 Fed. 169, 7 Ann. Cas. 352, 76 C. C. A. 139, *reversing* 5 Indian Ter. 219, 5 Ann. Cas. 226, 82 S. W. 727, the court after setting forth the statutes providing for granting to a widow a certain allowance at the death of her husband, said: "These sections quite plainly contemplate the case of a widow who in the lifetime of her husband lived with him as a member of his family, and performed the duties of that relation, and not one who willingly separated from him, performed none of the duties of a wife, and by her gross misconduct disqualified herself from succeeding him as the head of the family." And in Welsh's Estate, 5 Pa. Dist. 675, 18 Pa. Co. Ct. 517, 39 W. N. C. 167, the court in denying the right of a widow to claim her statutory allowance said: "The right to the exemption accorded to the widow by the Act of April 14, 1851, is grounded upon the existence of family relations between the wife and the husband, the severance of which by the death of the husband, and the consequent withdrawal of his support, involves the widow frequently in great pecuniary distress. If the wife was not, at the time of his death, a member of the family of her husband, the presumption is that she was not dependent upon him for maintenance and was not a subject for the operation of the statute. She can free herself from this presumption only by

showing that her husband's conduct compelled the separation; and the criterion by which the offensive treatment is to be judged is precisely that which would obtain in a proceeding for divorce: . . . This rule, as to family relationship, has been enforced even where the separation was amicable and was not meant to be lasting: . . . The evidence in the present instance was not, as it seldom is, of one character throughout, and some of it was conflicting; but that which told most severely against the claimant was given by her own children. It undoubtedly established the fact that she had left her husband's household at least six years before his death, and had never returned, and it disclosed no valid pretext on her side for taking that step. On the contrary, there was reason to believe that the husband made an honest effort to reconcile their differences, but without co-operation by the claimant, and hence without success."

In Kahn's Estate, 16 Pa. Co. Ct. 72, 3 Pa. Dist. 806, it appeared that the claimant, the wife of the decedent, was not living with her husband at the time of his decease. She asserted her right to the widow's allowance on the ground that the husband had driven her from his home. The court said: "The evidence leaves it in no manner of doubt that there were frequent quarrels, and even some show of violence, between the parties, and it is so evenly balanced that it is hard to say who was the sinner and who the sinned against. But it does not show that any specific act of the husband hastened the wife's departure, nor that his treatment of her at the close of their cohabitation was any worse than it had been at the beginning. In order to succeed in her application, the wife was bound to exhibit a legal excuse for withdrawing from her husband's society, and she failed to give it. For that reason her letters are important, as perhaps they otherwise would not be, inasmuch as they seem to disclose the motive which actuated her. If they mean what they say, they show that she quitted her husband in order to consort with another man. Having thus, by her own act, sundered the family relation, she cannot with any propriety claim an allowance which is based upon the continuance of that relation."

In *North Carolina* it has been provided by statute that if any married woman shall commit adultery, and shall not be living with her husband at his death she shall lose all right to the widow's allowance. See Leonard v. Leonard, 107 N. C. 171, 12 S. E. 60, wherein the court said: "The jury, in response to issues submitted, found that the plaintiff committed adultery prior to 1868, and had not since lived with her husband, and was not living with him at his death. It is unnecessary to consider the other exceptions, as upon the issues found we think judgment should have been entered for the defendant. The Code, sec. 2116, provides 'If any married woman shall commit adultery, and shall not be living with her husband at his death, she shall thereby lose all right to a year's provision, and to a distributive share from the personal property of her husband, and such adultery may be pleaded in bar of any action or proceeding for the recovery of such rights and estates.' Formerly the adultery of his wife, and living separate from her husband at the time of his death, ousted the woman of her dower (statute 13 Ed. I; Walters v. Jordan, 35 N. C. 361), but did not deprive her of her year's provision and distributive share of the estate. Walters v. Jordan, 34 N. C. 170. In 1871–'72, ch. 193, sec. 44, it was enacted that if any married woman shall elope with an adulterer, she shall thereby lose all right to dower, year's provision and distributive share. In Cook v. Sexton, 79 N. C. 305, this act was construed by the court, which held it to be entirely prospective, and not applicable when the elopement had taken place prior to the passage of the act." *Compare* Cook v. Sexton, 79 N. C. 305, and Walters v. Jordan, 34 N. C. 170, decided under an earlier statute and explained in Leonard v. Leonard, supra.

Likewise in *Indiana* a statute providing that a widow can claim no part of her husband's estate if she has abandoned him and is living in a state of adultery at the time of his death, has been held to bar her right to claim the widow's allowance, Owen v. Owen, 57 Ind. 291.

b. *Abandonment by Husband.*

In several jurisdictions it is held that where a separation has been caused by the husband's abandonment of his wife, the widow is entitled to her allowance on the death of the husband. Shaffer v. Richardson, 27 Ind. 122; Grieve's Estate, 165 Pa. St. 126, 30 Atl. 727 (distinguishing Spier's Appeal, 26 Pa. St. 233; Terry's Appeal, 55 Pa. St. 344; Balmforth's Estate, 26 Pa. Super. Ct. 491; Spence's Estate, 5 Pa. Co. Ct. 494; Moore's Appeal, 40 Leg. Int. (Pa.) 350; Krewson's Estate, 18 Montg. (Pa.) 114; In re Weidler's Estate, 16 York Leg. Rec. (Pa.) 3, 19 Lanc. 212. See also Reed's Estate, 21 Pa. Dist. 906. *Compare* Spier's Appeal, 26 Pa. St. 233 (*distinguished* in Grieve's Estate, 165 Pa. St. 126, 30 Atl. 727); Coates's Estate, 6 W. N. C. (Pa.) 367. Thus in Grieve's Estate, supra, it appeared that the claimant and the deceased had been married in Canada where the wife and three children were abandoned by the husband; Subsequently, the husband requested his wife to meet him in Ontario where they were reconciled. He later left

with the understanding that he was to make a home for the family in the States, and that the wife should remain in Canada until he sent for her. He continued to write to her for several years, after which nothing was heard from him. It further appeared that he settled in Pennsylvania and married another woman who lived with him until the time of his death. The court said: "All the evidence points to the conclusion that the appellee was a devoted wife and mother, and that she bravely bore the burdens which her husband's malicious and inexcusable desertion of his family imposed. To maintain herself and her children she taught school, gave music lessons and finally became a trained nurse. . . . There was no time after his departure in 1884 that she would not have gladly welcomed a redemption of his promise and rejoiced in a reunited family. It was no fault of hers that she was not a member of his household at his death. It was illegal acts and bad faith that excluded her from it. In contemplation of law the family relation still existed and his domicil was hers. Why, then, should she be denied the exemption which the law allows to his widow? Surely a refusal of her claim for it must have something more to rest upon than his repudiation of his marital vows and duties." See to the same effect Balmforth's Estate, 26 Pa. Super. Ct. 491. Likewise in Reed's Estate, 21 Pa. Dist. 906, it was held that where a wife has been driven from the home by her husband and is living apart from him at the time of his death, the same rule applies as where the wife has been deserted, and she is entitled to her allowance from the estate. See to the same effect De Walt's Estate, 38 Pa. L. J. 275. In Simpson's Estate, 5 Pa. Co. Ct. 326, 22 W. N. C. 172, it was held that the widow could claim her allowance where it appeared that she had been driven from the home of her husband by the cruelty of a step-son and had remained away through no fault of her own. However in Burkett's Estate, 5 Pa. Co. Ct. 501, the court said: "If a wife, in consequence of cruel and barbarous treatment endangering her life, withdraws from the husband's house and family, and remains away, without any offer or effort to return, for the space of six years, during which time, she is neither waiting nor willing to resume her place in the family, she may, upon his death, as his widow, have her share of his estate under the intestate laws, but not allowance of three hundred dollars given by the Act of 1851, which the widow belonging to the family is to retain for the use of herself and family. For the latter is a pure gratuity, intended to provide for the immediate necessities of a family suddenly deprived of its head, and is not given to the widow as such, but to her as the surviving head of the family, and she must be, either actually or constructively, in the family at the time of her husband's death. She may be constructively in cohabitation, though she be separated temporarily from her husband through his fault, if she is waiting to fill a wife's place; for she hath done what she could. . . . But if she abandons her husband with a fixed intention not to return, she is not constructively of his family." And in Groves's Estate, 5 Pa. Co. Ct. 498, although it was found that the widow and claimant was justified in leaving her husband before his decease her allowance was denied because of the fact that she was residing in another state and there had been a delay of more than two years in making the demand. In a case wherein it appeared that a husband abandoned his wife, by fraudulent means procured a decree of divorce in the courts of another state, and remarried, it was held that the divorce would be considered null and void and that the first wife was entitled to the widow's allowance. Field v. Field, 215 Ill. 496, 74 N. E. 443 (*affirming* 117 Ill. App. 307). *Compare* Kersey v. Bailey, 52 Me. 198, wherein the court said: "The appellant, though the legal wife of the deceased, had not lived or cohabited with him as such for more than forty years. True, he deserted her, but subsequently she, supposing him to be dead, married another man with whom she lived and cohabited as his wife for thirty years or more, and until his decease. The intestate, on his return to this state many years ago, finding that she had formed new ties, allied himself to another woman by whom he had a family, and in connection with whom the little property left by him at his decease would seem to have been accumulated. The appellant, entangled with her new connection, does not appear to have made any claim upon him for support during the long time that elapsed after his return to this state before his decease. She lost nothing by his death, which she had before possessed. In fact there seems to have been a taeit relinquishment by each of all claims upon the other for more than a quarter of a century. It is plain that she contributed nothing by her industry and prudence to the accumulation of the three or four hundred dollars out of which she now claims an allowance. Upon her right to dower in his real estate we do not pass. But while we impute no blame to her for the sundering of this old connection, we do not see that the Judge of Probate erred in refusing an allowance under all the circumstances of the case."

c. *Separation by Mutual Consent.*

In some jurisdictions it has been held that where a separation is mutually agreed to and the wife is living apart from her husband at

the time of his death, she is not entitled to the widow's allowance. Odell's Estate, 52 Mich. 592, 18 N. W. 373; Platt's Appeal, 80 Pa. St. 501; In re Park, 25 Utah 161, 69 Pac. 671. In the case last cited, the court said: "The statute providing for family allowance was doubtless intended to make immediate provision for the family when the head of it is removed by death, and such provision is to continue during the administration of the decedent's estate. In this case there was no family, except the wife, and she did not constitute the immediate family of the deceased; she and her husband having many years ago agreed to live separate and apart from each other, and had so lived up to the time of his death. She was therefore never dependent upon him for support, and we think, under all the circumstances, the court properly refused an allowance."

However, in Wright's Estate, 5 Pa. Co. Ct. 228, a widow was granted an allowance where it appeared that she had been married to the decedent for more than six years although, at his request, she had never lived with him. It appeared that they had always been on terms of entire amity and the sole reason for their living apart was the decedent's fear that he might not be able to provide for her. And in Linares v. De Sinares, 93 Tex. 84, 53 S. W. 579, the court said: "In this case we have the meager facts that the separation was by agreement between the husband and wife, and 'that the wife was induced thereto by reason of the cruel treatment of the husband.' The nature and extent of the cruelty does not appear from the court's findings. Presumably, it was sufficient to justify the separation on her part. If not, the administrator who contested her application should have shown it. We therefore conclude that under the facts of this case it does not appear that the wife had forfeited her right as surviving widow to claim an allowance in lieu of a homestead and other exempt property."

2. Minority View.

Under some statutes, the courts have held that a widow is entitled to her allowance if the status of husband and wife still existed at the time of the husband's death, though they had been living separate and apart previous to that time. Smith v. Smith, 112 Ga. 351, 37 S. E. 407; Sammons v. Higbie, 103 Minn. 448, 115 N. W. 265; Mowser v. Mowser, 87 Mo. 437; King v. King, 64 Mo. App. 301, 2 Mo. App. Rep. 998; Comerford v. Coulter, 82 Mo. App. 362; Matter of Shedd, 60 Hun 367, 14 N. Y. S. 841, *affirmed* 133 N. Y. 601, 30 N. E. 1147 (*distinguishing* Linton v. Crosby, 56 Ia. 386, 9 N. W. 311, 41 Am. Rep. 107); In re McMillan, 28 Ohio Cir. Ct. Rep. 645. See also Farris v. Battle, 80 Ga. 187, 7 S. E. 262; Linton v. Crosby, 56 Ia. 386, 9 N. W. 311, 41 Am. Rep. 107. Thus in Smith v. Smith, supra, the following charge regarding the widow's right to an allowance was held to be correct: "The fact that this widow (the plaintiff) may not have been living with him (her husband) for some time previous to his death would make no difference if she had not been divorced or he had not been divorced from her; she would be entitled to all the rights of a wife." In Sammons v. Higbie, 103 Minn. 448, 115 N. W. 265, the court said: "Allowances of personal property which do not rest in the discretion of the court . . . are not barred or forfeited by a wife who, with or without cause, deserts and abandons her husband and is living separate and apart from him at the time of his death. Such property rights spring from and arise out of the marriage of the parties, and the authorities sustain the general proposition that, if that relation in fact exists at the time of the husband's death, the statutes apply and force and effect must be given their provisions. . . . The statutes controlling the question whether a right to the property vested in the wife at the husband's death, or whether the 'allowances' rested in the discretion of the court, will admit of but one construction. They provide that when any person dies possessed of personal property the same 'shall be applied and distributed,' as follows: (1) The widow shall be allowed the wearing apparel of the husband; (2) his household furniture of a designated value; and (3) other personal property not exceeding in value five hundred dollars. This language is plain and unambiguous, and declares that the property mentioned 'shall be allowed' to the widow, and its allowance is in no sense discretionary with the probate court. The clear intention of the legislature was to vest an absolute right to the property mentioned in the widow; the only act remaining to be done after the husband's death being the designation of the particular property selected by her. . . . Our conclusion, therefore, upon this branch of the case, is that the property rights here involved, being absolute by the statute in the widow, were not barred or forfeited by her abandonment of the husband before death, whether the abandonment was with or without cause; and we hold generally, in construing the statute, that if at the time of the husband's death in any particular case the relation of husband and wife in fact exists the provisions of subdivisions 1 and 2 vest in the widow an unqualified right to the property there referred to. The operation of the statute can be suspended or prevented only by a decree annulling or dissolving the marriage." In Mowser v. Mowser, 87 Mo. 437, it was said: "The abandonment by plaintiff of her husband did

not impair her right to the provision claimed. The four hundred dollars allowed her by [statute] is an absolute provision for the widow, and she is entitled to it whether there are children of the marriage or not, or whether the deceased left a family or not. It is not given to the widow for the benefit of herself and her children, or the children of the deceased, but to her for her own use to be disposed of as she may see proper, and notwithstanding she abandoned her husband and without any sufficient reason, still she is entitled to the property or its value claimed by her. She was his wife to the day of his death. The court will not try divorce suits after one of the parties to the marriage is dead." In re McMillan, 28 Ohio Cir. Ct. Rep. 645, the court said: "It is said here in argument that there was some controversy between husband and wife, and it was perhaps mutually agreed by them that they would live apart and not cohabit together as husband and wife any further, which they continued to do for about the period of seven years. It is contended that relations between them as parts of the same family ceased to exist, and it is also said that the wife at one time brought an action for divorce; there was an answer to this petition praying for divorce, but there was never any divorce granted. Therefore, when this husband died, he left this woman as his widow, there being no legal separation, and as his widow she would be entitled to a year's support and the articles of personal property."

3. Rule in Massachusetts.

In Massachusetts it is held that the granting of an allowance to the widow lies within the discretion of the court and is to be made with regard to all the circumstances of the case. The fact that the widow has lived apart from her husband for some years does not prevent her from claiming the allowance if she is in necessitous circumstances. Holdenbeck v. Pixley, 3 Gray 521; Slack v. Slack, 123 Mass. 443; Chase v. Webster, 168 Mass. 228, 46 N. E. 705; Welch v. Welch, 181 Mass. 37, 62 N. E. 982. Thus in Slack v. Slack, supra, it appeared that the petitioner in 1847, went to live with the intestate as his housekeeper, and they cohabited as husband and wife from that time until 1858, when they were lawfully married, and afterwards continued to live together as husband and wife for about two years. Difficulties arising between them on account of his gross and confirmed habits of intoxication, which had existed throughout their cohabitation, they agreed that she should live apart from him for a year and then return. Before she went away, he withdrew his consent and urged her to remain, but she insisted on leaving him according to their agreement, and went to live in another town with her daughter by a former marriage. At the expiration of the year she returned to his house, but, finding that he had obtained another housekeeper, with whom she believed him to be living in adultery, she went away again and never returned. She was not asked by him to return, and continued to live apart, rendering him no services and supporting herself, until his death. The court said: "The statute gives a discretionary power to the judge of probate to make such allowance to the widow as he shall judge fit for the supply of necessaries for her use, 'having due regard to all the circumstances of the case.' The question how much shall be allowed must depend upon the varying circumstances of each case, with reference to which no general rule can well be stated. The fact that the parties lived separate, or which party was the culpable cause of the separation, may have little application to the question. 'The allowance,' as remarked by Shaw, C. J., in Hollenbeck v. Pixley, 3 Gray 521, 'is not made to the widow as a reward for faithful service as a wife; nor is it given out of the husband's estate as compensation to her for ill treatment by him as a husband; but it is a question solely of her actual necessities.'"

II. *Effect of Written Agreement.*

Where a husband and wife separate voluntarily, and continue to live apart under the terms of a separation contract by which the wife waives her rights in the husband's estate, it is generally held that the agreement may be effectively asserted as a bar to the widow's allowance. Noah's Estate, 73 Cal. 583, 15 Pac. 287, 2 Am. St. Rep. 829 (*affirmed* on second appeal 88 Cal. 468, 26 Pac. 361); In re Yoell, 164 Cal. 540, 129 Pac. 999; Fisher v. Clopton, 110 Mo. App. 663, 85 S. W. 623; In re Roth, 9 Ohio Dec. 429, 6 Ohio N. P. 498; Speidel's Appeal, 107 Pa. St. 18; Dillinger's Appeal, 35 Pa. St. 357; Schmitt's Estate, 5 Pa. Co. Ct. 183; Henkel's Estate, 13 Pa. Super. Ct. 337. See also Wickersham v. Comerford, 96 Cal. 433, 31 Pac. 358. See also Hettrick v. Hettrick, 55 Pa. St. 290. See also Hitner's Appeal, 54 Pa. St. 110. In Noah's Estate, supra, it appeared that the wife of the decedent had lived separate and apart from him for several years prior to his death. A written agreement for separation executed by them provided that in consideration of $10,500 paid by the husband she agreed not to demand any alimony or support from him and that the payment should be in full satisfaction of "all her marital claims" etc. The court said: "Since the appellant voluntarily made an agreement with her

husband for separation, such as our law authorizes, received and enjoyed the benefits of the money paid for her support during the separation, and voluntarily continued to live apart from him without any attempt to set aside the agreement, or to assume again the matrimonial connection, or even to demand further means or her separate support —the court below was justified in holding that the petitioner did not constitute the immediate family of the deceased, to whom was to be continued, during the settlement of the estate, the 'reasonable support' which the husband in ordinary cases, is presumed to furnish his wife." In re Yoell, 164 Cal. 540, 129 Pac. 999, the court said: "Upon the death of the husband the surviving wife may receive a family allowance when and only when she is a member of the family and receiving or entitled to receive support as such member, and when, even though a member of the family, she has not parted with or relinquished her right to make demand for such allowance. (a) To establish such relinquishment of right, no more apt words could be chosen than those deliberately employed in the agreement under consideration. True, it does not in terms and by name relinquish the right to a family allowance, but it does more than this. The wife covenants that she has renounced and waived all claim which she has or may have as heir of the husband or as his surviving wife. It is only as heir and surviving wife that she could make her demand for a family allowance, a demand which she has solemnly renounced. . . . It is concluded, therefore, that by the very language of the separation agreement the wife renounced, surrendered, and released her right to make application for a family allowance." In re Roth, 9 Ohio Dec. 429, 6 Ohio N. P. 498, the court held the following contract to be sufficient to bar the claimant's right to a year's allowance as his widow: "I, the undersigned, Amelia Roth, nee Schwappacher, do hereby, certify that I have received from William Roth, one hundred and fifty dollars ($150.00) as payment in full of all my accounts and claims upon him. I, Amelia Roth, do hereby absolutely renounce and waive all matrimonial rights and legal claims upon the said William Roth. Further I promise to annul my suit against William Roth now pending in the court of common pleas, Springfield, Ohio, and never to enter a law suit against him nor raise any claim whatever." In Speidel's Appeal, 107 Pa. St. 18, the court said: "The examiner appointed by consent of counsel, to take testimony and report the facts, found that the appellant entered into a contract of separation with her husband in 1868. That the agreement was signed, sealed and executed; that she at that time, and subsequently, received a certain portion of his estate in pursuance of said contract; that all mutual claims by virtue of their marital rights against each of their respective estates were then relinquished, and that their separation was actual, immediate and continuous. The court concurred with this finding of facts, and affirmed the conclusion of the examiner. A careful examination of the evidence justifies the finding. (The husband) lived some fourteen years after the agreement was executed. During all that time the separation continued. At his death the appellant did not sustain such a relation to him as one of his family as entitles her to claim three hundred dollars worth of property out of his estate." In Dillinger's Appeal, 35 Pa. St. 357, it appeared that a husband and wife agreed to live separate and apart and duly executed articles of separation. At the death of the husband the widow claimed her share of the estate including a claim for the widow's allowance of three hundred dollars. The court said: "In effect, and substance, the articles were a solemn and legal renunciation of dower in the husband's estate, and of all interests that might arise under existing or future statutes. Therefore, she has no right to claim in character of his widow. It is against equity and conscience, that she sets up a claim. It is said, she is embraced by the terms of the three hundred dollar law in favor of widows. We think not. We hold the legislature did not mean, by the word widow, a person in her circumstances, and that we should misapply the law, if we gave her the benefit of it."

However in Newton v. Truesdale, 69 N. H. 634, 45 Atl. 646, it appeared that the husband and wife had a controversy over the ownership of their joint property as to the amount belonging to each. For the purpose of settling the difficulty they executed an agreement. On the death of the husband the widow claimed her allowance and the agreement was pleaded as a bar. The court said: "The language . . . employed was apt and proper to effect a division of their joint property, and to provide that the wife's portion should be held as her separate estate, free from the control of her husband. There is no language in the instrument which indicates that the parties intended that the wife should release any claim she might have to the personal estate of her husband in case she survived him. If that had been the intention of the parties, they would doubtless have used proper language to express it. There is nothing in the agreement which can be held to be a bar to her claim for such share of the personal estate of her deceased husband as a widow is entitled to by law. The terms of the agreement did not provide that the parties should live separate, and that the parties did not so understand it is indicated by the fact

that they lived together a year and a half afterward. The mere fact that they lived separate a few years before the husband's death, in the absence of anything to show that it was due to the fault of the wife or was even desired by her, is not of itself sufficient to bar her claim for an allowance, or to show that the decree of the probate court granting her one ought on that account to be reversed."

The holding of the reported case to the effect that a separation agreement is not a bar to the widow's right of allowance from the estate of her husband unless the allowance is specifically waived is apparently based on the previous reasoning of the court with reference to antenuptial agreements. It is in direct conflict with the holding of the Missouri Court of Appeals in Fisher v. Clopton, 110 Mo. App. 663, 85 S. W. 623, wherein the proceeding was begun by the plaintiff's application to the probate court for an allowance of four hundred dollars and a year's maintenance out of the personal estate of her deceased husband. The defendant as administrator of the estate objected to the allowance on the ground that in the lifetime of the husband he and she had entered into a deed of separation whereby nearly three thousand dollars was made over to her and she released all claim to or interest in his estate. That portion of the deed read as follows: "And I, Louise Fisher, wife of the said John Fisher, for and in consideration of the sum of twenty-seven hundred dollars ($2,700) heretofore given me by said John Fisher, and his agreement that said moneys shall be and remain my sole and separate, and individual property, do hereby relinquish to him all my right, title and interest in any and all property now held, or owned, or hereafter acquired by him, and for said consideration do hereby, at his instance and request, release and relinquish unto said Thomas Adolph Blickle all my right, title and interest, in and to the above described lands." The court said: "A portion of the case as presented by the plaintiff would indicate that she considers there must be an express stipulation in the contract between husband and wife whereby she, in terms, expressly renounces dower or other interest in her husband's property. That view would be applicable to a case involving a contract for jointure before marriage. . . . And also, it seems, even if such contract be in the nature of jointure and made after marriage. . . . But the defense in this case is not based on jointure, but a contract of separation. And while it must appear in such contract that it was the intent and purpose to renounce all claim in the husband's property, yet there is no statutory requirement that such purpose must be stated in express terms, . . . there is a great difference between a contract for jointure and a contract for separation. In post-nuptial jointure the widow may renounce such provision and take her statutory dower. . . . But no such right is given in cases of contract for separation. The latter class of contracts, though they are postnuptial, are not revocable at the will of the wife, or widow. So, therefore, we rule that the plaintiff in this case is barred of her right to the allowances claimed."

Where there has been a reconciliation and cohabitation between the parties subsequent to the execution of a contract of separation the contract cannot be effectively asserted as a bar to the widow's allowance as by their acts the parties are deemed to have avoided the terms of such contract. Haile v. Hale, 40 Okla. 101, 135 Pac. 1143. See to the same effect, Roberts v. Hardy, 89 Mo. App. 86; Knapp v. Knapp, 95 Mich. 474, 55 N. W. 353.

As to the effect on an agreement for separation between a husband and wife of a subsequent reconciliation between them, see the note to In re Singer, Ann. Cas. 1913A 1326.

LAMBERT

v.

HOME.

England—Court of Appeal—April 7, 1914.

[1914] 3 K. B. 86.

Discovery — Privilege — Transcript of Court Proceedings.

A transcript of shorthand notes of a proceeding in court which the attorney of a stranger thereto procured to be taken for his information in anticipated litigation is not privileged from inspection.

[See note at end of this case.]

[86] Appeal from a decision of Lawrence J.

The action was brought by the plaintiff Lambert against the defendant Home for damages for personal injuries.

The facts were as follows. On May 4, 1913, a collision occurred between the defendant's motor car and a taxi-cab the property of the National Motor Cab Company, Limited. The taxi-cab was [87] driven by a driver named Sutton. The plaintiff Lambert was riding in the taxi-cab at the time of the collision. Proceedings were subsequently taken in the county court by the defendant against the

National Motor Cab Company, Limited, to recover the amount paid by him for repairs to his motor car. An action was also brought in the county court by Sutton, the driver of the taxi-cab, against the defendant for damages for personal injuries. The two actions Home v. National Motor Cab Company, Limited, and Sutton v. Home were heard together on July 23, 1913, before the judge of the West London County Court, who held that the driver of the defendant's car was to blame for the collision, and he accordingly gave judgment for the defendants in the first action and for the plaintiff in the second action. The defendant's solicitors were aware, prior to the hearing of these actions, that the plaintiff Lambert was riding in the taxi-cab at the time of the collision and that he received serious injuries, and they anticipated that in all probability an action would be brought by him after the determination of those two actions. They, therefore, for the purposes of an appeal, if necessary, but mainly in order to be in a position to advise the defendant in the present action whether or not he should defend the proceedings, if any, which might subsequently be brought by the plaintiff Lambert, had a shorthand note taken of the proceedings in the county court actions and a transcript thereof made. As anticipated, the present action was brought by the plaintiff Lambert. In the course of the action an affidavit of documents was made by the defendant, in which he objected (inter alia) to produce the transcript on the ground that it was privileged. The Master held that the plaintiff Lambert was entitled to have inspection of it. The defendant appealed to Lawrence J. in chambers, who dismissed the appeal, but gave leave to the defendant to appeal to the Court of Appeal. The present appeal was accordingly brought.

J. Sankey, K. C., and *Harold Brandon* for appellant.

T. C. Gibbons, K. C., and *C. Paley Scott* for respondent.

Solicitors: *White & Co.; Bell & Sugden.*

[90] COZENS-HARDY M. R.—On May 4, 1913, there was a collision between the defendant's motor car and a taxi-cab in which the plaintiff was riding. Two actions were commenced in the county court, one by the defendant against the taxi-cab company, and the other by the driver of the taxi-cab against the defendant. Both the driver of the taxi-cab and the plaintiff Lambert were injured in the collision. These two actions were tried together. The defendant Home, anticipating that an action would be brought against him by Lambert, caused a shorthand note of the county court proceedings to be taken and a transcript thereof made. The anticipated action was commenced. An affidavit of documents was made by the defendant in which he objected to produce (inter alia) the transcript on the ground of privilege. Master Archibald and Lawrence J. held that the plaintiff was entitled to have inspection, and this is an appeal against that decision.

It is admitted that the transcript relates to the matters in question in this action, but it is contended that the document is privileged —that it is in substance a part of the defendant's brief, as a statement of what some, or possibly all, of the witnesses who were present at the collision have sworn, and that it is not fair to require the defendant to produce that which has been brought into existence under the instructions and at the cost of the defendant in anticipation of the present litigation. Now the proceedings in the county court were public. Any one present could listen and take a note of what the witnesses said. The transcript did not involve any such "professional knowledge, research and skill" as Bowen L. J. referred to in Lyell v. Kennedy, 27 Ch. D. 1, 31. There is no original composition in the document. [91] It is a mere transcript of that which was publici juris. A defendant who has obtained at his own cost a copy of a document, not in his possession, which is not itself privileged, cannot decline to produce the copy, although he obtained it in anticipation of future litigation. So here a mere reproduction in a physical form of material which was publici juris cannot, I think, be privileged.

With one exception, the authorities seem to me to support this view. Wood V.-C. in Nicholl v. Jones, 2 Hem. & M. 588; Kay J. in Rawstone v. Preston Corp. 30 Ch. D. 116; North J. in In re Worswick, 38 Ct. D. 370, and Stirling J. in Ainsworth v. Wilding [1900] 2 Ch. 315, all laid down principles which seem to me to cover the present case. The only exception is the decision of a Divisional Court in Nordon v. Defries, 8 Q. B. D. 508, which, with great respect, I am unable to follow. The reasoning on which Mathew J. based the judgment of the Court has not, in the argument before us, been attempted to be supported. The authority of Nordon v. Defries, 8 Q. B. D. 508, has been questioned by text-writers. In my opinion the order made by Lawrence J. was quite right, and this appeal must be dismissed with costs.

BUCKLEY L. J.—The proposition which the appellant is here to affirm may, I think, be stated in the following terms: "That which was said by the witness in the box is, I agree, public property. And it is relevant. It exists in the form of a document. That relevant document is privileged because I wrote the document; or my solicitor for my benefit wrote it or procured it to be written for me." This is privilege based upon reproduction by

writing. In my opinion, no such privilege exists. If it did a copy of a document as distinguished from the original would be privileged. The document is not one which has been composed by the writer, or of which the writer is in any way the author. He has done nothing more than reproduce in a physical form that which came into existence in its relevant form when the witness spoke in the box. The writer is comparable to a [92] gramophone or a photographic camera. The document as distinguished from its contents is not relevant. The writing itself is not available at all in evidence. It is nothing more than the proof of the shorthand writer.

It has been sought to sustain the claim to privilege upon the familiar ground that materials coming into existence for the purposes of the trial, or collected by the solicitor for the purposes of the trial, are privileged. The doctrine, in my opinion, is not applicable. The case of Lyell v. Kennedy, 27 Ch. D. 1, is no doubt authority for the proposition that if the solicitor has by search and selection procured copies of or extracts from sources open to any member of the public the collection may be privileged. The point is best stated by Bowen L. J. 27 Ch. D. 31. He says: "A collection of records may be the result of professional knowledge, research, and skill, just as a collection of curiosities is the result of the skill and knowledge of the antiquarium or virtuoso, and even if the solicitor has employed others to obtain them, it is his knowledge and judgment which have probably indicated the source from which they could be obtained. It is his mind, if that be so, which has selected the materials, and those materials, when chosen, seem to me to represent the result of his professional care and skill, and you cannot have disclosure of them without asking for the key to the labor which the solicitor has bestowed in obtaining them." In that class of case the solicitor has done original work and by his professional skill and research has obtained a collection of materials to be used for the purpose of the trial. In the present case there is no original work or collection of materials leading to a result. The only original act done is to reproduce physically material which was publici juris and of which any one was at liberty to avail himself.

The authorities are in my opinion uniformly in favor of this view. Nicholl v. Jones, 2 Hem. & M. 588; Rawstone v. Preston Corp. 30 Ch. D. 116; In re Worswick, 38 Ch. D. 370; Goldstone v. Williams [1899] 1 Ch. 47, and Ainsworth v. Wilding [1900] 2 Ch. 315, are all cases in which the principle [93] which I have stated is, in my opinion, to be found. Nordon v. Defries, 8 Q. B. D. 508, with great respect to the learned judges who decided it, is in my judgment wrong. The decision is rested upon a proposition which I think cannot be maintained. The shorthand notes had been taken in an action of Nordon v. Nordon. Discovery of them was asked for the purpose of using them in an action of Nordon v. Defries, 8 Q. B. D. 508, Mathew J. says that in the action of Nordon v. Nordon the shorthand notes would seem to have been clearly privileged. In my judgment they would not have been privileged at all. If there had been subsequent proceedings in Nordon v. Nordon, as upon an inquiry as to damages or a reference before the Master or any subsequent step, the notes taken at the trial of Nordon v. Nordon would not have been privileged. That decision was said to follow the principles laid down in Southwark, etc. Water Co. v. Quick, 3 Q. B. D. 315. That case did not, I think, contain the principle which is supposed to be found in it. There were three classes of documents in that case. The third was plainly privileged. The first two were certain transcripts, and in both cases it will be seen that they were transcripts of conversations at interviews held for the purpose of obtaining information to be submitted to the solicitor for advising in relation to an intended action. The oral statement which was included in the document was a confidential statement, and the question did not arise in a case where the facts were that the oral statement was public and the only work done was to record that public statement in writing.

For these reasons I think that the privilege claimed in this case for the transcripts of the proceedings in the county court in the actions of Sutton v. Home and Home v. National Motor Cab Company, Limited, cannot be supported, and that this appeal must be dismissed.

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CHANNELL, J.—I regret that in this case, for the first time since I have had the privilege of sitting temporarily in this Court, I am unable to come to the same conclusion as the other members of the Court. I think that the proposition of the appellant is [94] not so fully stated in the commencement of the judgment of Buckley L. J. as to raise the points on which my opinion is based. Adopting his words, with what I think the necessary additions, I should state it: "That was said by the witness in the box is, I agree, relevant, and it was public property in the sense that it might have been heard and might have been recorded by any one; but words are evanescent, other people did not record them, and I did, and I did so solely for my use and protection in the present litigation which I then anticipated. I brought into existence as a document the document of which inspection is asked, and I brought it into existence through my solicitor for the express purpose of instructing my solicitor and counsel both as to advising me whether I should defend

the present claim and to enable them to conduct my defence for me if I did defend. It is a part of my brief and I claim privilege for it. The record is not public property, though the words which it records may have been." That, I think, is a full statement of the appellant's case. I see no distinction in principle between the foresight, knowledge, professional skill, and the labour involved in bringing into existence this record as materials to be used at the trial and the professional care and skill used in making a collection of inscriptions on tombstones or extracts from registers for use at the trial, as in Lyell v. Kennedy, 27 Ch. D. 1. Privilege does not appear to me to depend on the same considerations as copyright. Here the document is a full transcript of all the evidence. If it had been a note taken by counsel instructed to watch the previous proceedings, with a view to taking a note of the part of the evidence which in his judgment would be material in the present proceedings, would not that be privileged? And is there any difference? Here the solicitor is said to have in fact underlined the material passages. If this document is to be considered as the proof of the shorthand writer it is I think clearly privileged.

I do not think any of the cases are authorities against my view except Rawstone v. Preston Corp. 30 Ch. D. 116, because I think that in no other case but that was there actual evidence that the transcript was made for the protection of the party in the litigation [95] then before the Court. In Rawstone v. Preston Corp. 30 Ch. D. 116, it is true that the facts raised the point and the argument, view that the document was privileged in the J., but he disregarded it without giving any reasons except that the case was plain. On the other hand, Nordon v. Defries, 8 Q. B. D. 508, is an express authority the other way. I think that was rightly decided. I do not think that that decision depends solely on the view that the document was privileged in the action in which it was taken, and I do not think the authority of the decision is destroyed even if that proposition is wrong. But I am not sure that it was wrong from the point of view of the judges who decided that case. It probably would not have been privileged in such further proceedings as an inquiry as to damages or a reference to a master, but such proceedings do not take place except in very rare cases in the King's Bench Division, and would not have been in the contemplation of Mathew J. I do think that no judge of the King's Bench Division would make an ordinary order for inspection, for the purpose of an appeal, of shorthand notes of the case appealed from taken by one party at his own expense; and that is what Mathew J. probably meant by his statement that the notes would have been privileged in that case.

It is said by counsel that there is a difference of opinion and practice on the point before us between the Chancery and the King's Bench Divisions, and this is quite possible, as the litigation in the two Divisions is of a somewhat different character. In the King's Bench Division there are more cases of disputed facts and of contradictory evidence by unreliable witnesses, and there are more cases of fraudulent claims supported by such evidence, than there are in the Chancery Division, although no doubt such claims do sometimes appear there too. I made, in the course of the argument in this case, some remarks to this effect, and the counsel for the defendant very properly stated to the Court that the plaintiff in this case was personally beyond suspicion, and I hope that nothing which I have said indicates a view to the contrary; but having regard to the nature of the case, he may probably have to rely on the evidence of witnesses of whom the same cannot be said. Moreover, the contradiction [96] between witnesses in collision cases is not by any means always due to dishonesty. It is often a matter of memory, more often still from other causes not necessary to specify now. In cases of this character, in my opinion, the extensive discovery now allowed is mischievous. The disclosure of the case on the other side, which now can generally be obtained, often gives fraudulent claims a chance of success which they would not otherwise have, for they can be framed to meet the case against them. All this may account for the King's Bench judges being inclined to give less wide discovery than the Chancery judges.

I think that the defendant in this case is entitled to retain the advantage which the foresight of his solicitor has for the express purpose of this litigation procured for him. It is said by Mr. Gibbons for the plaintiff that, if there is any chance of a misuse of this information by the plaintiff if he gets it, there is as great or even greater chance of misuse of it by the defendant if he is allowed to keep it to himself, and that seems true, but I do not think it justifies the order asked for. If discovery is ordered the plaintiff will be entitled to obtain a copy of the transcript at a small price per folio, whereas the defendant will have paid a large sum for having the notes taken and transcribed. It may be, indeed I think it is, a case where it would be reasonable for the defendant to agree to treat the notes as having been taken for joint use, each party paying half of the cost, but that is matter for agreement and not for adverse order under the process of discovery. If I were now sitting as judge at chambers I should endeavour to get the parties to come to such an agreement. An adverse order is, under

Order XXXI., r. 14, to be made "as the Court or judge shall think right," and although no doubt it has been held that an order should be made in respect of any relevant document for which the party in whose possession it is cannot establish privilege, yet I cannot think it would be a just order to take from a party the advantage which the foresight of his solicitor has obtained for him, and that without even securing payment to him of the expense to which he has been put to obtain it. Further, in this case the document which the defendant has is stated to have been so underscored as to direct attention to the passages which the defendant's solicitor considers [97] material. That part of it certainly is privileged, and so the order made amounts to an order to make a new copy for the plaintiff's benefit, and I do not think such an order ought to be made. These difficulties, however, would not arise if the document is privileged, and my view is that the transcript should be held privileged as a document which has only come into existence for the purpose of this litigation.

I regret that, owing to my being only a temporary member of the Court, it is impossible for me to ask for further time before delivering judgment. I have, unfortunately, not time to write a fuller judgment going more in detail into the authorities, and I should personally prefer to give way to the much better opinions of the Master of the Rolls and Buckley L. J.; but as the matter rather affects the practice of the Division with which I am more familiar, I feel bound to give my judgment for what it is worth. I think the appeal should be allowed.

Appeal dismissed.

NOTE.

Transcript of Court Proceedings as Privileged from Inspection.

The reported case is in accord with the majority of the earlier English cases in holding that a transcript of shorthand notes of a proceeding in court, made by a party for the information of counsel in future litigation is not privileged from inspection. Ainsworth v. Wilding [1900] 2 Ch. (Eng.) 315; In re Worswick, 38 Ch. Div. (Eng.) 370; Rawstone v. Preston, Corp. 30 Ch. D. (Eng.) 116; In re Brown, 42 L. T. N. S. (Eng.) 501; Nicholl v. Jones, 2 Hem. & M. (Eng.) 588. See also Goldstones v. Williams [1899] 1 Ch. (Eng.) 47. In Rawstone v. Preston Corp. supra, it was said: "The refusal of the motion would lead to an extraordinary extension of the doctrine of privilege of documents; which rests upon well-established principles. There is privilege in the case of communications between a party and his solicitor, both in an action, and also after the disputes in reference to the action have arisen. Privilege is also extended to the materials collected by a solicitor or his clerk pending the trial of an action, for the purpose, as it is usually phrased, of preparing counsel's brief. There is privilege, but it has nothing to do with this case, in regard to the production of title deeds. In this case not one of those grounds of privilege exists. The transcript is admitted to be relevant. The land, the subject-matter of the arbitration, and the land referred to in the action are not the same.

The evidence was given and the speeches were made in presence of the corporation and their advisers, who, if they had happened to have a shorthand writer in the room, could have had shorthand notes taken for themselves, which they would have a perfect right to use, and although they had not notes taken, it is not a valid objection to the production by the plaintiff of his transcript of the notes which were taken for him."

There is, however, some authority to the contrary. Norden v. Defries, 8 Q. B. D (Eng.) 508; The Palermo, 9 P. D. (Eng.) 6. And see Gander v. Stansfeld, 5 Jur. N. S. (Eng.) 778; 28 L. J. Ch. 436; Rapson v. Cubitt, 7 Jur. (Eng.) 77. In Nordon v. Defries, supra, it was said: "If the plaintiff has a cause of action against the defendants, it is manifest that it would be most important for the plaintiff to be enabled to submit to his counsel a full and precise statement of the evidence given by the defendants and their witnesses at the former trial. We are therefore disposed to give credit to the suggestion that the notes were intended to form materials for the guidance of the plaintiff and his counsel in the prosecution of the present action, and we think that the affidavit of the plaintiff is sufficient to enable us to act upon this view."

In The Palermo, supra, copies of depositions taken by the Board of Trade in the investigation of a collision and furnished by the Board to the owner of one of the vessels were held to be privileged, the court saying: "Here discovery is sought of copies of certain depositions, and these were obtained for the purposes of this action, and as the phrase is, 'to form part of the brief.' Therefore I think that they are privileged, and I shall not inquire for what purpose the original depositions were taken, since it is the copies of which discovery is sought, and which were obtained for the purposes I have stated."

The question seems never to have been passed on in the United States. As to the right to compel an attorney to produce books or papers belonging to his client, see the note to Pearson v. Yoder, Ann. Cas. 1916A 62.

ROGERS
v.
ATLANTIC, GULF AND PACIFIC COMPANY.

New York Court of Appeals—January 5, 1915.

213 N. Y. 246; 107 N. E. 661.

Waste — What Constitutes — Injury by Third Person.

Injury by the negligence of a stranger is not waste for which the life tenant is liable to the remainderman; waste, which is of two kinds, voluntary or actual, and permissive or negligent, being spoil or destruction done or permitted by the tenant, to the prejudice of the remainderman.

[See 14 Am. St. Rep. 629.]

Life Estates — Right to Recover for Injury to Inheritance.

While the life tenant may recover for injury by negligence of a stranger not only to the life estate, but to the remainder, it is not on the theory of waste, but of trusteeship.

[See note at end of this case.]

Rogers v. Atlantic, etc. Co. 152 N. Y. App. Div. 916, affirmed.

Appeal from Appellate Division of Supreme Court, Third Judicial Department.

Action for damages. Elizabeth M. Rogers, plaintiff, and Atlantic, Gulf and Pacific Company, defendant. Judgment for plaintiff in trial court. Judgment affirmed by Appellate Division of Supreme Court. Defendant appeals. The facts are stated in the opinion.

AFFIRMED.

Charles Irving Oliver for appellant.
Erskine C. Rogers for respondent.

[249] MILLER, J.—The plaintiff, a life tenant, has recovered a judgment for all of the damages, both to the life estate and to the inheritance, caused by a fire set by the defendant, a canal contractor, on adjoining lands of the state, and negligently allowed to spread to the lands of the plaintiff. The single question involved in this appeal is whether the recovery should have been limited to the damages to the life estate. The right of the plaintiff to recover all of the damages has thus far been maintained on the ground that she is liable to the remaindermen for any injury to the inheritance not caused by them, the act of God or the public enemy. No case is known in which a tenant has been subjected to such a rule of liability, and the proposition is so startling as to demand examination before it is made the ground of a decision by us.

The text writers, generally, state the rule broadly that [250] the tenant is liable to the reversioner for all injuries amounting to waste, by whomsoever committed, even by a stranger, the only exceptions noted being injuries caused by the act of God, the public enemy, or the reversioner himself, and the obligation of the tenant is frequently likened to that of a common carrier. (See 4 Kent *77.) But Chancellor Kent says: "Perhaps the universal silence in our courts upon the subject of any such responsibility of the tenant for accidental fires, is presumptive evidence that the doctrine of permissive waste has never been introduced, and carried to that extent, in the common law jurisdiction of the United States" (4 Kent *82), and the text writers, generally, concur in the doctrine that the tenant is not liable for accidental fires. (1 Washburn on Real Property, 116; 1 Cruise's Digest [Greenleaf edition] 139 and note; Taylor's Landlord and Tenant, section 196.) Obviously the word "waste" in the broad, general statements above referred to is used in the legal, not in the popular, sense.

This is an action for negligence against a stranger both to the life estate and the remainder, and it may well be doubted whether the doctrine of waste has any application at all to it. Waste is thus defined by Bouvier: "Spoil or destruction, done or permitted, to lands, houses, or other corporeal hereditaments, by the tenant thereof to the prejudice of the heir or of him in reversion or remainder. . . . *Permissive waste* consists in the mere neglect or omission to do what will prevent injury; as, to suffer a house to go to decay for the want of repair. And it may be incurred in respect to the soil, as well as to the buildings, trees, fences, or live stock on the premises. *Voluntary waste* consists in the commission of some destructive act; as, in pulling down a house or ploughing up a flower-garden." "There are two kinds of waste, viz., *voluntary* or *actual*, and *negligent* or *permissive*. *Voluntary* waste may be done by pulling down or prostrating houses, or cutting down timber trees; *negligent* [251] waste may be suffering houses to be uncovered, whereby the spars or rafters, planches or other timber of the house are rotten." (Bacon's Abridgment, vol. 10, page 422.) In the popular sense, any injury may be waste, but it is not waste in the legal sense, unless caused in such manner as to be within the legal definition of either commissive or permissive waste.

The rule contended for is based on Lord Coke's interpretation of two English statutes passed in the 13th century, the statute of Marlbridge, 52 Henry III. chapter 24, and

the statute of Gloucester, 6 Edward I. chapter 5. The former provided, "that fermors, during their terms shall not make waste, sale, nor exile of house, woods and men, nor of anything belonging to the tenements that they have to farm, without special license had by writing of covenant, making mention, that they may do it, which thing if they do, and thereof be convict, they shall yield full damage, and shall be punished by amerciament grievously." The latter provided: "That a man from henceforth shall have a writ of waste in chancery against him that holdeth by law of England, or otherwise for a term of life, or for a term of years, or a woman in dower; and he, which shall be attained of waste, shall lose the thing that he hath wasted, and moreover shall recompense thrice so much as the waste shall be taxed at." Lord Coke construed those statutes as applying to permissive waste. (2 Inst. 145, 303.) But the English cases at least raise a doubt on the point, and there seems to be a distinction between tenancies for years and for life. (See Jones v. Hill, 7 Taunt. 393; Harnett v. Maitland, 16 M. & W. 257; Yellowly v. Gower, 11 Exch. 274; Powys v. Blagrave, 4 DeG. M. & G. 448; Woodhouse v. Walker, 5 Q. B. D. 404; Davies v. Davies, 38 Ch. D. 499; In re Cartwright, 41 Ch. D. 532.) In the last case Kay, J., said: "Lord Coke's words only include permissive waste where there is an obligation to repair." He further [252] said: "Since the statutes of Marlbridge and of Gloucester there must have been hundreds of thousands of tenants for life who have died leaving their estates in a condition of great dilapidation. Not once, so far as legal records go, have damages been recovered against the estate of a tenant for life on that ground. To ask me in that state of the authorities to hold that a tenant for life is liable for permissive waste to a remainderman is to my mind a proposition altogether startling." Bacon's Abridgment contains several pages of examples of actionable waste. (See volume 10, pages 422 to 434; also see Viner's Abridgment, volume 22, pages 435 et seq.) Neither there, nor anywhere in the books, have I been able to find a case of waste instanced, in which the injury was caused by the negligent act of a stranger to the estate, though it has been assumed in some cases that such an injury would amount to waste. Lord Coke gives two reasons for allowing the reversioner to recover of the tenant for waste committed by a stranger: 1. "For it is presumed in law that the former may withstand it" (2 Inst. 145, 146), and 2, "For he in the reversion cannot have any remedy but against the tenant." (2 Inst. 303.) It may be open to some question whether by "stranger" he did not mean the assignee of the tenant, against whom he said that the heir could not maintain an action for waste. (2 Inst. 300.) But, at any rate, it is plain that under that head he referred to voluntary, not permissive, waste. The Court of Chancery did not interfere to prohibit permissive waste. In Castlemain v. Craven, the master of the rolls said: "But as to repairs, the court never interposes in case of permissive waste, either to prohibit or give satisfaction, as it does in case of wilful waste." (22 Vin. Abr. 523.) Certainly there is no basis for any presumption that the tenant could have prevented such an injury as was done in this case. One of the reasons given for likening the liability of a tenant to that of a common carrier is that it is imposed to prevent collusion. (Attersoll [253] v. Stevens, 1 Taunt. 183, 198.) That reason cannot apply with any force except to cases of voluntary waste. Lord Coke does except the case of injuries done by the enemies of the king, and by tempest, lightning, and the like, but in that connection he also instances a case in which it was adjudged "that if thieves burn the house of tenant for life, without evil keeping of lessees for lives fire, the lessees shall not be punished therefor in an action of waste." (2 Inst. 303.) In Halsbury's Laws of England (Vol. 18, p. 499) it is said: "Lessees for years, or from year to year, or for any other period, are liable for voluntary waste, whether committed by themselves or any other person, for, if committed by another, it is their duty, and they are presumed to be able, to withstand it." The case in 1 Taunton (supra) is the one generally cited as the leading case in support of the proposition that the tenant is liable for waste committed by a stranger, but that was a case of voluntary waste, the removal of clay.

Even assuming that by the rule of the ancient common law an injury caused by the negligent act of a stranger both to the estate for life or years and to the reversion or remainder amounted to waste, for which the tenant for life or years was responsible, the reasons for the rule given by Lord Coke either no longer exist or do not apply to the facts of this case. The ancient common-law forms of the action have been abolished and the impediment of the common law against the maintenance of an action for waste by reversioner or remaindermen in case there was an intervening estate (2 Inst. 301; Coke upon Littleton, vol. III, p. *243) was removed in this state by chapter 246, section 47 of the Laws of 1811, which provided: "That it shall and may be lawful for any person or persons seized of an estate in remainder or reversion, to maintain an action of waste or trespass for any injury done to the inheritance, notwithstanding any intervening estate for life or for years." It may be of interest to note

[254] that for some reason that provision was apparently concealed in the Supply Bill. It was substantially re-enacted by 1 R. S. 749, section 8, and is now section 1665 of the Code of Civil Procedure. It is still undoubtedly true that contingent remaindermen, possibly persons not in being, may not maintain the action, but that is because their estate is contingent, and is not due to any of the impediments of the ancient common law.

Certain other statutes, affecting the obligation of tenants, remain to be considered. The statute of 6 Anne, c. 31, relieved an owner from liability for an accidental fire starting in his house or chamber, and the statute of 14 George III., chapter 78, extended the exemption to such fires starting anywhere on one's estate. Primarily, those statutes were intended to relieve from the rigorous rule of the ancient law which made a person liable for the consequences of a fire originating upon his own premises and spreading to his neighbor's. But they are broad enough to affect the liability of a tenant to reversioner or remainderman, and have been so construed (See 4 Kent *82), and they have been held to be part of the law of this state. (Lansing v. Stone, 37 Barb. (N. Y.) 15, and see Hoffman v. King, 160 N. Y. 618, at page 622, 55 N. E. 401, 73 Am. St. Rep. 715, 46 L.R.A. 672.) Whilst a fire is not accidental, within the meaning of those statutes, if caused by the negligence of the tenant, or his servants (Filliter v. Phippard, 11 Q. B. 347, 63 E. C. L. 347), and the statute literally applies only to a fire beginning on one's premises, there is no substantial reason for making a distinction as to liability of a tenant between an accidental fire and one caused by the negligence of strangers, or between a fire accidentally beginning on the premises and one spreading thereto from adjoining premises. By chapter 345 of the Laws of 1860 (now section 2227 of the Real Property Law) a lessee or occupant of a building is relieved from the obligation to pay rent in case it is destroyed or rendered untenable by the elements or any other cause without any fault or neglect [255] on his part. In the absence of covenant, no obligation rests upon either the landlord or the tenant to rebuild in such case. (Smith v. Kerr, 108 N. Y. 31, 15 N. E. 70, 2 Am. St. Rep. 362.) The law would be in an anomalous state if a tenant, though under no obligation to rebuild or to pay rent, were still answerable in damages, or if, though not liable for the injury or destruction of buildings without his fault, he were still liable for other injuries to the premises though equally without fault. Those statutes do not in terms apply to a case like this, doubtless for the reason that no one had ever attempted to hold a tenant responsible in such case. The written and the unwritten law should be consistent, and the whole body of law governing the obligations of tenants should by analogy be made to harmonize with the said statutory rules.

Moreover, the statutes of Marlbridge and Gloucester were superseded in this state by chapter 6 of the Laws of 1787, which provided: "That no tenant for life or years or for any other term, shall during the term make or suffer any waste . . . without special license in writing making mention that he may do it . . . and whoever shall be convicted of waste shall lose the thing or place wasted and shall recompense thrice so much as the damage shall be taxed at by the jury." That statute was substantially re-enacted by 2 R. S. 334, and is now embodied in sections 1651 et seq. of the Code of Civil Procedure. Whilst the construction given a similar statute of earlier times may have weight, our own statute should be construed according to the social conditions of its time and should not be controlled by the construction of a statute passed in the thirteenth century.

In U. S. v. Bostwick, 94 U. S. 53, 68, 24 U. S. (L. ed.) 65, 67, Chief Justice Waite, speaking for the court, said: "It [referring to the implied obligation of the tenant] has never been so construed as to make a tenant answerable for accidental damages, or to bind him to rebuild, if the buildings are burned down or otherwise destroyed by accident." In [256] Sampson v. Grogan, 21 R. I. 174, 42 Atl. 712, 44 L.R.A. 711, it was held by the Supreme Court of Rhode Island in a well-reasoned opinion that the mere acceptance by a life tenant of a devise of real estate, containing a direction to keep in repair, did not impose upon him the duty to rebuild in case of the accidental destruction of buildings by fire. (See, also, Earle v. Arbogast, 180 Pa. St. 400, 36 Atl. 923.) One case only in this state has been called to our attention in which it was held that a tenant was liable for the acts of strangers. (Regan v. Luthy, 16 Daly 413, 11 N. Y. S. 709.) That was a case of voluntary waste. Its authority was questioned by the Appellate Term of the Supreme Court in Rimoldi v. Hudson Guild, 59 Misc. 480, 110 N. Y. S. 881. In Beekman v. Van Dolsen, 63 Hun 487, 18 N. Y. S. 376, it was held by the General Term in the first department that a tenant was not liable, as for permissive waste, because of the partial destruction of the retaining wall, bulkhead and dock upon the leased premises caused by the dock department of the city of New York in changing the bulkhead line, and it was said by Mr. Justice Patterson, after referring to the authorities, that "to constitute this particular kind of waste [i. e., permissive waste] there must have been neglect, omission, suf-

ferance or permission of the tenant." In Robinson v. Wheeler, 25 N. Y. 252, a tenant was held liable for his own negligent burning of a building. In no case in this state, or anywhere for that matter as far as our research goes, has a tenant been held liable as for permissive waste for the negligent acts of strangers. White v. Wagner, 4 Har. & J. (Md.) 373, 7 Am. Dec. 674, is an extreme case, but that was a case of voluntary waste, and it might have been decided on another ground.

The plaintiff, however, relies upon cases in which the assumed liability of the tenant has been held to furnish ground for the maintenance of the action by him against the wrongdoer. (Cook v. Champlain Transp. Co. 1 Denio (N. Y.) 91; Austin v. Hudson River R. Co. 25 N. Y. 334; Baker v. Hart, 123 N. Y. 470, 25 N. E. 948, 12 L.R.A. 60.) It must be admitted [257] that the ground of the decision in the Cook case makes it precisely in point. It was decided on the authority of Attersoll v. Stevens (supra), which, as I have said, was a case of voluntary waste. It was cited in Baker v. Hart as authority for the statement "that tenant for life or years is bound to answer to the owner for any waste committed, even though it be the act of a stranger," a doctrine which was held to be wholly inapplicable to that case. Moreover, the further language of Judge Finch in that case suggests, if it does not plainly show, that he was speaking of voluntary waste. Austin v. Hudson River R. Co. was an action by lessees, who had erected buildings, for damages caused by their being undermined by the negligent excavation of his own soil by the adjoining owner. The plaintiffs had sublet the premises, but still had a reversionary interest in their unexpired term. Manifestly the plaintiffs were entitled to recover some damages, either the value of the buildings, the cost of their repair, or the value of their use during the residue of the term, and the question as to the true measure of damages was not properly raised at the trial. So that whatever was said as to the application of the Cook case was obiter. It is quite true that both Judge Wright and Judge Allen referred to the case as one of waste, for which the plaintiffs were responsible to the landlord, and cited the Cook case as authority, but it is difficult to determine from the report of the case precisely on what ground a majority of the court put the decision. In one part of his opinion Judge Allen said: "The defendants contend that because their wrongful act may have damnified the inheritance, giving an action to the reversioner, the tenant could have no action for the injury to him. But each may have a remedy for the damages sustained in respect to his particular estate. If the same act deprives the tenant of the temporary enjoyment of his term, and also injures the inheritance, the injury to the tenant is not merged in that done to the owner [258] of the larger and reversionary estate." (p. 344.) It thus appears that there is no binding decision of this court upon the point whether an injury by the negligent acts of third parties is waste, for which the tenant is liable to the reversioner or remainderman, and the consequences of holding such a doctrine would be too serious to justify us in resting the right of the plaintiff to recover upon it.

The doctrine has only been invoked in this state to permit the tenant to recover from the wrongdoer. (Cook v. Champlain Transp. Co. supra; Austin v. Hudson River R. Co. supra; Dix v. Jaquay, 94 App. Div. 554, 88 N. Y. S. 228; United Traction Co. v. Ferguson Contracting Co. 117 App. Div. 305, 102 N. Y. S. 190.) And it may well be that a rule so long recognized may be adhered to without adopting the reason originally assigned for it. In Dix v. Jaquay (supra) the Appellate Division in the third department, naturally followed the Cook case, but in a well-reasoned opinion Mr. Justice (now presiding justice) Smith suggested what appears to us to be a much better reason for maintaining the rule than that assigned in the Cook case. Notwithstanding the removal of the impediments of the ancient common law, there will be many cases in which, for a practical reasons, the tenant alone can compel redress from the wrongdoer, and it should not be open to the latter to escape liability by asserting the rights of a third party, under whom he does not claim. The tenant has not only possession, but an interest in the premises, in this case, a life estate, and there is equal, if not greater, reason for allowing a full recovery by him as for allowing a depositary, who has no interest, but only possession, to recover for the conversion of, or an injury to, the deposit. A bailee, though not liable to the bailor, may recover for the wrongful act of a third party resulting in the loss of, or injury to, the subject of the bailment. (Kellogg v. Sweeney, 1 Lans. 397, 46 N. Y. 291, 7 Am. Rep. 333. And see Mechanics, etc. Bank v. Farmers, etc. Bank, 60 N. Y. 40; Russell v. Butterfield, 21 Wend. (N. Y.) 300; Faulkner v. Brown, 13 Wend. (N. Y.) [259] 63; Finn v. Western R. Corp. 112 Mass. 524, 17 Am. Rep. 128; Johnson v. Holyoke, 105 Mass. 80; Chamberlain v. West, 37 Minn. 54, 33 N. W. 114. If the bailee recovers, he holds the recovery as trustee for the bailor. A recovery by either bailor or bailee will bar an action by the other. (Pontiac First Commercial Bank v. Valentine, 209 N. Y. 145, and citations at page 150, Ann. Cas. 1913D 1104, 102 N. E. 544; Woodman v. Nottingham, 49 N. H. 387, 6 Am. Rep. 526.) The principle is the same

as that applied in Madison Square Bank v. Pierce, 137 N. Y. 444, 33 N. E. 557, 33 Am. St. Rep. 751, 20 L.R.A. 335, in which it was held that the payee might recover from the maker the full amount of a promissory note, notwithstanding an indorser had paid part, the plaintiff in such case becoming trustee for the indorser of so much of the recovery as represents the amount paid by the latter.

The recovery in this case might be treated as a substitute *pro tanto* for the land damaged, as would be the case of the proceeds of a sale (see Ackerman v. Gorton, 67 N. Y. 63), the plaintiff being entitled to the life use of it and becoming trustee of the principal for the remaindermen. (See Smith v. Van Ostrand, 64 N. Y. 278; Leggett v. Stevens, 185 N. Y. 70, at page 76, 77 N. E. 874.) The recovery might be apportioned between life tenant and remaindermen according to their respective interests and the court might require the life tenant, if intrusted with the principal, to give security. (See In re Camp, 126 N. Y. 377, 27 N. E. 799; In re McDougall, 141 N. Y. 21, 35 N. E. 961.) It is for the court to make proper provision for the protection of the rights of remaindermen. The wrongdoer is only concerned in being protected from a second suit, and we are of the opinion that it must be held, as a necessary corollary to the proposition that the life tenant may recover all the damages, that such a recovery will bar an action by the remaindermen.

The judgment should be affirmed, with costs.

Werner, Hiscock, Chase, Collin, Hogan and Cardozo, JJ., concur.

Judgment affirmed.

NOTE.

Right of Life Tenant to Recover Damages for Injury Both to Life Estate and to Inheritance.

There is a conflict in the decisions as to a life tenant's right to recover damages for an injury both to the life estate and to the inheritance. The reported case upholding the minority view that such a recovery may be had finds support in two other decisions. Dix v. Jaquay, 94 App. Div. 554, 88 N. Y. S. 228; Willey v. Laraway, 64 Vt. 559, 25 Atl. 436 (tenant in dower). In the case first cited which was an action by a life tenant against a subtenant for cutting down and appropriating timber, the court said: "If the life tenant must wait for an action by the remainderman to determine his liability, his recourse against the wrongdoer must in many cases become ineffective by the delay. Nor can he perfect his right of action by satisfying the damages to the inheritance and then suing. The damages are unliquidated. Any amount which he pays in satisfaction must be paid at his peril, with his chance of establishing such amount as the damage done in an action against the wrongdoer. If the remainder is contingent, to whom shall he make satisfaction of the liability? In such case I am unable to conceive of any satisfaction of that liability which would be binding if perchance another became entitled to the remainder upon the happening or not of the contingency named. It will thus be seen that if the judgment below be well-rendered a life tenant at the best is subjected to a dangerous hazard in being compelled to make satisfaction of an unliquidated claim to a remainderman upon his chance of being able to establish that claim in full as damage in his action against the wrongdoer. At the worst the wrongdoer has burdened the life tenant with an absolute liability to one who upon the happening of a contingency shall thereafter become the remainderman without liability to the life tenant, and only with a remote liability to the person who shall upon the contingency thereafter become seized with the remainder. If these premises be sound, the conclusion is irresistible that the wrongdoer must answer to the life tenant for the full damage done both to his life estate and to the inheritance, and the damage to the inheritance recovered by the life tenant is held by him as trustee for the remainderman."

It has been held that if any injury, such as cutting down and carrying away wood and timber, is done to the inheritance by a stranger, a tenant for life may maintain an action for the injury to the possession and also to the inheritance if he has been compelled to satisfy the remainderman for the injury done by the stranger; but if he has not been so compelled, his recovery is limited to the injury to the possession. Wood v. Griffin, 46 N. H. 230, wherein the court said: "Again, there is no necessity for arming the tenant with such power. If he is entitled to recover for the injury to the inheritance, whether he has satisfied the reversioner or not, his recovery must be a bar to a suit by the landlord, and still the trespasser might avail himself, by way of defense of a license, or admission, by the tenant which might in effect defeat the landlord's claim against such trespasser, and besides the landlord might find his claim against the trespasser defeated by the result of a suit prosecuted without his assent, in a manner opposed to his wishes, or by his inability to obtain from the tenant himself the fruits of the suit against such third person. The fact that the tenant is answerable for the injury does not, we think, furnish an adequate reason for sanctioning such doctrines. Where waste is committed by cutting down timber trees by a stranger, the property in them at once passes

to the landlord; and he may take them or maintain trover for them; and there surely can be no propriety in holding that the tenant also could have the same remedy, for he has no property whatever in them."

The majority view, however, seems to be that a life tenant cannot recover for an injury to the inheritance. Sagar v. Eckert, 3 Ill. App. 412; Zimmerman v. Shreeve, 59 Md. 357; Yeager v. Fairmont, 43 W. Va. 259, 27 S. E. 234. See also Brown v. Woodliff, 89 Ga 413, 15 S. E. 491; Polk v. Haworth, 48 Ind. App. 32, 95 N. E. 332; Jordan v. Benwood, 42 W. Va. 312, 26 S. E. 266, 57 Am. St. Rep. 859, 36 L.R.A. 519. In Zimmerman v. Shreeve, supra, the court said: "By the instruction, however, as given by granting the first and fifth prayers of the plaintiff, no reference whatever is made to the several interests or estates of the tenant for life and that of the parties entitled in remainder; and though the cutting of trees, and the hauling away of rails, cross-tires, or other articles made of trees cut upon the premises, may have occasioned serious damage to the estate in remainder, yet, according to the instruction given, the whole amount of damage is required to be rendered to the plaintiff, the tenant for life. This, we think, was error. The jury should have been instructed with reference to the interest or estate of the plaintiff, and the injury thereto by the trespass of the defendant; and not have been allowed to award compensation to the plaintiff for an injury done to the estate of another." In Daffin v. C. W. Zimmerman Mfg. Co. 158 Ala. 637, 48 So. 109, it was held that a life tenant could not maintain trover or trespass for converting or taking trees from an estate, but could maintain trespass *quare clausum fregit* and recover such actual damages as he sustained to his possession. In Strong v. Strong, 6 Ala. 345, it was held that one who had only a life estate in a slave could recover in an action of trover for the slave only to the extent of the injury to his life interest.

BLAIR

v.

SEITNER DRY GOODS COMPANY.

Michigan Supreme Court—March 17, 1915.

184 Mich. 304; 151 N. W. 724.

Negligence — Fall into Elevator Shaft — Contributory Negligence.

In an action for injuries to plaintiff's wife caused by a fall as she was entering an elevator in a store where, under the evidence, it is not clear whether she exercised a proper degree of care, this question is properly submitted to the jury.

[See generally Ann. Cas. 1913C 568.]

Damages — Cause of Injury — Burden of Proof.

In an action for personal injuries, plaintiff, to sustain the burden resting upon him, must introduce testimony making it more probable that the conditions on account of which a recovery is sought were caused by the accident than that they were due to some other cause.

Husband and Wife — Injury to Wife — Recovery for Loss of Consortium.

A husband cannot recover against a person responsible for injuries to his wife for the loss of the undefined influence of the wife in the family relation and the pleasure of the relationship or for the loss of "consortium," defined as a person's affection, society, or aid, or the right to the conjugal fellowship of the wife and to her company, co-operation, and aid in every conjugal relation.

[See note at end of this case.]

Right of Wife to Sue for Injuries.

A wife may sue for injuries to her person without joining her husband as plaintiff.

Recovery by Husband for Loss of Services.

While the Legislature has relieved married women of certain disabilities and has denied to the husband the right to her earnings and the profits of any business she may carry on, it has not put her domestic duties and labor performed in and about her home for her family upon a pecuniary basis, nor classified such duties as services, nor permitted her to recover for the loss of ability to perform them, and the husband may recover the pecuniary value of a service habitually rendered by the wife which he has lost on account of her injuries.

Error to Circuit Court, Bay county: COLLINS, Judge.

Action for damages. Edmund Blair, plaintiff, and Seitner Dry Goods Company, defendant. Judgment for plaintiff. Defendant brings error. REVERSED.

[306] It is the claim of plaintiff that because of the negligence of defendant his wife sustained personal injuries. He sued to recover damages for his resulting injury. In his declaration he describes her injuries as—

"Injuries to her back, spine, digestive organs, intestines, kidneys, and bladder and to her uterus and its organs, resulting in appendicitis and a displacement of such uterus and its said organs, all occasioning nervousness, sleeplessness, loss of consciousness, and sexual power, dizziness, and fainting spells."

As a result, he says:

"Plaintiff has been compelled to lay out and expend large sums of money for medical and surgical care and attention, medicine,

care, and nursing in an endeavor to cure her of such injuries, hindrance, and incapacity and to restore such sexual power and consortium, and it will always continue to be necessary for him to expend large sums of money for medical and surgical treatment, care, and nursing that would have been wholly unnecessary to expend had she not received said injuries and been hindered and incapacitated as aforesaid, and by reason of such injuries he has lost the value of her earning capacity, services, and consortium and the large sums which she otherwise would have been able to earn for and save to him in and about her duties as such housekeeper, and in and about similar labor, and in the future he will continue to lose large sums from her said earning capacity being so impaired and by reason thereof and the several losses so sustained by him, including the value of such services and consortium."

Testimony introduced on the part of plaintiff tended to prove that upon an occasion in April, 1912, when his wife, accompanied by two daughters, was shopping in defendant's store, they undertook to use the elevator, in stepping into which, at the invitation of an employee, she fell because the floor of the elevator was below the level of the floor of the store, a condition of things which on account of semi-darkness [307] in the elevator and the invitation aforesaid she did not discover. Issues of fact were raised by the testimony about the negligence of defendant, the negligence of the wife, and the nature and effects of the injuries she sustained and, connected with the last, her previous physical condition. These issues, and others concerning the result to plaintiff, were submitted to a jury, and a verdict for $1,550.40 was returned. Judgment was entered on the verdict, and a new trial was refused.

Over objection that it did not tend to establish a basis for estimating plaintiff's damages, the plaintiff's wife was permitted to testify as follows:

"Q. Prior to your injury what was your relation with your husband with reference to the relation between a wife and husband on occasions?

"A. I was perfectly well on that occasion.

"Q. Had there ever been anything that interfered physically with the acts of intercourse between a wife and husband?

"A. No, sir."

A physician was permitted over objection to answer this question:

"Q. During that time what was her capacity as to discharging the functions of a wife so far as intercourse with a husband is concerned?

"A. I would not think that would be possible."

Other medical testimony upon the subject was admitted, and the plaintiff on direct examination gave the following:

"Q. Is the companionability, the sociability in your home the same now that it was before her injury?

"A. No, sir, it is not. It is less."

On cross-examination, he testified:

"Q. What do you mean by less? Your wife is there all the time as before?

"A. She is there, yes.

"Q. Then why is her companionship less than it [308] was before if she is there with you as much as ever; you can talk and visit with her, associate with her just as well now as before, can you not?

"A. Sometimes, not all the time. The woman is in pain all the time, and when a person is in pain they don't feel much like talking and laughing and joking, nor anything of that kind. They feel more like going and hiding themselves sometimes.

"Q. Then does it simmer down to this, that she is not at times in as cheerful a mood or condition now as she used to be?

"A. No, sir.

"Q. Is that what you complain of?

"A. Yes, sir.

"Q. Is there anything else in that connection that you complain of?

"A. No, not in particular."

The jury was instructed:

"By consortium as used by me is meant the right of plaintiff as husband to the fellowship of his wife, to her company, co-operation, and aid in every marriage relationship that ordinarily arises and exists as between husband and wife, including the care of his home, attention to household affairs, and such other reasonable discharge of ordinary domestic duties as she was accustomed to render him as his wife, and as is usual as between husband and wife situate as they were."

Also, in stating for what injuries plaintiff's damages should be determined:

"Third, for any and all loss sustained by plaintiff, if any, by the impairment of her ability and power to render such domestic services and perform such work as she, as his wife, was accustomed to render to plaintiff in his household prior to such injuries, including such loss of consortium as I have explained, and such of said services as she would have continued to render but for these injuries, and in determining the amount which you will allow plaintiff, if any, under this third subdivision you will deduct therefrom such sum as you may allow the plaintiff, if any, for any and all expenditures for help in his home for [309] which you may have made him an allowance under the second subdivision last above."

The contributory negligence of plaintiff's wife is established, it is claimed, as matter of

law, for which reason the court should have directed a verdict and, failing this, should have granted a new trial. The results of the injury to plaintiff's wife claimed by the plaintiff are not, it is said, made out; they are plainly conjectural.

In plaintiff's bill of the particulars of his damages is an item for—

"Expenses in connection with medical and surgical care and attention, medicine, care, and nursing of Louise Blair, wife of plaintiff, heretofore incurred and to be hereafter incurred, $500," and one for "loss of consortium of Louise Blair, as wife, heretofore incurred and to be hereafter incurred $2,000."

These, with a claim of $2,500 for loss of her earning capacity and services as wife, make up the $5,000 demand, to recover which the suit is brought.

The testimony of the plaintiff tended to prove that as she stepped into the elevator she fell, striking with the lower part of her abdomen a stool which was in the elevator, causing a displacement of the uterus and a condition which developed appendicitis. A surgical operation was resorted to some 2½ months after the injury was received, the cost of which is an item of plaintiff's demand. Whether this operation was made necessary by the injuries received by plaintiff's wife in defendant's store, or whether her condition, relieved or attempted to be relieved by the surgical operation, was of long standing and due to other causes, was a subject which received considerable atention at the trial. Upon this subject the defendant preferred the following request, which was refused:

"There is no evidence tending to show that there was anything wrong with any of Mrs. Blair's organs excepting the appendix and uterus, and there is no [310] evidence tending to show that her appendix and uterus were injured by the fall which it is claimed in this case she sustained in defendant's elevator, and there is no evidence tending to show that the surgical operation performed by Dr. Ballard became necessary because of any injury sustained by her in the accident complained of, and therefore the plaintiff is not entitled to recover, and I charge you to render a verdict in favor of the defendant."

Defendant offered in evidence the files and records in the suit of Louise Blair (plaintiff's wife) against this defendant, in which she recovered $1,000 damages for the injury in question here, which judgment was paid. They were excluded. They show that in that suit she alleged as damages expenses for medical and surgical care, medicine, and nursing already incurred and to be incurred, and loss of earning capacity, and large sums which she would have been able to earn as housekeeper, etc. The right of the husband in a case of this nature to recover damages for the loss of the services of his wife was and is questioned.

Stoddard & McMillan for plaintiff in error.

DeFoe, Hall & Converse for defendant in error.

OSTRANDER, J. (*after stating the facts*).—In the brief for appellant argument is addressed to the alleged positive character of the evidence establishing the negligence of plaintiff's wife, the uncertainty of the evidence to establish the injuries claimed to have been received by her, the rulings of the court and the charge upon the subject of plaintiff's loss of consortium, the alleged excessive recovery, and the verdict of the jury which is, it is claimed, opposed to the weight of evidence. These are the subjects of principal discussion and will be considered.

1. It is not clear whether plaintiff's wife did or did not exercise a proper degree of care in entering the elevator under the circumstances she says existed there. The question was for the jury.

2. The nature and extent of the injuries sustained [311] by plaintiff's wife are uncertain. The opinions of the medical men go no further than this: that her condition at the time of the operation and before and after it is not in doubt and, with certain exceptions, might have been the result of the injury. These witnesses relate also other causes for such a condition as existed, and it is plaintiff's claim that by his testimony he has eliminated these other possible causes from consideration, for which reason the proximate cause of her condition is not conjectural. On the other hand, it is the contention of defendant that the testimony is equally convincing that her troubles, relieved by the surgeons, were of long standing. It is very doubtful whether, exercising themselves wholly outside the domain of conjecture and wholly within that of proper and reasonable deduction from such testimony as they believed, the jury could have reached either material conclusion. As was true in Farrell v. Haze, 157 Mich. 374, 391, 392, 122 N. W. 197, a final condition of the patient was made certain by expert testimony. In the Farrell case it was admitted that the cause of the condition was matter for expert determination. In the case at bar the accident (in the Farrell case the treatment) might have produced the known condition. But in this, as in that case, the testimony seems to fall short of showing that it is more probable the conditions, relieved by the surgical operation, were caused by the accident. So much plaintiff was bound to prove. Otherwise recovery depends upon attributing to a particular cause an injury which may as well be attributed to another cause.

3. Consortium has been defined as the person's affection, society, or aid; the right to the conjugal fellowship of the wife, to her company, co-operation, and aid in every conjugal relation. 8 Cyc. p. 614. See Jacobsen v. Siddal, 12 Ore. 284, 7 Pac. 108, 53 [312] Am. Rep. 360; 21 Cyc. p. 1525; Bouvier's Law Dict. p. 402.

"The right of consortium is a right growing out of the marital relation, which the husband and wife have, respectively, to enjoy the society and companionship and affection of each other in their life together." Feneff v. New York Cent. etc. R. Co. 203 Mass. 278, 89 N. E. 436, 133 Am. St. Rep. 291, 24 L.R.A.(N.S.) 1024.

"*Per quod consortium amisit*" (by which he has lost the companionship) was the phrase used when at the common law plaintiff declared for any bodily injury done to his wife by a third person. 3 Blackstone Commentaries, p. 140. Appellant says:

"We insist that for loss or diminution of his wife's 'marriage fellowship,' of her 'company and co-operation,' that even if her society and companionship is less satisfactory than formerly, that in his association and intercourse with her he finds less comfort, pleasure, or happiness, all of which are matters of sentiment affecting the mind and heart and not the pocket, he cannot recover damages therefor. In this case no evil motive or wilful misconduct on the part of the defendant is claimed. . . . This is unlike an action on the case for seduction, or alienation of the wife's affections, which stand upon peculiar reasons."

At common law when a married woman was injured in her person she was joined with her husband in an action for the injury, and in such action nothing could be recovered for loss of her services or for the expenses to which the husband had been put in taking care of and curing her. There was no allowance for her loss of ability to earn wages, render services and be helpful to others, because these elements of damage, so far as recoverable at all, belonged to the husband. For such loss of services and such expenses the husband alone could sue. 1 Chitty, Pl. p. 84. The common law gave the husband the right to the labor, services, and earnings of his wife.

[313] It is not now an answer to the wife's suit to recover damages for injuries to her person that her husband is not joined as plaintiff. The legislature has relieved her of certain disabilities so called and has denied to her husband the right to her earnings and the profits of any business she may carry on. It has not, however, put her domestic duties and labor, performed in and about her home for her family, upon a pecuniary basis, nor meant to classify such duties as services, nor to permit her to recover damages for loss of ability to perform them. Gregory Oakland Motor Car Co. 181 Mich. 101, 147 N. W. 614. Where there is no intentional wrong, the ordinary rule of damages in every case goes no further than to allow pecuniary compensation for the impairment or injury directly done. If a husband is injured and recovers his damages, his wife cannot usually recover damages. The husband has usually, as a result of his action, been compensated for his pain and suffering, past and future, for loss of time, for diminution of capacity to earn money. The minor children of an injured father and those of an injured mother may suffer on account of the injury, but it has never been considered that they had an action therefor. The negligent defendant is supposed to have made full pecuniary compensation to the injured parent. Their loss is regarded not as direct, but consequential and remote.

If a husband may recover for the loss of consortium resulting from physical injury to the wife occasioned by negligent conduct of the defendant, the wife may recover for loss of consortium of the husband under similar conditions. The right affected, if it may be properly called a right, is mutual. No reasoning will now support a recovery by one which will deny it to the other spouse.

"No case has been brought to our attention, and after an extended examination we have found none, [314] in which an action for a loss of consortium alone has been maintained merely because of an injury to the person of the other spouse, for which the other has recovered, or is entitled to recover, full compensation in his own name, when the only effect upon the plaintiff's right of consortium is that, through the physical or mental disability of the other, the companionship is less satisfactory and valuable than before the injury." Feneff v. New York Cent. etc. R. Co. 203 Mass. 278, 280, 89 N. E. 436, 437, 24 L.R.A.(N.S.) 1024, 133 Am. St. Rep. 291.

If plaintiff has in fact, on account of his wife's injury, lost a service which she habitually rendered, then, as service, and according to the pecuniary value of it, he ought to be permitted to recover. Recovery should be according to the fact. For loss of consortium, of the undefined and indefinable influence of either spouse in the family relation, and the pleasure of the relationship, neither may recover. The Massachusetts decision in Kelley v. New York, etc. R. Co. 168 Mass. 308, 46 N. E. 1063, 38 L.R.A. 631, 60 Am. St. Rep. 397, relied upon in Gregory v. Oakland Motor Car Co. supra, and often cited in text-books and opinions of judges has been distinctly overruled as to the point now being considered. Feneff v. New York Cent. etc. R. Co. supra; Bolger v. Boston El. R. Co. 205

Mass. 420, 91 N. E. 389. While our own former decisions do not distinctly rule the point, still Bowdle v. Detroit St. R. Co. 103 Mich. 272, 61 N. W. 529, 50 Am. St. Rep. 366, is plainly not opposed to it. Nor do I think Gregory v. Oakland Motor Car Co. wrongly decided; no specific claim having been made that the damages were excessive, and the objection being that the husband could not recover at all for loss of services of his wife. As to the elements which may be considered by a jury in fixing the pecuniary loss of the husband, the charge delivered in that case was in some respects opposed to the conclusion I have reached (although to that portion of the charge no objection appears to have been made), and some of [315] the decisions of other courts quoted with approval permit a jury to consider what I now think they should not be permitted to consider in estimating the value of the wife's services.

The testimony referred to should not have been received, the court erred in his instructions upon the subject of loss of consortium, and, more doubtful, but nevertheless tangible, plaintiff did not fairly sustain the burden of proving that the probable cause of the wife's injuries, relieved by a surgical operation at the cost of the husband, was the injury for which defendant was held responsible.

The judgment is reversed and a new trial granted.

Brooke, C. J., and McAlvay, Kuhn, Stone, Moore, and Steere, JJ., concurred. Bird, J., did not sit.

NOTE.

Right of Husband to Recover for Loss of Consortium in Action for Personal Injuries to Wife where Statute Gives Wife Right of Action for Such Injuries.

It is the purpose of this note to review the recent cases discussing the right of a husband to recover for loss of consortium in an action for personal injuries to his wife, where the statute gives the wife the right to recover for such injuries. The earlier cases on this question are collected in the note to Marri v. Stamford St. R. Co. Ann. Cas. 1912B 1120.

The rule prevailing in the majority of jurisdictions is that the statutes generally known as the married women's property acts authorizing a married woman to sue for personal injuries in her own name without joining her husband, and making the amount recoverable her separate property, do not deprive the husband of his common-law right to sue for the loss of the services, society, and companionship of his wife resulting from her personal injuries. The Little Silver, 189 Fed. 980; Little Rock Gas, etc. Co. v. Coppedge, 116 Ark. 334, 172 S. W. 885; Twedell v. St. Joseph, 167 Mo. App. 547, 152 S. W. 432; Reeves v. Lutz, 179 Mo. App. 61, 162 S. W. 280; Garrison v. Sun Printing, etc. Assoc. 207 N. Y. 1, 100 N. E. 430, *affirming* 150 App. Div. 689, 135 N. Y. S. 721, which *affirmed* 74 Misc. 622, 134 N. Y. S. 670; Chattanooga v. Carter, 132 Tenn. 609, 179 S. W. 127; Baer v. Hepfinger, 152 Wis. 558, 140 N. W. 345. See also Moody v. Southern Pac. R. Co. 167 Cal. 786, 141 Pac. 388; Indianapolis, etc. Rapid Transit Co. v. Reeder, 51 Ind. App. 533, 100 N. E. 101; P. B. Arnold Co. v. Buchanan (Ind.) 111 N. E. 204; Lane v. Steiniger (Ia.) 156 N. W. 375; Shield v. F. Johnson, etc. Co. 132 La. 773, 61 So. 787; Stout v. Kansas City Terminal R. Co. 172 Mo. App. 113, 157 S. W. 1019; Bruce v. United Rys. Co. 175 Mo. App. 568, 158 S. W. 102; South v. West Windsor Tp. 82 N. J. L. 262, 82 Atl. 852; Warth v. Jackson County Ct. 71 W. Va. 184, 76 S. E. 420. *Compare* Savage v. New York, etc. Steamship Co. 185 Fed. 778, 107 C. C. A. 648. In Garrison v. Sun Printing, etc. Assoc. 207 N. Y. 1, 100 N. E. 430, the rule was followed in an action by a husband for damages for the illness of his wife caused by the publication of words, libelous per se, reflecting on her character. The court said: "The question is presented whether a husband may recover for loss of services of his wife caused by her sickness resulting from mental distress which in turn was caused by the defendant's willful and malicious publication concerning her of defamatory words actionable per se. . . . Reaching the conclusion . . . that the wife might have recovered damages for the mental distress and physical sufferings caused by the publication of defendant's libel, it follows that plaintiff as her husband may maintain this action for loss of society and services. He had a right to these. The services were presumably of pecuniary value to him and any wrong by which he was deprived thereof was a wrong done to his rights and interest for which he may recover damages." In Chattanooga v. Carter, 132 Tenn. 609, 179 S. W. 127, a recovery was had by a husband for the loss of the services of his wife by reason of personal injuries sustained by her. Referring to a statute removing the disabilities of coverture, the court in sustaining the judgment said: "The act in question does not affect the legal rights and duties of that relationship further than to emancipate the wife from her disabilities that attached to the relationship. Embraced in these disabilities are her incapacity to act for herself with respect to her property, to make contracts, to bind herself personally, to sue and be sued. In fact, the wife was placed on that footing en-

joyed by the husband as to the right to hold, manage, control, use, enjoy, and dispose of all property; to make any contract in reference to it and to sue and be sued. The act does not deprive either the husband or wife of the conjugal relationship, with its duties and rights. It results that there was no error in the action of the Court of Civil Appeals in sustaining the judgment in favor of the husband, and it is affirmed."

In *Alabama* a statute which requires the wife to sue alone for torts against her person or reputation, is held not to emancipate her from her household duties or to deprive the husband of the right to recover for the loss of her domestic services and society. People's Home Telephone Co. v. Cockrum, 182 Ala. 547, 62 So. 86, wherein it was said: "While the present statute requires the wife to sue alone for torts against her person or reputation, this court has held that this statute does not emancipate her from her household duties or deprive the husband of the right to her domestic service and society, or relieve him of the duty of providing for her 'in sickness and in health.' . . . The husband 'may not sue for the injury itself,' but has a right of action . . . for the loss and damage he has sustained as a proximate result of the injury done to the wife."

In some jurisdictions the rule obtains that the statutes relating to the status of married women have so altered the marital relation as to deprive the husband of his common-law right to recover, in the case of personal injuries to the wife by a third person, for the loss of consortium. Whitcomb v. New York, etc. R. Co. 215 Mass. 440, 102 N. E. 663, *following* Bolger v. Boston El. R. Co. 205 Mass. 420, 91 N. E. 389. See also Bean v. Portland, 109 Me. 467, 84 Atl. 981. And see the reported case. *Compare* McCauley v. Detroit United Ry. 167 Mich. 297, 133 N. W. 11; Gregory v. Oakland Motor Car Co. 181 Mich. 101, 147 N. W. 614. The case last cited apparently supports the majority rule and one of the decisions relied on in that case is Kelley v. New York, etc. R. Co. 168 Mass. 308, 46 N. E. 1063, 60 Am. St. Rep. 397, 38 L.R.A. 631, which, as the reported case points out "has been distinctly overruled as to the point now being considered," by the cases of Feneff v. New York Cent. etc. R. Co. 203 Mass. 278, 89 N. E. 436, 133 Am. St. Rep. 291, 24 L.R.A.(N.S.) 1024; Bolger v. Boston El. R. Co. 205 Mass. 420, 91 N. E. 389. The reported case does not hold that the case of Gregory v. Oakland Motor Car Co. supra, was wrongly decided because no specific claim was made in that case that the damages were excessive, "the objection being that the husband could not recover at all for loss of services of his wife." It is also said in the reported case that the charge delivered in Gregory v. Oakland Motor Car Co. supra, as to the elements which may be considered by a jury in fixing the pecuniary loss of the husband was in some respects opposed to the conclusion reached in the reported case. In Bean v. Portland, 109 Me. 467, by a husband to recover damages for injuries sustained by his wife in an accident, the court in holding that he was not entitled to recover said: "There is no legal foundation for the suit brought by the husband to recover for loss of his wife's services and the expenses connected with her injuries and recovery, and in fact this claim is not urged by counsel in argument. Charles A. Bean was not present at the time of the accident, and he neither 'received any bodily injury' nor 'suffered damage in his property,' which are the statutory prerequisites for the maintenance of this form of action, R. S. Chap. 23 sec. 76."

CUE
v.
PORT OF LONDON AUTHORITY.

England—Court of Appeal—June 15, 1914.

[1914] 3 K. B. 892.

Workmen's Compensation Act — "Average Weekly Earnings" — Casual Laborer.

Where an injured employer has been for over three years employed as a casual laborer by the person in whose service he was injured, but has during that time also worked casually for others, his "average weekly earnings" are to be calculated on the average of the earnings of similar laborers in the employment in which he was injured, and not by aggregating his earnings in all employments.

[See note at end of this case.]

[892] Appeal from an award of the judge of the Southwark County Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

On August 16, 1913, James Cue, a workman employed by the Port of London Authority, met with an accident arising out of and in the course of his employment, which resulted in his death. He worked as a corn porter, and whilst discharging grain at the Commercial Docks fell into the dock and was drowned. His widow and children applied for 300*l.* compensation and gave his earnings for the last three years as averaging 2*l.* 8*s.* per week. The employers, the Port of London Authority, alleged [893] that his earnings

in their employment during the three years next preceding his death amounted to 146*l.* 1*s.* 2*d.*

It appeared that the deceased workman was a casual labourer and had worked for the employers for three years, averaging about forty-two weeks for each year. During the twelve months from August 2, 1912, to the end of July, 1913, he also earned 67*l.* 7*s.* 10*d.* as a casual labourer in the employment of the Cunard Thompson Line. He was only employed by the employers when there was a job and a vacancy, and there was no obligation on him to work for them, and no obligation on them to employ him.

The employers admitted liability; alleged that his average weekly wages earned with them during the previous three years were 18*s.* 9*d.*; that that sum multiplied by 156 in accordance with Sched. I. (1.) (*a*) was less than 150*l.*; and they paid 150*l.* into Court.

The learned judge held that the deceased had concurrent contracts of service with the employers and the Cunard Thompson Line; his average weekly earnings were admitted to be 18*s.* 9*d.* a week with the former and 1*l.* 5*s.* 2*d.* with the latter, so that during the last twelve months he earned 2*l.* 3*s.* 11*d.* a week; that amount multiplied by 156 under Sched. I. (1.) (*a*) came to more than 300*l.*; therefore he awarded the applicants 300*l.*

The employers appealed on the grounds that there were no concurrent contracts of service and that the learned judge ought to have assessed the compensation due to the applicants at an amount not exceeding the sum of 234*l.*; i. e., 30*s.* a week, representing the average wages of a workman of the same grade, multiplied by 156.

George Wallace, K.C., and *C. B. Marriott* for appellants.

E. M. Pollock, K.C. and *S. Duncan* for respondents.

Solicitors: *Ernest Glenshaw; Berry Tompkins & Co.*

[896] COZENS-HARDY, M. R.—This is an appeal which raises a point as to the principle upon which the earnings of a casual porter employed by the Port of London Authority ought to be ascertained.

Now it has been my fate in at least three cases, namely, Perry v. Wright [1908] 1 K. B. 441; Snell v. Bristol [1914] 2 K. B. 291, and Barnett v. Port of London Authority [1913] 2 K. B. 115, to go at some length into what in my view is the true principle to apply. Having listened to all the arguments in the present case, I do not desire to detract from or vary one single sentence in any of those judgments, but it is right, having regard to what we have heard from Mr. Pollock, that I should say a few words. The deceased man, who met with his death by an accident undoubtedly arising out of and in the course of his employment, had been employed casually by the Port of London Authority for about forty-two weeks in each of the three years next preceding his death, that is on the average, or, in other words, he was employed for parts of 126 weeks during the three years. He was also employed by another shipping [897] company for a considerable time during which he earned much higher wages.

The case before the learned county court judge was put in this way: The Port of London Authority said: "Add up the actual earnings which he has made in our employment and divide it by the proper number of weeks, and that will be the right figure," and then they submitted to an award for a sum which they now admit to have been inadequate. They now offer 234*l.*, arrived at in the manner which I shall describe.

The learned county court judge based his judgment on this. He said it was a case of concurrent contracts, one with the Port of London Authority, another with a shipping company; and that what had to be done was this, to make a very simple calculation, to add up the total earnings under those concurrent contracts, and that that would give sufficient to entitle the dependents to the maximum figure under the Act. It has been scarcely contended here—in fact I am entitled, I think, to say that it has not been contended—that the decision of the learned judge on that ground can be supported. It is quite clear there were no concurrent contracts: there were successive contracts, and the point about concurrent contracts was not argued by counsel for the defendants. I think, therefore, that the learned judge's decision so far as it was based on that ground cannot be supported. Prima facie, therefore, the case ought to go down for a new trial; but Mr. Pollock has ingeniously sought to raise this point. He says that, assuming that it is a casual contract, the proviso in Sched. I. paragraph 2 (*a*), has nothing whatever to do with the case; that we have to find on the language of the Act itself what were the actual average earnings of the man; that we can do it, and that we can only go to the proviso if necessary. I am not in sympathy with that view. I can see no justification for saying that we are to disregard the clear words of the Act in Sched. I. paragraph 1 (*a*) (i.), where it speaks of the weekly earnings under the same employer. I think it is altogether wrong to disregard those words, and to say that we are not called upon to consider what were his earnings under the same employer. Mr. Pollock relied on these words of Sched. I. paragraph 2 (*a*): "average weekly earnings shall be computed in

[898] such manner as is best calculated to give the rate per week at which the workman was being remunerated." It is very curious drafting, but I think that means that the average weekly earnings shall be computed in the manner which is best calculated to give the rate per week at which the workman was being remunerated under the same employer. Then the proviso says there may be difficulties in doing that. Take the case of a "season" occupation, as it is sometimes called, such as harvesting, and of a man who is injured during harvesting, when it is common knowledge that his earnings are much higher than they are during the rest of the year. That is a case in which we cannot have regard to that period as at all decisive or sufficient to enable us to arrive at the rate at which he was actually being remunerated. The proviso says: "Where by reason of the shortness of the time during which the workman has been in the employment of his employer, or the casual nature of the employment, or the terms of the employment, it is impracticable at the date of the accident to compute the rate of remuneration, regard may be had to the average weekly amount which during the twelve months previous to the accident was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district." Throughout it seems to me that what we have to find as best we can is what were his weekly earnings under the same employer for the particular period in question. In some cases that is three years. In other cases it may only be for twelve months. This is a casual labourer; and the proviso expressly mentions the casual labourer. The casual labourer was held to be within the old Act in Lysons v. Knowles [1901] A. C. 79, where a man was only employed for a few days, but it was quite obvious that injustice was done by the provisions of that Act. Then this strange clause was put in; I say strange, but it is still more strange when we look at Sched. I. paragraph 2 (*b*), because, having said in the earlier part that what we have to ascertain is the earnings of the workman under the same employer, the proviso [899] goes on to say that if there are two concurrent contracts we are to add up the earnings under both of them. It is a very strange piece of drafting for which I have not heard a word of commendation uttered by anybody; certainly no word of commendation has ever fallen from the Bench.

The arbitrator has to find what the amount of earnings under the same employer would have been for the last twelve months; and I think this also is clear: that in cases to which the proviso applies we cannot take the average earnings of men in the same class and disregard the fact that the particular workman in question may be a specially bad man, an average man, or a specially good man. We have to deal with the particular grade, and there is a grade of these porters. Some may be better than the average and some lower than the average. I think without any difference of opinion in any Court it has always been held that, acting under paragraph 2 (*a*), the personal qualifications of the man may be considered, and that the mere average is not conclusive of the matter. Mr. Wallace does not dispute that as a proposition, but he says there is no evidence here that the deceased man was other than an average man; that that being so, the thing we must have regard to is what were the average wages of this grade; and that the average wages were 30*s.* a week. By his amended notice of motion he has offered to accept an award of 234*l.* on that footing. This is the point on which alone I have felt any difficulty. What we have to ascertain as best we can is what were the average earnings or would have been the average earnings of this man during the previous three years. We cannot ascertain that in the same way as we should where a workman has been employed for three years under a contract for so many shillings a week. The test we have to apply is not what would his earnings have been in another employment of the same class, but what is it reasonable to suppose that his earnings would have been in the previous twelve months, and not the three years. What we have to find is not what this man could have got in the whole market, but what would have been his average earnings under the same employer. It is said that in arriving at that we ought to disregard the fact that if he had gone elsewhere he might have got [900] more than he got at the Port of London. If, as is said, the Port of London Authority are in the habit of paying lower wages than other employers, that, of course, is a fact that would be taken into consideration, but with the evidence before us that this particular man when employed by other people did earn wages considerably in excess of the average of 30*s.* a week, and having regard to the fact that the learned county court judge seems to have disregarded altogether that consideration, I think that the case ought to go back to him to be dealt with, not on the footing of Mr. Pollock's contention, and not necessarily on the footing of Mr. Wallace's contention, but that he should have regard to the personal qualifications of the man. He seems to have disregarded them and proceeded on an entirely different footing.

For these reasons I think the appeal should be allowed, and there must be a new trial unless the parties can agree on a figure.

SWINFEN EADY, L.J.—I am of the same opinion. The learned judge in the Court below has given the applicants the compensation claimed upon the footing of concurrent contracts. He says that the deceased workman had entered into contracts of service both with the respondents and the Cunard Thompson Line during the twelve months immediately preceding his death. In my opinion the judgment proceeding on that ground was erroneous. It is not a case of concurrent contracts of service. Perhaps these may be called successive contracts, because technically, even with casual employment, for the time of the actual employment there was a subsisting contract, but it was merely casual employment; that is to say, there were no running contracts under which the employer was entitled to require the labour of the workman or under which the workman was entitled to demand employment from the employer. Sched I., paragraph 2 (*b*), is a useful clause applying to cases where there are strictly concurrent contracts of service, where a workman may have contracts at the same time running with two or more employers during the same week or month or whatever the period may be. During part of the day or part of the week he would work for one employer, and during another part of the [901] day or another part of the week, as the case may be, he would work for another employer. In that case the weekly earnings under the two are added so as to ascertain what his earnings were, and they are to be treated as if those were the earnings earned in the employment of the employer for whom he was working at the time of the accident. Paragraph 2 (*b*) refers to concurrent contracts properly so called, and not to a case of casual employment where there are no co-existing contracts at all. For these reasons I am of opinion that the judgment below was erroneous.

Then it was argued that the learned judge ought to have ascertained the average weekly earnings which the workman was in fact earning, and that they ought to have been ascertained by taking the aggregate earnings under all his employers during the last year. The short answer to that is that the schedule does not give the workman remuneration on that basis. Sched. I. paragraph 1 (*a*) (i.), applies where the workman has been in the employment of the same employer for some time; if for three years, then his earnings are to be ascertained on that basis. If for less than three years, the earnings are to be ascertained on the basis of the period of his actual employment whatever that period may be under the same employer. Then it may be that the period is so short or for some other reason we cannot fairly estimate the workman's wages; either not fairly towards the workman or not fairly towards the employer, especially where the period is very short. In the present case, as there was only a casual employment, paragraph 1 (*a*) (i.) cannot be applied. It is impracticable to apply that paragraph because under it the man's earnings cannot be ascertained. Then paragraph 2 provides that "For the purposes of the provisions of this schedule relating to 'earnings' and 'average weekly earnings' of a workman the following rules shall be observed:—(*a*) average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated." In my opinion that means was being remunerated by the same employer. It may be that the man was ill during part of that time, and could not work, it may be that work was short, it may be that some holidays intervened, it may be that there were exceptional circumstances under which it would not be fair [902] to take the strict application of paragraph 1 (*a*) (i.). Then his earnings must be computed in the manner best calculated to give the rate per week at which he was being remunerated. Then comes the proviso which does in my opinion apply to the present case. There is a provision "that where by reason of the shortness of the time during which the workman has been in the employment of his employer, or the casual nature of the employment, or the terms of the employment, it is impracticable at the date of the accident to compute the rate of remuneration." Here it is impracticable by reason of the casual nature of the employment. It would be unfair to the workman to take only his employment under the Port of London Authority, because his average there would work out at something like 18*s.* 9*d.* a week. Then we may have regard to the average weekly amount which during the twelve months previous to the accident was being earned by the man; and this is where the twelve months comes in; previously it was three years. When we take the average for the purpose of this paragraph we may have regard to what during the twelve months previous to the accident was being earned by a person in the same grade employed at the same work by the same employer. The word "same" being repeated in this proviso indicates that it is to that employment that we are to look in order to fix a scale of compensation under the statute. We are to have regard to the weekly amount which during the twelve months previous was being earned by a person in the same grade and at the same work under the same employer. It does not follow from that—in fact the contrary has been established—that although we may refer to the grade or to the position in which the man was being employed, workmen in the

same grade are all equal. Some workmen are better than others, and if the man in question was a superior workman evidence may be given of that fact with a view of increasing the compensation that should be paid. But the amount of compensation would be limited by the grade of men employed in the same work by the same employer; that is the limit of the compensation. In determining the amount of compensation to which the man is entitled we may also have special regard to his personal qualifications. I can see no difficulty in [903] the present case in arriving at the compensation on that basis. It has not been done in the Court below.

In Snell v. Bristol [1914] 2 K. B. 291, Cozens-Hardy M.R. first of all pointed out during the argument that it was wrong to add together the actual earnings of the man with various employers in order to arrive at his wages earned. Then he says, [1914] 2 K. B. 298: "The learned judge really seems to have thought that the only question was: Is it to be 12*s.* 6*d.*, which is half the average, or is it to be the half of 2*l.*, which the man himself had earned during the previous twelve months? that, I think, is not the test. Those earnings are elements which may be taken into consideration, and that is all." Sir Samuel Evans P. in the same way said, [1914] 2 K. B. 295: "It would be wrong for the judge in this case, or in any other case, to adopt a hard and fast rule and to say that a man has actually worked for a twelvemonth and has had the average weekly earnings of so and so. If that is adopted as a hard and fast rule it is wrong; but that is obviously not only a consideration, but a very important consideration, in making a computation as to what the average weekly earnings of a man ought to be estimated to be." That really means this: that in arriving in the best way we can at what the average weekly earnings ought to be estimated at under the Port of London Authority we may have regard to what his earnings were elsewhere, what his conduct has been, what his qualifications were, in order to see whether or not he is entitled to be regarded as capable of earning, and whether he would probably have earned, the maximum rate of wage paid by that employer.

On these grounds I think the case ought to go back to the learned judge for the compensation to be settled, and that there ought to be a new trial.

PICKFORD, L.J.—I am of the same opinion. The learned county court judge has decided the amount of compensation to be awarded to this applicant on the principle of there being concurrent contracts which he was entitled to take together. The man was a casual labourer. He worked for two different employers, [904] the Port of London Authority and the Cunard Thompson Line. Now the nature of casual employment of that kind is quite well known. The contract that exists is the contract that arises from the taking on of men to do a job and the job is for a whole day or a half-day, as the case may be. As soon as that job is done the contract is done. He then on the next day, or if he has only worked half a day possibly the same day, takes another job from another employer, but he does not do that till the first job is finished. The result of that is that he only takes the second job, on which the contract arises, after the first one is finished, and he only takes a later one after the former one is finished. They never exist together, and I have been from the moment that this case was opened at the greatest loss to see how two contracts can possibly be concurrent when they never exist together. Indeed the respondent to the appeal has never attempted to uphold the learned county court judge's judgment on that basis, and, as I gather, it was not a point that was argued before the judge or was expressly taken. But the respondent seeks to uphold the amount of the award of compensation on another ground, namely this, that the man being employed casually, and it being possible to ascertain for the twelve months preceding this award of compensation what his average weekly earnings were, that amount is to be taken as the amount of his average weekly earnings; that is to say that, inasmuch as taking the whole time that he has worked for the previous twelve months he has averaged something like 45*s.* a week, that and that alone is the thing which is to be looked at in arriving at what his average weekly earnings for that period were. Now that seems to me to proceed upon an erroneous construction of the opening words of Sched. I. paragraph 2 (*a*). It proceeds upon a construction which gives the meaning to those words that in the case of casual employment we are to look at what the man has earned under any number of employers, and say that those are his average weekly earnings for the purpose of the paragraph, namely, that "average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated." I think that is an erroneous construction. "Average weekly earnings" in paragraph 2 must [905] be read as having the same meaning as "average weekly earnings" in paragraph 1, and it means average weekly earnings under the same employer. It was conceded by Mr. Pollock that anybody apart from authority and having regard to grammar and common sense would read it in that way, but he said there were authorities which obliged

us to read it in a different way. I have heard no authority which comes within any measurable distance of laying down such a meaning for those words, and I think therefore that they must be read in the way that has been mentioned by the other members of the Court, namely, that his earnings must be computed in such a manner as is best calculated to give the rate per week at which the workman was being remunerated by the employer under whom he was working, and it seems to me that if that were not the meaning paragraph 2, sub-paragraph (*b*), would be quite without meaning; because the opening words of sub-paragraph (*a*) are not confined to casual labour, they apply to contract labour, and every other labour, and therefore, if that be the proper meaning, the earnings under every employer would have to be taken together and the provision as to concurrent contracts would be quite meaningless. Also I think the proviso to paragraph (2.) (*a*) points very strongly in that direction too, because it says that where by reason of the shortness of the time or the casual nature of the employment or other matters it is impracticable to compute the rate of remuneration, regard may be had in the first instance to the average weekly amount which during the twelve months previous to the accident was being earned by a person in the same grade employed at the same work by the same employer.

Now, if the opening words of (2.) (*a*) would apply to every employer, why, when we cannot apply them, should we go to a person in the same grade employed by the same employer? It seems to me that the two must be read together, and we go to a person employed by the same employer first because we are dealing with the remuneration paid by the same employer; and it is only when we cannot find a person in the same grade employed by the same employer that we go to a person employed somewhere else of the same grade in the same district. If that is so, it is clear that the award cannot [906] be supported on the ground on which the respondent seeks to support it.

The right principle which has to be applied has been laid down in several cases. It is this. In a case like this it is impracticable to ascertain the remuneration in the ordinary way: we must therefore look at a person in the same grade; we look at the average earnings of persons in the same grade, and then, if there be any special qualification in the man with whom we are dealing which would make him likely to earn more than the average or less than the average, regard must be had to that personal equation, as it has been called, as well. That is the principle which will have to be applied by the judge when this case comes before him again. The only doubt that I have had is whether there is any evidence at all of differentiation of this man from other men before the county court judge. The applicants did not run their case on that line at all, and therefore no positive evidence was given, and the only evidence was that the deceased had in fact earned during the previous twelve months more than the average wages of persons in the same grade employed by the same employer; but as that was brought about by his being employed by a company who paid higher wages for part of the time, I have some doubt whether that really was evidence of exceptional ability or steadiness or industry on the part of this man. But on the whole I think, as the applicant raised an erroneous contention before the county court judge, as the main contention by the respondents, the present appellants, before the county court judge was also erroneous, and as the county court judge's decision was erroneous on a principle which was not contended for by either side, it is more satisfactory that the case should go down and be retried. It seems to me that the fact that the workman had earned more than the average wages of a person in the same grade employed by the same employer cannot be used to raise his average weekly earnings above the maximum earnings of persons in the same grade employed by the same employer. That is the outside to which we can go. We must still have regard to earnings of persons in the same grade employed by the same employer, and if his wages are higher than the maximum [907] earned by persons in that grade he cannot be entitled to that excess. I agree, therefore, that this case should go down for a new trial.

Appeal allowed.

NOTE.

The reported case, construing the phrase "average weekly earnings" as used as the criterion of the allowance to be made under a workmen's compensation act, holds that where the injured person has been for several years employed as a casual laborer by the employer in whose service he is injured, compensation must be based on his earnings in that employment, without regard to the amount contemporaneously earned in the service of another. For a discussion of the meaning of the phrase "average weekly earnings" in a workmen's compensation act, see the notes to White v. Wiseman, Ann. Cas. 1913D 1021, and Shipp v. Frodingham Iron, etc. Co. Ann. Cas. 1914C 183.

LORD

v.

CITY AND COUNTY OF DENVER ET AL.

Colorado Supreme Court—July 8, 1914.

58 Colo. 1; 143 Pac. 284.

Municipal Corporations — Right to Construct Improvement Jointly with Railroad Company.

Denver Charter Amendment, May 20, 1913, § 355, created a tunnel commission to construct a railroad tunnel through the Rocky Mountains to transport freight, passengers, water, and electricity, provided that if the tunnel should be originally constructed for the transportation of freight and passengers, that right should not be destroyed or needlessly interrupted by the extension of the use for the passage of water, electricity, etc. The amendment also provided that two thirds of the cost of the tunnel should be paid by a bond issue of the city; that the other third should be paid by a railroad company, which should have the right to operate trains through the tunnel, the title to which should be in the city, but with the right of the railroad company to purchase the same. The city had not declared its intention to build a water system, power plant, or any public utility of which the tunnel was to form a part, nor by which it was to be of any use to the city whatsoever. It was to have the perpetual right to use the tunnel free of rent, as an aqueduct, and to install conduits therein to bring water into the city, to operate a pipe line, and an electric line through the tunnel, and to use it for drainage if it so desired, also to have full benefit of any one that might be found in driving the tunnel, and the right to subject it and the tracks herein to use of any other railroad desiring the same on terms which would be exceedingly onerous to any other railroad. Held, that the ordinance was violative of Const. art. 11, §§ 1, 2, prohibiting a city from lending its credit to any company or corporation for any purpose, and from making a donation of money or bonds in furtherance of a work jointly with any person, company, or corporation, etc.

[See note at end of this case.]

Error to District Court, Denver county: ALLEN, Judge.

Action for injunction. Daniel A. Lord, plaintiff, and City and County of Denver et al., defendants. Judgment for defendants. Plaintiff brings error. The facts are stated in the opinion. REVERSED.

Harry S. Silverstein and *Harry L. Lubers* for plaintiff in error.

I. N. Stevens, Harry A. Lindsley, Joseph C. Helm and *M. H. Kennedy* for defendant in error.

[3] SCOTT, J.—This action is by a citizen and taxpayer, to restrain the City and County of Denver from issuing its bonds in the amount of three millions of dollars, to aid in the construction of a proposed tunnel to be known as the "Moffat Tunnel." It seems that a statement of the facts must be extended to an unusual length in order that the matters to be determined may be properly understood.

The questions raised were determined in the court below upon a demurrer to the complaint. The complaint alleges the organization and existence of the City and County of Denver under the XXth article of the Constitution; and that on the 20th day of May, 1913, an amendment [4] to the charter of the city and county was adopted, known as section 355. This section purported to create a Tunnel Commission, to consist of three members, and at the same election, the members of such commission were elected. Among other things provided by the said amendment, were the following:

"All the powers granted to the City and County of Denver by Article XX of the Constitution of the State of Colorado, and otherwise existing by operation of law, including the power of eminent domain and authority to make all necessary filings under the laws of the State of Colorado and the United States, are hereby conferred upon said Tunnel Commission, to acquire, construct, build, assist in building and constructing, operate, maintain, lease and dispose of, a transportation tunnel, together with necessary approaches thereto, through the main range or divide of the Rocky Mountains under or near James Peak, to be known as the 'Moffat Tunnel,' for the purpose of transporting freight, passengers, water and electricity, or for any one or more of such purposes; *provided*, however, that in the event said tunnel shall be originally constructed for the transportation of freight and passengers, the right shall be retained by the City and County in perpetuity, to construct and operate, or to authorize the construction and operation, through such tunnel, of an aqueduct, pipe line or other apparatus for conveying water from the western to the eastern portal, for use by the City and County of Denver, and its inhabitants for domestic purposes, irrigation, power or other uses; also the right to extend or authorize the extension through the same, of cables, wires or other apparatus for conveying electricity manufactured west of the western portal thereof, to be used for power, lighting or other purposes, by the city and its inhabitants; and to permit the use thereof, upon some fair and equitable basis, by any and all railway lines desiring

such use; but in enlarging said tunnel or otherwise preparing it for, and subjecting it to the said water or electric uses, the original use to which it shall have been subjected, shall not be destroyed, impaired or needlessly interrupted. [5] And if in constructing said tunnel, mineral in paying quantities shall be discovered therein, the commission shall have power to make such contracts and take such other steps in relation thereto as will secure for the city and county, the benefit of such discovery or discoveries.

"The construction, management, operation, lease and sale or disposition of said tunnel and its subjection to the transmission of water and electricity, shall be in the exclusive control of said Tunnel Commission, including the disbursement of all funds provided in connection therewith.

"The commission shall institute and defend all litigation affecting its duties or powers or arising from the exercise thereof, or in relation to its trusts, and all expenses of such litigation shall be paid by the treasurer, out of the General Fund upon the warrant of the commission.

"The commission may also provide that a portion of the funds needed for construction of the tunnel may be furnished by individuals or corporations interested in the same, and may enter into contracts with such individuals or corporations interested in the same, and may enter into contracts with such individuals or corporations with reference to the construction, control, management, operation and future lease, sale or disposition of the same; provided always, that until the city and county shall have been reimbursed in full for any and all moneys so expended by it, together with interest thereon, and is released from all financial liability in connection therewith, it shall retain the ownership of said tunnel and the right to regulate and control the same itself, or by its representative or agent, or by contract as hereinbefore provided.

"And *provided* further, that the rights in and to said tunnel hereinbefore reserved to the city and county in perpetuity, shall be perpetually retained, notwithstanding any lease, sale or other disposition of said tunnel or its use. If upon investigation the commission shall decide that said tunnel is desirable and its construction feasible, that body shall determine the amount of general bonds of the city [6] and county necessary to be issued, and the rate of interest the same shall bear per annum; and the commission may by ordinance of the city council, submit to the vote of the taxpaying electors, at any time, at any election held in the city and county, after the adoption of this amendment, for whatever purpose such election may be called, whether such election be general or special, or at a special election called upon their request for the purpose, the question of whether the city and county shall issue its general bonds maturing in not less than fifteen, nor more than fifty years for such purpose, in such amount, and at such rate of interest as has been determined by said commission; and the council shall pass the necessary ordinance to call said election at the time so fixed by said commission, and the Clerk and Election Commission shall publish the necessary notices for calling and holding said election at the time so fixed, and they and all other officers, shall perform the duties incumbent upon them by law for the legal holding of said election.

"The commission may also submit any proposition concerning its powers or trust at any municipal election. All propositions shall be submitted in the way, at the time, and in the manner and form prescribed by said commission.

"When there is so submitted to the taxpaying electors the question of incurring a general indebtedness of the city and county, for the foregoing purpose, if a majority of the votes cast thereon shall be in favor of the proposition so submitted, it shall thereby be adopted, and such adoption shall be a sufficient authorization for the issuance of the bonds in the amount thereby provided for, and maturing on the date therein fixed, and the same, when issued, shall be and constitute a valid general indebtedness of the City and County of Denver for said purpose, and the provisions of this section relative to the issue, sale and redemption of bonds, shall apply thereto; the vote upon such election shall be canvassed and the result declared by the proper officers as provided by law.

[7] "The council shall pass such ordinance as said commission shall deem necessary respecting the issuance of said bonds, or to the full exercise of all the powers herein given it, in the form recommended by the commission and without amendment, and the Mayor shall sign the same.

"The City and County of Denver shall annually levy a sufficient tax for the creation of a sinking fund to discharge in full the principal of, and interest on, the bonds issued hereunder, unless the ordinance adopted, as hereinabove provided, shall contain suitable provisions otherwise to insure the prompt payment of said interest as the same shall become due, and also for the creation of a sinking fund sufficient to discharge in full the principal of said bonds at maturity.

"This section and any provision of the charter referred to herein shall remain in full force, so far as may be necessary for the purpose of securing the prompt payment of the bonds issued hereunder, and until said bonds are fully paid shall be irrepealable.

"The inhabitants of the City and County of Denver by the adoption of this charter amendment do find and declare that the said tunnel, will in their judgment, be of local use and convenience to the people, and that it is also absolutely essential to the future growth and welfare of said city and county."

It is then alleged that the tunnel commission so created, proceeded to determine and did determine, the approximate cost of the tunnel, together with the necessary approaches thereto, through the main range or divide of the Rocky Mountains, under or near James Peak, and for that purpose the same could be constructed for not to exceed $4,420,000, and that acting under the authority assumed to be conferred, by the city charter amendment, the commission on the 8th day of October, 1913, entered into a written agreement with the Denver and Salt Lake Railroad Company, for the construction of such tunnel.

This agreement recites that the railroad company owns and operates a railroad from the City of Denver [8] to Steamboat Springs, Colorado, and is engaged in the extension thereof to Craig, Colorado, and shall be further constructed and extended to Salt Lake City, Utah; that the railroad company desires to use, lease, operate and maintain and ultimately to acquire, the said tunnel, for railroad and transportation purposes, subject to the city's use for conveying water and electricity, and the city's power and control over said tunnel for the purpose of assuring fair and equitable rates to other railroads using said tunnel; and that in consideration of the premises, the railroad company is willing to grant the use of its tracks for the distance of thirty miles east of the eastern portal of said tunnel, and for a distance of seventy-five miles west of the western portal of said tunnel in perpetuity, to other railroads desiring to use the tunnel, on the terms and conditions afterwards provided in the agreement; that a survey has theretofore been made by the Continental Tunnel Railroad Company, and rights of way have been secured by said company, in the land office of the United States for the location of the proposed tunnel.

It is then agreed that in pursuance of the power conferred by the said charter amendment, the tunnel commission will procure the services of engineers of experience, and the construction of the proposed tunnel, and fixe the compensation to be paid such engineers, and that this payment shall be made from the funds provided for the construction of the tunnel; or in case of failure of the city to vote the bonds provided in the agreement, that the railroad company shall pay one-third, and the tunnel commission two-thirds of said expenses: that an estimate of the costs of the tunnel shall be made by the engineers, and which tunnel shall be adapted for and with a single-track railroad, having an inside clearance of not less than sixteen feet in width, and not less than twenty-one feet in height, and suitable for said city's use not only for railroad transportation purposes, but also for the conveyance of an ample supply of water for domestic and irrigation purposes, and electricity for power and [9] lighting purposes for the City and County of Denver, and the inhabitants thereof, and which said tunnel shall have grades not exceeding two per cent cut for railroad purposes.

The tunnel commission further agreed, that in case the engineers report the probable cost of construction of the tunnel and the approaches, ready for the installation of facilities for the transportation of water and electricity for use by the City and County of Denver, and ready for the electric operation of a single-track railroad, shall be $4,500,000 or less, then the tunnel commission shall undertake the construction, building and completion of said tunnel, approaches and stationary railroad facilities, and provide and pay $8,000,000 by and through the issuance of general bonds of the City and County of Denver, to be issued in accordance with the amendment; such bonds to bear interest at not more than five per cent per annum, interest payable semi-annually, and shall be payable fifty years after their date.

It was also provided for the retirement of such bonds and the creation of a sinking fund. It was then agreed by the commission that if the probable cost reported by the engineers did not exceed $4,500,000 and if the lowest satisfactory bid confirms such estimate, that the tunnel commission shall build said tunnel upon conditions that the railroad company shall pay the entire excess of costs over and above the sum of $3,000,000; further, that the payments required by the railroad company shall be deposited as thereafter agreed, and that the consideration of such payments, together with the right to use the tracks of said railroad company, are for an option provided for in the agreement, by which the railroad company is granted the right to use, lease, operate, and maintain, and ultimately to acquire the said tunnel from said tunnel commission, as provided in the agreement. The tunnel commission was to institute and defend all litigation affecting its duties and powers, or arising from the exercise thereof, or relating to the administration of its trusts, and to exercise the power of [10] eminent domain, and all of the expenses therein incurred, are to be included as a part of the costs of the tunnel.

The tunnel commission further agreed that the railroad company may at any time purchase said tunnel for railroad transportation

purposes, upon the payment by the railroad company, of the $3,000,000 of the bonds provided for, or so much thereof as may be sold for the purposes thereof, with all accrued interest, and that the title of the said tunnel and its approaches, shall thereupon immediately vest in the railroad company. The tunnel commission is, on demand of the railroad company, to execute and deliver to the railroad company, such other and further assurance of title as may be necessary in the premises; subject, however, to a perpetual easement in the city for the transmission of water, and electric current for light, heat and power, and also subject to the perpetual right reserved by the city and county, to have said tunnel equipment and approaches, and tracks of said railroad for a distance of thirty miles east of the eastern portal and for a distance of seventy-five miles west of the western portal, used by other railroads, as provided in the agreement.

The railroad company agreed that if the estimate of the engineers for the reasonable cost of said tunnel, necessary approaches and stationary railroad facilities, ready for laying of pipes and the installation of facilities for the transportation of an ample supply of water for domestic and irrigation uses, and of electricity for power and lighting purposes, for the City and County of Denver, and including said single-track railroad, to be $4,500,000 or less, then one-third of said estimate costs of construction, building and completion of said tunnel, approaches and facilities shall be deposited by said railroad company, concurrently with the two-thirds thereof deposited by the tunnel commission.

The railroad company further agreed that the tunnel commission should build and construct the tunnel, necessary approaches thereto, and facilities for transportation [11] of water and electricity as aforesaid, including said single-track, and that the railroad company should pay any excess of cost above the said sum of $3,000,000.

It was also agreed that the title to the said tunnel and its necessary approaches, shall be vested in the City and County of Denver, and shall remain the property of said city and county, until the same shall have been purchased and fully paid for by the railroad company.

It was further agreed that the railroad company should pay the interest on all the bonds to be issued and sold by the city, so long as any such bonds are unpaid and outstanding, plus one per cent per annum on all said bonds outstanding, to comply with the sinking fund for the provision of the retirement of said bonds, and should also pay the entire cost of maintenance, equipment and operation of said tunnel, including the necessary motive power.

The railroad company further agreed to provide trackage rights for the use of said tunnel and its approaches by other railroads under fair and reasonable trackage agreements containing the usual proper covenants and conditions customarily embodied in trackage agreements between railroads, and upon condition that each other railroad desiring to use the said tunnel and its approaches, may do so only upon payment of one-half of the interest upon the actual cost of construction and equipment of the tunnel, and its approaches, on a basis of five per cent of all sums paid by the constructing parties, for construction and equipment and motive power of said tunnel and its approaches, together with such proportion of the cost of maintenance and operation of said tunnel and its approaches, as the number of car wheels of each road so using said tunnel, shall bear to the total number of car wheels passing through said tunnel.

The railroad company further agreed to furnish at its own cost, and to provide all electric current necessary for the operation of the tunnel and its approaches, and to supply all the necessary equipment, including motive [12] power, for the operation of the tunnel. The railroad company further agreed to permit to the railroads having trackage rights to the use of the tunnel, to use its tracks and facilities for a distance of thirty miles from the east portal, and seventy-five miles from the west portal, *provided* that any such railroad so using the tracks and facilities, shall pay interest at the rate of three per cent per annum based upon the reasonable cost of reproducing the tracks so used, at the time of acquiring the right of way, and that each railroad shall in addition, and as a condition precedent, pay to the railroad company for maintenance and repairs, a percentage of the actual cost thereof based upon the car wheels estimate. The railroad company further agreed that it would on or before the maturity of the bonds of the city, exercise its option to purchase said tunnel by the payment of the principal of the $3,000,000, or so much thereof as may have been sold.

It is further agreed by the railroad company, that it will immediately, upon the beginning of the construction of the tunnel, proceed in the construction of its lines from Craig, Colorado, toward the Colorado and Utah line, and will within five years from the date of the completion of the tunnel, have its lines fully and continuously in regular, daily operation to the City of Salt Lake.

It was also agreed between the parties, that before any contract is let for the construction of the tunnel or any part thereof, the tunnel commission shall deposit with a depository to be agreed upon, $3,000,000 of bonds of the City and County of Denver, and that the railroad company will deposit with the said depository, its proportion of the total cost of

the said tunnel in cash or current marketable securities so deposited, to be sold by the party so depositing as it may desire, and all proceeds to be deposited with the depository.

It was mutually agreed further, that the money so deposited by the contracting parties shall be paid out in the same ratio or proportion, as the total amount furnished by the parties shall bear to each other.

[13] It was further mutually agreed that the exclusive right shall forever be reserved in perpetuity in the City and County of Denver, "to construct and operate through said tunnel, an aqueduct, pipe line, or other apparatus for conveying water from the western to the eastern portal, for use by the said City and County of Denver, for domestic, power, and other purposes, also the right to extend through the same, cables, wires and other apparatus for conveying electricity, to be used for power, light and other purposes by the city; subject to the conditions that all installation of equipment and use of said tunnel and approaches for the purposes aforesaid, shall not destroy, impair, or unreasonably interrupt the uses of said tunnel for said railroad purposes."

It was further agreed that the tunnel commission shall take such steps as may be permissible under the existing laws, or by procuring appropriate legislation, as will secure exclusively to the city, the benefit of any or all veins of mineral, or mineral deposits, that may be discovered in constructing the tunnel, provided that no mining operations or mining development shall, at any time or in any manner, interfere with, impede, endanger, or destroy the use of said tunnel or its approaches for transportation purposes. All funds were to be paid out upon order of the tunnel commission. Contracts were to be let by bid, the tunnel commission to reserve the right to accept or reject any such bids.

It was also provided, that upon completion of the tunnel and its approaches, the railroad company should be entitled to the possession and operation of the same for railroad transportation purposes, such possession and operation being subject to the use, rights and easements reserved to the city.

It was further agreed that the cost of the special election to determine the question of issuance of the $3,000,000 bond issue, shall be paid, one-half by the city, and one-half by the railroad company. It was likewise provided that in case of failure of the railroad to pay the interest on the outstanding bonds of the city, or to [14] deposit the one per cent sinking fund as provided, or failure in any other of the material provisions of the contract for a period of three months, then the tunnel commission may declare the contract terminated and all sums paid by the railroad company shall be held as liquidated damages.

The complaint further alleges that after the execution of this agreement the question of the issuance of $3,000,000 in bonds, was properly submitted and adopted.

There are but two questions presented for determination: 1. Is the issuance of the bonds by the city and for such a purpose, inhibited by the constitution; 2. If not, then is the provision of the contract and proposition to issue such bonds extended for the full period of fifty years, in contravention of sec. 8, art. XI of the Constitution limiting the period for the extinguishment of a city debt to fifteen years.

Sections 1 and 2 of art. XI of the Constitution provide:

"Sec. 1. Neither the state nor any county, city, town, township or school district, shall lend or pledge the credit or faith thereof, directly or indirectly, in any manner to, or in aid of any person, company or corporation, public or private, for any amount or for any purpose whatever, or become responsible for any debt, contract or liability of any person, company or corporation, public or private, in or out of the state.

"Sec. 2. Neither the state nor any county, city, town, township or school district, shall make any donation or grant to, or in aid of, or become a subscriber to, or shareholder in, any corporation or company, or a joint owner with any person, company or corporation, public or private, in or out of the state, except as to such ownership as may accrue to the state, by escheat or by forfeiture, by operation or provision of law; and except as to such ownership as may accrue to the state, or to any county, city, town, township or school district, or to either or any of them, jointly with any person, company or corporation, by forfeiture or sale of real [15] estate for non-payment of taxes, or by donation or devise for public use, or by purchase by or on behalf of any or either of them, jointly with any or either of them, under execution in cases of fines, penalties or forfeiture or recognizance, breach of condition of official bonds, or of bond to secure public moneys, or the performance of any contract in which they or any of them may be jointly or severally interested."

Prior to the adoption of our constitution, the policy of extending public aid to private corporations, had grown to be alarming. Judge Dillon in his work on Municipal Corporations, 1 Dill. § 313 and 318, points out the evil effects arising therefrom. This policy he suggests had become a mania, particularly in the west; that it had resulted in attempted repudiation upon the part of both states and municipalities, and says:

"The most noted of extraordinary or extra-municipal powers conferred upon municipal and public corporations, is the authority to aid in the construction of railways by sub-

scribing to their stock, issuing negotiable bonds as a means of paying their subscription, and taxing the inhabitants or the property within their limits to pay the indebtedness thereby incurred . . . . . regarded in the light of its effects, whatever may be thought of its constitutional soundness, there is little hesitation in affirming that this invention to aid the enterprise of private corporations has proved itself baneful in the last degree."

To prevent this evil, there began the adoption of constitutional amendments by many of the states, denying the right of the legislature to grant such powers. Our constitution was adopted at a time when the subject was much in the public mind. An examination of the proceedings of the constitutional convention shows the introduction of several resolutions upon the subject, and repeated redrafts of these sections, with the result that sections 1 and 2 of art. XI are broader in scope, and more specific in the matter of restriction, than any similar constitutional provision considered or brought to [16] our attention. Indeed, it would seem that language could not make plainer the intent of the framers of the constitution, to utterly prohibit the mingling of public moneys with those of private persons, either directly or indirectly, or in any manner whatsoever.

These sections of the constitution have been before this court, for interpretation at least, as to the spirit and intent. The case of Colorado Cent. R. Co. v. Lee, 5 Colo. 192, was decided within a very short period after the adoption of the constitution. Two of the three judges, then constituting the Supreme Court, had served as members of the constitutional convention. The question of public benefit was urged in that case, as here. It was there said:

"That the construction of the proposed line of railroad would be of great benefit to the county and its citizens; that it would give them increased and superior facilities for traffic and commerce with both the Atlantic and Pacific seaboards, do not make it any the less a donation within the intent of the inhibition.

"These and similar considerations of public benefit and advantage, had constituted for years, under our territorial government, the basis of appeals for and grants of county and municipal aid to railroad companies, and it was undoubtedly the intention of the framers of the Constitution, whether wisely or not, to prohibit, by the fundamental law of the new State, all public aid to railroad companies, whether by donation, grant or subscription, no matter what might be the public benefit and advantages flowing from the construction of such roads. I understand the framers of the Constitution and the people who adopted it, to have intended by this provision the declaration of a broad policy of prohibition, forbidding state, county and municipal aid to railroad and other companies in any of the modes specified.

"If the existence of a public benefit is to give such an agreement the character of a sale of the stock, and take it out of the constitutional prohibition, then the prohibition is utterly nugatory, and [17] valueless, as such consideration would exist in every probable case."

Speaking of the sections of the Constitution under consideration and other provisions in restriction of authority to incur public debt, in the case of People v. May, 9 Colo. 80, 10 Pac. 641, it was said:

"It was their duty not only to provide against the recurrence of evils, patent and already experienced, but also to guard every point where abuses were liable to creep into the administration of public affairs. The waste, extravagance, frauds, peculations, defalcations and tax burdens, disgracing and incumbering the administration of American municipalities, county, town and city, had long been national topics of discussion, written about by publicists, denounced by the press and resolved about by political parties, and were known to the country at large. The effect of this was to make the honest and economical administration of affairs, whether town, city, county or state, practically the most important question that came before the convention."

It may be well to consider briefly the material facts as presented by the record. The railroad company owns and operates a railroad, beginning in the City of Denver and extending westward and over and beyond the range of mountains, through which the tunnel is proposed to be constructed. The agreement is in effect that the city will issue and sell its bonds in payment of two-thirds of the expense of the construction of such tunnel and its approaches, and to provide the same with railroad tracks for the operation of the company's trains through said tunnel. The railroad company to contribute one-third of the expense of such tunnel. The city is to sell, and the railroad to purchase, the city's interest in the tunnel upon payment to the city of the amount invested, with interest, within a specified time, and in the meantime to use the same as a part of its railroad line, and to pay the interest on the city's bonds.

The city has not projected, provided for, nor has it declared its intention to build, construct, own or operate [18] a water system, power plant, or any other public utility, of which the tunnel is to form a component part, or in which it is to be of any use to the city whatsoever.

Stripped of non-essentials for consideration here, and of improbable contingencies and remote possibilities, the foregoing statement

presents the gist or rather the meat of the agreement between the city and the railroad company:

The railroad company operates its line over the mountains. It is important, and may be necessary for it to reduce its grade by going through the mountain by means of a tunnel. The city agrees with it, to issue its bonds in payment of two-thirds of the expense of driving the tunnel, constructing the railroad tracks, and proper approaches with the other necessary equipment to enable the railroad company to connect with its tracks at both ends of the tunnel. For this the company agrees to pay the interest on the bonds, and finally the principal, and upon such payment is to receive full title to the tunnel as constructed, for its purposes. Plainly this is in violation of the constitutional provisions; in that the city pledges its faith and credit for the benefit and use of the railroad corporation, and as plainly this is in aid of the railroad corporation.

It is likewise just as clear that this constitutes a joint enterprise between the city and the company, to last until the company shall have purchased the city's interests. By every legal test it is a partnership.

Do the other provisions of the agreement relieve it from this limitation of power.

Counsel for the defendants in error assert that there are four reservations in the contract that take it out of the inhibition of the constitution. We will consider these in the order and in the exact language presented:

"1. The perpetual right to use the tunnel free of rental or charge, as an aqueduct, and to install conduits therein for the purpose of bringing water from the western slope to be used by the city and its inhabitants."

[19] The agreement specifically provides that all the money contributed by the city shall be expended in the construction and equipment of the tunnel for railroad purposes alone. Not a dollar of this fund is to be used to install conduits or other means for the purpose of bringing water from the western slope to be used by the city and its inhabitants.

The engineers were to report the probable cost of the tunnel ready for the installation of facilities for the transportation of water and electricity for use by the City and County of Denver, and ready for the electrical operation of a single-track railroad, and for the building and completion of said tunnel, approaches, and railroad, and stationary railroad facilities.

The tunnel is thus to be ready only for the installation of city facilities, but is to be fully equipped for the purpose of railroad operation by the company, including the approaches and tracks. In another part of the agreement it is said the tunnel is to be "ready for the laying of pipes" by the city.

In the agreement, the rights of the city are specifically referred to as "easements." The agreement specifically provides, not for construction for the city's use, but the right only to the city of an easement.

"To construct and operate through said tunnel, an aqueduct, pipe line, or other apparatus for conveying water from the western to the eastern portal for use by the said City and County of Denver, for domestic, power, and other purposes, also the right to extend through the same, cables, wires and other apparatus for conveying electricity, to be used for power, light and other purposes by the city; subject to the conditions that all installation of equipment and use of said tunnel and approaches for the purposes aforesaid, shall not destroy, impair, or unreasonably interrupt the uses of said tunnel for said railroad purposes."

Counsel for the city in their brief say:

"For drainage and other purposes, it is necessary to have the center of the Moffat Tunnel slightly [20] higher than either portal; and, as a matter of fact, the western portal of the tunnel, as now proposed, will be fifty or sixty feet lower than the eastern portal. These facts have given rise to a doubt in the minds of many intelligent people as to the ability of the city to bring water through the tunnel from the western slope. This doubt does not, however, exist in the minds of educated engineers. It arises through a want of knowledge and experience on the part of the ordinary, though educated and intelligent laymen. In reality, the circumstances detailed present no difficulty whatever. By employment of what may be termed the 'inverted siphon' principle, all difficulty is overcome."

They also submit a drawing showing a vertical section of the mountain, the line of the proposed tunnel, the portals, and the line of level, and argue that the conveyance of water through the tunnel after its construction for railroad purposes, is an engineering possibility.

But this is not intended or suggested as a part of the agreement under which the city is to spend its money, to obtain which it must levy a tax upon its citizens.

Besides this, it is conceded that the city has no rights to the use of water west of the proposed tunnel, or that it has declared a purpose to acquire any such right, or has any intention to so do, or that it has a purpose to convey water through such tunnel, or by any other means, for the use of its inhabitants or otherwise, or that it has a purpose to attempt to convert such an engineering possibility into an accomplished fact. Indeed, under the express provision of the charter amendment the purpose of the tunnel is not necessarily for the conduct of water or electricity, but for any one of four purposes,

for it recites, "for the purpose of transporting freight, passengers, water and electricity, or for any one or more of such purposes." And the amendment again recites: "But in enlarging said tunnel or otherwise preparing it for, and, subjecting it to, the said water or electric uses, the original use to which it shall have been subjected, shall not be impaired or needlessly interrupted." [21] The "original use" can be none other than for railroad transportation purposes, and by the Denver and Salt Lake road.

The second reservation to the city, relied on by counsel to sustain their contentions is as follows:

"2. The perpetual right, free of rental or charge, to install wires, together with all other apparatus that may be necessary, and bring electricity through the tunnel for lighting and power and other uses by the city and its inhabitants."

What has been said concerning the first proposition applies with equal force to this one, which deals with the possible transmission of electric current. Clearly the record discloses no intent or purpose upon the part of the city, to acquire power for the generation of electricity at a point beyond the tunnel or at any other point, or to engage in the generation and distribution of electricity for any municipal or other purpose.

And if it did so intend, certainly it would not undertake the construction of a tunnel at an expense to the city, of three millions of dollars, in the face of the common knowledge that electric current may be as easily conveyed over the mountains as through a tunnel, and at a comparatively insignificant expense.

The third reservation in the agreement, cited by counsel and upon which reliance is had, is:

"3. The ownership of mineral veins discovered in constructing the tunnel, and the perpetual right, free of charge, to locate the same and mine the ore therein; provided the city acquires the legal right to such veins; and provided also that such mining shall not interfere with, impede, endanger, or destroy the use of the tunnel for transportation purposes."

Certainly it will not be seriously contended that a municipality as such, can have the lawful right to levy a tax upon its citizens, in the absence of specific constitutional authority, for the purpose of locating mining claims, and engaging in the mining of metalliferous ores.

If it may do so in Grand and Gilpin counties, it may [22] with equal right and more propriety, so engage in the well known mining districts of Cripple Creek, Telluride or Leadville. We know of no authority wherein it has even been suggested that such a business comes within the range of municipal purposes. Besides, the discovery of valuable ores in the proposed tunnel can be said to be nothing more than a very remote possibility, and it will hardly be said that prospecting for ores, is a municipal power. But by what right may the city and the railroad company contract as to the ownership of ores located upon premises to which neither of the contracting parties have any right, title or interest.

The fourth and last proposition upon which counsel rely is the following:

"4. The perpetual right to subject the tunnel and the railway tracks therein to use by any other railroad desiring such use, including outside trackage rights over the line of said Denver & Salt Lake Railroad for such other railroads, covering a distance of seventy-five miles westerly from the western portal of the tunnel and thirty miles easterly from its eastern portal; such use of the tunnel and trackage rights to be upon reasonable terms to the other railroads so using the same; said terms being already specified in the written contract of October 8th, 1913, between the city and the railroad company."

If it is within the constitutional prohibition for the city to make donation, or grant to, or in aid of one railroad; or to lend or pledge its faith or credit, in aid of one railroad, or to become a joint owner with one railroad, clearly it is within such prohibition to so do with two or more railroads.

This proposition is but a repeated offense against the constitution. It involves another and only a possible contingency. It does not appear that any other railroad company desires or ever will desire, to avail itself of any such privilege, if it be a privilege. And if so, then under the agreement, it must be by a future contract with the Denver & Salt Lake Railroad Company [23] alone, and upon terms dictated by that corporation. Such agreements are to be the usual trackage agreements between railroads, in addition to other specific charges. It is true that in general the basis of the terms of such contracts are set out in the contract between the city, and the Denver & Salt Lake Company, but the latter company is to avail itself of all financial benefit. For instance it is provided that each railroad so using the tunnel, must pay one-half of the interest upon the actual cost of construction and equipment of the tunnel and its approaches, on the basis of five per cent of the cost both to the city and the Denver & Salt Lake Company, including motive power, and the proportionate cost of maintenance.

Thus, if four of the great railroad companies, whose lines now enter the City of Denver, and some of which now extend both east and west of the city, with connections extending to both seaboards, should conclude that the use of the proposed tunnel would be

of benefit to them in making shorter, through routes, or for other reasons, and if the city should conclude that this would be of material commercial advantage to it, an object apparently much desired by the citizens of Denver, then under this provision of the contract, the Denver & Salt Lake Railroad Company is empowered to charge each of such roads $112,500 annually, under the fictitious item of interest, in addition to the usual trackage agreements and other fixed charges provided by the agreement now being considered.

Not because there would be any such interest to pay, for the interest provided for would in the case suggested, amount to but one-half of what these four railroads alone must pay. Upon the estimated cost of construction at $4,500,000, and of five per cent as the rate of interest, these four roads would pay as an annual arbitrary and indefeasible sum, not to the city, but to the Denver & Salt Lake Railroad Company, of $450,000. This right is thus given to that railroad company in perpetuity.

[24] Thus, during the life of the proposed bonds alone, fifty years, each road so to use the tunnel, must first agree to pay to the Denver & Salt Lake Railroad Company, the sum of $5,625,000 for the use and benefit of that company. And this same right is given to the railroad company, to so tax every additional railroad that may desire to use the tunnel.

Certainly such manifest inequality and injustice, both to the city and to other companies, cannot act as an inducement for such companies to make use of the tunnel. Indeed, it would seem to present such a serious obstacle to the accomplishment of such purpose, as may be absolutely prohibitive. In this feature alone the contract between the city and the Salt Lake Company, if not a grant of subsidy, is indefinitely worse, for it confers the power upon the Salt Lake Company to levy tribute upon every other railroad company that may desire to make use of the tunnel. This is a flagrant violation of the constitutional provision.

From our consideration of these provisions inserted in the contract, we are irresistibly forced to the conclusion that they were inserted, not for the accomplishment of a legitimate municipal purpose, but rather in an effort to evade the constitutional prohibition.

Counsel urge that the question here is one for legislative determination, and point out that by elections, both by the voters and tax payers separately expressed, the legislative will of the municipality has been manifested in terms not to be mistaken. This manifestation of the will of the people of the municipality has been constantly before us in the consideration of the case.

But the question we are now considering is not one of the will of the municipality, but is solely a question of limitation of power. We have not overlooked the rule of construction adopted by this court in an opinion written by the late Chief Justice Steele, in the case of Denver v. Hallett, 34 Colo. 398, 83 Pac. 1068, but rather to reiterate and emphasize it. It was there said:

"In a number of cases before this court as well [25] as the court of appeals, it has been held that with respect to municipal corporations, except as limited by the constitution, the general assembly has plenary power; that it is clearly a legislative function to determine what power shall be granted, what withheld, and what restrictions shall be imposed in the exercise of the powers granted. . . . The supremacy of the legislative authority over municipal corporations is not, however, in all respects unlimited, but the limitation must be sought in the national or state constitution."

. . . . . It will certainly not be contended that either by the legislature of the state, or by the legislative powers of a municipality, such powers as are expressly prohibited by the organic law, may be exercised by either. Ours is a constitutional government, wherein the sovereign will of all the people, as expressed in the constitution, is supreme, beyond the express limitations of which a municipality may not go. If the municipality may offend, then so may the individual. If this may be done in case of the levy of a prohibited tax, it follows that it may be done in a case involving life or liberty; the Bill of Rights is then no protection, and the constitution becomes a rope of sand.

It is said that under the provisions of sec. 1, art. 20, there is the implied power to do that which is attempted in this case. The provision relied on is:

"The municipal corporation known as the City of Denver, etc., shall have the power, within or without its territorial limits, to construct, condemn, and purchase, acquire, lease, add to, maintain, conduct and operate, waterworks, light plants, power plants, transportation systems, heating plants, and any other public utilities or works or ways local in use and extent, in whole or in part, and everything required therefor, for the use of said city and county and the inhabitants thereof, and any such systems, plants, or works or ways, or any contracts in relation or connection with either, that may exist and which said city and county may desire to purchase, in whole or in part, the same or any part thereof may [26] be purchased by said city and county which may enforce such purchase by proceedings at law as in taking land for public use by right of eminent domain, and shall have the power to issue bonds upon the vote of the taxpaying electors, at any special or general election, in any amount necessary to carry out any of said

powers or purposes, as may by the charter be provided."

Nowhere in sec. 1, art. 20 can there be found express alteration or limit of the prohibition contained in secs. 1 and 2 of art. XI, and all municipalities operating under the 20th art. are clearly subject to such limitations.

It is said in 1 Dill. Mun. Corp. 399, and heretofore approved by this court:

"It is a general and understood proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; Second, those necessarily or fairly implied in, or incident to, the powers expressly granted; Third, those essential to the declared objects and purposes of the corporation—not simply covenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the court against the corporation, and the power is denied. Of every municipal corporation the charter or statute by which it is created, is its organic act. Neither the corporation nor its officers can do any act or make any contract or incur any liability not authorized thereby. All acts beyond the scope of the powers granted are void."

From what has been said, it is clear that the declaration in the amendment to the charter, § 355, to the effect that the tunnel will be of local use, and convenience to the public, and is essential to the future growth and welfare of the city and county, cannot prevail as against an express constitutional prohibition of the power therein attempted to be exercised.

Higgins v. San Diego Water Co., 118 Cal. 537, 45 Pac. 824, 50 Pac. 674, was a case where there was an attempt to violate constitutional limitations similar to ours.

In that case a flume company was the owner of a [27] water supply and system of pipes by which it brought water to the city limits. A water company had pipes and all necessary facilities for distributing water to consumers throughout the city. These two companies entered into an agreement constituting the water company sole agent for the flume company for the sale of its water to the city. The entire distributing plant was then turned over to the city. This was in form of a lease to five citizens of the city, who in turn granted a sub-lease to the city. One of the considerations of the lease was that the water company should cause a railroad to be constructed from the City of San Diego to a point in Mexico. The court held:

"That these reasons, and for these alone, the contract was held invalid by the learned judge of the Superior Court. As to the other objection above stated he says in the opinion referred to: 'While it is very evident from the terms of the contract that the hope that a railroad would be constructed was one of the moving causes for the city authorities entering into the contract, it was not in my opinion a consideration of the contract, but merely a condition subsequent which falls because invalid, without affecting the other provisions of the contract.' And in his conclusions of law he holds: 'That said lease and sublease were not void because the amount agreed to be paid was a subsidy to or in aid of the construction of a railroad.' These conclusions are based upon findings to the effect that the city waived the construction of the railroad, and that neither the city nor its mayor acting in its behalf, was induced to enter into the contract by any promises or representations of the officers or agents of the water company that the railroad would be built."

And again the Supreme Court said: "The result of the foregoing discussion is that the contract of the city with water company is held invalid upon at least two grounds: 1. Because the city was led by the contrivance of the water company to agree to pay, under the name of rent, a subsidy to a railroad: and, 2. Because the mayor had not sufficient authority to execute it on the part of the city."

[28] Counsel for the city cites many cases upon which they rely, and which it seems proper to carefully consider.

Among these is Denver v. Hallett, 34 Colo. 393, 83 Pac. 1066. But that case involved simply whether or not the issuance of bonds by the city for the construction of an auditorium within the city and for public use, was a municipal purpose within the meaning of the laws of the state. The question did not involve that of aid to a private corporation, or any joint ownership or partnership with such person or corporation. It was an entirely different and distinct proposition and can in no way aid in the determination of the case at bar.

I apprehend that if the proposition there involved an agreement between the city and a private party, wherein the city was to pay two-thirds of the cost, and a private person or corporation was to pay one-third of the cost, with each party reserving the right to separate and different uses of the building, or to different parts thereof, and coupled with the provision that the city should thereafter sell its interest therein to the private party for its own uses, the bond issue could not and would not have been sustained.

From a careful examination of the authorities cited in the able and exhaustive briefs of counsel on both sides of this controversy, and from such examination as we have been able to make in the limited time at our disposal, we do not find one that even hints that it is

within the ordinary powers of a municipal corporation to construct an improvement, convenience or necessity with the avowed and declared purpose of selling the same or an interest therein, to a private person or corporation. This seems to be repugnant to every conception of the term, "municipal purpose."

In this case however, counsel contend that the agreement to sell was a mere option. But the city has expressly agreed to sell and convey title to the railroad company for a stipulated price, and the railroad company has agreed to buy and pay the agreed price. This [29] constitutes an executed contract, not an option. But if it were said to be an option, it is still a contract to sell, and for such reason the purpose of the city is the same.

Counsel for the city cite also as tending to sustain the validity of the proposed bond issue, the following cases: Walker v. Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24; Sun Printing, etc. Assoc. v. New York, 152 N. Y. 257, 46 N. E. 499, 37 L.R.A. 789; Admiral Realty Co. v. New York, 206 N. Y. 110, 99 N. E. 245, Ann. Cas. 1914A 1054; Haeussler v. St. Louis, 205 Mo. 656, 103 S. W. 1034.

Walker v. Cincinnati, supra, involved the validity of an act of the legislature authorizing cities of one hundred and fifty thousand or more inhabitants, under conditions specified in the act, to provide for the construction of a line of railway over terminals, of which one should be within the city.

The specific case was, that the City of Cincinnati voted bonds for the construction of, and did construct a railroad extending from the City of Cincinnati, to the City of Chattanooga, in the State of Tennessee.

The provision of the Ohio constitution said to be violated was: "The general assembly shall never authorize any county, city, town, or township, by vote of its citizens or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or raise money for, or loan its credit to, or in aid of any such company, corporation or association."

It will be seen that the provision of the Colorado constitution is broader and more exclusive than the one stated, in that it denies this power to the state as well as to corporate subdivisions, and uses the terms, "directly," or "indirectly," "in any manner," "public or private," "for any amount," or for "any purpose whatsoever," or "become responsible for any debt," "contract or liability," "in or out of the state," "make any donation to," "grant, or in aid of," "subscribe to," "shareholder in," "joint owner with," etc.

[30] But in that case the purpose of that section of the constitution was distinctly stated to be; "the mischief which this section interdicts is a business partnership between a municipality or subdivision of the state, and individuals or private corporations or associations. It forbids the union of public and private capital or credit, in any enterprise whatever. In no project originated by individuals, whether associated or otherwise, with a view to gain, are the municipal bodies named, permitted to participate in such manner as to incur pecuniary expense or liability. They may neither become stockholders nor furnish money or credit for the benefit of the parties interested therein. Though joint stock companies, corporations and associations only are barred, we do not doubt that the reason of the prohibition would render it applicable to the case of a single individual. The evil would be the same, whether the public suffered from the cupidity of a single person, or from that of several persons associated together."

Such action of the city was there sustained upon the sole ground that it was the exclusive enterprise of the city. This is the view expressed by the same court in later cases, and it was expressly stated in Cincinnati v. Dexter, 55 Ohio St. 93, 44 N. E. 520; that "In Cincinnati v. Walker, the constitutionality of the act is there placed upon the ground that the construction of an improvement of that kind, to be owner exclusively by the municipality, does not involve an alliance of public and private capital or credit, nor constitute a loan of municipal credit to, or raising money for, or in aid of other parties, incorporated, or unincorporated, and, therefore, it is as competent, by legislation to authorize municipal corporations to construct improvements of that nature, and provide means therefor by taxation, when deemed essential to the public interests, as to authorize them to acquire and hold property for other needed public uses, and make other municipal improvements."

In the case of Pleasant Tp. v. Aetna L. Ins. Co. 138 U. S. 67, 34 U. S. (L. ed.) 864, 11 S. Ct. 215, the [31] court speaking through Mr. Justice Brewer, so recognized the distinction made by the Ohio court in the Cincinnati case. This was a case arising under the provision of the Ohio constitution and under which, aid to a railroad corporation was held to be repugnant.

Discussing the spirit of such a constitutional provision as we are now considering, it was said:

"The significance of its inhibition is read in the evil which it was intended to remedy. Common was the practice, therefore, of issuing municipal bonds to aid in the construction of railroads. The practice was felt to be evil, stimulating unnecessary railroad enterprises, and injuriously affecting the interests of the taxpayer. The universal method of railroad enterprises was through private

corporations. The possibility of other methods was unknown, or not seriously contemplated. So, when the people by their constitution prohibited public aid to private corporations, obviously the thought was that all public assistance to the building of railroads was prohibited. The ingenuity of the lawyer and the legislator, by means of which the letter of this prohibition was avoided, and a city enabled to construct a railroad running from itself to other parts of the county, as a great highway of approach and distribution of its business, was obviously not expected or foreseen. We are not criticising the decision in Walker v. Cincinnati, 21 Ohio St. 14, supra, as an erroneous construction of the constitutional provision. We simply note the fact that the statute therein construed was a skillful avoidance of its generally understood scope."

Since the Cincinnati case was decided, the supreme court of Ohio has considered the same question in other cases and in each of these, has denied the validity of a statute authorizing a grant of aid to a railroad corporation. Taylor v. Ross County Com'rs, 23 Ohio St. 22; Wyscaver v. Atkinson, 37 Ohio St. 80; Counterman v. Dublin Tp. 38 Ohio St. 515.

Taylor v. Ross County Com'rs, supra, is a very exhaustive [32] discussion of the question and it was there said, among other things:

"But the tenth section is a constituent part of the plan or method provided by the act for accomplishing its objects. That section provides, that the 'County Commissioners shall have power, and they are hereby authorized, to lease said road, constructed under the provisions of this act, before or after completion, . . . or to sell the same for such compensation and upon such terms as may be agreed upon by said commissioners and lessee or purchaser. . . . Thus, by section ten, it appears the commissioners, or other public authorities operating under the act, are invested with authority to sell or lease the road either before or after completion. It would be within their power to sell what is called the road at any time; certainly after the making of the contract. Now, in such case, what is sold? Substantially the right to use the public bonds to construct a work which becomes the property of the purchaser as fast as it is built."

And again: "The extent of such aid can make no difference. The mandate of the constitution is, that such aid shall never be authorized. Whatever is furnished must be exacted by taxation; and whether the amount be large or small, to recognize the authority under which it is sought to be imposed, would be to deny the protection guaranteed by the constitution to every tax-payer."

In Wyscaver v. Atkinson, supra, after quoting and approving the doctrine of other Ohio cases it was said:

"And I will add, that it make no difference whether the scheme for the union of public and private money or credit, originates with the party or parties representing the public or the private interests. In short, the thing prohibited is the combination in any form whatever of the public funds or credit of any county, city, town or township with the capital of any other person, whether corporated or unincorporated, for the purpose of promoting any enterprise whatever. From these views it is plain that the statute before us manifests an intent to do [33] that indirectly which, if done directly, would constitute a palpable infraction of the constitution, for which reason it must be declared inoperative and void."

Sun Printing, etc. Assoc. v. New York, supra, involved the validity of a statute authorizing cities of over a million inhabitants to construct railroads therein which shall be deemed public highway, at their own expense, etc.

This was a case where the city of New York constructed at its own expense a system of subways for transportation purposes. The city was to own these in perpetuity and to lease the use thereof to a private corporation for a limited term. The subways were to be constructed entirely within the city and for the use of the public therein. The court held that this was not in violation of a constitutional limitation similar to our own, for the reason that the improvement was to be constructed entirely by the city, to be owned by the city and in perpetuity, and that it was not in aid of a private corporation, nor was there any joint ownership, nor mingling of public funds with that of private persons or corporations. But it was held in that case that such a lease by the city in perpetuity, would be in violation of the constitution, and construed the leases proposed, to be for a limited term only.

That case clearly distinguishes the right of a city to construct and perpetually own as its sole property, such a public improvement, from a joint ownership, or, aid of, or the loan of the city's faith or credit to a private corporation.

Speaking of the constitutional inhibition the court said:

"This provision should be construed with reference to the evils it was intended to correct. It first found place in the Constitution in 1874. Prior to this, there had been upon the statute books that which was commonly known as the Town Bonding Act. Under it numerous railroads had been built upon the bonds procured from towns through which they were constructed in return for

stock issued by the [34] corporations. The inhabitants of the towns were induced to give their consent through supposed benefits that would result to their property and upon representations that the earnings of the road would provide dividends upon the stock, with which they could pay their bonds. In some instances the bonds were procured and sold and the roads never built. In many other cases the roads in a few years were sold out under foreclosure of mortgages and the stock cut off. So great was the evil and so heavy was the burden upon the towns that relief was sought through a constitutional provision. It was this evil that the provision in question was intended to correct, and with this situation in view it should be construed. There had been, at that time, no attempt on the part of municipalities to construct and own railroads. Such a project had not been publicly promulgated, discussed or contemplated. The towns had subscribed for the stock in private corporations and in most instances they had lost. Hence, the provision that they should not give any money or loan their credit to or in aid of any individual, association, or corporation, or become owners of stock or bonds of any such individual, association or corporation. This was not intended, nor does it prohibit municipalities from constructing their own roads and paying therefor when necessary and authorized by the legislature."

It was further said in that case, that "we do not understand that the views above expressed are in conflict with the Ohio cases. In that state the constitution does not limit municipal expenditures to a 'city purpose.' We do not, however, wish to be understood as approving of these cases, especially in so far as they sustain the right of a city to construct a railroad mainly outside of its own territory and state."

In the case at bar, there is not only the objection that there is a grant of lease in perpetuity, but of an absolute sale of the tunnel itself, reserving only an easement for the possible purpose of conducting water and electricity through it, and which shall in no way interfere [35] with the railroad's exclusive and perpetual use for railway transportation purposes.

The case of Admiralty Realty Co. v. New York, supra, involved the question of the lease of the subways then constructed and owned by the city, and of the construction of additional subways, by the city and to be owned by it, and the lease by the city of all these.

This was no different in principle from the case of Sun Printing, etc. Assoc. v. New York, supra, and it was expressly said:

"It is to be noted that there is no provision that the city shall loan its credit by guaranteeing payment of the bonds by which it is assumed the Interborough Company will raise the money which it is to expend."

The case of Haeussler v. St. Louis, supra, was one which involved an issue of city bonds for the following purpose:

"For the construction and maintenance of a municipal bridge for public use by railroads, street cars, vehicles of all kinds and pedestrians, over and across the Mississippi river and located within the corporate limits of said city of St. Louis, and the state of Illinois, and for the purchase of all lands to be used for approaches in connection therewith, and which said bridge shall at all times, be and forever remain a free bridge; *provided*, however, the city reserves the right to grant franchises for the use of such bridge for public service purposes, upon such terms and compensation as may be prescribed by ordinance; and, provided further, that no such franchise shall confer an exclusive right in respect to such public service purposes upon the grantee thereof."

This was authorized by a state statute, and by an act of congress permitting one end of the bridge and the approach thereto in the state of Illinois.

But here likewise, the city exclusively was to construct and forever own the bridge, and which was to remain a free bridge forever, with the right of the city to [36] grant franchises but not exclusive, for the use of such bridge for public service purposes.

It was held in that case that this was not in violation of a constitutional provision similar to the one we are discussing and the reason therefor was expressly stated as follows:

"These ordinances in no wise violate the constitutional provisions quoted. Under these ordinances not a dollar is given to any individual or corporation, nor by them has the city become a subscriber to the capital stock of any railroad or other corporation. On the other hand, the city is to be the absolute and sole owner of the proposed public improvement, and is to have the absolute and sole control and management thereof. Similar constitutional provisions in like cases have been discussed by the courts, and in practically every case the holdings are against the contentions of the plaintiffs. Sun Printing etc. Assoc. v. New York, 152 N. Y. 257, 46 N. E. 499, 37 L.R.A. 788; Brooke v. Philadelphia, 162 Pa. St. 123, 29 Atl. 387, 24 L.R.A. 781; South St. Paul v. Lamprecht Bros. Co. 88 Fed. loc. cit. 454, 31 C. C. A. 585; Prince v. Crocker (Boston Subway Case) 166 Mass. 347, 44 N. E. 446, 32 L.R.A. 610; Walker v. Cincinnati, 21 Ohio St. loc. cit. 55, 56, 8 Am. Rep. 24; Pleasant Tp. v. Etna L. Ins. Co. 138 U. S. loc. cit. 74, 11 S. Ct. 215, 34 U. S. (L. ed.) 864.

"It may be true that, under the terms of the ordinances and the law, the city can grant to railway and street car corporations the right to use the public highway, so constructed, owned and controlled by it; but that does not change the ownership nor the control. Such is true of every highway controlled by the city. Such privileges can be granted, provided the public way is not seriously impaired for public use."

It should be noted that in no case brought to our attention involving a similar constitutional provision, has the right of a state, city, county, township or other corporate entity of the state, being sustained to aid a private [37] corporation, by means of subscription to stock, the issue of bonds, by joint interest or ownership, or through direction or indirection, or by any means or device whatsoever. Indeed, this question has been so well settled by the Supreme Court of the United States, and appellate courts of the states, that we find no recorded case since that of Pleasant Tp. v. Etna L. Ins. Co. supra, decided in 1891, in which there has been an attempt to violate, or evade such a constitutional limitation, until the present case.

All cases cited as tending to sustain the contention of the city here, are those wherein the municipality is the sole contributor to the enterprise and the sole owner thereof, and in perpetuity. In none of such cases was there commingling of public and private funds, in any form or manner whatsoever. That a city may, with the good faith purpose of constructing or enlarging a municipal water plant, construct a tunnel or other improvement, reasonably necessary to convey its supply of water or an essential part thereof, to the city and at any point beyond the limits of the city, cannot be questioned.

This power is clearly conferred by section one of the 20th article, and has been universally held to exist, as implied within the express power to construct, own and maintain such municipal water plant. But this must be by the municipality alone, and as being a public purpose for which taxes may be levied.

The question presented here is entirely different from that where a city undertakes to construct such a tunnel, with such necessary and good faith purpose, with its own funds, and to be so exclusively owned by the city. But the proposed bond issue here, is clearly both in letter and spirit, within the inhibition of secs. 1 and 2 of art. XI, of the constitution, and is void. So holding, it becomes unnecessary to consider the question concerning the length of time for which such bonds may run.

The judgment is reversed with instruction to overrule the demurrer and proceed in accordance with the views expressed in this opinion.

En banc.

[38] GABBERT, J. (*dissenting*).—At an election held May 20, 1913, section 355 of the charter was adopted by the electors of the city. By this section a tunnel commission was created, and provisions made for the issuance of bonds to raise funds with which to construct the "Moffat Tunnel," and on February 17, last, the taxpayers of the city, voted in favor of issuing such bonds. It is the validity of these bonds which is the subject of inquiry, and the only question involved in this proceeding, and the question thus presented must be determined by ascertaining whether the city, by our fundamental law, the constitution of the state, is without power, or is inhibited to create an indebtedness by the issuance of the bonds in question, for the purposes and under the conditions specified in section 355 supra, and the contract hereafter noticed, in order to raise funds with which to construct the tunnel. The amendment to the charter, section 355, and the authorization of the voters to issue the bonds are legislative acts adopted by the people of Denver under their charter. It is elementary, as often declared by this court, that a legislative act will not be declared unconstitutional, unless it is clearly and palpably so, and, in cases of doubt every intendment will be made in favor of its constitutionality, and that courts will only interfere in cases of clear and unquestioned violations of the fundamental law. In other words, a legislative act must be held constitutional, unless its unconstitutionality is established beyond a reasonable doubt.

The majority opinion declares the city is without authority to authorize the issuance of the bonds involved, because inhibited by sections 1 and 2 article XI of the constitution. With due deference to the majority, it is submitted, that this is not tenable. In substance, so far as material to consider, sections 1 and 2 article XI provide [39] that a city shall not lend or pledge its credit, directly or indirectly in any manner to, or in aid of any corporation for any amount, for any purpose, or become responsible for any debt, or liability of any corporation, nor shall it make any donation to, or in aid of any corporation, or become a joint owner with such corporation. That neither of these provisions is violated, is clear when section 355 of the charter, and the contract entered into between the tunnel commission, and the Denver and Salt Lake Railroad Company are analyzed. Section 355 creates a tunnel commission, and confers upon that body all the powers granted to the city by article XX of the constitution, and otherwise existing by operation of

law; authorizes the commission to acquire, construct, build, or assist in building, a tunnel through the main range of the Rocky Mountains, in the vicinity of James Peak, and the necessary approaches thereto, to be known as the "Moffat Tunnel," for the purposes of transporting freight, passengers, water, and electricity; provided that in the event the tunnel shall be originally constructed for the transportation of freight and passengers, the right shall be reserved by the city in perpetuity to construct and operate, through such tunnel suitable apparatus for conveying water and electric current from the western to the eastern portal for the use of the inhabitants of the city, and to permit the use of the tunnel, upon a fair and equitable basis, by any and all railway lines desiring such use. It also provides the commission may arrange that a portion of the funds needed for the construction of the tunnel may be furnished by corporations, and that the commission may enter into contracts with such corporations with reference to the construction, control, future lease, sale, or disposition of the tunnel, but expressly provides that until the city shall have been reimbursed in full for all moneys expended by it with interest, and is discharged from all financial liability in connection therewith, it shall retain the ownership of the tunnel, and that the rights reserved to utilize it for the transportation [40] of water and electricity, shall be perpetually retained, notwithstanding, any sale or lease of the tunnel. The section then provides that if on investigation the commission shall find that the construction of the tunnel is desirable and feasible, that that body shall determine the amount of bonds necessary to be issued for that purpose, and may by ordinance of the city council, submit to the vote of the taxpaying electors, the proposition of issuing such bonds, and if it is carried, that annually thereafter, a tax shall be levied to raise funds to discharge the interest and the principal of the bonds as they mature, unless suitable provisions for these purposes are otherwise made, and finally declares, "The inhabitants of the City and County of Denver, by the adoption of this Charter Amendment, do find and declare that the said tunnel will, in their judgment be of local use and convenience to the people, and that it is also absolutely essential to the future growth and welfare of the said City and County."

After the adoption of this section the commission entered into a contract with the Denver and Salt Lake Railroad Company, which owns and is operating a line of railroad from Denver west, the salient features of which are as follows: The tunnel shall be constructed by the commission and two thirds of the cost, or three million dollars is to be paid by the city, and one-third by the railroad up to four and one-half million dollars, and the excess above that amount, if any, is to be paid by the company; that the amount to be paid by the company shall be deposited with a depository, to be mutually agreed upon, or secured in a suitable manner; that the company shall pay the interest on the bonds and provide a sinking fund to discharge them at maturity, and that the consideration for the obligations which it thus assumes, is the right to operate and maintain the tunnel for railroad purposes, and ultimately acquire it for this purpose. It requires the railroad company, upon the request of the city, to allow any other railroad company to use the tunnel, and its tracks and facilities for a [41] distance of thirty miles east and a distance seventy-five miles west of the tunnel, upon specified conditions. The contract requires the company to commence work upon the extension of its road from Craig to Salt Lake contemporaneously with the commencement of work upon the tunnel, and complete it within five years after the completion of the tunnel. By the contract the company is given the option on or before the maturity of the bonds, to purchase the tunnel by the payment of the principal of such bonds, and accrued interest thereon, but this option is subject to the perpetual right of the city to transport through the tunnel, water and electric current, and also subject to the perpetual right reserved by the city to have the tunnel, approaches and tracks outside used by other railroads. In other words, the option extends only to the purchase of the tunnel by the company for its own railroad operation purposes, and does not give the company the right, in the event of such purchase, to interfere with the use of the tunnel by the city for any of the other purposes for which it is to be built by the city. The company is to operate the tunnel for railroad purposes at its own expense. Finally, the contract provides that if the company, after completion or during the construction of the tunnel, fails to pay the interest on the bonds or deposit the necessary amount in the sinking fund, or comply with any other material provision of the contract for three months, it may be terminated by the commission, and all moneys paid by the company thereunder forfeited and held as liquidated damages. It contains other provisions which are not of any moment in determining the validity of the bonds.

From the foregoing synopsis of the provisions of section 355 and the contract, it is apparent that there is not a word or line in either which violates, in letter or spirit, the inhibitions contained in sections 1 and 2, article XI, of the constitution. The city has not loaned or pledged its credit to, or in aid

of the railroad company in any amount, or in any manner, for any purpose whatever; it [42] has not become responsible for any debt, contract, or liability of the company, neither has it made any donation or grant to, or in aid of the company. In brief, the construction of the tunnel is undertaken by the city alone for its own benefit, and the tunnel is, and remains its own exclusive property until the option to purchase is exercised. True, the company is to furnish at least one third of the cost of the tunnel, but the city is not obligated to refund the sum thus advanced, and incurs no liability of any kind in connection with such advancement. On the contrary, if the company fails to comply with the obligations imposed upon it by the contract, it forfeits the advancement to the city. The consideration for the advancement by the company is an option to purchase the tunnel, and a lease or license to lay tracks in the tunnel, and operate its trains through the same. It would certainly be an anomalous proposition to say that because the city had undertaken to construct the tunnel it was without authority, for a valuable consideration, to contract in advance to sell or lease it for one of the purposes for which it was constructed. No such inhibition is found in the provisions of the constitution under consideration, and it is impossible, in my opinion, to deduce from either section 355 of the charter, or the contract, that by this arrangement the city has pledged its credit to, or in aid of the company; become responsible for its debts, or made a donation to it. The option to purchase and lease or license given the company is nothing more than the exercise of wise business judgment on the part of the commission, which assures the use of the tunnel for one of the main purposes for which it was designed, and in effect provides for a return upon the investment by the city, until the option to purchase is exercised, and then if exercised, leave such rights in the city as will enable it to require the purchaser to permit the use of the tunnel by other railroad companies, and the other purposes for which it is designed. Nor in the event the company purchases the tunnel, nor under the arrangement existing, until the option to purchase is exercised, is [43] there any joint ownership which the constitution inhibits. The tunnel is the property of the city. It has no interest whatever in the railroad or its operation; this belongs exclusively to the railroad company, and in case it purchases the tunnel its ownership is for a purpose with which the city is in no manner connected. The city will still have the right to use the tunnel for the transportation of water and electricity, but this right belongs to it alone. The joint ownership which the constitution inhibits, is a joint ownership for the same purpose or use. Neither can it be said that because the section provides that the commission may assist in building the tunnel, it thereby lends aid to a corporation which the constitution inhibits, as that would depend upon whether under any contract the commission entered into, by virtue of provision of the section, aid was given contrary to constitutional restrictions. It is therefore manifest that plaintiff in error has not only failed to establish beyond a reasonable doubt, that section 355 of the charter or the contract violate the constitutional provisions under consideration, but it appears clearly and beyond question that they do not.

Suppose the tunnel commission had been given power in the first instance to construct the tunnel at the expense of the city, by the issuance of bonds, and after it had been constructed, had been authorized in a legal manner to enter into a contract with a railroad company, operating a line of road from the city west, to lease the tunnel to the company for railroad purposes, and give it an option to purchase the tunnel, it certainly could not be said that such authority was inhibited by the constitution. Between such an arrangement and the one made there is no difference in effect or principle, except that the commission by entering into the arrangement it has in advance, as authorized to do by section 355, has exercised sound business sense for the reason provision has been made before any money is expended which assures the use of the tunnel for the transportation of freight and passengers, the payment of a valuable consideration upon the [44] money expended, and for a sale which will reimburse the city for all expenditures. Such an arrangement is to be commended, rather than condemned upon the theory that thereby constitutional limitations are violated, when in effect it is simply the exercise of good business judgment.

Counsel for plaintiff in error contends that the city is without power to issue the bonds because a municipal corporation cannot exercise any powers except those expressly granted, or fairly implied as incident to such powers, or those essential to the declared objects and purposes of the corporation. This is a sound proposition of law, but in no sense applicable. Denver is operating under a special charter by virtue of the provisions of article 20 of the constitution. In Walker v. Cincinnati, 21 Ohio St. 14, 14 Am. Rep. 24, an act of the legislature of Ohio which empowered the city to build a railroad from the city to Chattanooga, was under consideration. The supreme court of Ohio held, that unless prohibited by the constitution it was within the legitimate scope of legislative power to authorize a city to construct a railroad in which it had a special interest. In this con-

nection it should be noted, that Judge Dillon in his work on municipal corporations, from which counsel for plaintiff in error have quoted extensively, says in effect that in the absence of special restrictive constitutional provisions, it is competent for the legislature to authorize a municipal corporation to construct railways in which such corporation has a special interest, and impose upon its citizens taxes for that purpose. If Denver could construct a railroad to Salt Lake, including the tunnel, clearly it may construct one of the important links in the line, namely, the tunnel alone, on its own account, and in consideration of a railroad company aiding in constructing it, give such company a lease and option to purchase. Otherwise the tunnel would not benefit the city. Our own court has repeatedly held that the object of article XX was to confer upon the people of Denver, not only the powers expressly mentioned in that article, but every [45] power the legislature theretofore possessed in making a charter for Denver.

It was upon the basis that the people of the city of Denver possessed power to legislate with respect to charter provisions that we held in the Auditorium case (Denver v. Hallett, 34 Colo. 393, 83 Pac. 1066), it was within the power of the people of the city of Denver to provide by charter for the erection of an auditorium, and to issue bonds to discharge the indebtedness for that purpose, for the reason that the people of the city possessed the power to legislate on this subject. That is precisely the situation in the case at bar. Authority has been conferred upon the tunnel commission to build the Moffat tunnel, through legislation by the people of the city, which they have the power to enact. They have provided for the issuance of bonds for this purpose; they have declared that the tunnel will be of local use and convenience to the people, and that it is absolutely essential to the future growth and welfare of the city. It is manifest from the topography of the country west of the city, the necessities of the city, and the beneficial results which will follow the construction of the tunnel that these declarations have ample foundation upon which to base them. If the city could build an auditorium, which it was evident was not necessary for any municipal purpose, in the ordinary meaning of that term, and could not result in any financial benefit to the people of the city, except as it would serve to attract national conventions of various organizations which might meet here at long intervals of time, it certainly cannot be successfully asserted that the electors of Denver may not make provision by appropriate legislation, to construct a tunnel for the transportation of freight and passengers which will be of benefit to the people every day in the year.

Counsel for defendants in error contend that special authority is conferred upon the city to construct the tunnel under article XX of the constitution. It is unnecessary to discuss this question, as it is clear the city is not inhibited from constructing such tunnel by that section.

[46] Counsel for plaintiff in error suggest that some portions of section 355 are invalid because they undertake to empower the city to engage in business which it cannot be permitted to engage in. In answer to this it is only necessary to say, that where a part of an act is unconstitutional it does not vitiate the part that is good, when the good and bad can be clearly separated, and the good is complete in itself, and does not depend upon the void portion. They also urge that the section violates section 8, of article XI of the constitution. In the opinion of the writer this contention is not tenable.

In my opinion the judgment of the district court sustaining the validity of the bonds should be affirmed.

NOTE.

Power of Municipality to Enter into Partnership Contract for Construction of Improvement.

The few cases passing on the point are in accord in holding that a contract whereby a municipality engages jointly with a private individual or corporation in the construction of an improvement for joint use, is invalid as a loan of the municipal credit for private benefit. Armiral Realty Co. v. New York, 206 N. Y. 110, Ann. Cas. 1914A 1054, 99 N. E. 241 (*affirming* Hopper v. Wilcox, 76 Misc. 345, 135 N. Y. S. 384; Admiral Realty Co. v. New York, 151 App. Div. 888, 135 N. Y. S. 1097, and Ryon v. Wilcox, 151 App. Div. 890, 135 N. Y. S. 1140); Alter v. Cincinnati, 56 Ohio St. 47, 46 N. E. 69, 35 L.R.A. 737. See also the reported case. In several cases there are dicta to the same effect. Garland v. Montgomery County, 87 Ala. 223, 6 So. 402; Atkinson v. Ada County, 18 Idaho 282, 108 Pac. 1046, 28 L.R.A.(N.S.) 412; Walker v. Cincinnati, 21 Ohio St. 14, 8 Am. Rep. 24; Wyscaver v. Atkinson, 37 Ohio St. 80; Cincinnati v. Dexter, 55 Ohio St. 93, 44 N. E. 520; Brode v. Philadelphia, 230 Pa. St. 434, 79 Atl. 59; Colburn v. Chattanooga Western R. Co. 94 Tenn. 43, 28 S. W. 298. In Alter v. Cincinnati, supra, an action brought to test the constitutionality of a statute known as the waterworks act, which in effect was interpreted to authorize the city to enter into a joint enterprise with private corporations, it was declared that such a legislative provision was unconstitutional in that it sanctioned the commingling of public and private capital in contravention of the

constitution. The disputed statute read as follows: "Section 8. If said commissioners should deem it inexpedient or inadvisable to proceed under section 7 of this act, then, in order to provide for the construction of water-works, if there be none existing, or for the enlargement, improvement or addition to existing water-works, said commissioners are hereby authorized to contract, in the name of the city, with any person, company, or corporation, their successors or assigns, for the construction of such works, or such enlargements, extensions, improvements or additions, as an entirety, in accordance with the surveys, plans and specifications that may be adopted, and for the exclusive privilege of connecting such enlargements, extensions, improvements, or additions to the existing water-works, and for a lease on behalf of such city of such water-works of such enlargements, extensive improvements or additions to the same, from the person, company or corporation, their successors or assigns so constructing the same, upon such terms as may be agreed upon, and may by said contract or lease pledge the income of such water-works as so constructed and enlarged, to secure the payment of the rentals provided in said lease. And said commissioners are hereby authorized to convey to such person, company or corporation, their successors or assigns, any property or rights acquired, or which may become necessary to acquire, under the provisions of section 6 of this act or authorize the use of any property which may be necessary to enable the said person, company or corporation, their successors or assigns, to complete the construction or enlargements, extensions, improvements or additions to existing water-works, upon such terms and conditions as may be agreed upon; provided, however, that no such lease shall be made for a longer period than forty years, renewable forever, with the right reserved to said city, upon six months' notice in writing, at the end of each period of ten years, or at such shorter period as may be agreed upon during the term of said lease, to purchase said water-works, or the enlargements, extensions, improvements, and additions to the water-works, under such terms and conditions as may be agreed upon in said contract; and provided further, that in making such contract, said commissioners shall be governed by all the statutes now in force relative to competitive bidding, and the making of contracts. And provided further, that if said commissioners enter into said contract and lease, as herein provided for, then said work shall be operated, managed and conducted by such city as provided by law." The court said: "The serious question is, whether this section eight is constitutional. Section six of article eight of the constitution is as follows: 'The general assembly shall never authorize any county, city, town or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation or association whatever, or to raise money for or loan its credit to, or in aid of, any such company, corporation or association.' . . . This section of the constitution not only prohibits a 'business partnership,' which carries the idea of a joint or undivided interest, but it goes further and prohibits a municipality from being the owner of part of a property which is owned and controlled in part by a corporation or individual. The municipality must be the sole owner and controller of the property in which it invests its public funds. A union of public and private funds or credit each in aid of the other, is forbidden by the constitution. There can be no union of public and private funds or credit, nor of that which is produced by such funds or credit. The whole ownership and control must be in the public. The city may lease from an individual or corporation any property of which it may need the use, or having property the use of which it does not need, it may lease the same to others, but it cannot engage in an enterprise with an individual or corporation for the construction or erection of a property which, as a completed whole, is to be owned and controlled in part by the city, and in part by an individual or corporation. . . . It will be noticed by a careful reading of section eight, that the water-works and the enlargements will be owned by the person, company or corporation constructing them, that the existing water-works are owned by the city, that to these water-works so owned by the city, an individual or corporation may make enlargements, extensions, improvements and additions to be owned by the person or corporation making them, and to be connected with the existing works, and to be leased to the city upon such terms as may be agreed upon. When the enlargements, extensions, improvements and additions shall be thus made, completed and connected with the existing water-works so owned by the city, the enlargements, extensions, improvements and additions, together with the existing works, all taken together, will constitute one completed whole—one water-works system, one water-works—owned in part by the city, and in part by the individual or corporation, and thereby the union of public and private capital and funds in one enterprise will become complete. The provision that the works shall be operated, managed and conducted by the city, does not relieve the matter, because before the city can operate the works, it must first obtain a lease upon such terms as may be agreed upon, and that puts it beyond the power of the city to operate and control the

works as sole proprietor. It would be a joining of two properties owned by different parties, together, to make one property, the parts owned by each being necessary to the successful operation of the whole, and each owner having his say as to the terms and conditions upon which the whole should be operated. The existing water works would be so tied to the extensions as to be dependent upon them, and the extensions would be so tied to the existing works as to be of but little value without them. It is this close connection and dependence one upon the other that constitutes both together as a single whole, and makes a union of public and private funds and credit. The existing works are to be connected with the new improvements, and are thereby to lend aid to the person, company or corporation making and owning such new improvements. The case is not like a city leasing a building or water-works plant owned by another, because in such case the leased property, would stand upon its own merits, and would not, before or after the lease, become merged into the other property of the city so that the whole would become one property, and make the property of the city dependent upon the leased property for its value and utility. Whether the city has the right to appropriate private property, for the sole purpose of selling the same to a private person, company or corporation, as provided in the sixth and eighth sections, may well be doubted. We regard the eighth section of the act as clearly in conflict with section six of article eighth of the constitution, and therefore void." And in Admiral Realty Co. v. New York, 206 N. Y. 110, Ann. Cas. 1914A 1054, 99 N. E. 241 (*affirming* Hopper v. Wilcox, 76 Misc. 345, 135 N. Y. S. 384; Admiral Realty Co. v. New York 151 App. Div. 888, 135 N. Y. S. 1097, and Ryon v. Willcox, 151 App. Div. 890, 135 N. Y. S. 1140), wherein it appeared the city of New York entered into a contract with certain private corporations for the construction of subways, the court held that the terms of the contract did not warrant the conclusion that the relation between the city of New York and the traction company was a partnership but was that of lessor and lessee and on this basis the contracts were upheld. The court intimated several times in the course of its decision that if the circumstances were such as to support the conclusion of the existence of a partnership transaction then the contracts could not be sustained. Thus it was said: "In attacking these contracts much is said about a joint ownership of property, about the speculative partnership between the municipality and the railroad company and about the obnoxious pooling of the proceeds derived from the joint operation of municipal and privately owned property. While these arguments indirectly are entirely pertinent and legitimate, we must not allow them to obscure the exact and only question presented to us in this connection." And in distinguishing the case from that of Alter v. Cincinnati, supra, the court said: "When we keep in mind that under the Brooklyn contract, most favorable for the appellants' argument, the municipality and the private corporation each retains the title to and ownership of its property, and that the only joinder of the two is under a contract for joint operation for a limited period, we see that this comes far from presenting a situation such as was held to be illegal in Alter v. Cincinnati, 56 Ohio St. 47, which of the Ohio decisions cited by the appellants is especially relied on. In that case the court had before it for consideration a constitutional provision not unlike that now before us as affecting the validity of a statute for the construction and extension of water-works by municipalities. In brief this statute provided that a municipality and a private owner might become the joint owners of indivisible interests in a single water system, and this was condemned by the court." In an opinion by Chief Justice Cullen in the same case wherein he dissented as to the nature of the contract in question the rule was more emphatically stated as follows: "That this contract creates a partnership, and a very one-sided partnership at that, between the city and the railroad company seems to me entirely clear. Indeed, it is so denominated by the railroad company in its proposals to the city. That if the agreement was between private individuals or corporations it would create a partnership is settled law, because the parties are entitled to share in the profits as such (Manhattan Brass, etc. Co. v. Sears, 45 N. Y. 797; Burnett v. Snyder, 81 N. Y. 550, 555; Leggett v. Hyde, 58 N. Y. 272), though it must be conceded that the city's chance of sharing is somewhat remote. But it is contended, assuming that a partnership is created, that there is no violation of the constitutional provision. The learned judge who decided the case at Special Term has written: 'The city does not give its property, it leases it; the city does not guarantee the yearly $6,335,000, for it does not pledge its credit that this amount will be realized; leasing property, even if the lease be so valuable as to enable the lessee to borrow on it, is not lending the lessor's credit to the lessee, and finally there is no express prohibition in the constitution against mingling public and private property, or against a partnership.' I am constrained to differ with the court on each of these propositions. I have already shown that a gift of property may be as easily made by a lease as by a conveyance of a fee. It seems that there are in this state

leases for 990 years at an annual rent of three peppercorns. (Elmira v. Dunn, 22 Barb. (N. Y.) 402.) Who is the real owner of the property, the landlord or the tenant? The gift of the use for a year of a building renting for twenty thousand dollars annually is greater than the gift of the fee of a building worth only ten thousand dollars. Equally clear is it that a city may loan its money or credit to a corporation without guaranteeing its bonds or other obligations. It is urged that the constitutional inhibition is against loaning money or credit, but not against loaning property. Even that technical argument fails in this case because the agreements to spend the money to build the subway and to lease it when built are but interdependent parts of a single and entire contract. If, therefore, the terms of the lease are such that the use of the property is given in aid of the corporation, the money which the city agrees to expend to create the property is equally so given. So, also, while the word partnership is not mentioned in the constitutional inhibition, it is as clearly condemned as if named, for the inhibition is in terms so comprehensive as necessarily to include partnerships. In every partnership the credit of each partner is pledged so far as the common venture is concerned in aid of each of his copartners, except in a special partnership, and there the capital contributed by the special partner is equally pledged for the same purpose. On this last proposition authority is not wanting."

CANADIAN PACIFIC RAILWAY

v.

JACKSON.

Canada Supreme Court—Nov. 29, 1915.

52 Can. Sup. Ct. 281.

Damages — Personal Injury — Verdict Not Excessive.

A verdict awarding $27,000 to a railroad engineer thirty-two years old for injuries permanently incapacitating him from labor will not be set aside as excessive.

[See note at end of this case.]

Witnesses — Competency — Knowledge of Facts.

A witness who knows the cost of an annuity, and can identify the mortuary tables in use by insurance companies is competent to testify thereto though he is unable to explain the manner in which the cost is estimated or the basis on which the table is prepared.

Appeal from Appellate Division of Supreme Court of Alberta.

Action for damages. Franklin Seaford Jackson, plaintiff, and Canadian Pacific Railway, defendants. Judgment for plaintiff in trial court. Judgment affirmed by Appellate Division of Supreme Court of Alberta. Defendant appeals. The facts are stated in the opinion. APPEAL DISMISSED.

O. M. Biggar, K.C. and *Geo. A. Walker* for appellant.

Frank Ford, K.C. and *G. M. Blackstock* for respondent.

Geo. A. Walker, solicitor for appellant.

Mahaffy & Blackstock, solicitors for respondent.

[282] THE CHIEF JUSTICE.—The respondent, an engine-driver in the employ of the appellant company, was severely injured whilst in the performance of his duty. The jury found the appellant "guilty of negligence from the fact that the mail crane was in faulty condition and that the plaintiff was injured by it in the performance of his duty." They awarded the plaintiff $27,000 damages.

I have no hesitation in saying that in my opinion the amount of the damages is too large. There is, however, a general consensus of authority that it is for the jury alone to fix the amount of damages to be awarded in an action and that under ordinary circumstances the verdict should not be set aside merely on the ground that the damages appear excessive. Where the damages are manifestly so unreasonable that no body of twelve men could have honestly given such a sum, or where it is shewn that in arriving at the amount the jury took into consideration something which they ought not to have taken, or failed to take into consideration something which they ought to have taken, there may be ground for the court to set aside the verdict. It is not, however, a ground [283] for interference that the damages seem to the court too large and more than would to most people have seemed ample.

One might assume that the jury have not sufficiently taken into account the accidents of life, and that they probably misapprehended the effect of the figures in the actuarial tables produced, but, with all respect, I do not think that is sufficient to justify us in granting a new trial on the ground that the jury have gone beyond a figure which any jury of reasonable men properly informed as to the question which they were to decide could have reached.

In Thoms v. Caledonian R. Co. [1912-13] Ct. Sess. (Eng.) 804, Lord Kinnear said:

"Now it is impossible to read the account of this man's history and his present posi-

tion without seeing that no amount of damages could ever be considered as real compensation for the personal injury he has suffered. It is obvious that that is not a consideration which can be pressed to any logical conclusion because the result of it would be that the defender, in a case of personal injury, might be ruined, and yet the pursuer not compensated. And, therefore, that cannot be treated as a ground for any exact or logical estimate of damage, but I think it is a consideration which may fairly lead us to think that, upon a question of this kind a larger latitude, within the bounds of reason, is to be allowed to a jury than upon matters which are capable of anything like exact calculation."

The same might well be said of the respondent in the case as it comes before us.

This court held in Fraser v. Drew, 30 Can. Sup. Ct. 241, that where a case has been properly submitted to a jury and their findings upon the facts are such as might be the conclusions of reasonable men, a new trial will not be granted on the ground that the jury misapprehended or misunderstood the evidence, notwithstanding that the trial judge was dissatisfied with the verdict.

[284] The case of The Canadian Pacific Railway Co. v. Roy, decided in this court in November, 1913, might be consulted with advantage. On that appeal the only question pressed was as to the amount of the damages.

That the damages were excessive, was the only ground for setting aside the judgment that was urged by the appellant at the argument before us. I do not think the damages, though undoubtedly high, are so excessive as to warrant the interference of this court on that ground. I do think, however, that the trial judge did not direct the jury as fully as was desirable as to the measure of damages which the plaintiff was entitled to recover. True, he told them that they were not to award punitive damages, but the instruction would, I think, have been more intelligible to lawyers than to a jury of laymen. I cannot help thinking that the amount of the damages awarded indicates that the jury did not properly appreciate the considerations on which they had to assess these damages.

There is yet another serious objection to this judgment being allowed to stand. Although, as I have said, the amount of the damages was the only question discussed, on the hearing before this court, the notice of appeal by the defendants to the Appellate Division of the Supreme Court of Alberta claims that there was no evidence of negligence on the part of the defendants.

Now there was, I think, misdirection by the learned judge at the trial. After referring to the [285] order of the Board of Railway Commissioners, dated the 20th November, 1908, which provides that "such crane must be erected at a distance of not less than 7' 1¾" . . . in position" (i. e., from the centre of the track), he continues—"that briefly is the allegation of negligence on the part of the plaintiff that this crane was erected or allowed to be closer to the track than the order of the Board of Railway Commissioners provided. That question I must leave to you, whether or not that crane was permitted to be closer to the centre of the track than the order provides for. That is the question which you must determine." And further on he says:

"The defendants in this case would be liable for the acts of their servants or workmen if they did construct this crane closer to the track than the order of the Board of Railway Commissioners provided."

"It may perhaps be assumed that the order was passed for the protection of railway employees in the position of the plaintiff, though, of course, unless this were so, he could advance no claim founded upon it. The judge, however, did not instruct the jury that they must not only find a breach of the statutory duty, but also that this was the cause of the accident.

The failure to give such a necessary instruction was the main reason why the Privy Council directed a new trial in the case of Grank Trunk R. Co. v. McAlpine [1913] A. C. (Eng.) 838, Ann. Cas. 1914A 532. At page 846 the judgment reads:

"Where a statutory duty is imposed upon a railway company in the nature of a duty to take precautions for the safety of persons lawfully travelling in its carriages, crossing its line, or frequenting its premises, they will be responsible in damages to a member of any one of these classes who is injured by their negligent omission to discharge, or secure the discharge of, that duty properly, but the injury must be caused by the negligence of the company or its servants. . . .

"In the last passage quoted from the charge of the learned judge [286] in the present case, he did not point out to the jury that it was necessary, in order that the plaintiff should recover, that the omission to whistle or to give the warning, or both combined, and not the folly and recklessness of the plaintiff himself, caused the accident. For all that appears, the omission to whistle might not have contributed in any way to the happening of the accident. The jury, instructed as they were, may well have been under the impression that the two alleged breaches by the company of its statutory duties—the two faults of which the jury found them guilty—rendered them liable whether or not those faults caused to any extent the injury to the plaintiff or the contrary.

"These are, in the main, the reasons which led their Lordships to the conclusion that a new trial should be directed."

In precisely the same way in the present case the jury, instructed as they were, may have concluded that the breach by the defendants of the order of the Board of Railway Commissioners, of the 20th November, 1908, rendered them liable whether this fault caused the injury to the plaintiff or the contrary.

Though, for these reasons, I am of opinion that there was misdirection of the jury, yet as the appellant has not raised the point I do not think this court should send the action for a new trial on this ground. The respondent ought to have had an opportunity to argue that the verdict shews, as perhaps it does, that the jury were not misled by the misdirection and that no substantial injustice has been caused thereby.

Though I find much that is unsatisfactory about the conduct of this trial and its results, I cannot say that there is sufficient ground for setting aside the judgment. I have not come to this conclusion without much hesitation, and I think it would be unfortunate if the case were to be regarded as any precedent for awarding such enormous damages in similar actions in the future.

IDINGTON, J.—This is an appeal on the ground of excessive damages. There is nothing else put forward [287] to support it except the untenable objection to evidence admitted to shew how much an annuity might be purchased for. This practice of using such evidence to help a jury in arriving at a reasonable estimate has been in daily use for many years in our courts.

The objection that because a man called to testify what his company held to be the market price could not vouch for the accuracy of the tables upon which it and such life companies proceed, therefore the evidence was inadmisible, seems to me as unsound as it would be to object to the evidence of actuaries resting their estimate upon the basis of the "Carlisle Tables," for example, because none of them can vouch personally for the accuracy of the figures upon which such tables rest. The truth is the evidence which was adduced was of little value and made nothing of by the learned trial judge or the jury so far as we can see, but that is quite another thing and furnishes no ground for setting aside the trial, which seems to have been eminently fair.

It is impossible to say there was a miscarriage of justice by reason of anything connected therewith.

To come to the real ground of appeal resting upon excessive damages it may be admitted the damages are large and possibly larger than we as a jury would have assessed.

But can we say they are such as to demonstrate that the jury must necessarily have proceeded upon an erroneous basis or been moved by some indirect motives in arriving thereat?

The almost uniform course of this court has been to refuse to interfere with the mere assessment of [288] damages when maintained by the local court having usually an immense advantage over us in the way of fairly appreciating the damages which must be measured in light of many local conditions.

But I must respectfully decline to accept the suggestion of counsel for appellant, and apparently some of the judges below, that the possibilities of a permanent investment producing eight per cent. per annum forms a proper basis of estimating the value of this verdict simply because that may be a fair rate of interest at the present moment.

We all know, if we can recall the economic history of other provinces, that this will not continue. And some other arguments put forward by counsel and in a measure countenanced in the court of appeal seem to me untenable.

It seems, for example, assumed, as matter of course, that the earnings of the respondent at the time of the accident must be taken as basis for life. They are properly taken in ordinary cases as basis of estimating pecuniary loss of a temporary character. But in the case of a young man only thirty-two years of age, when probably earnings would increase, being disabled for life, there is no rule of law preventing the jury from contemplating the possibilities of the future in that regard.

Again, it was even suggested that the pain and suffering of him injured could not enter into the basis of the estimate of compensation. I dissent entirely from any such proposition. Physical and mental pain and suffering have always, by law, entered into the basis of such estimates, and when these must endure for a lifetime, or the victim be reduced to the deplorable condition of the respondent, it is hard to place [289] the limit of an adequate compensation therefor. And the possible need of attendance to help and comfort him in decay may also be considered.

It is quite true that in cases resting upon the "Fatal Accidents Act," pain and suffering are excluded from the basis of the estimate for damages. In such cases the estimate must be confined to the mere monetary considerations bearing upon the case of survivors who have suffered in a monetary sense as well as otherwise by the death of him upon whom they were dependent for the deprivation of what they might reasonably have hoped to enjoy.

No such rule obtains in the case of him suffering and suing for such damages as caused thereby.

We may yet hear it urged that a man reduced to the impotent condition in which respondent, a young man with the prospects before him of increasing his earnings and savings and thereby adding to the comfort of his life and enjoyment thereof, when so reduced ought to be treated as a helpless creature who can enjoy life no longer and hence might as well be kept, or keep himself in some asylum or house of refuge for a few cents a day, and thereby ameliorate the sad condition of the unfortunate offender in the like position the appellant is now in.

I prefer resting as usual upon the broad common sense of an intelligent jury as being more likely to fix justly the amount which the wrongdoer should pay than to look for justice in anything which might be determined in a very logical way either thus or otherwise.

The appeal should be dismissed with costs.

[290] DUFF, J. (*dissenting*).—With respect I am unable to concur in dismissing the appeal. While the charge of the learned trial judge is not in any way open to exception I have been unable to satisfy myself, after considering the whole of the evidence, that a jury appreciating the evidence and making due allowance for the risk of accident (negligence apart) in a hazardous pursuit, would have given the verdict now before us.

There is, of course, no difference of opinion as regards the principle; which is well settled. The facts are carefully considered in the judgment of Mr. Justice Beck and it is unnecessary to repeat what he has said.

I think there should be a new trial.

ANGLIN, J.—Having regard to all the circumstances of this case—the plaintiff's earning capacity prior to his injury, his comparative youth, the pain and suffering to which he was subjected, his probable total incapacity for work in the future, and the inconvenience, discomfort and unhappiness which his condition is likely to entail during the rest of his life—it is, in my opinion, not possible to say that the verdict in this case is so excessive that it is apparent that the jury must have been influenced by views and considerations to which they should not have given effect; Johnston v. Great Western R. Co. [1904] 2 K. B. (Eng.) 250; Cox v. English, etc. Bank [1905] A. C. (Eng.) 168. If the only element of damage were the plaintiff's actual pecuniary loss, it might be argued with great force that an attempt had been made to award him full and [291] complete compensation; and when the loss to be compensated for has a money value capable of precise ascertainment there is no good reason why that should not be done. But with such other elements of damage, as I have indicated, present, which must be taken into account, while the jury should not attempt to give full compensation, it is almost impossible to say that an amount awarded short of what would distinctly shock the conscience, it so great that a new trial should be ordered purely on the ground of its excess.

The admission of evidence as to the expectation of life of a person of the plaintiff's age and as to the cost of an annuity equal to his income is made a ground of appeal. The objection is based on the alleged lack of qualification of a witness who gave this evidence and the misleading character of the evidence itself.

Standard mortuary tables shewing the expectancy of life and the cost of an annuity at given ages are admissible in evidence; Rowley v. London, etc. R. Co. L. R. 8 Exch. (Eng.) 221; Vicksburg, etc. R. Co. v. Putnam, 118 U. S. 545, 7 S. Ct. 1, 30 U. S. (L. ed.) 257. The appreciation of the value to be put upon such tables in any particular case may always be affected by appropriate cross-examination and by directing the attention of the jury, by other relevant evidence and by argument, to considerations calculated to lead to the conclusion that the plaintiff's expectation of life should be regarded as less than the average and that his continued receipt during the full period of his expectation of life of the income which he enjoyed when injured was subject to many contingencies.

If a witness called can verify a mortuary table produced [292] in evidence as one in actual use by a company dealing in that class of business I do not understand it to be the law that he must possess knowledge sufficient to enable him to explain the basis on which the table was prepared or to give an opinion worth something as to its reliability or correctness in order to render his evidence, *quantum valeat*, admissible. No doubt such tables are not conclusive and the jury should be warned to take into account the contingencies to which the continued receipt of his income by the plaintiff would have been subject had he not met with the injury for which he sues. In the present case those contingencies were called to the attention of the jury by the learned trial judge by reading a passage from a judgment in which they were referred to. He was not asked further to emphasize them or specially to warn the jury against attaching too much weight to the evidence now objected to. No doubt its value had been fully discussed by counsel for the defendant in his address. No objection was taken either at the trial, in the notice of appeal to the Appellate Division, or in the appellant's factum in this court to the accuracy or sufficiency of the charge itself. At bar counsel suggested non-direction only; Creveling v.

Canadian Bridge Co. 51 Can. Sup. Ct. 216. Misdirection upon any aspect of the case was not even hinted at.

The verdict is, no doubt, large, but a case has not been made for interfering with it or for ordering a new assessment of damages, which, if an experience not uncommon should be repeated, might not result favourably to the defendants.

The appeal fails and should be dismissed with costs.

[293] BRODEUR, J.—The only question in this case is whether a new trial should be granted because the amount granted by the jury for damages is excessive.

It is a railway accident. The plaintiff (respondent) was a locomotive engineer, an employee of the appellant company. He seems to have been incapacitated for life. He was earning a sum of about $2,100 a year. There was not much evidence given as to the damages which should be granted and the verdict was for the sum of $27,000.

I am inclined to think that the amount is excessive, and if I had been on the jury I would certainly not have given so large a sum. But the charge to the jury seems to have been fair and it was for them to decide as to the amount.

I am sorry that we have to accept their verdict. It is to be expected that some day legislation will be passed in the provinces, where it does not exist now, by which those verdicts could be reduced by the courts of appeal.

In the circumstances, I cannot do otherwise than to dismiss the appeal.

Appeal dismissed with costs.

NOTE.

The reported case sustains a verdict awarding $27,000 damages for personal injuries whereby the plaintiff, a railroad engineer thirty-two years old, earning $2,100 a year, was totally incapacitated from labor for life. The several judges, concurring in the decision refer to the damages as "too large," and "possibly larger than we as a jury would have assessed," but lay down the rule that an appellate court should not interfere with the amount of the damages awarded unless "the damages are manifestly so unreasonable that no body of twelve men could have honestly given such a sum." The cases discussing what is an excessive verdict in an action for personal injuries not resulting in death are reviewed in detail in the notes to Cleveland, etc. R. Co. v. Hadley, 16 Ann. Cas. 1 and Ruck v. Milwaukee Brewery Co. Ann. Cas. 1913A 1356.

PEOPLE

v.

TOMLINS.

New York Court of Appeals—December 18 1914.

216 N. Y. 240; 107 N. E. 496.

Self-defense — Duty to Retreat — Person Assaulted in His Dwelling.

The owner of a dwelling attacked therein is not bound to flee, but may stand his ground and kill his assailant; this being the rule both at common law and under Penal Law (Consol. Laws, c. 40) § 1055.

[See note at end of this case.]

Criminal Law — Review — Necessity of Exception.

Code Cr. Proc. § 528, declares that, in case of a death sentence, the Court of Appeals may order a new trial, if justice requires it, though no exception was taken. No exception was reserved to an instruction charging that accused, whose assailant attacked him in his dwelling house, should have retreated. Accused claimed self-defense, and admitted, on cross-examination, that if he had fled from his house he would have been safe. Held, that a conviction of murder in the first degree must be reversed, though no exception was reserved to the instruction, for it deprived accused of all benefits of his plea of self-defense.

Appeal from Trial Term of Supreme Court, Rockland county.

Criminal action. Newton Tomlins convicted of murder in first degree and appeals. The facts are stated in the opinion. REVERSED.

Frank Comeskey for appellant.

Thomas Gagan for respondent.

[241] CARDOZO, J.—The defendant shot and killed his son, a young man of twenty-two The shooting took place on August 26, 1913, in the little cottage in Stony Point where the son had been born and reared. On the trial, the father maintained that he had acted without premeditation, when blinded by passion because of blows and insults. He maintained also that he had acted justifiably, in lawful self-defense. It will not be helpful to state the details of the tragedy. It is enough to say that the verdict of murder in the first degree is sustained by ample proof. We have, therefore, only to inquire whether there was material error in the court's statement of the law. The jury were properly instructed that homicide in self-defense is not justifiable unless there is reasonable ground to apprehend a design on the part of the person slain to

commit a felony, or to do some great personal injury to the slayer, and unless also there is reasonable ground [242] to apprehend that the danger is imminent. These instructions were coupled, however, with a statement that it was the defendant's duty, if possible, to retreat and escape. "A man," said the court, "has no right to resort to force and violence against another, even where the danger is imminent, even where he has reasonable cause to believe that he is in danger, unless he has no reasonably safe means of escape and retreat. Before a man can use force and violence under the law for his own protection, the danger must be imminent; he must have reasonable cause for believing that the danger exists, and then he must be so situated, he must be in such a position, that he cannot safely retreat. That is the law, gentlemen. We may not feel always like retreating in the face of an attack; it may not seem manly to us, but it is the law that if a man can safely retreat, and thereby escape a conflict with another, he must do so, even though it may not seem dignified and manly. To justify this defendant, applying the law to this case, in shooting his son, or shooting at him, or using any force against him, he must have had reasonable cause for believing, not that the boy some time in the future might do something against him, but he must have had reasonable cause for believing that the boy right then, when he came down those stairs and landed on the kitchen floor, was about to attack him. Even then, he would have had no right to use a weapon, or any other force, if he could have gotten away from danger by retreating, if he could have gotten off the porch, and gone across the lot, and down the road, or around the house, or anywhere, to a place of safety, then the law says that he should have done so, and that he had no right to use the weapon against his son, unless all reasonable means of retreating were cut off, and the boy was threatening him with bodily injury, or putting his life in danger."

We think that these instructions are erroneous as [243] applied to the case at bar. The homicide occurred in the defendant's dwelling. It is not now, and never has been the law that a man assailed in his own dwelling, is bound to retreat. If assailed there, he may stand his ground, and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home. More than two hundred years ago it was said by Lord Chief Justice Hale (1 Hale's Pleas of the Crown, 486): In case a man is assailed in his own house, he "need not fly as far as he can, as in other cases of *se defendendo*, for he hath the protection of his house to excuse him from flying, for that would be to give up the possession of his house to his adversary by his flight." Flight is for sanctuary and shelter, and shelter, if not sanctuary, is in the home. That there is, in such a situation, no duty to retreat is, we think, the settled law in the United States as in England. It was so held by the United States Supreme Court in Beard v. U. S. 158 U. S. 550, 15 S. Ct. 962, 39 U. S. (L. ed.) 1086. In that case there was a full review of the authorities, and the rule was held to extend not merely to one's house but also to the surrounding grounds. That case has been followed by the same court in later decisions. (Alberty v. U. S. 162 U. S. 499, 16 S. Ct. 864, 40 U. S. (L. ed.) 1051; Rowe v. U. S. 164 U. S. 546, 557, 17 S. Ct. 172, 41 U. S. (L. ed.) 547.) The same rule is enforced in Michigan (Pond v. People, 8 Mich. 150; People v. Keuhn, 93 Mich. 619, 53 N. W. 721); in New Jersey (State v. Zellers, 7 N. J. L. 220); in Vermont (State v. Patterson, 45 Vt. 308, 12 Am. Rep. 200); in Wisconsin (State v. Martin, 30 Wis. 216, 11 Am. Rep. 567); in Alabama (Green v. State, 96 Ala. 29, 11 So. 478); in Georgia (Haynes v. State, 17 Ga. 465); in Florida (Wilson v. State, 30 Fla. 234, 11 So. 556, 17 L.R.A. 654); in Ohio (State v. Peacock, 40 Ohio St. 333); in North Carolina (State v. Taylor, 82 N. C. 554); and in other jurisdictions. It is also stated as undoubted law in all the leading treatises. (1 Wharton Crim. Law, sec. 633; 1 Bishop Crim. Law, secs. 858, 859; 3 Russell on Crimes 207, 213; 2 East Pleas of the Crown 372; Foster's Crown Cases, c. 3, p. 273.) The rule is the same whether the attack proceeds from some other occupant or [244] from an intruder. It was so adjudged in Jones v. State, 76 Ala. 8, 14. "Why," it was there inquired, "should one retreat from his own house, when assailed by a partner or co-tenant, any more than when assailed by a stranger who is lawfully upon the premises? Whither shall he flee, and how far, and when may he be permitted to return?" We think that the conclusion there reached is sustained by principle, and we have not been referred to any decision to the contrary. The duty to retreat, as defined in the charge of the trial judge, is one applicable to cases of sudden affray or *chance medley*, to use the language of the early books. (Blackstone Com. bk. IV, ch. XIV; East Pleas of the Crown, supra; Russell on Crimes, supra; People v. Fiori, 123 App. Div. 174, 188, 108 N. Y. Supp. 416.) We think that if the situation justified the defendant as a reasonable man in believing that he was about to be murderously attacked, he had the right to stand his ground.

The cases in this court relied on by counsel for the People hold nothing to the contrary. People v. Sullivan, 7 N. Y. 396, is referred to as a case where the homicide was in the de-

fendant's dwelling. The murdered man and the defendant lived in a boarding house. Their rooms were on different floors. The affray started in the defendant's room. The two men separated, and the defendant's victim went down stairs. At the foot of the stairs he turned and went back. The defendant, instead of taking shelter in his own room, remained on the landing of the stairway. The fight was renewed, and the murder followed. It was with reference to that situation that the court said that the defendant was under a duty to avoid the encounter. He had only to enter his own room and he would have been safe. The court did not hold that it was his duty to abandon his home and take refuge in the streets. Its brief opinion, little more than a summary statement of its conclusion, betrays no purpose to lay down a rule so far in conflict with precedent. Other [245] cases, such as People v. Kennedy, 159 N. Y. 346, 54 N. E. 51, 70 Am. St. Rep. 557; People v. Constantino, 153 N. Y. 24, 47 N. E. 37; People v. Johnson, 139 N. Y. 358, 34 N. E. 920, and People v. Carlton, 115 N. Y. 618, 22 N. E. 257, are instances either of sudden broils in public places or of the voluntary renewal of a quarrel which had once subsided. A man who is himself the aggressor or who needlessly resumes the fight, gains no immunity because he kills in his own dwelling. General statements to the effect that one who is attacked should withdraw, must be read in the light of the facts that led up to them. We think also that there is nothing in the statutes of this state that enlarges in such conditions the duty to retreat. The present statute (Penal Law, section 1055) is a re-enactment of the Penal Code (section 205) and this in turn was a re-enactment in substance, though not in form, of the Revised Statutes (2 R. S. 630, section 3). The notes of the revisers state that the revision was intended to be declaratory of the law as stated by most of the writers on the subject (citing Russell on Crimes 699, 700), and as established by decision in Massachusetts and New Jersey.

The portions of the charge, which we thus hold to be erroneous, were not excepted to by the defendant's counsel; and the question remains whether the erroneous statement of the duty to retreat requires us to reverse in the absence of an exception (Code Crim. Proc. section 528). The defendant admitted, on cross-examination, that it was possible for him to run away from the house, and escape the danger. The charge that it was his duty to escape, if he could, was, therefore, equivalent to an instruction to the jury that the defendant had failed to justify the homicide on the ground of self-defense. It was thus a direction to find the defendant guilty, at least of some degree of crime. (People v. Walker, 198 N. Y. 329, 334, 91 N. E. 806.) The situation is the same in effect as if the issue of self-defense had not been submitted to the jury at all. It was submitted in form, but not in [246] substance, for the submission was coupled with instructions that predetermined the answer. It is the defendant's right to have the question of his guilt determined by the verdict of a jury rather than by the judgment of this court; and whatever our own opinion of his guilt may be, we cannot say, until it has been passed upon by a jury, that justice has been done. (People v. Jung Hing, 212 N. Y. 393, 404, Ann. Cas. 1915D 383, 106 N. T. 105.)

The judgment of conviction should be reversed, and a new trial ordered.

Willard Bartlett, Ch. J., Werner, Hiscock and Hogan, JJ., concur; Collin and Cuddeback, JJ., dissent.

Judgment of conviction reversed, etc.

NOTE.

Right of Person Assaulted on His Own Premises to Repel Attack without Retreating.

Introductory, 918.
Person Assaulted in His Dwelling, 918.
Person Assaulted in His Place of Business, 921.
Person Assaulted Outside His Dwelling or Place of Business, 922.

Introductory.

The earlier cases discussing the right of a person assaulted on his own premises to repel the attack without retreating are reviewed in the notes to State v. Bennett, 5 Ann. Cas. 997; State v. Brooks, 15 Ann. Cas. 49, and State v. Sumner, 74 Am. St. Rep. 707. This note presents the recent cases on the subject.

Person Assaulted in His Dwelling.

It is well settled that where a person is assaulted in his own dwelling, without any fault on his part, he is not required to retreat, but may stand his ground, and use such force as may be reasonably necessary to repel the attack. Hutcherson v. State, 165 Ala. 16, 50 So. 1027, 138 Am. St. Rep. 17; Hutcheson v. State, 170 Ala. 29, 54 So. 119; Watts v. State, 177 Ala. 24, 59 So. 270; State v. Bissonnette, 83 Conn. 261, 76 Atl. 288; State v. Perkins, 88 Conn. 360, 91 Atl. 265, L.R.A. 1915A 73; Russell v. State, 61 Fla. 50, 54 So. 360. And see the reported case. See also Com. v. Croson, 242 Pa. St. 19, 89 Atl. 821.

"In effect the jury was instructed that if one is attacked unlawfully in his own dwelling-house by one who is attempting to make

a forcible and unlawful entry therein, he is not obliged to retreat, but he may use such means as are absolutely necessary to prevent the assailant's forcible entry, even to taking life. It is justifiable homicide if it appears that the resistance is neither greater in degree nor earlier in time than is necessary, unless the householder, under such circumstances, should take the opportunity of the unlawful entry to kill the intruder to gratify his hatred, malice or illwill, when the killing will be least manslaughter. . . . An assault on one's house can be regarded as an assault on the person, within the meaning of the law with reference to self-defense, where the purpose of the assault is an injury to the person of the occupant or members of his family, to accomplish which the assailant attacks the house in order to reach the inmate. In this connection it is said, and settled, that in such case the inmate need not flee from his house in order to escape injury by the assailant, but he may meet him at the threshold, and prevent him from breaking in, by any means rendered necessary by the exigency; and, upon the same ground and reason, that one may defend himself from peril of life, or great bodily harm, by means fatal to the assailant, if rendered necessary by the exigency of the assault." State v. Perkins, 88 Conn. 360, 91 Atl. 265, L.R.A.1915A 73.

Where a man and his wife are living together in the same house, the law imposes on the one who is free from fault in bringing on an encounter no duty to retreat from the other. Hutcherson v. State, 165 Ala. 16, 50 So. 1027, 138 Am. St. Rep. 17; Hutcheson v. State, 170 Ala. 29, 54 So. 119; Watts v. State, 177 Ala. 24, 59 So. 270. In Hutcheson v. State, 170 Ala. 29, 54 So. 119, the court said: "The evidence was without dispute that the killing took place in the dwelling house of both defendant and deceased. Defendant was the wife of the deceased, and they were living together in this house. There must be some where a person may stop and defend himself or herself, when they have the right otherwise to do so. The fact that two may live in the same house, have the same dwelling, or place of business does not take away from either in favor of the other the right to stop there and defend himself." In Watts v. State, 177 Ala. 24, 59 So. 270, it was said: "In the course of his oral charge the trial judge instructed the jury that, before defendant could successfully plead and establish self-defense, it was necessary for him to show that at the time of the killing there was no convenient or reasonable mode of escape open to him by retreating and declining combat, unless by retreating he increased his danger. Defendant duly objected to this part of the charge, the insistence being that this principle, though ordinarily applicable, cannot be applied to a killing in defendant's own home. The reason of the rule is said to be that 'the law regards a man's house as his castle, or, as was anciently said, his tutissimum refugium, and, having retired thus far, he is not compelled to yield further to his assailing antagonist. When he has reached this refuge, he may stand at bay, and may turn on and kill his assailant, if this be apparently necessary to save his own life; nor is he bound to escape from his house in order to avoid his assailant. Jones v. State, 76 Ala. 8, 16. . . . The rule is of ancient origin, and indeed deeply rooted in the elemental instincts of humanity. In its original applications it doubtless had in view only attacks from external aggressors, but in the case of Jones v. State, supra, it was held equally applicable to partners and tenants in common; the court declaring that 'the doctrine of retreat, or of declining combat by retreat, has no application to cases of this character, and that the right of self-defense may be perfect without it, where one partner or cotenant is assailed by another, each being equally entitled to the possession of the house or premises where the attack is made.' The reasoning of the court in support of this conclusion is, we think, convincing. In the recent case of Hutcheson v. State, 170 Ala. 29, 54 So. 119, the defendant killed her husband in the house jointly occupied by them as a dwelling, and the doctrine of Jones v. State, supra, was applied. A charge was there requested by defendant 'that it was not necessary for the defendant to retreat, because the facts in the case show that the defendant was in her own castle,' and for its refusal the judgment of conviction was reversed. The report of the case shows only that the attack and the killing occurred in the home which the defendant and the deceased were jointly occupying. In the present case it appears without dispute that the house in which the killing was done had been occupied jointly by defendant and deceased as their common home, and was then so occupied, except that about 10 days previously deceased had separated herself from her husband and children, and was in the exclusive occupation of one of the two rooms of the house. Had the evidence showed that defendant went into this room and was there attacked by his wife, the case might be different, and it may be that a due regard for the sacredness of human life would require a qualification of the principle announced in Jones v. State, and Hutcheson v. State, to the extent that those occupying separate rooms under a common roof should be held to the duty of retreating each to his own quarters, or at least from the other's quarters, rather than to stand there and kill, if such retreat might reasonably avoid the necessity of killing and offer safety

to the one assailed. The evidence, however, does not show that defendant entered his wife's room, nor that he was anywhere but in his own room, when he fired the shot that killed her. The rooms were adjoining, and the door open between them; and it is at least inferable from defendant's testimony that he met the alleged assault standing in his own room. There is, therefore, no occasion to consider the exceptional case above suggested. It results that the charge of the trial court on this phase of the case was erroneous in predicating the duty of retreat under the circumstances described by defendant in his testimony before the jury."

No obligation to retreat from an assault on a person in his own house arises from the fact that the assailant is in the house by invitation. State v. Bissonnette, 83 Conn. 261, 76 Atl. 288, wherein the court said: "We think that error is well assigned upon that portion of the charge which relates to the duty of a person assaulted within his own home to retreat before killing his assailant. The general rule is that where one, without fault himself, is assaulted in his dwelling-house, he need not retreat from his assailant, but may resist the assault even to the extent of taking the life of his adversary when necessary. It is claimed that there is an exception to this rule, and that when the assailant has come into the house by invitation, express or implied, as for business purposes, and while there gets into an altercation with the owner and starts to assault him, the latter is required to retreat reasonably to avoid the conflict. The charge complained of does not make this distinction, but gives the jury to understand that in any case the person assailed in his own house should, if he can do so without leaving his house, withdraw somewhat in order to avoid the conflict. The evidence on both sides showed that Demery was not in the defendant's house with any respect for it or its master. He did not greet the defendant as he entered it. He gave directions with respect to what should be done within it. He declared himself to be the master of it. He then proceeded to assault the owner of it as he was seated in his chair. The defendant claimed that Demery entered the house wrongfully, with the purpose to assault and kill him. The charge complained of did not sufficiently meet this aspect of the case."

A person who is entitled to remain in a certain part of a building is not excused from retreating when assaulted elsewhere therein. State v. Dyer, 147 Iowa 217, 124 N. W. 629, 29 L.R.A.(N.S.) 459. In that case the court said: "It does not appear that defendant was on his own premises when he claims to have been assaulted by the deceased. The most that can be said is that he had a room in the house of the deceased which he called his own, and that he made his home there. The alleged assault was not made upon him while he was in his room, but in the dining room or parlor of the house belonging to the deceased. This was not defendant's castle. It belonged to and was occupied by the deceased, and defendant was not, under the circumstances, permitted to stand his ground in order to defend his premises. In other words, the duty of retreat applied to him just the same as if he were upon the street, or in any other place where the rights of disputants were equal. Generally speaking, the duty of retreat applies in this jurisdiction, and the rule was correctly stated by the trial court in its instruction which is now challenged."

Where a defendant has fallen short of bringing himself within the protection of the rule that the law accords to a guest the right of the owner to repel an attack without retreating, a refusal to give the jury such an instruction is proper. Dawson v. State, 148 Ala. 672, mem. 41 So. 803; Thomas v. State (Ala.) 69 So. 315. In the case first cited the charges requested were in part as follows: "(1) I charge you that if you believe from the evidence that the defendant was assaulted by Robert Thomas in such a manner as was calculated to lead a reasonable man to believe that defendant was in great danger to life or limb from the assault, and the defendant did so believe, and you should further find from the evidence that the defendant was free from fault in bringing up the difficulty, then the law would not require the defendant to retreat before striking in self-defense, if you further believe from the evidence that the defendant was at the home of Helena Wilson by her invitation. (2) I charge you that if the defendant was invited to the home of Helena Wilson, and that while there, so invited, he was attacked by one not in the family of said Helena Wilson, then the law does not cast on him the duty to retreat. . . . (4) I charge you that if you believe from the evidence that Helena Wilson invited the defendant to her home, and the defendant was assaulted while there by one not a member of that home, without fault on his part, then the law would not require the defendant to retreat before striking in self-defense." The court said: "Charge 1, requested by defendant, was properly refused, as it was misleading. There was evidence on the part of the state that when the shooting was done the defendant was outside the inclosure which constituted the home of Helena Wilson, and the jury might infer from this charge that the privileges of the home extended to that phase of the testimony, construing 'at her home' to include the road outside her gate. Charge 2 is subject to the same criticism, be-

side being elliptical. . . . Charge 4 was properly refused. It was calculated to mislead the jury. There was no evidence in this case of any striking in self-defense, except the shooting by the defendant, so that, applying the charge to the facts in this case, the jury might infer the right to shoot in self-defense, without regard to the nature or violence of the assault or the degree of peril." In Montgomery v. State, 160 Ala. 7, 49 So. 902, the following instruction was before the appellate court for consideration: "The law has long been settled that a guest in a dwelling house is entitled to the protection that the law affords the owner or more permanent occupant, and he may repel trespassers in and upon the house, and repel assaults, actual or menaced, as if he were under his own roof and within his own doors." Holding that the instruction was inapplicable and therefore misleading, and also mere argument, the court said: "Conceding that, in the house of his son, he was (under proper circumstances) excused from the doctrine of retreat, and might, while in it, make reasonable resistance to all assaults not provoked by himself, yet no person is permitted by the law to turn his castle from a shield to a sword,' for purposes of 'offensive effort against the lives of others;' for, as was tersely said by one of our great judges (McClellan), "it is a shelter, but not a sally port.' 'If he leaves its shelter to encounter a danger beyond its precincts, he is in no better attitude, before the law, than if he had come from any other place, and voluntarily entered upon a combat, from the peril of which he was secure, but for his own act. It is immaterial that, after he has armed himself and emerged from his house, he encounters a necessity to kill to save his own life. Such necessity is, in legal contemplation, of his creation, and he cannot justify under a necessity which his own fault and wrong have contributed to produce." In Thomas v. State (Ala.) 69 So. 315, the court said: "While there is no positive proof of the fact, the evidence was sufficient to afford an inference that defendant was there on the implied invitation of the owner of the house, or by prearrangement with some of its lawful occupants, and therefore was a guest at the house. If the defendant was a guest of the owner or occupants of the house, there by prearrangement with them or on their invitation, while in the house in that capacity the law armed him with the right to defend himself against an unlawful assault from outsiders, he being free from fault, and to employ all necessary force to protect his own life or his person grievous harm. For this purpose and under these circumstances, he was armed with the same rights of self-defense as if he had been the owner of the house, as to all persons except its lawful occupant; in other words, to that extent this house was his castle for the purpose of defense, and if without his fault he was assaulted there by an intruder, the law imposed on him no duty to retreat therefrom, but he had the right to stand his ground and defend himself even to the taking of the life of his assailant. . . . This doctrine only applies to the house, and the yard is not within its protection. . . . The defendant testified that he then ran around the house two or three times with the deceased following him; that he then went in the house, and secured a gun, came back into the yard, and met the deceased at the corner of the house, when the deceased drew a pistol, and defendant shot him. Outside of the defendant's own testimony, there is no positive evidence that deceased was armed with a pistol, and there was evidence sufficient to afford an inference that he was not so armed. The defendant's own evidence shows that the deceased did not attempt to draw a pistol or shoot him until he (defendant) had gone into the house and secured the gun and returned to the yard with it, and some of the testimony in connection with the location and range of the wound had tendencies going to show that defendant was pursuing the deceased when he encountered the danger that he relies on as the necessity for his act. . . . If the defendant had retreated into the house, and there remained, and the deceased had pursued him into the house, his right, if a guest of the house, to there remain and defend himself, would have been clear; but, as we have shown, this doctrine did not relieve him from the duty to retreat after the defendant left the house."

Person Assaulted in His Place of Business.

No duty to retreat devolves on one who is assailed without any fault of his own, in his office or place of business. Cheney v. State, 172 Ala. 368, 55 So. 801; Chaney v. State, 178 Ala. 44, 59 So. 604. And see Suell v. Derricott, 161 Ala. 259, 18 Ann. Cas. 636, 49 So. 895, 23 L.R.A.(N.S.) 996. Thus in Cheney v. State, 172 Ala. 368, 55 So. 801, the court said: "The defendant was under no duty to retreat, and there was no evidence that he was at fault in bringing on the difficulty, other than his mere appearance in his own place of business, and his firing on the deceased, and he should not have been convicted, if the jury entertained a reasonable doubt whether he acted upon the well-grounded and reasonable belief that it was necessary to shoot to take the life of Snyder, to save himself from great bodily harm or from death, or that he shot before such impending necessity arose."

In Hill v. State (Ala.) 69 So. 941, a prosecution for homicide, it appeared that the kill-

ing occurred at an illicit distillery, set up and maintained by the defendant and the deceased. It was held that such a place of unlawful business would not be held to be a place of business from which those engaged therein were not required to retreat. The court said: "By the reason of the rule in each case, of defense of the castle or place of business, the right to stand and defend against unlawful invasion must be held to attach to a place that at the time is a dwelling house or house where the owner conducts a lawful trade or business. The fundamental principle of all the cases on this subject is the right of 'the castle,' and the rule is not extended to the protection or defense of a house where the then occupant has no legal right to be. Thus, such unlawful occupant has no higher, or more special, right of defense than that extended to him in a public thoroughfare or in his wood or field."

In Brake v. State, 8 Ala. App. 98, 63 So. 11, a prosecution for homicide, the evidence tended to prove that when the fatal shot was fired, the defendant was in the street in front of the livery stable in which he was employed. It was held that that was not a place from which the law excused him from retreating if he could do so in safety.

Person Assaulted Outside His Dwelling or Place of Business.

It has been held that where a person is assailed in his own grounds, without any fault of his own, he need not retreat, but may defend himself with such force as may be necessary. Rigell v. State, 8 Ala. App. 46, 62 So. 977; Langston v. State, 8 Ala. App. 129, 63 So. 38; People v. Cyty, 11 Cal. App. 702, 106 Pac. 257; Mulkey v. State, 5 Okla. Crim. 75, 113 Pac. 532. In Rigell v. State, supra, the evidence for the defendant, tended to show that on the night of killing, he, a young married man, went home about 10 o'clock from the drug store, where he was employed as a clerk; that as he approached his home he discovered that the light in his room was dimly burning; that, before entering the house, he stopped in the yard a few moments, and while standing there he heard somebody on the inside of the house talking in a low tone, whereupon he walked nearer to the house and looked into the room through the window (the inside shade, which covered it, lacking a few inches of being pulled entirely down), when he discovered his wife and a man, whom he did not then recognize, on the bed together; that the defendant then ran up the steps to the front door, and through it saw a man going out of the back hall door, whereupon the defendant came back down the front steps and ran around the house to the back porch, and found the man standing on the back porch; that the defendant halloed twice, demanding to know who it was, to neither of which demands the man made any reply, but immediately on the second demand, the defendant saw him pull his pistol out of his pocket; and that then the defendant quickly pulled his own pistol, and commenced to shoot at the man, while he was still standing on the back porch, firing four shots at him (the only shots fired), after which the deceased ran. The court said: "The defendant was therefore engaged in no unlawful enterprise in going into his own back yard, though armed with a pistol, and hailing deceased and demanding to know who he was. If, then, the deceased, in anticipation of and to prevent detection and arrest, or through other motives, became the assailant by drawing his pistol, or making other hostile demonstrations of a character evincing an intent to commit a present deadly assault on defendant, or one calculated to do him great bodily harm, the latter had the right to act on the reasonable appearance of things, and to do so promptly. The law does not require a man, confronted then as defendant's evidence tends to show he was, to wait and see if his assailant, if such he was, is going to shoot, or to wait and see if he may not, in the excitement of the moment, accidentally, or otherwise drop his pistol. Nor did the law require the defendant to retreat. He was at his home—within the precincts of his own castle—and was in no sense under a duty to retreat from an assailant (if such he was) who was a trespasser there, and who, under the veil of night, when its lord and master was away, had, by a previous abuse of the privilege of the entree which kinship gave, been able, on this occasion, to foully invade that sacred domain and seduce, or strip of her virtue, its erstwhile queen. The deceased at the time of the tragedy, had not only no right to resist arrest, but no right to defend himself, by inflicting injury on defendant, even though he had been assailed by defendant with a deadly intent while acting under the sudden heat of passion engendered from discovering deceased in the act of sexual intercourse with his (defendant's) wife. In such case, though defendant were the aggressor, and there was no way to escape death at his hands except by taking his life, still, if deceased had done so, he would have been guilty of murder, for he was the wrongdoer in the first instance, was not therefore free from fault in bringing on the difficulty, but on the contrary, had furnished the very provocation which brought it on." In Mulkey v. State, 5 Okla. Crim. 75, 113 Pac. 532, the court held that the defendant was entitled to have the following requested instruction given "You are instructed that every person has the right to act in his own necessary

self-defense, and where a person is in a place where he has a right to be, and is not the aggressor in bringing on the conflict, and is assaulted by another person in such a way as to place him in danger of death, or great bodily harm, the person thus assaulted is not bound to retreat, but, on the contrary, may stand his ground and repel the danger in which he is placed with such force as will repel the attack and protect his person from serious bodily harm."

However, one who provokes an assault on himself in his own house or yard or place of business cannot invoke the rule excusing a person assaulted on his own premises from retreating. Sanford v. State, 2 Ala. App. 81, 57 So. 134, wherein the court said: "A man's house is his castle for purposes of defense, but not for offensive or aggressive operations, and he can claim the right to stand his ground and if necessary kill his adversary, without being under an obligation to retreat from his home only when free from fault in bringing on the difficulty and when acting under an impending necessity to protect himself or home."

COFFEY
v.
McGAHEY ET AL.

Michigan Supreme Court—July 24, 1914.

181 Mich. 225; 148 N. W. 356.

Creditors' Suits — Jurisdiction — Waiver by Failure to Demur.

In a creditor's bill to enforce his claim, brought on the theory of defendant's violation of the Bulk Sales Act, defendant, by failing to demur to the bill of complainant, or to claim the right of demurrer in his answer on jurisdictional grounds, and by answering to the bill on the merits, and by taking proofs thereon, waives the question of jurisdiction, on the ground that the claim had not been reduced to judgment.

Bulk Sales Law — Remedy of Creditor in Equity.

Under Bulk Sales Act (Pub. Acts 1905, No. 223), providing that creditors upon knowledge that the requirements of the act have not been followed, may apply to have the purchaser become a receiver and account to creditors, the rule that a creditor must obtain a judgment at law before resorting to equity does not apply; and, apart from the statute, the rule is subject to exceptions, where a judgment cannot be had because the debtor is dead, has absconded from the state, and has no property therein.

[See note at end of this case.]

Same.

Under Bulk Sales Act (Pub. Acts 1905, No. 223), on a bill in behalf of complainant and all other creditors of the seller upon the theory that the statute made the debtor's sale absolutely void, and that his creditors could apply the property to their claims, by receivership, injunction, and an accounting, and not on the theory of a creditor's bill or a bill in aid of execution, the complainant will not be denied equitable relief, on the ground that he has an adequate remedy at law, though the equitable remedy is not exclusive.

[See note at end of this case.]

Validity of Bulk Sales Law.

The Bulk Sales Act (Pub. Acts 1905, No. 223), regulating the sale of merchandise in bulk, and making sales not in accordance therewith void as against the seller's creditors, is constitutional.

[See Ann. Cas. 1914C 414.]

Action by Creditor — Parties.

In a suit by the creditor of one who sold merchandise in bulk, without a compliance with the Bulk Sales Act (Pub. Acts 1905, No. 223), regulating such sales, the seller is a necessary party.

Waiver of Rights by Creditor.

A creditor who knows nothing of the debtor's sale of his stock of goods in bulk, or that it had been made contrary to the Bulk Sales Act (Pub. Acts 1905, No. 223), by his conversation with the seller in the presence of the purchaser, cannot waive his rights under the act, since a "waiver" is an intentional relinquishment of a known right, or such conduct as warrants an inference of a relinquishment of such right.

Appeal from Circuit Court, Kalamazoo county: KNAPPEN, Judge.

Action for appointment of a receiver, accounting, and injunction. William J. Coffey, plaintiff, and William A. McGahey, et al., defendants. Judgment for plaintiff. Defendant Baker appeals. The facts are stated in the opinion. AFFIRMED.

Jesse R. Cropsey and *Don B. Sharpe* for appellant.

Samuel W. Oxenford for appellee.

[226] McALVAY, C. J.—This is an appeal by the defendant Herman D. Baker from a decree entered in this cause [227] against him and his codefendants in the circuit court for the county of Kalamazoo, in chancery.

The facts are as follows: Defendant McGahey, who had for some time owned and conducted a certain saloon in the city of Kalamazoo, on July 22, 1908, sold and conveyed the entire stock in trade, fixtures, and personal property owned and used by him in and about said business to defendant Baker in bulk. In making this sale, these parties in no form or manner complied with the provisions of Act No. 223, Pub. Acts 1905 (2

How. Stat. [2d ed.] § 2612), known as the "bulk sales act." This was the only property owned by McGahey, and defendant Baker had been acquainted with him but a few days. On the date of said sale defendant Baker took immediate possession of all of said property and proceeded to continue the business. Defendant McGahey absconded for parts unknown, and his whereabouts have not since been known. He was brought into court by publication. Defendant Baker continued this business until August 14, 1908, when he sold and transferred to defendant Felix Schmidt for the sum of $2,500 all the stock in trade, fixtures, tools, and personal property of every kind owned and used by him in and about the said business, being the property purchased from McGahey. Neither of the parties to this sale conformed in any manner to the provisions and requirements of the said "bulk sales act." Defendant Schmidt upon his purchase immediately took possession, and was engaged in carrying on the business when this suit was instituted. Complainant had been employed by defendant McGahey some time previous to the date of the sale to Baker in and about these premises as a carpenter in charge of the carpenter work in repairing and remodeling the building occupied by defendant McGahey as a residence upstairs and as his business place on the ground floor, and so [228] worked for him up to and including the date of sale, at which time he was indebted to him in the sum of over $200.

Complainant filed his bill of complaint in this cause against these defendants for himself and in behalf of all the creditors of defendant McGahey, setting up at length the foregoing facts, and asking the aid of the court in equity in the premises, to decree the amount due him from McGahey, and that defendants Baker and Schmidt be declared receivers of all of the said stock of merchandise and fixtures, and the proceeds and avails thereof, for his benefit and that of the other creditors who might intervene, and that Baker and Schmidt come to a full accounting for the said property and the proceeds of the same, and that a receiver be appointed in their stead, and that pending the action an injunction be granted.

To this bill of complaint, defendants Baker and Schmidt filed their several answers under oath. The answer of defendant Baker, which is the only one necessary to be considered by this court, he alone having appealed, admits all but three of the charges of the bill of complaint, and the record shows those were admitted upon the hearing of the cause.

Defendant on this appeal contends that the court in equity has no jurisdiction of this cause, for the reasons that complainant is not a judgment creditor, that complainant has a complete and adequate remedy at law, and in any event that the record shows complainant has waived any right of action which he might have had against defendant Baker or the goods in question.

Defendant did not demur to the bill of complaint or claim the right of demurrer in his answer on jurisdictional grounds. It does appear that, when complainant was sworn as a witness and proceeded to prove the indebtedness of McGahey to him, an objection was made to the admission of any such evidence, [229] unless it appeared that the claim had been reduced to judgment. Such a question cannot be raised after an answer upon the taking of proofs at a hearing. This court has repeatedly held that such an objection comes too late if made for the first time at the hearing of the cause. Stockton v. Williams, Walk. Ch. (Mich.) 120; Wales v. Newbould, 9 Mich. 45, and authorities cited; F. H. Wolf Brick Co. v. Lonyo, 132 Mich. 162, 93 N. W. 251, 102 Am. St. Rep. 412; Negaunee Iron Co. v. Iron Cliffs Co. 134 Mich. 264 96 N. W. 468.

In each of the foregoing cases this court has held the question of jurisdiction should have been raised by demurrer, where the grounds of the objection appear upon the face of the bill; that, after defendants have answered, put the case at issue upon the merits, and taken proofs on that issue, they cannot raise the question of jurisdiction. The same rule has been recognized by the Federal courts. Hollins v. Brierfield I. Coal, etc. Co. 150 U. S. 371, 14 S. Ct. 127, 37 U. S. (L. ed.) 1113.

In all cases where the question has been raised before this court, it has held that the question of jurisdiction is waived, when no demurrer is imposed until after issue is joined, and proofs are taken.

Appellant contends that it appears that complainant is not a judgment creditor, and therefore has no standing in a court of equity. The admitted facts show that defendant McGahey disposed of all of his property, absconded from the jurisdiction of this State, and his whereabouts could not be ascertained: that process could not be had upon him in Michigan. It would have been impossible under the circumstances for complainant to obtain a judgment against the principal defendant McGahey. We find from the authorities it is not an inflexible rule that a judgment at law must be obtained by a creditor before resort to equity. There are exceptions to this rule in cases where a judgment cannot be obtained because [230] the debtor is dead, or has absconded from the State, and has no property in the State. This was recognized by this court in Earle v. Grove, 92 Mich. 285, 289, 52 N. W. 615, where the court said:

"The complainant claims that while the general rule in all the States, statute or no statute, is that there must be a judgment and

a return of execution unsatisfied before a resort can be had to equity, still that there are, and always have been, exceptions to this general rule in special cases, as where a judgment cannot be obtained because the debtor is dead, or has absconded, or removed from the State, or is a nonresident. This claim is supported by the following among other cases [citing many authorities].

"The statute . . . cannot be said to point out the only conditions of equitable relief in cases of this kind. If it should be held to apply only to home judgments, as the New York statute, of which ours is a copy, has been interpreted in that State (Tarbell v. Griggs, 3 Paige (N. Y.) 207, 23 Am. Dec. 790), it would not, in our opinion, bar equitable relief in cases where a compliance with the statute was rendered impossible by the death, absconding, or removal from the State, or nonresidence of the debtor."

In the case cited, from which these excerpts are taken, the amended bill showed that a New York judgment had been obtained, yet the court recognized the exceptions to the general rule. Further, the remedy in the instant case is given by the statute, by which any and all creditors may, as soon as knowledge comes to them that the requirements of the statute have not been followed, proceed immediately, not to set aside the sale, but to impound the property or its proceeds. Upon application of any of the creditors, "any purchaser shall become a receiver and be held accountable," etc., is the reading of the statute, and for this reason the judgment creditor rule does not apply.

The contention that complainant has a complete [231] and adequate remedy at law is based upon the decisions of this court in construing the bulk sales act. The bill of complaint was filed in behalf of complainant and all other creditors of defendant McGahey. It sets up an equitable cause of action, and shows that this property is being sold and disposed of by defendants, and complainant will be left remediless, unless the court interferes. Its charges and averments of fact are not in dispute. There is no pretense on the part of appellant that any of the requirements of the bulk sales act were followed by either party to the sale. The defendant McGahey had absconded after the transfer of all his property to defendant Baker, who in turn sold the property to defendant Schmidt before the institution of this suit. The bill prays for an accounting, a receiver, and an injunction.

The bill of complaint is not filed upon the theory of a judgment creditor's bill, or a bill in aid of execution, but upon the theory that the statute made the transfer to defendant Baker absolutely void as to creditors; that creditors of McGahey are entitled to reach this property and apply it upon their claims; that for such purpose it is necessary to have a receiver, an injunction, and an accounting. It is contended by complainant that by reason of the circumstances of this case he has no adequate remedy at law.

The bulk sales act has been before this court for consideration and construction several times, and, from an examination of the decisions of these cases, it is clear that, while the court has held a remedy by garnishment was permissible, it has refused to hold that it was the exclusive remedy under the statute. In the decisions upon the questions raised under this statute, this court has been unanimous only in holding that the law is constitutional, and that in case of a sale void thereunder the seller is a necessary party. To deny jurisdiction to a court in equity would be contrary to a fair interpretation of this statute, [232] which, by its title and the language used in it, indicates that it was enacted for the purpose of preventing frauds by debtors upon creditors, and made certain transfers "void as against the creditors of the seller," if the requirements of the act were ignored, and, further, made the purchaser in such cases a "receiver" to be held accountable to the creditors of the seller upon application of any such creditors.

This is not a statement of the arguments made by counsel in previous cases in favor of exclusive jurisdiction in equity, but is in support of the proposition that it was the legislative intent not to deprive equity of jurisdiction. The statute creates a trust fund in the hands of the purchaser for the benefit of all creditors. The profession understands that the usual proceeding where an application is made to a court by a creditor against a receiver or trustee is by a bill or petition in equity, and such proceeding is not like one in garnishment where the reward inures only to the benefit of the swift creditor, but is a proceeding where every creditor is entitled to his just proportion of a trust fund. Cases are arising under this statute where an action at law is not an adequate remedy.

Bixler v. Fry, 157 Mich. 314, 122 N. W. 119, was a case quite similar to the instant case. In one of the opinions written by Mr. Justice Moore, it is said:

"The questions raised by this record have not been passed upon by this court, and, so far as we are advised, by any court. The effect of the demurrer to the bill is to admit the truth of its averments. . . . The case is unlike the two cases already cited, which were proceedings in behalf of a single creditor. The bill is filed, not only in behalf of the complainant, but in behalf of all the other creditors. It calls for an accounting and for a receivership. It is not necessary to quote the provisions of Act No. 223, Pub. Acts 1909,

as they are so easily accessible, but we think a reading of them establishes the authority of a court [233] of equity to interfere in such a case as is stated in the bill of complaint."

In the instant case all allegations setting up a case warranting equitable relief are contained in the bill of complaint. It makes a stronger case for complainant than that stated in Bixler v. Fry, supra. These facts alleged are admitted, and from them it appears that complainant has no adequate remedy at law. He has brought himself within the rule which permits the maintenance of a bill by one who is not a judgment creditor, if under the circumstances of this case such a showing is necessary.

Appellant also contends that in any event the complainant is not entitled as a creditor to recover under this void sale for the reason that he waived all rights under the statute. The record shows that this claimed waiver occurred after the completion of the sale, and was entirely without consideration, during a brief conversation had by McGahey, in the presence of Baker, with complainant, who knew nothing about the sale or the circumstances surrounding it, or that it had been made contrary to the provisions of law. This contention requires but brief consideration. It is too well settled to require citation of authorities that there can be no waiver of rights without knowledge of the facts upon which it is based. A waiver has been aptly defined, as follows:

"It is an intentional relinquishment of a known right, or such conduct as warrants an inference of a relinquishment of such right."

The record shows no waiver on the part of complainant.

Our construction, therefore, is that by the provisions of this act jurisdiction is given to courts in equity to grant relief to creditors. This jurisdiction is not exclusive. Musselman Grocer Co. v. Kidd, etc. Co. 151 Mich. 478, 115 N. W. 409.

[234] The decree of the circuit court in favor of complainant and against defendant and appellant Herman D. Baker is as to him in all respects affirmed, with costs of both courts in favor of complainant and against such defendant and appellant.

A decree will be entered in this court accordingly.

Brooke, Kuhn, Stone, Moore, and Steere, JJ., concurred with McAlvay, C. J. Bird, J., concurred in the result.

OSTRANDER, J. (*dissenting*).—The opinion of Mr. Justice McAlvay covers considerable ground, and is prepared so as to rule several distinct points. He first rules that, because no demurrer was interposed, defendant (appellant) was precluded at the hearing below, and is precluded in this court, from raising the question of the jurisdiction of a court of equity in the premises. *Secondly.* He rules that the remedy in the instant case, by which I suppose he means the remedy sought by the bill, is given by the statute, meaning, of course, the sales in bulk act—

"By which any and all creditors may, as soon as knowledge comes to them that the requirements of the statute have not been followed, proceed immediately, not to set aside the sale, but to impound the property or its proceeds. . . . . The judgment creditor rule does not apply."

Thirdly. He rules that the bill was not filed—

"Upon the theory of a judgment creditor's bill, or a bill in aid of execution, but upon the theory that the statute made the transfer to defendant Baker absolutely void as to creditors; that creditors of McGahey are entitled to reach this property and apply it upon their claims; that for such purpose it is necessary to have a receiver, an injunction, and an accounting."

Fourthly. He rules that the sale in bulk act gives [235] jurisdiction to equity to grant relief to creditors, but that the jurisdiction so given is not exclusive. All of these rulings are of such general importance as to justify a somewhat critical study of their soundness.

If the statute referred to does not give this complainant a remedy, if he is required to resort to general equity jurisdiction and equity rules to maintain his right to file the bill, he must be a judgment creditor. Nothing is better settled than that a simple contract creditor whose claim is not reduced to judgment, and who has no express lien upon his debtor's property, has no standing in a court of equity to obtain seizure of the debtor's property and its application to his debt. We have, further, a statute which recognizes the general rule (1 Comp. Laws, §§ 436, 437) in defining the jurisdiction of chancery courts. Certain facts *must* appear to sustain a judgment creditor's bill, and not appearing, the court cannot proceed. Vanderpool v. Notley, 71 Mich. 422, 39 N. W. 574; Grenell v. Ferry, 110 Mich. 262, 68 N. W. 144. Jurisdiction in such cases is not acquired because a defendant fails to question it. None of the cases cited in the opinion sustains a contrary doctrine. In Hollins v. Coal, etc. I. Co. 150 U. S. 371, 14 S. Ct. 127, 37 U. S. (L. ed.) 1113, it appearing that such a suit had been dismissed upon the merits, it was held that it should have been dismissed for want of jurisdiction. Want of jurisdiction of the subject-matter may be urged at any time.

He is right in finding that the bill in this cause is not, and was not intended to be, a judgment creditor's bill. The solicitor for

complainant leaves us in no doubt upon the subject. He says, in the brief:

"Section 3 [referring to the sales in bulk law] carves out a new remedy, not before known to the law."

And also:

"One cannot read this statute without at once concluding [236] that it was the intention of the legislature to give the general creditor one new, complete remedy by one action and not compel him to pursue his remedy through several courts."

In this connection it may be observed that the decree appealed from is nothing more or less than a money judgment against appellant Baker primarily and against defendant Schmidt secondarily. There is no decree against the goods and no provision in the decree for selling them to satisfy complainant's demand.

The second and the fourth rulings which I have referred to are the important ones. They agree only in part with complainant's theory.

The statute makes a sale of goods in bulk void as to creditors of the seller, unless accompanied by certain specified formalities. What, in such cases, is the remedy of the creditor of the seller? If the statute gives a remedy, it is clearly a remedy in equity. If it was the legislative intention that the merchandise transferred in violation of the statute, or the value thereof, should be a fund for payment of the debts of the seller, the remedy is in equity.

In Musselman Grocer Co. v. Kidd, etc. Co. 151 Mich. 478, 115 N. W. 409, it was the contention of appellants that: "The legislature meant that on the application of any creditor, and after hearing, the court would make an order declaring the purchaser to hold the goods for the benefit of all the creditors of the seller *pro rata*."

The contention was overruled; the justices sitting in that case holding that: "It would destroy the intent of the legislature in passing the act to require the intervention of a court of equity."

The action was garnishment, and a personal judgment [237] against the purchaser of the goods for the amount of the seller's debt to the plaintiff was affirmed.

In Bixler v. Fry, 157 Mich. 314, 122 N. W. 119, which was a suit in equity, the bill of complaint charged that one R. S. Drew was a retail merchant who became indebted to the complainant for merchandise and also became indebted to others; that Drew sold his stock of goods to defendant Fry, in bulk, without complying with the statute, whereby said Fry "became and is a receiver and liable to said creditors for all goods . . . that have come into his possession by virtue of the said sale." It was charged that Drew was insolvent. In behalf of complainant and all other creditors of Drew, it was prayed that Fry appear and answer, that he be decreed to hold all of said goods, etc., as receiver and in trust for creditors of Drew, that he come to an accounting and turn over to the court sufficient of the goods to pay Drew's debts, the property to be disposed of and proceeds distributed under the order and direction of the court. No personal judgment against Fry was asked for; but the attempt was to follow the goods as a fund for payment of creditors. The bill was filed according to the theory that the statute, by its terms imported, if it did not create, an equitable remedy. The court below overruled a demurrer to the bill, and in an opinion used the language following:

"Section 3 of Act No. 223 of the Public Acts of 1905, Michigan, reads:

"'Any purchaser, transferee, or assignee shall upon application of any of the creditors of the seller, transferror or assignor, become a receiver and be held accountable,' etc.

"'The purchaser, transferee, or assignee does not become a receiver and accountable until appointed as such, and he cannot be so appointed, except by a court of chancery. To delay the appointment until the [238] creditors become judgment creditors would render the statute practically of no benefit in many cases. I do not care to be responsible for such a construction, but rather prefer to give the construction that will secure the results evidently intended by the legislature. Whether Drew ought not to have been made a party, is a question I do not now pass upon, as later he may be added, if deemed necessary. This would seem true, unless made a party, no claim can be made out against Drew in this proceeding. Judgment would have to first be obtained in an action at law against him before the funds in the hands of the receiver could be applied to the liquidation of complainant's claim. The necessity of the case demands that the purchaser be placed in a position of responsibility at the earliest possible moment. Largely for this reason, I overrule the demurrer, granting the usual time to plead."

From the order overruling the demurrer, the defendant appealed. Two of the eight justices who heard the argument were of opinion that the bill was demurrable because Drew was not made a party defendant, and two favored an affirmance of the decree upon the ground that the statute "establishes the right of a court of equity to interfere in such a case." Four of the justices were of opinion that prior decisions of the court disposed of the contention that the statute itself provided for or indicated a proceeding *in rem*, or for the exclusive jurisdiction of courts of equity, and held that a court of equity would

assume jurisdiction only when such jurisdiction was warranted by general rules.

Having held that to require the intervention of a court of equity in such cases would destroy the intention of the legislature, having held that the purchaser of the stock of goods is liable in garnishment, having held (Porter v. Goudzwaard, 162 Mich. 158, 127 N. W. 295), that a creditor of the seller of a stock of goods in bulk may attach the goods, it would seem to be settled that the statute we are considering does [239] not give a remedy. It would seem that the court had heretofore been of opinion that creditors of the seller have an adequate remedy at law. And the opinions referred to cannot be harmonized with the theory that the goods sold constitute a trust fund for creditors.

If the effect of these decisions is not that the purchaser of the goods is liable to the creditors of the seller to the extent of the value of the goods, and that such creditors have such, and only such, remedies as, independent of the particular statute, are afforded by law, then I have misunderstood them. If my Brother McAlvay's conclusions are sustained, we come to this proposition, viz.: Any creditor of a seller of a stock of goods in bulk may, *at his election*, pursue the buyer at law, or pursue the goods or their proceeds in equity, without having secured a judgment at law; equitable jurisdiction being grounded upon the statute itself.

How, in practice, can such a proposition be sustained? If the first creditor who acts files a bill in equity, are other creditors thereby deprived of the right to pursue the purchaser in actions at law? If, in a particular case, some creditor institutes garnishment proceedings or attachment and garnishment proceedings, and some creditor later files a bill in equity, will the equity court administer so much of the fund as shall remain after the plaintiff in the law action is satisfied, or will it dislodge the plaintiff in the law case and oblige all creditors to accept an equitable division of the property or of its proceeds? These are questions which at once suggest themselves.

The statute either leaves creditors to such remedies as existed when the law was passed or else it provided a new remedy. If it provided a new remedy, it did so in the words:

"Any purchaser . . . who shall not conform to the provisions of this act shall, upon application of [240] any of the creditors of the seller, . . . become a receiver and be held accountable to such creditors for all the goods, wares, merchandise, and fixtures that have come into his possession by virtue of such sale."

If it provided a new remedy, it is necessarily an exclusive remedy. The unlawful sale is void. The goods, as to his creditors, belong to the vendor. The vendee is a receiver "accountable to such creditors for all the goods . . . that have come into his possession by virtue of such sale."

In my opinion, it would have been logical if in the initial case presented this court had agreed with the contention of the appellant and had held that the legislative intention, in case the law was disobeyed, was to make the buyer a trustee for creditors of the seller, responsible to all creditors alike for the value of the goods. Such a holding and such a construction of the act would affirm the idea of a new and complete remedy under the statute and preclude the idea that the swift creditor may recoup himself, even to the extent of the entire value of the goods sold, in garnishment or other proceedings at law. But the court rejected this construction of the act and in so doing, I repeat, necessarily decided that no new remedy was given by the statute. Independent of statute, a simple contract creditor has no remedy in equity.

If the construction then placed upon the act was wrong, it can be remedied by overruling the decision and those which follow it. I do not favor such a course, believing the remedy at law to be fairly adequate.

One other proposition remains to be considered, and that is whether the bill can be sustained as a judgment creditor's bill, upon the ground that it was impossible by reason of the debtor's absence to obtain a judgment. It was filed upon no such theory, but according to a theory which I have stated. Moreover, [241] there is not here present as there was in Earle v. Grove, 92 Mich. 285, 2 N. W. 615, the fact that the demand could not be satisfied by an action at law. Plaintiff might have proceeded by attachment and garnishment.

The decree should be reversed, and the bill dismissed, with costs of both courts to appellant.

NOTE.

Remedies of Creditor for Violation of Bulk Sales Law.

At Law.

In almost all of the American states bulk sales laws have been passed the object of which is to prevent a trader from disposing of his merchandise and fixtures in bulk without complying with certain requirements such as notice to creditors, etc., and which declare that a sale made in violation of such provisions shall be void and fraudulent as against the creditors of the vendor. Under such a law it has been held that a creditor of a person who has sold goods in violation of its terms cannot, without a judgment or a

lien in his favor, maintain a direct action at law against the purchaser of the goods to recover the debt. Rogers' Milling Co. v. Goff, etc. Co. (Okla.) 148 Pac. 1029; Bewley v. Sims, — Tex. Civ. App. —, 145 S. W. 1076; Rothschild v. Trewella, 36 Wash. 679, 79 Pac. 480, 104 Am. St. Rep. 973, 68 L.R.A. 281. This rule does not, however, apply to a trustee in bankruptcy who may bring an action of replevin to recover a stock of goods sold by the bankrupt in violation of the provisions of a bulk sales law. Goodwin v. Tuttle, 70 Ore. 425, 141 Pac. 1120, wherein it was held that a person who took possession of property in violation of a bulk sales statute was not "a bona fide holder for value prior to the date of the adjudication" within the meaning of section 70 of the national bankruptcy law.

The creditor may proceed by suing out a writ of attachment and may attach the goods in the hands of the vendee. Carstarphen Warehouse Co. v. Fried, 124 Ga. 544, 52 S. E. 598; Kight v. Stephen Putney Shoe Co. 137 Ga. 493, 73 S. E. 740; Galbraith v. Oklahoma State Bank, 36 Okla. 807, 130 Pac. 541; Rogers' Milling Co. v. Goff, etc. Co. (Okla.) 148 Pac. 1029. See also Daly v. Sumpter Drug Co. 127 Tenn. 412, Ann. Cas. 1914B 1101, 155 S. W. 167.

Likewise a creditor of the vendor has a remedy by garnishment to enforce his rights against a person who has bought the goods without complying with the requirements of a bulk sales law. Musselman Grocer Co. v. Kidd, etc. Co. 151 Mich. 478, 115 N. W. 409; Marquette County Sav. Bank v. Koivisto, 162 Mich. 554, 127 N. W. 680; Appel Mercantile Co. v. Barker, 92 Neb. 669, 138 N. W. 1133; Interstate Rubber Co. v. Kaufman, 98 Neb. 562, 153 N. W. 585; Rogers' Milling Co. v. Goff, etc. Co. (Okla.) 148 Pac. 1029; Owosso Carriage, etc. Co. v. McIntosh (Tex.) 179 S. W. 257, (*reversing* judgment in 146 S. W. 239); Kohn v. Fishbach, 36 Wash. 69, 78 Pac. 199, 104 Am. St. Rep. 941; Friedman v. Branner, 72 Wash. 338, 130 Pac. 360. See also Humphrey v. Coquillard Wagon Works, 37 Okla. 714, 132 Pac. 899, 49 L.R.A.(N.S.) 600. *Compare* McGreenery v. Murphy, 76 N. H. 338, 82 Atl. 720, 39 L.R.A.(N.S.) 374. As the theory on which the remedy by garnishment is grounded is that the purchaser of goods sold in violation of the provision of a bulk sales law is regarded as a trustee for the creditor, it has been held that the creditor may hold the garnishee for the fund coming into his hands in case he has disposed of the goods. Jaques, etc. Co. v. Carstarphen Warehouse Co. 131 Ga. 162 S. E. 82; Appel Mercantile Co. v. Barker, 92 Neb. 669, 138 S. W. 1133; Interstate Rubber Co. v. Kaufman, 98 Neb. 562, 153 N. W. 585; Owosso Carriage, etc. Co. v. McIntosh (Tex.) 179 S. W. 257 (*reversing* judgment in 146 S. W. 239); Kohn v. Fishbach, 36 Wash. 69, 78 Pac. 109, 104 Am. St. Rep. 941; Friedman v. Branner, 72 Wash. 338, 130 Pac. 360. And it is immaterial that the goods have been sold by the garnishee before the service of the garnishment summons. Jaques, etc. Co. v. Carstarphen Warehouse Co. 131 Ga. 1, 62 S. E. 82. In Kohn v. Fishbach, supra, the court said: "It is true, the garnishee answered, and probably in accordance with the facts, that he did not at that time have any of the property of the defendant in his possession, and that he was not indebted to him. But, in contemplation of law, he had the property of the defendant in his hands, because, having purchased the property in fraud of law, without complying with the provisions of the law in relation to sales of property in bulk, he stood in the position of a trustee of the property, responsible to the cestui que trust or the creditors for the disposition of such property."

Where the purchase price for goods sold without complying with the provisions of a bulk sales law has been paid into court in an action brought to recover it, the fund so paid in will be regarded as a trust fund to be distributed pro rata among those creditors who have intervened in the suit. Fitz Henry v. Munter, 33 Wash. 629, 74 Pac. 1003.

So on the ground that no title to the goods has been passed by one who sells goods in violation of a bulk sales law it has been held that his creditors may levy execution on the goods on a judgment recovered against the vendor. Parham v. Potts Thompson Liquor Co. 127 Ga. 303, 56 S. E. 460; Mutz v. Sanderson, 94 Neb. 293, 143 N. W. 302; Marshon v. Toohey (Nev.) 148 Pac. 357. And a creditor may levy on the proceeds received by the vendee of the goods fraudulently sold where it appears that he has disposed of them. Marshon v. Toohey (Nev.) 148 Pac. 357. A creditor need not in such a case levy on other property of his debtor and have the execution returned unsatisfied before levying on the property fraudulently sold. Mutz v. Sanderson, 94 Neb. 293, 143 N. W. 302.

Where a bulk sales law provides that "no proceedings at law or equity shall be brought against the purchaser to invalidate any such voidable sale after the expiration of ninety days from the consummation thereof," it has been held that a levy on goods within ninety days of their sale under an execution issued on a judgment secured by a creditor against the vendor is a "proceeding at law or equity" within the meaning of the law. Dickinson v. Harbison, 78 N. J. L. 97, 72 Atl. 941; Wilson v. Edwards, 32 Pa. Super. Ct. 295. And that provision has been held to be satisfied where a creditor attaches within ninety days the goods which have been fraudulently sold by his debtor and there is no break in the con-

tinuity of the proceedings so begun by attachment, although the final sale of the merchandise under the writ does not take place till after the ninety days mentioned in the law have passed. Schumacher-Binzley Co. v. Riddle, 52 Pa. Super. Ct. 6, wherein the case of Schmucker v. Lawler, 38 Pa. Super. Ct, 578, was distinguished on the ground that an attachment execution under Act of June 16, 1836 (P. L. 755) was not an appropriate remedy where goods were sold in violation of a bulk sales law, as that process was intended to reach only certain classes of personal property not subject to the writ of fieri facias.

It has been held that where a person has sold goods in violation of the provision of a bulk sales law which makes such a sale voidable as against his creditors, any one creditor may attack the sale immediately without obtaining the co-operation of his fellow creditors. Wilson v. Edwards, 32 Pa. Super. Ct. 295.

There is, however, a limitation on the extent of a creditor's right to follow property as sold in relation of a bulk sales law. Thus in Kasper v. Spokane Merchants' Assoc. 87 Wash. 447, 151 Pac. 800, it appeared that a stock of goods had been sold by one Cohn to a corporation known as the Colville Toggery without complying with a bulk sales law, and the vendee later made an assignment of the same property to a merchants' association for the benefit of its creditors. In a suit by Cohn's vendor for a part of the purchase price wherein he sought to charge the merchants' association as garnishee, alleging that the sale was void originally under the provisions of the bulk sales act, the court said: "But the statute does not confer upon the creditors of a vendor who transfers his goods, wares, or merchandise in bulk without a compliance with this statute the right to pursue the property into whosoever hands it may fall. The creditor having neither title to nor a lien upon the property, but only an inchoate right to have the property subjected to his debt, the rule of caveat emptor does not apply. We must, therefore show that the holder or converter of the property is the fraudulent vendee himself, or some person who took the property from the fraudulent vendee with knowledge of the fraudulent transfer. If this be not the rule, a creditor of a fraudulent vendor could permit such vendor to continue the business purchased, sell the goods to customers in the ordinary course of trade, and, after the property is exhausted pursue the purchasers as for a conversion of the goods; thus permitting the act to operate in restraint of trade, and as a fraud upon the innocent; things not intended, in our judgment, by the framers of the act or by the Legislature which enacted it into law. Tested by these principles, there can be no recovery in this proceeding against the appellant association. It affirmatively appears in the record that the association had no knowledge, at the time it took the assignment from the Colville Toggery either that there had not been a compliance with the Sales-in-Bulk Law in the sale from Cohn to that corporation, or that Kasper was a creditor of Cohn on account of her purchase of the goods from him. Conceding, therefore, that the association was in fact a purchaser of the stock of goods in virtue of the assignment, it was a purchaser from the fraudulent vendee of the goods for value and in good faith, not in itself a party to the fraudulent transfer, and hence not liable as for a conversion of the property."

The bulk sales law of Missouri (Laws 1913, pp. 163, 164, 165) provides in section 2 that "nothing in this act shall be so construed as to give any creditor, manufacturer, wholesale merchant or jobber any right to, or lien on any merchandise or article in any stock of goods, except the goods sold and delivered by such creditor, manufacturer, wholesale merchant or jobber." Another provision gives to creditors of a fraudulent vendor a right to proceed against their debtor under pre-existing statutes which give a right to set aside fraudulent conveyances by attachment and by seizure by writ of fieri facias. In an action of the kind authorized by the latter provision the creditor was held not to be limited in his right of attachment to such merchandise or articles in stock as were sold by him to the fraudulent vendor as provided for in section 2 of the bulk sales law. Joplin Supply Co. v. Smith, 182 Mo. App. 212, 167 S. W. 649, wherein the court said: "We hold that where a sale is made such as is declared fraudulent and void by the Act of 1913, creditors of the vendor have open to them the right to attach which has existed since the enactment of sections 2294 and 2344, Revised Statutes 1909, to set aside fraudulent conveyances or to seize by fieri facias, and also the remedy as provided in section 2 of the Act of 1913, and that unless the latter remedy is invoked, the creditors have the same rights and remedies as to fraudulent conveyances that they have always had when the law declared a conveyance fraudulent and void. In case, however, they do invoke the remedy as provided in section 2 of said act, then and not until then does the proviso, if ever, begin to operate. Keeping in mind the legislative intent of declaring such sales fraudulent and void, this construction gives a greater effect to that intent and arms the defrauded creditor with all the instruments of redress which he had heretofore as well as the one created by section 2 of the act of 1913. This construction places no hardship on the parties to the sale as the act plainly designates what

must be done to make the sale or trade invulnerable so far as this act is concerned."

In Equity.

In the reported case it is held that a remedy by garnishment is not the only remedy under a bulk sales law and that where it appears that a vendor who has sold articles without complying with the terms of the statute has disposed of all his property, and has absconded to parts unknown, his creditors have no adequate remedy at law and can proceed in equity without first obtaining a judgment at law. Similarly, it has been held in a Nebraska case that where goods were sold without a compliance with a bulk sales law, by a person who died soon after the sale, a creditor might bring a bill in equity for the appointment of a receiver, and for the sale of the goods and a distribution of the proceeds pro rata among the creditors, without first reducing his claim to a judgment or presenting it to the probate court for allowance. Scheve v. Vanderkolk, 97 Neb. 204, 149 N. W. 401. So creditors have a remedy by a bill in equity to set aside as fraudulent a sale of merchandise made in violation of a bulk sales law where it appears that it is practically impossible for them to reduce their claims to judgment within the ninety days allowed by the law and that no attachment lies because a statute requires actual, and not merely constructive, fraud to be shown in such a case. Guaranty Title, etc. Co. v. Pearlman, 144 Fed. 550.

It has been held that where a bulk sales law makes a sale of goods absolutely void as to creditors for a violation of its provisions, the creditors of the vendor are entitled, by a bill in equity, to reach and apply the property to a payment of their claims, and for that purpose may have a receiver, an injunction and an accounting. Humiston v. Yore, 181 Mich. 629, 148 N. W. 266; To the same effect see the reported case. And a creditor may maintain an action in the nature of a creditor's bill to have a sale of goods in violation of the terms of a bulk sales law set aside and an accounting from the vendee for the value of the goods, on the ground that the purchaser from the debtor becomes a trustee of the property purchased to the extent of the creditor's claim, and it is immaterial that the buyer may have mingled the purchased goods with property of his own so as to destroy their identity or that he has converted them into cash. Wheeler, etc. Mercantile Co. v. Moon, 49 Mont. 307, 141 Pac. 665.

Where part of a stock of goods has been sold in violation of the provisions of a bulk sales law which declares that sales so made "shall be presumed to be fraudulent" as against creditors of the seller, it has been held that the latter may proceed directly in equity against the purchaser for the value of the goods without attaching them, where it appears that part of the goods have been sold and the remainder so intermingled with new goods that it is impossible to distinguish them. Daly v. Sumpter Drug Co. 127 Tenn. 412, Ann. Cas. 1914B 1101, 155 S. W. 167, Mahoney-Jones Co. v. Sams, 128 Tenn. 207, 159 S. W. 1094.

Where, however, the remedy at law by attachment against a fraudulent debtor is complete and available a creditor will be denied a remedy by injunction and the appointment of a temporary receiver. Carstarphen Warehouse Co. v. Fried, 124 Ga. 544, 52 S. E. 598.

In Muller v. Hubschman, 84 N. J. Eq. 30, 96 Atl. 189, a bill brought by a creditor to obtain a money decree against the purchaser and his vendee of goods which were sold in violation of a bulk sales law which law made the sale voidable as against creditors of the seller, was held not to be maintainable without a showing that the complainant was a creditor who had acquired by judgment and execution or otherwise a lien on the goods in question. The court said: "Its purpose, declared in its title, is the prevention of fraud. Because proof of fraud is sometimes so difficult, it goes to the extent of annulling an entire class of sales, innocent or fraudulent, as against the vendor's creditors, unless certain prescribed steps are taken whose object is to notify them of the contemplated sale. The act so far restricts the seller in the enjoyment of his property rights that some courts have held similar, though perhaps somewhat more drastic, legislation to be unconstitutional. . . . It yet remains true that, if a creditor must clothe himself with a judgment before he can take advantage of that provision of the statute of frauds (section 12) which declares void every conveyance of goods and chattels contrived in fraud with intent to hinder, delay, or defraud creditors, so must he where the right is given to attack a transaction that may be innocent and is only voidable because the statute makes it so."

It was held in Bixler v. Fry, 157 Mich. 314, 122 N. W. 119, 16 Detroit Leg. N. 411, by an equally divided court that a bill in equity would not lie in favor of a creditor of one who sold his goods without complying with the bulk sales law, thereby rendering the sale void as to his creditors, where it appeared that the creditor had an adequate remedy at law and had not reduced his claim to a judgment. And in Rubinsky v. Spiro, 60 Misc. 582, 113 N. Y. S. 852, it was held that a creditor at large had no standing in equity to set aside a sale of goods in violation of the terms of a bulk sales law until he had recovered a judgment against the debtor and had made a return of the execution as unsatisfied.

LONDON COUNTY COUNCIL

v.

ALLEN ET AL.

England—Court of Appeal—May 28, 1914.

[*1914*] *3 K. B. 642.*

Restrictive Covenant — Enforcement against Subpurchaser — Covenantee Owning no Adjoining Land.

A restrictive covenant which does not run with the land will not be enforced in equity against a purchaser from the covenantor, though he bought with notice of the covenant, if the covenantee owns no land adjoining that to which the covenant relates.

[See note at end of this case.]

[642] Appeal from the judgment of Avory J. at the trial without a jury of an action for breach of a covenant dated January 24, 1907.

In November, 1906, the defendant M. J. Allen, who was a builder, applied to the plaintiffs under s. 7 of the London [643] Building Act, 1894 (57 & 58 Vict. c. ccxiii), for their sanction to form and lay out on certain land a new street, called Galloway Road, running from south to north, and a new street at the northern end of Galloway Road running from east to west in continuation of a road called Dunraven Street. The plaintiffs, by their Building Act Committee, gave their sanction on condition that the applicant entered into a deed of covenant not to erect any building, structure, or other erection on two plots of land coloured green on the plan, the object being to afford facilities for the continuation of the proposed streets. Accordingly by an indenture dated January 24, 1907, and made between the plaintiffs and the defendant M. J. Allen (therein called the applicant), the latter entered into the following covenant: "The applicant doth hereby for himself, his heirs and assigns, and other the persons claiming under him, and so far as practicable to bind the land and hereditaments herein mentioned into whosesoever hands the same may come, covenant and agree with the council that he and they will not erect or place, or cause or permit to be erected or placed, any building, structure, or other erection upon the land shewn by green colour on the said plan, without the previous consent in writing of the council so to do, and that on every conveyance, sale, charge, mortgage, lease, assignment, or other dealing with the land herein mentioned or any part thereof he will give notice of the aforesaid covenant in every conveyance, transfer, mortgage, charge, lease, assignment, or other document by which such dealing is effected." The portions coloured green were two, namely, plot 1, being a continuation to the westward of Dunraven Street, and plot 2, being a continuation to the northward of Galloway Road. M. J. Allen was erroneously described in the deed as the owner in fee simple of the land, whereas at that date he had only an option to purchase it.

With regard to plot 1, this plot was with certain other land conveyed to M. J. Allen in fee simple on July 3, 1908. On the same day he conveyed it together with other property to one Willcocks by way of mortgage as security for an advance. On [644] August 1, 1911, the mortgage debt due to Willcocks was paid off, and Willcocks, with the concurrence of M. J. Allen, conveyed the land to the defendant Emily Allen, the wife of M. J. Allen, in fee simple freed and discharged from the mortgage. Meanwhile, in July, 1911, Emily Allen commenced to build and completed three houses on the plot, and on October 9, 1911, she conveyed the plot with the houses thereon to the defendant Norris in fee simple by way of mortgage as security for an advance. On August 5, 1911, the present action was brought against the defendant M. J. Allen. Emily Allen was added as a defendant on October 31, 1911, and subsequently Norris was also added as a defendant.

With regard to plot 2 the defendant M. J. Allen erected a wall, one brick thick and six feet high, on it at the northern end of Galloway Road, and he contended that this wall was not a "building, structure, or other erection" within the meaning of the covenant, and that it was erected solely for the purpose of protecting persons using the road, as the land at this point had a sharp fall in the surface of the ground.

The plaintiffs claimed as against the Allen defendants (1.) a declaration that neither M. J. Allen nor Emily Allen was entitled to erect or place or cause to be erected or placed any building, structure, or other erection upon either of the plots; (2.) an order directing M. J. Allen or alternatively Emily Allen to pull down and remove the houses erected on plot 1; (3.) an order directing M. J. Allen to pull down and remove the wall erected on plot 2; (4.) an injunction restraining M. J. Allen or alternatively Emily Allen from erecting, etc., any building, etc., upon plot 1, and a similar injunction against M. J. Allen as to plot 2; (5.) damages. The plaintiffs claimed as against the defendant Norris (1.) a declaration that he was not entitled to retain upon plot 1 the three houses or any other building, structure, or other erection; (2.) an order directing him to pull down and remove or to concur with Allen defendant in pulling down and removing the houses.

The defendants Norris and Emily Allen pleaded (so far as material) (1.) that each of them was, as purchaser and mortgagee

plot 1 respectively, a purchaser for value without notice, [645] and acquired the legal estate and title therein through Willcocks, who was himself a purchaser for value without notice of the deed of covenant; (2.) that the statement of claim disclosed no cause of action against them. The contention upon this second plea was that, assuming that the defendants had notice of the covenant, inasmuch as the plaintiffs neither owned nor were interested in any adjoining or neighbouring land for the protection or benefit of which the covenant was imposed, the defendants, as derivative owners of plot 1, were not bound by the covenant.

It was admitted that the covenant did not run with the land at law.

With regard to plot 1, Avory J., upon the first plea, was not satisfied that Emily Allen had not notice of the restrictive covenant, and he came to the conclusion that Norris and Willcocks had constructive notice of the covenant. Upon the second plea he held that, having regard to the powers vested in the plaintiffs under ss. 7 and 9 of the London Building Act, 1894, the contention failed. He declined, however, in the circumstances, in the exercise of his discretion, to grant a mandatory injunction to pull down the houses, and he gave judgment for the plaintiffs as against the defendants M. J. Allen and Emily Allen for 40*s.* nominal damages and the costs of the action, and he gave judgment for the defendant Norris and ordered him to pay his own costs, giving him leave to appeal on the question of costs.

With regard to plot 2 the learned judge held that the wall was a "structure" or "erection" within the meaning of the covenant, and made an order against M. J. Allen to pull down and remove the wall.

All the defendants appealed.

Upon the appeal of the defendants Norris and Emily Allen the point of law was argued first, as to whether, assuming that they had notice of the restrictive covenant, the covenant was enforceable against them.

W. H. Cozens-Hardy, K. C., S. C. N. Goodman and *Chartres* for appellants.

Dickens, K. C. and *F. F. Daldy* for respondents.

Rodgers, Gilbert & Rodgers, solicitors for appellant Norris.

Hogan & Hughes, solicitors for appellants M. J. Allen and Emily Allen.

E. Tanner, solicitor for respondents.

[651] BUCKLEY, L. J.—This action is brought by the London County Council upon an indenture dated January 24, 1907, made between the defendant Morris Joseph Allen of the one part and the London County Council of the other part, claiming certain mandatory injunctions and damages for breach of a covenant contained in that indenture. Before the date of the execution of the deed the defendant M. J. Allen had applied to the London County Council for their permission under s. 7 of the London Building Act, 1894, to his laying out a certain new road, called Galloway Road, running from south [652] to north, and a further small portion of road at the northern end of Galloway Road running from east to west in continuation of a road called Dunraven Street. The London County Council gave their permission upon the terms, amongst other things, that this defendant should enter a certain deed of covenant, and that was the deed of January 24, 1907. The covenant in question was as follows: "The applicant" (that is to say, the defendant M. J. Allen) "doth hereby for himself, his heirs and assigns, and other the persons claiming under him, and so far as practicable to bind the land and hereditaments herein mentioned into whosesoever hands the same may come, covenant and agree with the council that he and they will not erect or place, or cause or permit to be erected or placed, any building, structure, or other erection upon the land shewn by green colour on the said plan without the previous consent in writing of the council so to do, and that on every conveyance, sale, charge, mortgage, lease, assignment, or other dealing with the land herein mentioned or any part thereof he will give notice of the aforesaid covenant in every conveyance, transfer, mortgage, charge, lease, assignment, or other document by which such dealing is effected." The deed recited (but contrary to the fact) that the applicant was the owner in fee simple of the land in question. He was not. He had at the date of this deed of covenant merely an option of purchase, which might or might not result in his becoming owner of the land. The portions coloured green were two, namely, plot No. 1, being the continuation of Dunraven Street to the west of Galloway Road, and plot No. 2, being the continuation of Galloway Road to the north of Dunraven Street. It is necessary to deal with these two plots separately.

First as regards plot No. 1. On July 3, 1908, this was conveyed to the defendant M. J. Allen in fee. On the same day he mortgaged it with other land to one Willcocks to secure a sum of 3600*l.* On August 1, 1911, the mortgage was redeemed, and Willcocks with the concurrence of Allen conveyed the land discharged from the incumbrance to the defendant Emily Allen in fee. On October 9, 1911, Mrs. Allen charged the land together with the three messuages then recently erected thereon to the defendant Norris in fee by way of mortgage. In the interval, [653] namely, in July, 1911, Mrs. Allen built on

plot No. 1 and completed by the end of that month three houses. The writ in this action was issued on August 5, 1911.

By virtue of ss. 7 and 9 of the London Building Act, 1894, the London County Council have certain powers of control over land which the owner proposes to form or lay out in streets. But they have no estate or interest in such land. The plaintiffs at the date of the deed of covenant had no estate or interest in any land adjoining or in any manner affected by the observance or non-observance of the covenant contained in the deed. Under these circumstances the defendants Mrs. Allen and Norris, who were not covenanting parties, contend upon this appeal that as matter of law, assuming that there has been a breach of the covenant contained in the deed of January 24, 1907, and assuming (although as matter of separate contention they deny it as a fact) that they had notice of that covenant, the plaintiffs cannot as against them maintain any action upon the covenant contained in the deed. The short proposition is that as matter of law a derivative owner of land, deriving title under a person who has entered into a restrictive covenant concerning the land, is not bound by the covenant even if he took with notice of its existence if the covenantee has no land adjoining or affected by the observance or non-observance of the covenant. I proceed to examine how the law upon this point stands upon the authorities.

The respondents do not contend that the covenant here in question runs with the land. It is the better opinion, and in Austerberry v. Oldham Corp. (1885) 29 Ch. D. 750, the Court of Appeals by way of opinion and not of decision held, that the burden of a covenant, not involving a grant, never runs with the land at law except as between landlord and tenant. Cotton L.J. at p. 776 said: "In order that the benefit may run with the land, the covenant must be one which relates to or touches and concerns the land of the covenantee." The relation of landlord and tenant did not in the present case subsist between the plaintiffs, the covenantees, and M. J. Allen, the covenantor. Under these circumstances the plaintiffs admit that this covenant did not run with the land at law. As between the covenantee and the owner [654] deriving title under the covenator there is no privity of contract, and the law is that it is only where there is privity of estate between landlord and tenant that the burden of a covenant will run with the land. Ownership of land both by covenantor and covenantee must exist in order that Spencer's Case, 5 Coke 16a, 1 Smith Lead. Cas. 11th ed. 55, shall apply, and that the covenant shall run with the land. But it does not follow that the covenantee is without remedy where the covenant does not run with the land. Tulk v. Moxhay, 2 Phil. 774, established that as between the grantor of a restrictive covenant affecting certain land and the owner of adjoining land the covenantee may in equity enforce the covenant against the derivative owner taking with notice. The reasoning of Lord Cottenham's judgment in Tulk v. Moxhay, 2 Phil. 774, is that if an owner of land sells part of it reserving the rest, and takes from his purchaser a covenant that the purchaser shall use or abstain from using the land purchased in a particular way, that covenant (being one for the protection of the land reserved) is enforceable against a subpurchaser with notice. The reason given is that, if that were not so, it would be impossible for an owner of land to sell part of it without incurring the risk of rendering what he retains worthless. If the vendor has retained no land which can be protected by the restrictive covenant, the basis of the reasoning of the judgment is swept away. In Haywood v. Brunswick Permanent Ben. Bldg. Soc. (1881) 8 Q. B. D. 403, the Court of Appeal declined to extend the doctrine of Tulk v. Moxhay, 2 Phil. 774, to covenants other than restrictive covenants. They rejected the doctrine that, inasmuch as the defendants took the land with notice of the covenants, they were bound in equity to perform them. That therefore is not the principle upon which the equitable doctrine rests. In the present case we are asked to extend the doctrine of Tulk v. Moxhay, 2 Phil. 774, so as to affirm that restrictive covenant can be enforced against a derivative owner taking with notice by a person who never has had or who does not retain any land to be protected by the restrictive covenant in question. In my opinion the doctrine does not extend to that case. The doctrine is that a covenant not running [655] with the land, but being a negative covenant entered into by an owner of land with an adjoining owner, binds the land in equity and is enforceable against a derivative owner taking with notice. The doctrine ceases to be applicable when the person seeking to enforce the covenant against the derivative owner has no land to be protected by the negative covenant. The fact of notice is in that case irrelevant.

The particular equity recognized in Tulk v. Moxhay, 2 Phil. 774, has been said to be analogous to an equitable charge upon land subsisting in the owner of the adjoining land, or to a negative easement enjoyed, not in gross, but by the adjoining land over the land to which the covenant relates. It arises from the possession by the covenantee of land enjoying the benefit of the negative covenant coupled with notice of the existence of the covenant. In London etc. R. Co. v. Gomm. 20 Ch. D. 562, at p. 583, Sir George Jessel says: "The doctrine of Tulk v. Moxhay, 2

Phil. 774, rightly considered, appears to me to be either an extension in equity of the doctrine of Spencer's Case, 5 Coke 16a, 1 Smith Lead. Cas. 11th ed. p. 55, to another line of cases, or else an extension in equity of the doctrine of negative easements; such, for instance, as a right to the access of light, which prevents the owner of the servient tenement from building so as to obstruct the light. The covenant in Tulk v. Moxhay, 2 Phil. 774, was affirmative in its terms, but was held by the Court to imply negative. Where there is a negative covenant expressed or implied, as, for instance, not to build so as to obstruct a view, or not to use a piece of land otherwise than as a garden, the Court interferes on one or other of the above grounds. This is an equitable doctrine, establishing an exception to the rules of common law which did not treat such a covenant as running with the land, and it does not matter whether it proceeds on analogy to a covenant running with the land or on analogy to an easement." At p. 587 Lindley J.L. says: "The first thing therefore the plaintiffs must shew is, upon what legal principle the defendant is bound by a contract into which he did not enter. . . . Upon what principle is it that he is bound in equity? It is said that he is bound in equity [656] because he bought the land knowing of the covenant into which his predecessor in title had entered. That proposition stated generally assumes that every purchaser of land with notice of covenants into which his vendor has entered with reference to the land is bound in equity by all those covenants. That is precisely the proposition which had to be considered in Haywood v. Brunswick Permanent Ben. Bldg. Soc. 8 Q. B. D. 403, and because it was sought there to extend the doctrine of Tulk v. Moxhay, 2 Phil. 774, to a degree which was thought dangerous, considerable pains were taken by the Court to point out the limits of that doctrine."

In In re Nisbet, etc. Contract [1905] 1 Ch. 391; [1906] 1 Ch. 386, this view of the matter is I think accepted, and in Formby v. Barker [1903] 1 Ch. 539, and Millbourn v. Lyons [1914] 1 Ch. 34 (since *affirmed* by the Court of Appeal [1914] 2 Ch. 231), that review was, I think, definitely accepted by the Court of Appeal. In Formby v. Barker [1903] 2 Ch. 539, the question arose between the assign of the covenantee and the derivative owner deriving title under the covenantor. So much of the judgment as relates to derivative title in the plaintiff is not pertinent to the present case. The London County Council have never assigned. They are original not derivative owners of the benefit of the easement. But the case is directly in point as regards the right of a proper plaintiff to sue the owner deriving title under the covenantor. There are interlocutory observations made during the argument which are important; for instance, at p. 543, Romer L.J. referring to Spencer's Case, 5 Coke 16a, 1 Smith Lead. Cas. 11th ed. 55, and to Stokes v. Russell, 3 T. R. 678, says: "In equity you could only sue on such a covenant in respect of some land;" and Vaughan Williams, L.J.: "The plaintiff has no estate for the benefit of which the covenant was entered into." Vaughan Williams, L.J., in the course of his judgment, at p. 549, pointed out that the plaintiff's testator had conveyed his whole estate, and had no contiguous estate which would be benefited by the covenant, and at p. 550, after pointing out that the [657] vendor had sold all his land, he goes on to say: "It becomes necessary therefore to ascertain whether the principle of Tulk v. Moxhay, 2 Phil. 774, applies to a case in which the vendor sells his whole estate. I have not been able to find any case in which, after the sale of the whole of an estate in land, the benefit of a restrictive covenant has been enforced by injunction against an assignee of the purchaser at the instance of a plaintiff having no land retained by the vendor, although there are cases in which restrictive covenants seem to have been enforced at the instance of plaintiffs, other than the vendor, for the benefit of whose land it appears from the terms of the covenant, or can it be inferred from surrounding circumstances, that the covenant was intended to operate. In all other cases the restrictive covenant would seem to be a mere personal covenant collateral to the conveyance. It is a covenant which cannot run with the land either at law or in equity, and therefore the burden of the covenant cannot be enforced against an assignee of the purchaser." He then goes on to negative the proposition that the doctrine is based upon obligations on the conscience of the purchaser taking with notice of the covenant, quoting Collins L.J. in Rogers v. Hosegood [1900] 2 Ch. 388, at p. 407: "The covenant must be one that is capable of running with the land before the question of the purchaser's conscience and the equity affecting it can come into discussion." There is a further passage, at p. 552, which I do not read at length. Romer L.J. gave judgment principally upon the question of the effect of the fact that the plaintiff was administratrix of the covenantee, but he says (at p. 554): "If restrictive covenants are entered into with a covenantee, not in respect of or concerning any ascertainable property belonging to him, or in which he is interested, then the covenant must be regarded, so far as he is concerned, as a personal covenant—that is, as one obtained by him for some personal purpose or object." Stirling L.J. agreed with the other members of the Court and dwelt

upon the fact that the covenantee was not entitled to any land for the protection or benefit of which the restrictive covenants were or could be intended. Upon these judgments, and particularly upon the principal judgment as delivered by Vaughan Williams L.J., [658] it seems to me that the Court of Appeal affirmed the view taken by Sir George Jessel that the doctrine of Tulk v. Moxhay, 2 Phil. 774, was either an extension of Spencer's Case, 5 Coke 16a, 1 Smith Lead. Cas. 11th ed. 55, or of the equitable doctrine of negative easements, regarding it as something arising from the relation of two estates, the one to the other. In Milbourn v. Lyons [1914] 1 Ch. 34, 2 Ch. 231, the decision rests upon a similar view. Inasmuch as at the date when the covenant was taken the covenantee had no land to which the benefit of the covenant could be attached, it was held that the benefit of the restrictive covenant could not enure against a derivative owner even where he took with notice. I have had the advantage of reading an advance copy of the judgments delivered in the Court of Appeal. They all adopt this view.

On the other hand the decisions of the Court of Appeal in Catt v. Tourle, L. R. 4 Ch. 654, and of Fry J. in Luker v. Dennis, 7 Ch. D. 227, undoubtedly create a difficulty. In Catt v. Tourle, L. R. 4 Ch. 654, Selwyn L. J. referred to Wilson v. Hart (1866) L. R. 1 Ch. 463. But that is a case upon which the difficulty, as it seems to me, does not arise. The land there was part of a building estate, and it would seem that there were other lands of the covenantee in respect of which the benefit of the covenant might be enjoyed. I do not, it is true, find that that was the case in Catt v. Tourle, L. R. 4 Ch. 654. But on the other hand the Court do not seem to have considered and given judgment upon the exact point here raised, namely, whether the covenantee had any land in respect of which the benefit could be enjoyed. The question of fact, whether there was or not ownership of other land, is nowhere mentioned either affirmatively or negatively, and no decision was given upon the point now under consideration. The concluding words of Selwyn L.J.'s judgment are not consistent with later authorities. Upon the general abstract question, whether a person purchasing with such a covenant, as there mentioned, is to be bound by it, the answer must be in the negative. Notwithstanding what was said by Knight Bruce L.J. in De Mattos v. Gibson, 4 De G. & J. 276, at p. 282, it is not true as a general proposition [659] that a purchaser of property with notice of a restrictive covenant affecting the property is bound by the covenant. This may be illustrated by the cases relating to the sale of chattels, such as Taddy v. Sterious [1904] 1 Ch. 354, and McGruther v. Pitcher [1904] 2 Ch. 306. The proposition is true only in certain cases, such as Spencer's Case, 5 Coke 16a, 1 Smith Lead. Cas. 11th ed. p. 55, and Tulk v. Moxhay, 2 Phil. 774. The passage already quoted from Lindley L.J. in London, etc. R. Co. v. Gomm. 20 Ch. D. 587, and the decision in Haywood v. Brunswick Permanent Ben. Bldg. Soc. 8 Q. B. D. 403, are enough to dispose of this point. In Luker v. Dennis, 7 Ch. D. 227, the covenant related as well to a public-house which was leased by the brewer to the covenanting publican, as also to another public-house which the publican held under a different landlord, and Fry J. held that the covenant was binding in equity upon an assignee of the second public-house who had notice of the covenant. The point here in question certainly arose, but the point which the learned judge expressly decided was another, namely, that Keppell v. Bailey (1834) 2 My. & K. 517, had been displaced by Tulk v. Moxhay, 2 Phil. 774. The decision in Luker v. Dennis, 7 Ch. D. 227, was in 1877, and since that date this doctrine has been so examined and developed by London, etc. R. Co. v. Gomm, 20 Ch. D. 587; Austerberry v. Oldham Corp. 29 Ch. D. 750, and quite recently by Formby v. Barker [1903] 2 Ch. 539, and Millbourn v. Lyons [1914] 1 Ch. 34 [1914] 2 Ch. 231, that it cannot I think be relied upon as now accurately stating the law. Further, as regards Catt v. Tourle, L. R. 4 Ch. 654, which was a decision of the Court of Appeal, we are of course bound by that decision, but again that was in 1869, and since that date the decisions to which I have referred seem to me to have recognized and established the principle to which we are bound to give effect, and, as I have already pointed out, the decision in Catt v. Tourle, L. R. 4 Ch. 654, does not deal with the exact point now in debate. As regards Clegg v. Hands, 44 Ch. D. 503, I do not feel any difficulty. The case was one as between lessor and lessee.

[660] Upon the authorities, therefore, as a whole I am of opinion that the doctrine in Tulk v. Moxhay, 2 Phil. 774, does not extend to the case in which the covenantee has no land capable of enjoying, as against the land of the covenanter, the benefit of the restrictive covenant. The doctrine is either an extension in equity of the doctrine in Spencer's Case, 5 Coke 16a, 1 Smith. Lead. Cas. 11th ed. p. 55 (in which ownership of land by both covenantor and covenantee is essential) or an extension in equity of the doctrine of negative easements, a doctrine applicable not to the case of easements in gross, but to an easement enjoyed by one land upon another land. Where the covenantee has no land, the derivative owner claiming under the covenantor is bound neither in contract nor

by the equitable doctrine which attaches in the case where there is land capable of enjoying the restrictive covenant.

The appeal of Emily Allen and Norris upon the point of law in my opinion succeeds.

Under these circumstances it is not necessary to determine whether they had notice or not. Upon that question we have not heard the appellants. But if this case should go further, that point will be open to them in the House of Lords.

As regards the defendant M. J. Allen, he is not within the considerations above dealt with. He was the covenanting party. The erection of the three houses was a breach of covenant. The learned judge has refused any injunction but has given nominal damages for the technical breach. He has also given the plaintiffs, as against this defendant, the general costs of the action. The only matter which here requires observation is the question of costs. I will mention this presently.

Secondly as regards plot No. 2, the only defendant concerned in this matter is the defendant M. J. Allen. He contends first that the wall which he erected on this plot was not a building, erection, or other structure within the covenant. The object of the covenant was to secure that plot No. 2 should remain unobstructed so as to be available for the extension of Galloway Road to the north. The wall is an erection which creates such an obstruction. It is, within the literal words of the deed, an erection or structure, and it is within the object of the deed. [661] It is to my mind plain that its erection was a breach of the covenant. But further, this defendant says that there was at this place a sharp drop in the surface of the soil, and that a fence was necessary for the protection of the public; that the wall was only a 9-inch wall bonded into the walls on either side of the roadway to prevent it from falling, and was no more than a temporary fence. If this had been the case put forward at the trial there would have been no difficulty in the matter. This defendant might have offered an undertaking to remove this which he says is a mere temporary fence, if and when requested to do so. He did nothing of the sort. He maintained that it was no breach of the covenant, and that he was entitled to maintain it. In this, in my judgment, he was wrong. In the absence of such an undertaking or offer the order to pull down this wall was, I think, rightly made.

As regards the order for costs as against the defendant M. J. Allen, I have felt some doubt whether the costs ought not to have been divided as between the two plots. As regards plot No. 2 the defendant M. J. Allen was wrong, and would have to pay the plaintiffs' costs. As regards plot No. 1 the plaintiffs failed in obtaining the order to pull down for which they asked, and they recovered merely nominal damages. I have doubted whether in respect of this latter part of the action they ought to have costs against the defendant Allen, but I have arrived at the conclusion that the case is not one in which we ought to interfere. The learned judge in his discretion did not think proper to divide the costs as above suggested, and in giving the general costs as against the defendant M. J. Allen I think he was making an order which we ought not to review.

The result is that as against the defendants Emily Allen and Norris the action will be dismissed with costs, including their costs in this Court, and as regards M. J. Allen his appeal will be dismissed with costs.

KENNEDY, L.J.—I have had an opportunity of reading and considering the judgments in this case which have been prepared by Buckley L.J. and Scrutton J. I concur in the conclusions at which they have arrived. I only [662] desire to add that, as regards plot No. 1 and the demurrers raised by Mrs. Allen and Mr. Norris to the plaintiffs' claim in regard to that property, I concur because, as the judgments of my colleagues point out, the most recent decisions of this Court, and especially the decision in Formby v. Parker [1903] 2 Ch. 539, bind us, I think, so to hold, whatever might be my own opinion if I was not controlled by such recent decisions, but free, in accordance with judicial authority in earlier cases which Scrutton J. has cited in order of date, from Tulk v. Moxhay, 2 Phil. 774, down to the year 1882, to treat a restrictive covenant in regard to the use of land as enforceable in equity at the suit of the covenantee, although he may retain no other land which can be affected by the covenant, against an assign of the covenantor who has acquired the land with notice of the restrictive covenant.

SCRUTTON, J.—In this case the London County Council, on January 24, 1907, entered into an indenture with one Morris Joseph Allen, a builder, describing himself as "the owner in fee simple of certain land," by which he "doth hereby for himself, his heirs and assigns, and other the persons claiming under him, and so far as practicable to bind the land and hereditaments herein mentioned into whosesoever hands the same may come, covenant and agree with the council that he and they will not erect or place, or cause or permit to be erected or placed, any building, structure, or other erection upon the land shewn by green colour on the said plan, without the previous consent in writing of the council so to do, and that on every conveyance, sale, charge, mortgage, lease, assignment, or other dealing with the land herein

mentioned or any part thereof he will give notice of the aforesaid covenant in every conveyance, transfer, mortgage, charge, lease, assignment, or other document by which such dealing is effected." The plots coloured green were two plots intended to be reserved for the making of roads. On plot No. 1, in July, 1911, three houses were built by Mrs. Allen; on plot No. 2 a wall was built by Allen. The London County Council thereupon issued a writ claiming a mandatory injunction to pull down the houses and wall respectively. Thereupon [663] it was alleged that as to plot No. 1 the legal estate was in one Norris as mortgagee, and the equity of redemption in Mrs. Allen, who had taken title from Mr. Allen and Willcocks, his mortgagee, who had no notice of the restrictive covenant; and it was contended (1.) by way of demurrer that as the London County Council were not neighbouring landowners, or grantors of the plot in question, a covenant by Allen in their favour was only a personal covenant, and could not affect the land when in the hands of assigns of Allen, whether they had notice of the covenant or not. It was said that to affect them the right must be in the nature of a negative easement; that an easement required both a dominant and a servient tenement; and that as the council had no land to which the benefit of the covenant could attach, there could be no dominant tenement, and therefore no negative easement binding on a servient tenement, but only an easement in gross, which did not bind assigns of the land. (2.) It was alleged that the defendants Mrs. Allen and Norris could prove they were purchasers for value of the legal estate without notice of the covenant, and therefore not bound by it. Avory J. found on the second contention as a fact that Mrs. Allen and Norris had not satisfied him they had not notice, actual or constructive, of the covenant. On the first contention he said: "It was contended before me that this restrictive covenant, being in the nature of a negative easement, the action would not lie except at the suit of a covenantee who was at the time of the covenant in possession of land which required protection, and that the plaintiffs were not at the time in possession of any such land. But having regard to the powers vested in the London County Council under ss. 7 and 9 of the London Building Act, 1894, and to the admission made in the argument before me that the conditions imposed in this case were not ultra vires, I think this contention fails." He apparently treated the duty and interest of the county council in the matter of new streets as sufficient to make the covenant bind the land in the hands of assigns from Allen. This Court determined to decide the first contention before hearing argument on the second, and we have now to decide on the first contention.

Counsel on each side agreed that the burden of this covenant [664] would not run with the land at law, so as to bind assigns, for the reason stated in the notes to Spencer's Case, 1 Smith Lead. Cas. 11th ed. 88, that "there appears to be no authority which has decided, apart from the equitable doctrine of notice" (by which is meant, as hereinafter explained, the doctrine identified with the case of Tulk v. Moxhay, 2 Phil. 774), "that the burden of a covenant will run with land in any case except that of landlord and tenant." This opinion appears to be justified by the judgments of the Court of Appeal in Austerberry v. Oldham Corp. 29 Ch. D. 750, especially that of Lindley L.J. at p. 781 and of Fry L.J. at p. 784.

The question then is whether it is essential to the doctrine of Tulk v. Moxhay, 2 Phil. 774, that the covenantee should have at the time of the creation of the covenant, and afterwards, land for the benefit of which the covenant is created, in order that the burden of the covenant may bind assigns of the land to which it relates. It is clear that the covenantee may sue the covenantor himself, though the former has parted with the land to which the covenant relates: Stokes v. Russell, 3 T. R. 678. To answer the question as to the assigns of the covenantor, and the land in their hands, requires the investigation of the historical growth of the doctrine of Tulk v. Moxhay, 2 Phil. 774. Though the covenantee in that case did hold adjacent land, there is no trace in the judgment of Lord Cottenham of the requirement that the covenantee should have and continue to hold land to be benefited by the covenant. I read Lord Cottenham's judgment as proceeding entirely on the question of notice of the covenant, and on the equitable ground that a man purchasing land with notice that there was a covenant not to use it in a particular way would not be allowed to violate the covenant he knew of when he bought the land. Lord Cottenham states the question, "Whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor and with notice of which he purchased," and answers it: "If there was a mere agreement and no covenant, this Court would enforce it against a party purchasing with notice of it; for if an equity is attached to the [665] property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased."

Up to 1881, when counsel in Haywood v. Brunswick Permanent Ben. Bldg. Soc. 8 Q. B. D. 403, stated (at p. 405) that Tulk v. Moxhay, 2 Phil. 774, had been applied in fifteen cases, I cannot trace, nor could counsel before us discover, that Tulk v. Moxhay, 2 Phil. 774, had been based on anything but notice of the covenant by the assignee. In

the case cited, in which the Court of Appeal refused to extend the doctrine to an affirmative covenant to repair, Lindley L.J. said (at p. 410): "The result of these cases is that only such a covenant as can be complied with without expenditure of money will be enforced against the assignee on the ground of notice." Brett L.J. said (at p. 408): "That case" (Tulk v. Moxhay, 2 Phil. 774) "decided that an assignee taking land subject to a certain class of covenants is bound by such covenants if he has notice of them, and that the class of covenants comprehended within the rule is that covenants restricting the mode of using the land only will be enforced." Cotton L.J., after citing Lord Cottenham that "No one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased," said (at p. 409): "This lays down the real principle that an equity attaches to the owner of the land." Meanwhile in De Mattos v. Gibson, 4 De G. & J. 276, at p. 282, in 1858, Knight Bruce L.J. had put the principle as applying to all property thus: "Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not, to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller," resting the matter on knowledge of the previous contract, that is notice. In Catt v. Tourle, L. R. 4 Ch. 654, in 1869, A., a brewer, had sold land to B. with a covenant that he should have the exclusive [666] right to supply all ale consumed in any public-house erected on the land. C., with knowledge of the covenant, bought part of the land from B., erected a public-house on it, but did not take his beer from A. The Court of Appeal, citing De Mattos v. Gibson, 4 De G. & J. 276, at p. 282, restrained C., treating the covenant as negative, and resting the judgment on the ground L. R. 4 Ch. at p. 657 that C. "clearly purchased with notice of the present covenant, and . . . cannot be heard to say that he is now entitled to disregard its provisions." It is to be noted that A. is not stated to have owned any land, and as he might brew beer anywhere, the covenant could not relate to any particular land of his.

In Luker v. Dennis, 7 Ch. D. 227, in 1877, A., a brewer, granted a lease to B. of public-house X., with a covenant that B. should take from him all beer consumed not only in X., but also in public-house Y., which B. held of a different landlord. C. took public-house Y. from B. with notice of the covenant, and did not take his beer from A. It was argued before Fry J. that notice was not enough unless the covenantee had some interest in the land bound by the covenant, either as vendor or lessor. That learned judge refused to accede to this argument, and, citing De Mattos v. Gibson, 4 De G. & J. 276, at p. 282, and Catt v. Tourle, L. R. 4 Ch. 654, granted the injunction, giving, as he said (at p. 236), "effect to the equitable doctrine of notice." I think up to this point the doctrine had been rested on notice, and did not depend on the covenantee having land in favour of which the covenant was created.

The first departure from this position occurs in the judgment of Jessel M.R. in London, etc. R. Co. v. Gomm, 20 Ch. D. 562, at p. 583, in March, 1882. The contract to be enforced was one to reconvey land on notice, and clearly therefore an affirmative covenant, and, as such, within the doctrine laid down in Haywood's Case, 8 Q. B. D. 403, in December, 1881, excluding such contracts from the doctrine of Tulk v. Moxhay, 2 Phil. 774. The Court also held that the sale was ultra vires the railway company, and void for remoteness. [667] But Sir George Jessel, holding that the covenant did, but for its being ultra vires and void, create an interest in the land, discussed the nature of the right. He said: "The doctrine of that case," (Tulk v. Moxhay, 2 Phil. 774) "rightly considered, appears to me to be either an extension in equity of the doctrine of Spencer's Case, 5 Coke 16a, 1 Smith Lead. Cas. 11th ed. p. 55, 2 Y. 2, to another line of cases, or else an extension in equity of the doctrine of negative easements; such, for instance, as a right to the access of light, which prevents the owner of the servient tenement from building so as to obstruct the light. The covenant in Tulk v. Moxhay, 2 Phil. 774, was affirmative in its terms, but was held by the Court to imply a negative. Where there is a negative covenant expressed or implied, as, for instance, not to build so as to obstruct a view, or not to use a piece of land otherwise than as a garden, the Court interferes on one or other of the above grounds. This is an equitable doctrine, establishing an exception to the rules of common law which did not treat such a covenant as running with the land, and it does not matter whether it proceeds on analogy to a covenant running with the land or on analogy to an easement. The purchaser took the estate subject to the equitable burden, with the qualification that if he acquired the legal estate for value without notice he was freed from the burden. That qualification, however, did not affect the nature of the burden; the notice was required merely to avoid the effect of the legal estate, and did not create the right, and if

the purchaser took only an equitable estate he took subject to the burden, whether he had notice or not." It will be noticed that the equitable estate or burden was held to arise independent of notice; which I respectfully think was contrary to the previous authorities; and that in Sir George Jessel's view it did not matter whether it was by analogy to covenants running with the land, or on analogy to an easement. Both, however, had this in common, that some land belonging to the covenantee was required, either for him to let, that the covenant might run with the land, or as a dominant tenement for the easement, an easement in gross being merely a personal right. Whether the "analogy" or "extension" spoken of by Sir [668] George Jessel involved this condition as to land is not discussed. The other members of the Court did not discuss the foundation of Tulk v. Moxhay, 2 Phil. 774, though Lindley L.J. seems again to put it on notice. Catt v. Tourle, L. R. 4 Ch. 654,—a decision of the Court of Appeal—and Luker v. Dennis, 7 Ch. D. 227, were not cited to the Court.

In 1890, in Clegg v. Hands, 44 Ch. D. 503, the doctrine of Tulk v. Moxhay, 2 Phil. 774, was applied by the Court of Appeal to a case somewhat similar to Catt v. Tourle, L. R. 4 Ch. 654, without any discussion of Sir George Jessel's explanation of the doctrine, the case, however, being one of landlord and tenant. In Rogers v. Hosegood [1900] 2 Ch. 388, in 1900, A., the mortgagor, and B., the mortgagee, of some land, conveyed plot X. to C., who entered into a restrictive covenant with the mortgagor only, who had not the legal estate in the land. This plot X. was purchased by D. with notice of the restrictive covenant. A. also conveyed some of his adjoining land, plot Y., to E., who had no notice of the restrictive covenant on plot X. D. then proceeded to erect buildings on plot X. said to contravene the restrictive covenant. E. then sued D. to enforce the covenant. Farwell J. (at p. 394) treated D. as obviously bound by the covenant. "He is obviously bound, by reason of notice, whether the covenant as regards him runs with the land or not." (This expression of the reason why he is bound does not harmonize with the later decisions, but does, I think, with all the earlier ones.). And he held that the benefit of the covenant passed to E. at law running with his land. There was an appeal. In the course of the argument of Mr. Haldane, Q.C., that the covenant ran with the land in equity, Rigby L.J. said: "I do not think any covenant runs with the land in equity. The equitable doctrine is that a person who takes with notice of a covenant is bound by it;" a remark again which seems to me to harmonize with the earlier authorities. The Court held that the benefit of the covenant did not run with the land at law, as the covenantee, the mortgagor, had no legal interest in the land, but did run with the land in equity, as there was a clear intention to benefit that land, and equity would regard [669] the mortgagor as the owner, and, citing Jessel M.R. in London, etc. R. Co. v. Gomm, 20 Ch. D. at p. 583, continued at p. 405: "These observations, which are just as applicable to the benefit reserved as to the burden imposed, shew that in equity, just as at law, the first point to be determined is whether the covenant or contract in its inception binds the land. If it does, it is then capable of passing with the land to subsequent assignees; if it does not, it is incapable of passing by mere assignment of the land. The benefit may be annexed to one plot and the burden to another, and when this has been once clearly done the benefit and the burden pass to the respective assignees, subject, in the case of the burden, to proof that the legal estate, if acquired, has been acquired with notice of the covenant." This makes land bound or benefited by the covenant essential to bind or benefit assigns. The judgment proceeds: "These authorities" (Renals v. Cowlishaw, 9 Ch. D. 125, at p. 130, and Child v. Douglas (1854) Kay 560, at p. 571), "establish the proposition that, when the benefit has been once clearly annexed to one piece of land, it passes by assignment of that land, and may be said to run with it, in contemplation as well of equity as of law, without proof of special bargain or representation on the assignment. In such a case it runs, not because the conscience of either party is affected, but because the purchaser has bought something which inhered in or was annexed to the land bought. This is the reason why, in dealing with the burden, the purchaser's conscience is not affected by notice of covenants which were part of the original bargain on the first sale, but were merely personal and collateral, while it is affected by notice of those which touch and concern the land. The covenant must be one that is capable of running with the land before the question of the purchaser's conscience and the equity affecting it can come into discussion." This again appears to me to treat land as essential, on both sides of the covenant, to affect assigns whether of the benefit or burden.

This view seems to me to be adopted also by the Court of Appeal in Formby v. Barker [1903] 2 Ch. 539. A., the owner of land, conveyed [670] all his land with a restrictive covenant against its being used in particular ways to B., who assigned it to C., who had notice of the covenant. A. died; C. began to use the land in a way forbidden by the covenant; the administratrix of A., who had no land, sued C. It was argued that the right to enforce such a covenant depended entirely on

notice; members of the Court suggested in argument that the benefit of the covenant, if not pursued by the covenantee, must follow some land; and this was the argument put forward for the defendant, that without land the covenant was only one in gross. Romer L.J. asked (at p. 546), "Is there any case in which it has been held that such a covenant purporting to bind land for ever is valid except for the protection of an estate?" and counsel for the plaintiff did not refer him, as they might have done, to Catt v. Tourle, L. R. 4 Ch. 654, and Luker v. Dennis, 7 Ch. D. 227, in neither of which cases had the plaintiff an estate, but only a trade. In the judgments, Vaughan Williams L.J. points out that A. conveyed his whole estate and had no contiguous estate which would be benefited by the covenant in question. I refer to, but do not read, the Lord Justice's judgment on pp. 550–552, but it seems to me, adopting the language of Collins L.J. in Rogers v. Hosegood [1900] 2 Ch. 388, at p. 407, to negative the view that the doctrine of Tulk v. Moxhay, 2 Phil. 774, depends on notice, and to make it depend, where there is no contractual privity, on a "relation of dominancy and serviency of lands" (p. 552), and to fail if the covenantee or his assign has no land to which the covenant relates. Romer L.J. thought that the assign of a covenantee could not sue unless the covenant related to or concerned some ascertainable property belonging to him or in which he was interested. Stirling L.J., while saying that different considerations would apply if the covenantee sued, a remark which leaves it doubtful whether he thought the covenantee could, though owning no land, have sued assigns of the land restricted, rested his judgment on the ground that damages, not injunction would be the appropriate remedy.

The doctrine was again considered, and I think further [671] developed, in In re Nisbet, etc. Contract [1905] 1 Ch. 391, in 1905. The owner of certain land had entered into restrictive covenants with the vendor, who owned an adjoining estate. A squatter, without notice of these covenants, acquired a title by adverse possession, and sold to A., who did not require a forty years' title, which would have disclosed the restrictive covenants. A. sold to B., who, having reason to believe there were restrictive covenants, declined to complete. B. took out a summons for a declaration that the title was not one which he ought to be compelled to accept. Farwell J. treated the nature of the right of action created under the doctrine of Tulk v. Moxhay, 2 Phil. 774, as analogous to an equitable charge on real estate, not depending in any way on notice for its validity, but only defeated by a legal estate acquired for value and without notice. He held therefore that the squatter, though he had no notice and had the legal estate, was bound by the restrictive covenants, as apparently he only took the land subject to the equitable interest in it, and that as the purchaser from the squatter of the legal estate for value would, if he had required a forty years' title, have had notice of the covenants, he had constructive notice and was bound by the covenants. In the Court of Appeal [1906] 1 Ch. 386, the appellant argued that notice was part of the cause of action, the respondent that the doctrine rested on an interest in land, binding on the land itself, with a dominant and servient tenement. The Court of Appeal adopted the latter argument, and held that the restrictive covenant was an equitable interest in the land, whether the occupier of the land had notice of it or not, unless he had purchased the legal estate for value without notice. They do not expressly refer to the necessity of there being a dominant tenement to enforce the interest, but there was in fact such a dominant tenement in the case.

Lastly, in Millbourn v. Lyons [1914] 1 Ch. 34, where a person who had agreed to sell with a restrictive covenant died, and his personal representatives, having sold all their land, conveyed with a similar restrictive covenant, Neville J. enforced the title against a purchaser who knew of the restrictive covenant, and therefore [672] objected to complete, on the ground that there was no restriction against him, as the vendors, at the date of the covenant, had no land to which the benefit of the covenant could be attached, and the Court of Appeal affirmed his judgment on similar grounds. [1914] 2 Ch. 231.

I think the result of this long chain of authorities is that, whereas in my view, at the time of Tulk v. Moxhay, 2 Phil. 774, and for at least twenty years afterwards, the plaintiffs in this case would have succeeded against an assign on the ground that the assign had notice of the covenant, since Formby v. Barker [1903] 2 Ch. 539; In re Nisbet, etc. Contract [1905] 1 Ch. 391 [1906] 1 Ch. 386, and Millbourn v. Lyons [1914] 1 Ch. 34 [1914] 2 Ch. 231, three decisions of the Court of Appeal, the plaintiffs must fail on the ground that they have never had any land for the benefit of which this "equitable interest analogous to a negative easement" could be created, and therefore cannot sue a person who bought the land with knowledge that there was a restrictive covenant as to its use, which he proceeds to disregard, because he is not privy to the contract. I think the learned editors of Dart on Vendors and Purchasers, 7th ed. vol. ii. p. 769, are justified by the present state of the authorities in saying that "the question of notice to the purchaser has nothing whatever to do with the question whether the covenant binds him,

except in so far as the absence of notice may enable him to raise the plea of purchaser for valuable consideration without notice." If the covenant does not run with the land in law, its benefit can only be asserted against an assign of the land burdened, if the covenant was made for the benefit of certain land, all or some of which remains in the possession of the covenantee or his assign, suing to enforce the covenant. It may be, if the matter is considered by a higher tribunal, that tribunal may see its way to revert to what I think was the earlier doctrine of notice, or at any rate to treat it as co-existing with the later refinement of "an equitable interest analogous to a negative easement" binding on persons who are ignorant of it. The remarks of Lord Selborne in Zetland v. Hislop, 7 App. Cas. 427, at pp. 446, 447, are not favourable [673] to the too rigid development or enforcement of the latter alternative; and the observations of Lord Macnaghten (p. 32), Lord Davey (p. 35), and Lord Lindley (p. 36) in Noakes v. Rice [1902] A. C. 24, seem to suggest that the doctrine of Tulk v. Moxhay, 2 Phil. 774, may well be reconsidered and put on a proper footing. For I regard it as very regrettable that a public body should be prevented from enforcing a restriction on the use of property imposed for the public benefit against persons who bought the property knowing of the restriction, by the apparently immaterial circumstance that the public body does not own any land in the immediate neighbourhood. But, after a careful consideration of the authorities, I am forced to the view that the later decisions of this Court compel me so to hold.

In my opinion, therefore, the demurrer of Mr. Norris and of Mrs. Allen succeeds. The action against Mr. Norris must be dismissed with costs. I regret that I do not see my way to depriving Mrs. Allen of her costs, as, whatever may be her equitable rights, I am not at all favourably impressed with her conduct as a good citizen. I see no reason for interfering with the judgment against Mr. Allen in respect of plots No. 1 or No. 2, and his appeal must be dismissed with costs.

Appeal of Norris and Emily Allen allowed; appeal of M. J. Allen dismissed.

NOTE.

Enforcement in Equity against Subpurchaser of Restrictive Covenant Not Running with Land, Where Covenantee Has No Interest in Adjoining Land.

The reported case, while recognizing the rule that a restrictive covenant which does not run with the land may be enforced in equity against a person who purchases from the covenantor with notice, holds that the covenantee has no right to enforce the covenant under such circumstances if he has no interest in adjoining lands. To the same effect is Formby v. Barker [1903] 2 Ch. (Eng.) 539, discussed in the reported case. Similar rulings have been made in a few instances in the United States. Los Angeles University v. Swarth, 107 Fed. 798, 46 C. C. A. 647, 54 L.R.A. 262; Dana v. Wentworth, 111 Mass. 291. The decisions in those cases were placed, apparently, on the want of injury to the covenant. See the note to Hartman v. Wells, Ann. Cas. 1914A 901, for a discussion of the question whether the right to enforce a building restriction is dependent on damage to the complainant by reason of the violation thereof. A like result was reached in Duncan v. Central Pass. R. Co. 6 Ky. L. Rep. 426, but the decision in that case was put on the ground that by selling his adjoining lands without restriction the covenantee had waived the covenant.

However, in the recent case of Van Sant v. Rost, 260 Ill. 401, 103 N. E. 194, 49 L.R.A. (N.S.) 186, the contrary rule was laid down. The court said: "Numerous decisions of American and English courts will be found sustaining the covenantee's right to insist upon the observance of the restrictions without making the right dependent upon his owning related land or the existence of a dominant and servient estate. In our opinion Hays v. St. Paul M. E. Church, supra [196 Ill. 633], clearly recognizes the right of a covenantee owning no neighboring land to maintain a bill to enforce observance of restrictive covenants. In that case John A. King conveyed a vacant lot at the corner of Harrison street and Ashland boulevard to the First Methodist Episcopal Church of Chicago. The deed contained a provision that it was made subject to the condition that no building should be erected on the lot further east or nearer Ashland avenue than the house immediately south of the lot conveyed. The deed was recorded, and the lot by mesne conveyances subsequently became the property of the St. Paul M. E. Church. When John A. King conveyed the lot Nellie King Hays owned the house and lot immediately south of it and John A. King owned no other property in the vicinity. The church planned to erect a building on its lot with walls nearer the street than the walls of the house of Nellie King Hays, and she filed a bill to enforce the observance of the restrictive covenants in the deed from John A. King. We quote at length from the opinion: 'It is not denied that the purchase from John A. King, and the acceptance of the conveyance subject to the provision contained in it, created a valid personal obligation to him. An owner has a right to sell and convey his property

upon such terms and conditions as he may see proper, and if the terms are accepted by the grantee and are not objectionable in law they will be enforced at the suit of the one in whom the right is vested. (Frye v. Partridge, 82 Ill. 267.) If a subsequent owner has taken title with notice, either actual or constructive, of a binding agreement between his grantor and the original owner establishing a building restriction, he will be bound to abide by it and equity will enforce it. In this case there is no dispute that the defendant had notice of the building restriction from the recorded conveyance to the First Methodist Episcopal Church, and if it was imposed in favor of complainant's house and lot and for the benefit of the same, complainant would have a right to enforce it. The question is whether, by the agreement between King and his grantee, defendant's lot was burdened with the restriction for the benefit of the complainant's lot so that she can enforce the agreement. The restriction was imposed by John A. King and the agreement was with him. Complainant was a stranger to that transaction, and there was no covenant or agreement between her and the defendant or its grantor. Her right to enforce the agreement must depend upon her making it appear that it was entered into for the benefit of her lot. In making his conveyance John A. King had a legal right to impose the condition from any motive, and it is immaterial what the motive was, and he could impose it in favor of property which he did not own and which belonged to complainant, if he saw fit to do so. When he executed his deed he did not own any other property in the block or in that vicinity. He did not own the lot or house south of the premises which he conveyed and had no interest in either. He had once owned the premises and had conveyed them by warranty deed December 1, 1889, to the complainant, who is his daughter, and, as a matter of fact, the conveyance was a gift to her. There was no agreement outside of the deed, either between King and the complainant or between either of them and the grantee. To establish complainant's right she must show the intention of the restriction to have been to benefit her lot, and this intention must arise out of the language of the deed, construed in the light of the surrounding circumstances. The intention is to be ascertained as in other cases,—not by learning some secret or unexpressed intention in the mind of King, but from the language of the deed itself, considered in connection with the circumstances existing at the time it was executed. (Hutchinson v. Ulrich, 145 Ill. 336.) The defendant is bound by what it had notice of but not by secret intentions of King. If the deed, in the light of the circumstances, expresses an intention to give complainant's property the benefit of the restriction she can enforce it in behalf of that property, otherwise not. In construing the provision restrictions are not favored, although where the intent is clearly manifested the court will enforce them. When a fee is conveyed, limitations and restrictions upon the use of the property are not favored, and all doubts, as a general rule, are to be resolved against them. (Eckhart v. Irons, 128 Ill. 568; Hutchinson v. Ulrich, supra; Ewertsen v. Gertsenberg, 186 Ill. 344.) The defendant took the premises bound by the agreement, and can be restrained from violating it at the suit of anyone having the interest.'"

WESTERN TIE AND TIMBER COMPANY

v.

CAMPBELL ET AL.

Arkansas Supreme Court—July 6, 1914.

113 Ark. 570; 169 S. W. 253.

Mortgages — Priority Over Liens — Purchase-Money Mortgage.

A mortgage given at the time of the purchase of real estate to secure the purchase money, whether given to the vendor or to a third person, who, as a part of the same transaction, advances the purchase money, has preference over all judgments and liens against the mortgagor.

[See note at end of this case.]

Liens — Fine and Costs.

Kirby's Dig. § 2467, providing that the real and personal property of one charged with a criminal offense shall be bound from the time of his arrest or the finding of an indictment against him, whichever shall first happen, for the payment of all fines and costs which may be adjudged to pay, creates a lien upon such property, not only in the hands of accused, but in the hands of any other person possessing or holding it, after the arrest or indictment found, until accused is discharged or fines and costs adjudged against him are paid, which lien also attaches to the accused's after-acquired property.

Recording Acts — Unrecorded Mortgage — Valid between Parties.

Under Kirby's Dig. § 5396, providing that every mortgage of real or personal property shall be a lien thereon from the time it is filed in the recorder's office for record, an unrecorded mortgage is valid between the parties and as against persons holding the property under a voluntary conveyance.

Failure to Record — Subjection to Subsequent Liens.

Under Kirby's Dig. § 2467, binding the property of an accused from the time of his

arrest or the finding of an indictment against him to the payment of fines and costs adjudged against him, and section 5396 providing that every mortgage shall be a lien on the mortgaged property from the time it is filed in the recorder's office for record, the state after indictment had a valid lien for fines and costs prior to a mortgage of property of accused, executed after the indictment, but not recorded until several months after execution.

Appeal from Jackson Chancery Court: HUMPHRIES, Chancellor.

Action by Western Tie and Timber Company, plaintiff, against L. L. Campbell et al., defendants. Judgment for defendants. Plaintiff appeals. The facts are stated in the opinion. AFFIRMED.

A. J. Stack and *Frank H. Sullivan* for appellant.

Stuckey & Stuckey and *Lon L. Campbell* for appellees.

[571] MCCULLOCH, C. J.—This controversy involves the title to a tract of land in Jackson County, Arkansas, both [572] parties to the suit claiming title from a common source, appellant claiming under a mortgage executed by one Thomas, and appellees claiming under a sale upon execution issued against the property of Thomas.

The question in the case relates to the priority of the respective liens.

On February 11, 1904, the grand jury of Jackson County returned an indictment against Thomas for misdemeanor, and he was arrested on a bench warrant in July of the same year.

After the return of the indictment against Thomas, some time during the month of February, 1904, the precise date not being shown, he negotiated the purchase of the tract of land in controversy from one Mustin, who was then the owner. The purchase price was to be $350, and Thomas borrowed $250 to complete the purchase, having only $100 of his own to pay on the land, and he executed the mortgage upon which appellant rests its claim of title to secure the amount so borrowed, which was used in paying the purchase price. The mortgage was dated February 26, 1904, and the deed from Mustin to Thomas bears date February 29, 1904, but the proof shows that the two transactions were simultaneous.

The mortgage was not recorded, however, until November 4, 1904.

On January 30, 1905, Thomas entered a plea of guilty, a fine of $50 was assessed against him, and judgment was rendered in favor of the State for the recovery of said fine and the costs of prosecution. In October, 1905, execution was issued on the judgment, the land was sold, and appellees became the purchasers.

Subsequently appellant purchased the notes secured by the mortgage executed by Thomas, and foreclosed the mortgage and became the purchaser at the sale.

It is quite well settled by the authorities that a mortgage, given at the time of the purchase of real estate to secure the payment of purchase money, whether given to the vendor or to a third person, who, as a part of the same transaction, advances the purchase money, has preference [573] over all judgments and other liens against the mortgagor.

"A purchase-money mortgage may," says Mr. Jones, "be made to a third person who advances the purchase-money at the time the purchaser receives his conveyance, and such mortgage is entitled to the same preference over a prior judgment as it would have had if it had been executed to the vendor himself." 1 Jones on Mortgages (6 ed.) § 472.

Professor Pomeroy has this to say on the subject:

"Even in the absence of any statute, and upon the general principles of equity, a purchase-money mortgage given at the same time as the deed, or as a part of the same transaction, has precedence over any prior general lien, such as that part of a prior judgment against the mortgagor. The same equitable rule applies in like manner to a mortgage given by the grantee to a third person, as security for money loaned for the purpose of being used, and which is actually used, in paying the purchase price." 2 Pomeroy's Equity Jurisprudence (3 ed.) § 725.

The following cases, among many others, fully sustain the text: Kaiser v. Lembeck, 55 Ja. 244, 7 N. W. 519; Clark v. Butler, 32 N. J. Eq. 664; Moring v. Dickerson, 85 N. E. 466; Rogers v. Tucker, 94 Mo. 346, 7 S. W. 414; Roane v. Baker, 120 Ill. 308, 11 N. E. 246; Courson v. Walker, 94 Ga. 175, 21 S. E. 287.

"The reason given," says the North Carolina court in stating the principle in the above cited case, "is that the execution of the deed and of the mortgage being simultaneous acts, the title to the land does not for a single moment rest in the purchaser, but merely passes through his hands, and without stopping, vests in the mortgagee, and during such instantaneous passage no lien of any character can attach to the title."

The facts presented in this record bring the case within that rule as to the mortgage under which appellant claims title, but the real turning point in the case is whether or not not appellant's lien under the mortgage [574] was superior to the State's lien for the fine and costs assessed against Thomas.

The statute provides that "the property, both real and personal, of any person charged with a criminal offense, shall be bound from the time of his arrest, or the finding of an indictment against him, whichever shall first happen, for the payment of all fines and costs which he may be adjudged to pay." Kirby's Digest, § 2467.

This court, in an early case, speaking of that statute, said:

"This provision of law, we have no doubt, creates a lien in favor of the State, on all of the property of a person charged with a criminal offense, wheresoever it may be within the limits of the State, which attaches upon and binds it, not only in the hands of the accused, but also in the hands of any other person who shall, in any manner, possess or hold it, from the time of the arrest or indictment found, as mentioned in the statute, until the accused is discharged from the prosecution, or such fines and costs as shall be adjudged against him are paid." Lawson v. Johnson, 5 Ark. 168.

It is insisted by learned counsel for appellant that the lien which arises under the statute from the time of the finding of the indictment or the arrest, whichever first occurs, does not attach to after-acquired property.

But we think counsel are clearly mistaken in their interpretation of the statute. The binding force of the statute begins at the time of the arrest or finding of the indictment, but it gathers within its sweep all property owned by the accused from that time until the judgment subsequently rendered for fine and costs be paid.

Similar language is used in the statute creating liens in favor of judgment-creditors, the language being that a judgment shall be a lien "from the date of its rendition," and this court held in Real Estate Bank v. Watson, 13 Ark. 74–82, that the lien attached to any property acquired subsequent to the rendition of the judgment.

[575] The main question is whether the State's lien attached as against the unrecorded mortgage.

It will be noted that under the authorities cited above a purchase money mortgage must be simultaneous with the execution of the deed of conveyance in order to take precedence over prior liens, for if there is any intervening space of time during which the title rests in the purchaser the prior liens attach to it in preference to the mortgage. Cohn v. Hoffman, 50 Ark. 108, 6 S. W. 511.

The registration statutes of this State provide that "every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before." Kirby's Digest, § 5396.

This court has held that, notwithstanding the provision of the statute with reference to registration of mortgages, an unrecorded mortgage is valid between the parties and as against persons holding the property under voluntary conveyance. Main v. Alexander, 9 Ark. 112, 47 Am. Dec. 732; Leonhard v. Flood, 68 Ark. 162–168, 56 S. W. 781.

This is obviously so, because the registration statute is not intended to apply between the parties to a mortgage or to a grantee under a voluntary conveyance.

But is it valid as against the State's claim? We think not. If the statute, by express language, made the mortgage good except as against third parties, it might well be argued that the State was not deemed to be a party within its meaning. But the language is quite different. It declares, unconditionally, that the mortgage "shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before."

When the two statutes involved in this case are read together, the one which declares that the property of an accused person shall be bound for the fine and costs from the time of his indictment or arrest, and the one which declares when a mortgage lien shall take effect—the conclusion is unavoidable that the Legislature meant to give the State a lien against an unrecorded mortgage.

[576] It does not follow that the State would have a lien as against equities of third parties not within the registration statutes; but where the statute has, as in this case, unconditionally provided that there shall be no lien until the mortgage is recorded, it would be straining the language of the lawmakers to say that an unrecorded mortgage should be valid as against the State's statutory lien.

We are of the opinion, therefore, that the State's lien was superior and that appellees acquired a superior title under their purchase at the execution sale. The decree of the chancery court is, therefore, affirmed.

NOTE.

Priority as between Purchase-Money Mortgage and Other Lien or Claim.

I. Introductory, 946.
II. Deed, 946.
III. Dower:
1. General Rule, 946.
2. Reasons and Applications of Rule, 947.
IV. Homestead, 949.
V. Judgment, 949.
VI. Mechanic's Lien, 951.
VII. Mortgage:
1. Mortgage Previously Executed, 951.
2. Mortgage Executed Contemporaneously, 952.

3. Mortgage Securing Money for Cash Payment, 953.
4. Loss of Priority, 953.
VIII. Tax, 955.

I. Introductory.

The question with which this note is concerned arises where a vendee of real property executes to the vendor a mortgage on the property to secure the payment of all or a part of the purchase money, and the lien of the mortgage conflicts with another claim on the same property. The purpose of the note is to review the cases determining the priority as between the purchase-money mortgage and the other claims. Those cases in which the priority is determined by other factors without regard to the purchase-money character of the mortgage are considered as not being pertinent to the present inquiry.

II. Deed.

It is generally held that the lien of a purchase-money mortgage is not defeated by the previous execution of a deed to the property by the mortgagor to a third person at a time when he had no legal title. McRae v. Newman, 58 Ala. 529; Warren Mortgage Co. v. Winters, reported in full, post, this volume at p. 956; Chew v. Barnet, 11 Serg. & R. (Pa.) 389. In the case first cited the court said: "The mortgage became operative only when the conveyance of the land, for the price of which it provided, was delivered. Until that time the mortgagor neither owned the land he mortgaged, nor owed the debt secured thereby; wherefore, it did not matter whether he had previously executed a deed of the land . . . or not. This could not have precedence of the mortgage; because, the mortgagor never was able to convey the land, free from that incumbrance. The title remained in Newman [the original vendor] until his deed was delivered, and by the mortgage, *eo instanti*, returned to him, so as to preclude the interposition of any title or right in any other person." And in Chew v. Barnet, 11 Serg. & R. (Pa.) 389, the court said: "What is the nature of the estate which Mr. Chew acquired by the conveyance from Judge Wilson? When that conveyance was executed, the legal title was in Jeremiah Parker, by patents from the commonwealth; and Judge Wilson having nothing but an equitable title under the articles could convey nothing more; his deed, therefore, passed to Mr. Chew only an equitable title. But it is said, the subsequent conveyance from Jeremiah Parker to Judge Wilson inured to the benefit of Mr. Chew. It did so; but only in equity, and to entitle him to call for conveyance from Judge Wilson; and not as vesting the title in him, of itself, as contended, by estoppel. The facts presented constitute the ordinary case of a conveyance before the grantor has acquired the title; in which the conveyance operates as an agreement to convey, which, when the title has been subsequently acquired, may be enforced in chancery. But Judge Wilson's act could not prejudice the original vendors, who had a title under the articles, to call on him for a mortgage to secure the purchase-money."

In Moshier v. Knox College, 32 Ill. 155, wherein it appeared that a purchase-money mortgage was executed but not recorded at the time of the execution of a deed by the mortgagor to a third person, the court said: "The appellees [mortgagees] ought to retain this decree, because it is shown the indebtedness was for the purchase money of the premises, and appellant [grantee] has not shown he was a bona fide purchaser for a valuable consideration, paying his money at the time on the faith of the title so purchased. It was incumbent on the appellant to show not only that he had a conveyance for this land, legal in form, but that he actually paid for the land. It is not sufficient that he may have secured the payment of the purchase money. He must have paid it in fact before he had any notice of appellee's prior equitable title. That is an essential element in the equity, which must exist in order to support appellant's claim, which he attempts to uphold. If he has not paid the purchase money, no wrong is done him taking from him a legal title, which has cost him nothing."

It seems that a purchase-money mortgage, if recorded before the mortgagor receives title to the premises, is inferior to a deed subsequently executed by the heir of the mortgagor to a purchaser without notice, the reason being that the purchaser is required to search the title of the mortgagor only back to the deed to the mortgagor. Donovan v. Twist, 105 App. Div. 171, 93 N. Y. S. 990.

III. Dower.

1. General Rule.

It is established by the great weight of authority that the lien of a purchase-money mortgage is prior to the rights of the widow of the mortgagor, although she does not join in the execution of the mortgage. While in some of the cases supporting this rule it appears that the wife did join in the execution of the mortgage, nevertheless those cases are in accord with the reason of the rule.

United States.—Maybury v. Brien, 15 Pet. 21, 10 U. S. (L. ed.) 646; Underground Electric R. Co. v. Owsley, 196 Fed. 278, 116 C. C. A. 98, 40 L.R.A.(N.S.) 609 (by New York Statute).

Alabama.—Eslava v. Lepretre, 21 Ala. 504, 56 Am. Dec. 266; Boynton v. Sawyer, 35 Ala. 497.

Florida.—McMahon v. Russell, 17 Fla. 698.

Idaho.—See Kneen v. Halin, 6 Idaho 621, 59 Pac. 14.

Illinois.—Stephens v. Bicknell, 27 Ill. 444, 81 Am. Dec. 242; Lohmeyer v. Durbin, 206 Ill. 574, 69 N. E. 523; Harrow v. Grogan, 219 Ill. 288, 76 N. E. 350. See also Roane v. Baker, 120 Ill. 308, 11 N. E. 246; Gibson v. Brown, 214 Ill. 330, 73 N. E. 578; Spitzer v. Williams, 98 Ill. App. 146, *reversed* on other grounds 203 Ill. 505, 68 N. E. 49.

Indiana.—Nottingham v. Calvert, 1 Ind. 527; Patton v. Stewart, 19 Ind. 233 (by statute); Fletcher v. Holmes, 32 Ind. 497 (by statute); May v. Fletcher, 40 Ind. 575 (by statute); Walters v. Walters, 73 Ind. 425 (by statute); Baker v. McCune, 82 Ind. 339 (by statute); Bowman v. Mitchell, 97 Ind. 155; Butler v. Thornburgh, 141 Ind. 152, 40 N. E. 514, *affirming* 131 Ind. 237, 30 N. E. 1073.

Iowa.—Barnes v. Gay, 7 Ia. 26; Thomas v. Hanson, 44 Ia. 651. See also Haynes v. Rolstin, 164 Ia. 180, 145 N. W. 336, 52 L.R.A. (N.S.) 540.

Kentucky.—Gully v. Ray, 18 B. Mon. 107.

Maine.—Young v. Tarbell, 37 Me. 509; Moore v. Rollins, 45 Me. 493; Wing v. Ayer, 53 Me. 138. See also Gage v. Ward, 25 Me. 101.

Maryland.—McCauley v. Grimes, 2 Gill & J. 318, 20 Am. Dec. 434; Glenn v. Clark, 53 Md. 580.

Massachusetts.—See Hazleton v. Lesure, 9 Allen 24; King v. Stetson, 11 Allen 407; Holbrook v. Finney, 4 Mass. 566, 3 Am. Dec. 243.

Minnesota.—Jones v. Tainter, 15 Minn. 512 (by statute).

Mississippi.—See Whitehead v. Middleton, 2 How. 692.

Missouri.—See Fontaine v. Boatmen's Sav. Inst. 57 Mo. 552; Ragsdale v. O'Day, 61 Mo. App. 230.

New Hampshire.—Hastings v. Stevens, 29 N. H. 564.

New Jersey.—Boorum v. Tucker, 51 N. J. Eq. 135, 26 Atl. 456. See also Griggs v. Smith, 12 N. J. L. 22.

New York.—Mills v. Van Voorhis, 23 Barb. 125 (by statute); McGowan v. Smith, 44 Barb. 232 (by statute); Wheeler v. Morris, 2 Bosw. 524 (by statute); Stow v. Tifft, 15 Johns. 459, 8 Am. Dec. 266; DeLisle v. Herbs, 25 Hun 485 (by statute); Sheldon v. Hoffnagle, 51 Hun 478, 4 N. Y. S. 287; Brackett v. Baum, 50 N. Y. 8 (by statute); Mead v. Mead, 27 Misc. 459, 59 N. Y. S. 444.

North Carolina.—See Bunting v. Jones, 78 N. C. 242.

Ohio.—Welch v. Buckins, 9 Ohio St. 331; Ruffner v. Evans, 1 Ohio Cir. Dec. 368, 2 Ohio Cir. Ct. 70. See also Hickey v. Conine, 27 Ohio Cir. Ct. Rep. 369.

South Carolina.—Stoppelbein v. Shulte, 1 Hill L. 200; Crafts v. Crafts, 2 McCord L. 54; Brown v. Duncan, 4 McCord L. 346; Calhoun v. Calhoun, 2 S. C. 283; Agnew v. Renwick, 27 S. C. 562, 4 S. E. 223; Groce v. Ponder, 63 S. C. 162, 41 S. E. 83; Evans v. Pegues, 86 S. E. 480. See also Frazier v. Center, 1 McCord Eq. 270; Childs v. Alexander, 22 S. C. 169.

Virginia.—Seekright v. Moore, 4 Leigh 30, 24 Am. Dec. 704; Wheatley v. Calhoun, 12 Leigh 269, 37 Am. Dec. 654; Coffman v. Coffman, 79 Va. 504; Hurst v. Dulaney, 87 Va. 444, 12 S. E. 800.

West Virginia.—George v. Cooper, 15 W. Va. 666; Roush v. Miller, 39 W. Va. 638, 20 S. E. 663.

Wisconsin.—Thompson v. Lyman, 28 Wis. 266 (by statute); Foster v. Hickox, 38 Wis. 408 (by statute); Jones v. Parker, 51 Wis. 218, 8 N. W. 124.

In a few *Canadian* cases the view has been taken that the wife's right to dower is paramount to a claim under a purchase-money mortgage to which the wife is not a party. Potts v. Meyers, 14 U. C. Q. B. 499; Norton v. Smith, 20 U. C. Q. B. 213, *affirmed* 7 U. C. L. J. 263. See also Lynch v. O'Hara, 6 U. C. C. P. 259.

2. Reasons and Applications of Rule.

In Young v. Tarbell, 37 Me. 509, the court said: "It is well settled by the entire weight of authority, as well as upon the clearest principles of equity, when a conveyance is made to one, who at the time mortgages back the premises to the grantor to secure the purchase money, that the widow of such mortgagor is not, as against the mortgagee, entitled to dower save in the equity of redemption. The deed and mortgage back being at the same time, though separate instruments, are to be regarded as part of one and the same transaction, in the same manner as the deed of defeasance forms with the deed to be defeated but one contract, though engrossed on several sheets. . . . The husband is not deemed sufficiently or beneficially seized by an instantaneous passage of the fee in and out of him to entitle the wife to dower as against the mortgagee."

It seems that the statutes enacting the foregoing rule are merely declaratory of the common law. Thus, in Nottingham v. Calvert, 1 Ind. 527, the court said: "In the case before us, the conveyance to Carmean, and his mortgage for part of the price, were executed on the same day. It is a case, we think, where the seizin of the purchaser was not sufficient to entitle his widow to dower against the mortgage. 'The following is the language of Chancellor Kent on this subject:

'A transitory seizin for an instant, when the same act that gives the estate to the husband conveys it out of him, as in the case of a connusee of a fine, is not sufficient to give the wife dower. The land must vest in the husband beneficially for his own use; and then, if it be so vested but for a moment, provided the husband be not the mere conduit for passing it, the right of dower attaches. Nor is the seizin sufficient when the husband takes a conveyance in fee, and at the same time mortgages the land back to the grantor, or to a third person, to secure the purchase-money in whole or in part. Dower cannot be claimed as against rights under that mortgage. The husband is not deemed sufficiently or beneficially seized, by such an instantaneous passage of the fee in and out of him, to entitle his wife to dower as against the mortgagee; and this conclusion is agreeable to the manifest justice of the case."

In Overturf v. Martin, 170 Ind. 308, 84 N. E. 531, wherein the rule was enforced in favor of a purchaser of the mortgaged premises, the court said: "It was conclusively shown that said Martin paid nothing upon the 55-acre tract, but executed a mortgage to the vendor, William Gordon, to secure the whole of the purchase money. Appellant bought the land with this mortgage upon it, and paid the mortgage as the consideration for the conveyance of the land by Martin to him. The trial court found these facts, but adjudged that appellee [the widow] was entitled to one-third of this piece of land, without regard to the vendor's lien and incumbrance, which were upon the title held by her husband. In this respect the conclusions of law were erroneous. Appellant caused the mortgage to be satisfied upon the record, but appellee is in no position to insist that he should not be subrogated to the rights of the mortgagee, and the mortgage be treated as alive and in full force as against her claim. Appellant bought the land, apparently at a fair price, and paid the full consideration agreed upon, in the belief that he had acquired a good title, and it would be manifestly inequitable to permit appellee, under the circumstances, to take a full one-third of the land, in which her husband had no valuable interest. If Martin had died while holding the title to this tract, with the purchase-money mortgage upon it, appellee's interest therein as his widow would have been subject to the lien of the mortgage. . . . We perceive no ground, either legal or equitable, for enlarging appellee's rights in the land because of the fact that her husband conveyed it to another in his lifetime. It is our conclusion that this mortgage should be regarded and treated as still alive and enforced in this action for the benefit of appellant."

That the rule rests on reasons further than those expressed in the doctrine of instantaneous seizin was pointed out in Boorum v. Tucker, 51 N. J. Eq. 135, 26 Atl. 456, as follows: "The equity of the holder of the purchase-money obligation, as against the grantee and debtor, rises higher than the mere cotemporaneous execution of a mortgage to secure it. It does not rest alone upon the notion of instantaneous seisin, which preserves the right of the mortgagee as against previous judgment creditors of the mortgagor. . . . The true view, in my judgment, is, that a purchase-money mortgage is, in its essential nature, in equity, precisely the same thing, so far as the wife's dower is concerned, as a vendor's lien for unpaid purchase money. The effect of such a mortgage is a mere practical embodiment of the vendor's lien in legal shape, so that he may give notice of it to all the world, and be able to enforce it at law as well as in equity. The so-called vendor's lien is nothing more or less than the right to come into a court of equity, and ask it to appropriate the property to the payment of the debt; and that is precisely the right which is assured to him in writing by the formal execution and delivery of the mortgage. It is a formal and explicit statement in writing that the purchase money, to the extent named, is unpaid, and that the creditor is entitled to have the land sold to pay it. Thus far in equity. At law, it is also a conveyance of the land to the vendor in pledge. So that if we compare the case of a mortgagee of a purchase-money mortgage upon land coming into a court of equity and asking for foreclosure against the mortgagor and his wife, and that of a vendee of land without mortgage coming into the same court to enforce his so-called vendor's lien against the vendee and his wife, we shall find it difficult to distinguish between the cases—as least I do. In short, it seems to me that the execution of a mortgage to secure purchase money is, in equity, a mere continuance of the lien, and it is that circumstance, and that alone, that gives it efficiency in this court to bar dower, or rather, gives it precedence over dower."

However, in order to defeat the widow's dower, it must be shown that the making of the deed and the mortgage constituted but one transaction. Grant v. Dodge, 43 Me. 489; Rawlings v. Lowndes, 34 Md. 639. In the case last cited the court said: "In order to exclude the dower right in such cases, the deed and mortgage should constitute and form part of one and the same transaction, for if the deed is delivered, no agreement made subsequent thereto between the vendor and purchaser, can affect in any manner the inchoate right of dower, which attached upon the seizin of the husband. It may be laid down as a general rule therefore, that the deed and mortgage should be executed and delivered simultaneously, or if executed on different

days, should be delivered at the same time, as in Mayburry v. Brien, 15 Pet. 21 [10 U. S. (L. ed.) 646], where the court say, that although the deed was executed prior to the mortgage, 'the proof is clear that both instruments were delivered, and consequently, took effect at the same time.' In this case however, the deed was executed and delivered more than two weeks before the acknowledgment and delivery of the mortgage, for although the latter bears date with the deed, yet the acknowledgment on the 14th of November following, destroys the presumption that it was delivered on the day of its date. . . . The only evidence is to be found on the face of the instruments themselves, and although it does appear that the tract of land sold and conveyed, was mortgaged to secure the purchase money, and that the mortgage bears date with the deed, it is equally clear that it was not acknowledged and delivered until more than two weeks subsequent to the delivery of the deed. It also appears that the parties lived in the same county, and that the two witnesses before whom the mortgage purports to have been signed on the 28th of October, are the two justices of the peace before whom the same instrument was acknowledged on the 14th of November following, and yet there is no reason assigned or explanation offered wh it was not acknowledged at the time of its attestation. Upon such proof as this, we do not feel justified in finding when the deed was executed and delivered there was an agreement that a mortgage should be executed and acknowledged and delivered at the same time. To support such an agreement, the effect of which the appellee contends, is to exclude the widow's dower, a right existing by the common law upon the seisin of the husband, and which courts in all time have favored and protected, the proof ought to be clear and conclusive. We are of opinion, therefore, that the husband of the appellant acquired a beneficial seisin in the tract of land in question under the deed of October the 28th, which, upon his death, entitled her to dower, and that her claim thereto is in no manner affected by the mortgage acknowledged on the 14th of November following, nor by the sale and conveyance if the land by the insolvent trustee."

In *Georgia*, according to the old rule, based on the statutes as to mortgage and dower, the widow's right to dower was superior to the right of a purchase-money mortgagee. Slaughter v. Culpepper, 44 Ga. 319. But the widow was obliged to discharge the incumbrance of a purchase-money mortgage existing prior to the seizin of her husband. Rust v. Billingslea, 44 Ga. 306. The rule was changed in 1875 by a statute providing that when a vendor sells land and makes a deed thereto, and at the same time takes a mortgage for the purchase money, the widow of the vendee shall not be entitled to dower in the land as against the vendor, until the purchase money is paid. Wilson v. Peeples, 61 Ga. 218.

IV. Homestead.

A purchase-money mortgage is superior to a claim of a homestead in the mortgaged property. Moses v. Home Bldg. etc. Assoc. 100 Ala. 465, 14 So. 412; Dillon v. Byrne, 5 Cal. 455; Lassen v. Vance, 8 Cal. 271, 68 Am. Dec. 322; Montgomery v. Tutt, 11 Cal. 190; Skinner v. Beatty, 16 Cal. 157; Van Sandt v. Alvis, 109 Cal. 165, 41 Pac. 1014, 50 Am. St. Rep. 25; Barnes v. Gay, 7 Ia. 26; Pratt v. Topeka Bank, 12 Kan. 570; Andrews v. Alcorn, 13 Kan. 351; Shelden v. Motter, (Kan.) 53 Pac. 89; Cohen v. Ripy, 33 S. W. 625, 17 Ky. L. Rep. 1078; Amphlett v. Hibbard, 29 Mich. 298; Jones v. Tainter, 15 Minn. 512; Peterson v. Fisher, 85 Neb. 745, 124 N. W. 145, 133 Am. St. Rep. 688; Hopper v. Parkinson, 5 Nev. 233; Starkey v. Wainwright, 9 Ohio Dec. 436; Calhoun v. Calhoun, 2 S. C. 283; Jones v. Parker, 51 Wis. 218, 8 N. W. 124; Cornish v. Frees, 74 Wis. 490, 43 N. W. 507. See also Carr v. Caldwell, 10 Cal. 380, 70 Am. Dec. 740; Austin v. Underwood, 37 Ill. 438, 87 Am. Dec. 254; Williston v. Schmidt, 28 La. Ann. 416; Bunting v. Jones, 78 N. C. 242.

"The mortgage upon which the suit was brought being given as security for the purchase money of the premises, no homestead could be carved out of the property so as to impair the rights of the previous mortgagee." Montgomery v. Tutt, 11 Cal. 190.

V. Judgment.

The well established rule is that a purchase-money mortgage has preference over a pre-existing judgment against the mortgagor.

Georgia.—Scott v. Warren, 21 Ga. 408.

Illinois.—Roane v. Baker, 120 Ill. 308, 11 N. E. 246; Wehrheim v. Smith, 226 Ill. 346, 80 N. E. 908. See also Curtis v. Root, 20 Ill. 53, *reversed* on other grounds 28 Ill. 367, 38 Ill. 192; Fitts v. Davis, 42 Ill. 391; Christie v. Hale, 46 Ill. 117.

Iowa.—Parsons v. Hoyt, 24 Ia. 154; Laidley v. Aikin, 80 Ia, 112, 45 N. W. 384, 20 Am. St. Rep. 408.

Louisiana.—Rochereau v. Colomb, 27 La. Ann. 337.

Maryland.—Ahern v. White, 39 Md. 409.

Minnesota.—Banning v. Edes, 6 Minn. 402; Marin v. Knox, 117 Minn. 428, 136 N. W. 15, 40 L.R.A.(N.S.) 272.

New Jersey.—Bradley v. Bryan, 43 N. J. Eq. 396, 13 Atl. 806 (by statute); Henry McShane Mfg. Co. v. Kolb, 59 N. J. Eq. 146, 45 Atl. 533.

New York.—Frelinghuysen v. Colden, 4 Paige 204; Card v. Bird, 10 Paige 426; Jackson v. Austin, 15 Johns. 477 (by statute); Pope v. Mead, 99 N. Y. 201, 1 N. E. 671. See also Crombie v. Rosenstock, 19 Abb. N. Cas. 312; Hayward v. Nooney, 3 Barb. 643.

Ohio.—Ward v. Carey, 39 Ohio St. 361.

Pennsylvania.—See Watt v. Steel, 1 Pa. St. 386; Foster's Appeal, 3 Pa. St. 79; Cake's Appeal, 23 Pa. St. 186, 62 Am. Dec. 328.

Texas.—Masterson v. Burnett, 27 Tex. Civ. App. 370, 66 S. W. 90.

Virginia.—Sumers v. Darne, 31 Grat. 791; Cowardin v. Anderson, 78 Va. 88; Straus v. Bodeker, 86 Va. 543, 10 S. E. 570.

Washington.—Bisbee v. Carey, 17 Wash. 224, 49 Pac. 220.

Canada.—Ruttan v. Levinsconte, 16 U. C. Q. B. 495.

Thus in Scott v. Warren, 21 Ga. 408, the court said: "Chancellor Kent says, 'In one instance a mortgage will have preference over a prior docketed judgment, and that is the case of a sale and conveyance of land and a mortgage taken at the same time, to secure the payment of the purchase money. The deed and the mortgage are considered parts of the same contract and constituting one act; and justice and policy equally require that no prior judgment against the mortgagee should intervene and attach upon the land during the transitory seisin, to the prejudice of the mortgagee.' . . . Where a deed is given by the vendor of an estate, who takes back a mortgage to secure the purchase money, at the same time he executes a deed, the deed and mortgage are to be considered as parts of the same contract, as taking effect at the same instant, and as constituting but one act; in the same manner as a deed of defeasance forms with the principal deed to which it refers but one contract, although it be by a distinct and separate instrument. . . . If the land abided but for a single moment in Wade, it would be subject to his judgment debts. It does not depend upon the length of duration; the question is—was it in Wade and out of him, *quasi uno flatu*, and by one and the same contract? For if so, he never was substantially seized of the land so as to subject it unconditionally to the judgment lien."

In Banning v. Edes, 6 Minn. 402, the court applied the rule as follows: "By the mortgage a condition was annexed to the grant, and whatever passed by the grant, passed subject to the condition. There was no moment of time when Baker owned or held the premises free from the condition, nor when he could voluntarily have conveyed them, except subject to the mortgage. Can a judgment creditor, then, by virtue of his judgment, obtain a greater interest in the premises than the debtor himself had? I think it is well settled, that the lien of the judgment will, in all cases, be limited to the actual interest which the judgment debtor has in the estate. 1 Atk. on Conv. 512; 1 Paige 128; 4 Paige 9. The rule is based on principles of justice and public policy, as well as common sense, and can work no hardship to the judgment creditor. So far as the contract between Pairo and Baker is concerned, there can be no question but that it was the intent to give Pairo the first lien on the premises; nor can it be claimed that he would have parted with the premises on any other condition. The judgment creditor having parted with nothing on the strength of this conveyance to Baker, it would be highly inequitable to permit the judgment to be satisfied out of what, in fact, was Pairo's property."

In *Kansas* and *New York* it has been provided by statute that a purchase-money mortgage shall have preference over a prior judgment against the purchaser, and such statutes have been regarded by the courts as declaratory of the common law. Plumb v. Bay, 18 Kan. 415; Stow v. Tifft, 15 Johns. 459, 8 Am. Dec. 266.

Consonant with the general rule heretofore stated, it has been held that a purchase-money mortgage, executed before but not recorded until after the rendition of a judgment against the mortgagor, is superior to the judgment. Britton's Appeal, 45 Pa. St. 172 (wherein it appeared that the judgment creditors had actual knowledge of the mortgage): Coleman v. Reynolds, 181 Pa. St. 317, 37 Atl. 543; Cowardin v. Anderson, 78 Va. 88; Charlottesville Hardware Co. v. Perkins, (Va.) 86 S. E. 869. See also Moomaw v. Jordan (Va.) 87 S. E. 569. In Charlottesville Hardware Co. v. Perkins, supra, the court said: "Coming now to consider the judgment of the Charlottesville Hardware Company, it seems equally clear that as to this claim also the Walker deed of trust [for purchase money] must be given precedence, for the reason that until Walker's debt is paid there is no interest in J. R. Elam upon which the judgment can attach as a lien. It is argued that this view denies to the judgment creditor the benefit of the registry statutes, but, as will hereinafter more fully appear, the question at issue is controlled by considerations which are not in conflict with, but overreach and are entirely independent of, the provisions of the recording acts. The deed of conveyance dated August 22, 1912, from Walker to J. R. Elam, and the deed of trust of the same date from Elam to Walker, were plainly intended by the parties to operate simultaneously, and they were expressly declared to be 'parts of the same transaction.' It affirmatively appears that the deed of trust was executed, acknowledged, and delivered, though not recorded for more

than a year. In the absence of proof to the contrary (and there is no proof or contention to the contrary), the presumption is that the two instruments were executed simultaneously. Summers v. Darne, infra, 31 Grat. 791. The legal result is that there was, as against Walker's debt, no beneficial, but merely an instantaneous or transitory, seisin in Elam, and not such an interest as could become subject to the lien of either prior or subsequent judgments. The conclusion which results in awarding the fund in this case to Walker is just and reasonable, and is amply sustained by authority. In Summers v. Darne, 31 Grat. 791, at page 801, Judge Staples says: 'The creditor is in no just sense treated as a purchaser. He has no equity whatever beyond what justly belongs to the debtor, . . . When, therefore, land is conveyed, and the purchaser at the same time gives back a mortgage or other incumbrance to secure the purchase money, he does not thereby acquire any such seisin or interest as will entitle his wife to dower, or his creditor to subject the land to his debts discharged of the mortgage. In such cases the deed and mortgage are regarded as parts of the same contract, and constitute but a single transaction, investing the purchaser with the seisin for a transitory instant only.' . . . Until Walker's debt is paid J. R. Elam's title is not such as to be subject to the lien of either prior or subsequent judgment creditors, and the question of recordation is wholly immaterial."

In *Arkansas*, as is held in the reported case, the state's lien under a judgment for fine and costs is superior to the lien of an unrecorded purchase-money mortgage.

It has been held that a defendant whose property is bound by a judgment cannot defeat the lien of the judgment by conveying the property to a co-defendant and taking back a purchase-money mortgage. Simmons v. Vandergrift, 1 N. J. Eq. 55.

VI. Mechanic's Lien.

The question of priority as between a purchase-money mortgage and a mechanic's lien is fully treated in the note to H. F. Cady Lumber Co. v. Miles, Ann. Cas. 1916B 632.

VII. Mortgage.

1. Mortgage Previously Executed.

It is generally held that a purchase-money mortgage has priority over another mortgage previously executed. Farmers' Loan, etc. Co. v. Denver, etc. R. Co. 126 Fed. 46, 60 C. C. A. 588; Gould v. Adams, 108 Cal. 365, 41 Pac. 408; Elder v. Derby, 98 Ill. 228; Morris v. Pate, 31 Mo. 315; Wendler v. Lambeth, 163 Mo. 428, 63 S. W. 684; Daly v. New York, etc. R. Co. 55 N. J. Eq. 595, 38 Atl. 202; Ames v. Trenton Brewing Co. 57 N. J. Eq. 347, 45 Atl. 1092; Hinton v. Hicks, 156 N. C. 24, 71 S. E. 1086; Jarvis v. Hannan, 40 Ohio St. 334; Hand v. Savannah, etc. R. Co. 12 S. C. 314; Nevitt v. McMurray, 14 Ont. App. 126. See also Kaiser v. Lembeck, 55 Ia. 244, 7 N. W. 519; Demeter v. Wilcox, 115 Mo. 634, 22 S. W. 613, 37 Am. St. Rep. 422; Chamberlain v. Meeder, 16 N. H. 381. Especially does this rule apply where the purchase-money mortgagee has no notice of the other mortgage. Tolman v. Smith, 85 Cal. 280, 24 Pac. 743; Ely v. Pingry, 56 Kan. 17, 42 Pac. 330; Protection Building, etc. Ass'n v. Knowles, 54 N. J. Eq. 519, 34 Atl. 1083, *affirmed* 55 N. J. Eq. 822, 41 Atl. 1116; Dusenbury v. Hulbert, 59 N. Y. 541. The same rule has been applied, however, even where it appeared that the purchase-money mortgagee knew of the previous mortgage. Jacoby v. Crowe, 36 Minn. 93, 30 N. W. 441; Moring v. Dickerson, 85 N. C. 466.

In Tolman v. Smith, 85 Cal. 280, 24 Pac. 743, the court said: "The Darby mortgage was given to secure part of the consideration of the deed from him to Eunice W. Smith, and was part of the same transaction by which Eunice W. Smith and her husband acquired the property. Darby (the owner) had no notice that his grantee had undertaken to mortgage the property before he had conveyed it. . . . And it seems clear that the instantaneous seisin which Eunice W. Smith and her husband may have had by reason of any momentary interval between the deed and the mortgage did not give priority to the mortgage made when they had no title."

Consonant with the foregoing line of decisions it has been held that a purchase-money mortgage is superior to a special agreement, concerning the premises, previously entered into by the mortgagor. Bolles v. Carli, 12 Minn. 113. In that case, it appeared that the plaintiff had entered into an agreement with the defendant that the latter should purchase the land for the use of the plaintiff and take the title as collateral security. The court said: "Whatever, therefore, may have been the agreement between the plaintiff and Carli, and whatever rights the former may have as against the latter, Taylor [the vendor] was not bound, although fully advised of the agreement, under these circumstances, by the agreement, and was at liberty, irrespective of the plaintiff's assent, to convey the premises in any manner he desired; it was therefore competent for him to convey in fee to Carli, upon the terms he did, taking a mortgage for the unpaid purchase money; and upon default he might foreclose the mortgage and sell the premises. The mortgage being given for this purchase money, and executed at the same time, must

take priority of the agreement of Carli, or any encumbrance by him, since the title must enure to him before the encumbrance can exist, and in the case of a mortgage for the purchase money delivered at the same time with the deed, the title and the encumbrance become simultaneously operative."

Priority has been accorded to a purchase-money mortgage executed before and recorded after the execution and recording of a mortgage for a pre-existing debt. Phelps v. Fockler, 61 Ia. 340, 14 N. W. 729, 16 N. W. 210.

Second mortgage bonds given in part payment of the purchase price of a corporation's property have been held to be superior to first mortgage bonds, where it appeared that the first mortgage bonds had gained their superiority through fraud. Hooper v. Central Trust Co. 81 Md. 559, 32 Atl. 505, 29 L.R.A. 262.

Where a mortgagee sells the premises under foreclosure and receives from the purchaser a mortgage to secure payment of the price fixed at the foreclosure sale, the mortgage is superior to another mortgage on the premises executed by the original owner before the foreclosure but after the execution of the mortgage under which the foreclosure is made. Threefoot v. Hillman, 130 Ala. 244, 30 So. 513, 89 Am. St. Rep. 39.

But the heir of a mortgagor cannot by conveying the premises and taking back a purchase-money mortgage, enlarge his interest in the premises; and in such a case the purchase-money mortgage remains subject to the other mortgage. Card v. Bird, 10 Paige (N. Y.) 426.

2. Mortgage Executed Contemporaneously.

A purchase-money mortgage has priority over another mortgage where the two are delivered and recorded contemporaneously. Clark v. Brown, 3 Allen (Mass.) 509; Boies v. Benham, 127 N. Y. 620, 28 N. E. 657, 14 L.R.A. 55; City Nat. Bank's Appeal, 91 Pa. St. 163. *Compare* Koevenig v. Schmitz, 71 Ia. 175, 32 N. W. 320 (wherein it was held that the two mortgages should share equally). "Until Clark made his deed to Tuttle, the latter certainly had no interest in the land, which he could make the subject of a conveyance to another; and as the deed and mortgage from him to Clark was delivered at the same time that Clark's deed was delivered to him, he acquired seisin but for an instant; taking an absolute estate in fee, and instantaneously rendering back a conditional estate in fee; and so it was by the same act that he acquired and parted with his title. The mortgage to Wyatt was therefore necessarily a thing subsequent, because it was made after the deed from Clark; and, the mortgage back to Clark being identical with the deed in the time of taking effect, the mortgage to Wyatt was necessarily after that mortgage. As soon as Tuttle had a right to make any conveyance at all to another, the right of Clark under the mortgage to him had already become vested, and therefore all other conveyances must of necessity be posterior to it. The mortgage to Wyatt could therefore convey only the interest which the mortgagor then had in the premises; and that was simply a right of redemption, namely, the right of redeeming the estate from the pre-existing mortgage to Clark. It can make no difference that the deeds were all entered of record at the same moment. The law arranges acts performed, or things done, in one day, and relative to the same subject matter, so as to render them conformable to the intention of the parties." Clark v. Brown, 3 Allen (Mass.) 509. "The understanding of the parties as found, that the deed and mortgages were to be, and accordingly were, made and recorded at the same time, did not necessarily, and as a matter of law, place the lien of the two mortgages on an equality, as would have been the case if neither of the mortgagees had been the vendor and grantor of the premises. Upon the facts so found he did not necessarily waive any rights which the relation of the vendor and grantor gave him." Boies v. Benham, 127 N. Y. 620, 28 N. E. 657, 14 L.R.A. 55.

Likewise it has been held that a purchase-money mortgage has priority over another mortgage executed contemporaneously and recorded before the purchase-money mortgage. Brower v. Whitinger, 121 Ind. 83, 22 N. E. 975 (other mortgage given for antecedent debt); Rogers v. Tucker, 94 Mo. 346, 7 S. W. 414; Truesdale v. Brennan, 153 Mo. 600, 55 S. W. 147; Jeanes v. Hizer, 186 Pa. St. 523, 40 Atl. 785; McMillan v. Munro, 25 Ont. App. 288 (in the last four cases it appeared that the other mortgage secured money used for cash payment). *Compare* Higgins v. Dennis, 104 Ia. 605, 74 N. W. 9.

Where two purchase-money mortgages on the same property were recorded simultaneously, it was held that they were concurrent liens, although one became due before the other. Collerd v. Huson, 34 N. J. Eq. 38. But where a purchaser gives a purchase-money mortgage and then sells the premises, taking a purchase-money mortgage, although both mortgages are made and recorded on the same day, the one given to the first vendor has priority. Dungan v. American Life Ins. etc. Co. 52 Pa. St. 253. And the same principle applies where the final vendee executes both mortgages. City Nat. Bank's Appeal, 91 Pa. St. 163, wherein the court said: "Thus, substantially and in effect, the mortgage to Hall was for the purchase-money due him on the legal title, and the mortgage to

Nichols was for the value of his equitable interest in the land. The mortgage to Hall having thus been recorded on the day of its execution and delivery, and on the day of the delivery of the deed, is clearly entitled to a preference over the other mortgage."

3. Mortgage Securing Money for Cash Payment.

A purchase-money mortgage to a vendor without notice has priority over another mortgage which was executed and recorded before the mortgagor obtained title and which was given to secure the money for the mortgagor's cash payment to the vendor. Schoch v. Birdsall, 48 Minn. 441, 51 N. W. 382; Turk v. Funk, 68 Mo. 18, 30 Am. Rep. 771; Boyd v. Mundorf, 30 N. J. Eq. 545. *Compare* Koevenig v. Schmitz, 71 Ia. 175, 32 N. W. 320. In Schloch v. Birdsall, supra, the court said: "The mortgage to the defendant had not attached before the conveyance by plaintiff to Bothman; neither did the lien thereof intervene between the conveyance to her and her purchase-money mortgage back to plaintiff. The seizin being instantaneous, the lien of plaintiff's mortgage took precedence of any lien, general or specific, created by her. On the other hand, the prior record of the defendant's mortgage did not avail as notice to the plaintiff, because, under the circumstances, the plaintiff was not bound to search for conveyances made by his grantee while the latter was a stranger to the title, and before the execution of his deed, and the defendant whose mortgage was recorded before plaintiff's conveyance was not a subsequent bona fide mortgagee, within the meaning of the recording act." And in Boyd v. Mundorf, 30 N. J. Eq. 545, the court said: "Where, as in this case, the vendor of real estate records his mortgage at the same instant that the deed from him is recorded, he surely can have no occasion to examine the records for encumbrances created by his vendee on the property, prior to the recording of his conveyance."

Likewise the lien of a purchase-money mortgage is superior to that of another mortgage, which is executed on the same day and recorded before the purchase-money mortgage, and which is given to secure money used for a cash payment on the premises. Rogers v. Tucker, 94 Mo. 346, 7 S. W. 414; Truesdale v. Brennan, 153 Mo. 600, 55 S. W. 147; Brasted v. Sutton, 29 N. J. Eq. 513; Jeanes v. Hizer, 186 Pa. St. 523, 40 Atl. 785; McMillan v. Munro, 25 Ont. App. 288. *Contra* Higgins v. Dennis, 104 Ia. 605, 74 N. W. 9.

A purchase-money mortgage has been held to have priority over a junior mortgage given to one who with notice that the purchase price was not fully paid loaned the money for the cash payment, although the junior mortgage was first recorded. Ellis v. Horrman, 90 N. Y. 466.

4. Loss of Priority.

Where the vendor waives his right to a purchase-money mortgage at the time of the sale, but such a mortgage is subsequently executed, it is inferior to an intervening mortgage on the premises to secure an ordinary debt in favor of one who has no notice that the purchase money has not been paid. Houston v. Houston, 67 Ind. 276; Davis v. Lutkiewiez, 72 Ia. 254, 33 N. W. 670. See also Koon v. Tramel, 71 Ia. 132, 32 N. W. 243. Thus, in Houston v. Houston, supra, the court said: "The vendor of real estate may, if he choose, exact a mortgage from the purchaser to secure the unpaid purchase-money, at the time of the sale. That is the vendor's right, but surely he may waive such right; and if he does waive it, and allows another creditor of the purchaser, without notice of the non-payment of the purchase-money, to secure a mortgage on the real estate sold, such mortgage will be entitled to preference over a mortgage thereafter acquired by such vendor to secure his unpaid purchase-money." In Davis v. Lutkiewiez, 72 Ia. 254, 33 N. W. 670, wherein it appeared that the plaintiff's purchase-money mortgage had described the wrong premises and that the mistake was not corrected until after another mortgage had been recorded, the court said: "Upon the face of the record, then, Davis & Sons' mortgage was the prior lien, provided they took their mortgage in good faith, for a valuable consideration, and without actual notice that the plaintiff's mortgage was intended to be on the same land. If this was the relation of Davis & Son to the subject-matter, the subsequent correction of the mortgage had no more effect upon their mortgage liens than if no mortgage whatever had been taken until the correction was made. The fact that the mortgage was for purchase-money can make no difference in the rights of the parties. When a vendor of real estate makes a conveyance and delays taking his mortgage for the purchase-money until a mortgage is made to another party without notice, the vendor's mortgage will be postponed to the other."

Where creditors are induced to rely on the absolute deed to the mortgagor without notice of a purchase-money mortgage, the mortgage has been held to be inferior to another mortgage given to the creditors. Young v. Wood, 11 B. Mon. (Ky.) 123; Heffron v. Flanigan, 37 Mich. 274; Trigg v. Vermillion, 113 Mo. 230, 20 S. W. 1047; Protection Building, etc. Ass'n v. Knowles, 54 N. J. Eq. 519, 34 Atl. 1083, *affirmed* 55 N. J. Eq. 822, 41 Atl. 1116; Ramsey v. Jones, 41 Ohio St. 685.

See also Spring v. Short, 90 N. Y. 538. Thus, in Young v. Wood, supra, a purchase-money mortgage which was not recorded until after the recording of another mortgage given for a valid consideration was held to have lost its priority. And in Heffron v. Flanigan, supra, wherein it appeared that a purchase-money mortgage was executed and recorded before the delivery of the deed, and that another mortgage was executed immediately thereafter, the court, in allowing priority to the second mortgage, said: "The delivery of the deed in his [the second mortgagee's] presence to the grantee not only vested the title in her at the time, but it was a clear and direct notice to him that up to the time of such delivery she had no such interest or title in the premises therein described as would enable her to encumber the same to his prejudice. This case differs in no essential from that of an ordinary conveyance of land with a mortgage back at the same time to secure a part or the whole of the purchase price or for other purposes. The grantor and mortgagee in such a case would not suppose, nor would he have any right to suppose, that his grantee had before acquiring the title encumbered it, and if he took back a mortgage at the same time and had both conveyances promptly placed upon record together, he would be doing all that the law required him to do for the protection of his rights and he would not be affected by any previous conveyances which his grantee, the mortgagor, might have placed upon record, when he had no title to the premises."

In Trigg v. Vermillion, 113 Mo. 230, 20 S. W. 1047, the facts were stated in the opinion as follows: "A third party to the case, Mr. Crow, entered into an agreement with Mr. Beckett to buy this land; and, as part of the purchase, was to execute a deed of trust in the nature of a mortgage to Mr. Beckett to secure the greater portion of the purchase price, viz. $3,300. Before this arrangement was carried out, Mr. Crow negotiated with the Walton & Tucker Company for a loan of three thousand dollars upon the same land, which he represented he was about to buy of Mr. Beckett. The company (after some delay for the purpose of having the title examined) agreed to make the loan upon Crow's acquiring a clear title. Beckett executed a deed of full warranty to Crow at the office of the company and delivered it to Crow. This having been placed of record, the mortgage by Crow, in favor of a trustee for the company, to secure the three thousand dollars was then given and filed for record at 12:30 P. M. and that the sum was accordingly advanced to Crow by the company. Later in the day (at 1:45 P. M.), the mortgage of Crow to Beckett (to secure the unpaid part of the purchase money) was recorded." The court said: "Our registry laws declare that no instrument in writing affecting title to real estate shall be valid 'except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the recorder for record.' Revised Statutes, 1889, sec. 2420. It follows that, where a loan is made upon the credit of an ostensibly clear record title, and an instrument securing the loan is duly recorded, that security cannot be impaired by the later record of a mortgage to the vendor to secure the purchase price of the title, where the lender had no notice of the facts creating a vendor's lien at the time of making the loan. The case at bar is distinguishable from Turk v. Funk, 68 Mo. (1878) 18, in this, that there the loan was made, not upon a clear record title in the borrower, but upon a lesser equitable estate vested in him, whereas here the entire title had passed to Crow, and upon that title the Walton & Tucker company advanced the funds which their mortgage was intended to secure. In Rogers v. Tucker, 94 Mo. (1887) 346 (another precedent relied upon by defendants), it appeared that all parties to the transaction were informed of the actual state of the title; and, hence, it was naturally held that a vendor's lien embodied in his mortgage was prior in right to another lien given to a third person to secure a loan of part of advances toward the purchase money. But in the case before us the important element of notice to the lender of the vendor's rights in the premises, which dominated that judgment, is wanting. Had the lending company here been informed (or was it chargeable in equity with notice, in the circumstances) of the real facts, touching the nonpayment of the purchase money, the equities of the parties would be wholly different. But equity follows the law, and cannot properly ignore the positive statute above quoted touching the effect to be given to the registry of deeds. It cannot rightly promote a vendor's lien to a priority forbidden by the law as it is written."

Where it appeared that a purchase-money mortgagee allowed another mortgage to be recorded first and acquiesced for several years in the demand of such other mortgagee that his should be a first mortgage, it was held that the purchase-money mortgage was inferior to the other. Mutual Loan, etc. Ass'n v. Elwell, 38 N. J. Eq. 18. Of course, the priority of a purchase-money mortgage may be waived by agreement. Skeel v. Christenson, 17 Wash. 649, 50 Pac. 466.

But it has been held that prior registration did not give priority to a mortgage executed subsequently to the execution of a purchase-money mortgage, where the junior mortgagee had actual knowledge of the existence of the

purchase-money mortgage. Kirk v. Harvey, 18 British Columbia 645.

In *Kansas*, it has been held that "the fact that a mortgage is given for purchase-money does not place it outside the provisions of the registry act, or give it a priority to which it would not be entitled under said act," and therefore that a recorded mortgage in the hands of a purchaser without notice has priority over a prior unrecorded purchase-money mortgage. Jackson v. Reid, 30 Kan. 10, 1 Pac. 308.

In *North Carolina*, a purchase-money mortgage loses its priority if not registered before an intervening mortgage is executed and registered, although the one taking the intervening mortgage has actual notice of the previous purchase-money mortgage. Quinnerly v. Quinnerly, 114 N. C. 145, 19 S. E. 99, wherein the court said: "The plaintiff further contends that his mortgage, being for the unpaid purchase-money, is entitled to priority over the Nelson mortgage, though registered after it, and that Nelson and Williams had notice that the purchase money had not been paid. As to this, it will be sufficient to quote from Blevins v. Barker, 75 N. C. 436 (on page 438): 'Under the act of 1829 (now section 1254 of the Code) no notice to the purchaser (here the defendant), however full and formal, will supply the place of registration. . . . All secret trusts, latent liens and hidden encumbrances are, and were intended to be, cut up by the roots, by force of our registration laws. And since the decision of this court in Womble v. Battle, 38 N. C. 182, the law as here announced has been considered as well settled in North Carolina.'"

In *Washington*, it has been said in a recent case: "Under our recording acts the question of priority between one holding a purchase-money mortgage and another cannot be raised, unless the mortgages concur in time or the priorities are controlled by some contract or equities arising between the several mortgagees." Wakefield v. Fish, 62 Wash. 564, 114 Pac. 180. See also Brace v. Superior Land Co. 65 Wash. 681, 118 Pac. 910.

VIII. Tax.

The lien of a purchase-money mortgage is inferior to that of an assessment against the property made after the execution of the mortgage. Clifton v. Cincinnati, 5 Ohio Dec. (Reprint) 687, wherein the court said: "The only question is, whether the court erred in finding the purchase-money mortgage of Rees E. Price, as signed to Mrs. Harrison, was subject to the lien for assessment [levied two years after the making of the mortgage] That brings up the question as to the nature of an assessment. The municipal authorities may levy an assessment for the improvement of a street. It is called a tax or assessment. The municipal code, statute 554, provides that under certain circumstances, where the tax or assessment against property is not paid, it is the right of the municipal authorities to place it upon the grand duplicate, and when that is done the same section provides it shall be collected as other taxes are collected. An assessment, therefore, is in the nature of a tax. By a tax is ordinarily understood, a revenue raised by levy at a uniform rate upon the property of every citizen, for the purpose of keeping the governmental machine in motion. It is general in its operation—while an assessment is local-levied to defray the expense of a local improvement—an improvement, however, while it confers an individual benefit, is, at the same time, of public benefit. The citizen derives benefit from the tax, in the protection he receives through the public authorities in the peaceable possession and enjoyment of his property, and in the protection of his person against violence and wrong. Both have their origin in the constitution, in that provision conferring the taxing power. The general assembly here derives its right to confer this power upon a corporation. Subject to the power of taxation and assessment for public purposes, every citizen holds his property. Such being the organic law of the state, the citizen cannot by contract, cannot by mortgage, or otherwise, dispose of or encumber his property, so as to defeat this paramount right of taxation. The absolute owner holding his property in this manner, his mortgagee certainly cannot occupy a more favorable position. Hence the court below very properly found that the mortgage lien was subordinate to the assessment lien."

The lien of a purchase-money mortgage is superior to that of a tax against a corporation which purchases the premises from the mortgagor. Sweeney v. Arrowsmith, 43 Pa. Super. Ct. 268, wherein the court said: "It is obvious at a glance that if the distribution to the commonwealth is to stand, it is out of the mortgagee's pocket that payment will be made of what is owing by another party with whom she in the conveyance of the land and in the acceptance of the mortgage had no dealings whatever. She has sold her property to an individual for a stipulated amount. For that amount, less the cash paid down, she has accepted a pledge of the property itself. Her vendee, or rather the grantee of her vendee, transfers it to a corporation. The corporation fails to pay the state tax due by it. Upon default on the mortgage the mortgagee proceeds to collect under it the balance of the purchase money due her by her contract with her vendee. The state, by virtue of a lien filed against the corporation's property,

requires the mortgagee to pay the debt of the corporation and to accept just that much less in payment of her land than the price for which it was conveyed. The proposition involved seems repugnant to a clear dictate of natural justice; and wherever such is the case, as intimated by Mr. Justice Woodward in Evans v. See, 23 Pa. St. 88, at p. 91, it is necessary to look closely whether the result is one which the law requires a court to sanction. There is no perfect analogy between the case here presented and one in which a mortgagee finds himself postponed to liens entered against the property for municipal taxes assessed upon the owner. Doubtless such taxes are a personal claim against the latter: May's Estate, 218 Pa. St. 64. But by various statutes the property is made liable for them ahead of mortgages antedating them. It is well understood that these taxes are assessed with reference to the property and its value. Anyone who takes a mortgage upon it is apprised in advance that his security is subject to diminution to the extent that taxes assessed with respect to it may remain unpaid by the owner, whoever he may be. On the other hand, that state tax upon corporate capital stock is not a tax assessed specifically upon or with reference to the realty owned by the corporation. It affects the realty (at least as against other lien creditors) only by virtue of the certification and filing of the lien: Wm. Wilson & Son Silversmith Co.'s Estate, 150 Pa. St. 285; Gladden v. Chapman, 188 Pa. St. 586. It cannot be reasonably supposed, therefore, that one selling land to an individual and taking a mortgage upon it from him for part of the price should foresee or actually contemplate the eventuality of its passing at some future time into the hands of a corporation—a failure of that corporation to pay its state tax upon capital stock—and the impairment, possibly the wiping out, of the security for the unpaid purchase money by the enforcement of a lien filed therefore by the commonwealth and taking precedence of the mortgage. . . . What was the Pendora Park Company's 'property' in this real estate? Simply what is termed the equity of redemption. That, with the possession subject to the rights of the mortgagee, was all it ever acquired. The rest belonged to the plaintiff before she conveyed to defendant and for the purposes of security never passed out of her, but was retained to her by the purchase-money mortgage executed simultaneously with her conveyance to defendant."

In *Indiana*, the rule has been established by statute that taxes assessed against a mortgagor during the life of a purchase-money mortgage constitute a lien superior to that of the purchase-money mortgage. Bodertha v. Spencer, 40 Ind. 353; Peckham v. Millikan, 99 Ind. 352. In Peckham v. Millikan, supra, the court applied the rule as follows: "He [the original vendor] maintains that as these taxes were assessed against Hirzel during the time this land was encumbered by appellant's mortgage, they only bound the equity of redemption, and inasmuch as this has been extinguished by the foreclosure of the mortgage and the sale of the property, no interest of Hirzel remains upon which they can attach, and hence they do not now constitute a lien upon the land. This precise proposition was decided adversely to the appellant in the cases of Bodertha v. Spencer, 40 Ind. 353, and Isaacs v. Decker, 41 Ind. 410. In each of these cases it was held that taxes thus assessed continue a lien upon the land after a foreclosure and sale upon a prior mortgage, as against the mortgagee who becomes the purchaser."

WARREN MORTGAGE COMPANY

v.

WINTERS ET AL.

Kansas Supreme Court—March 6, 1915.

94 Kan. 615; 146 Pac. 1012.

Liens — Loan of Purchase Money.

A lien upon land is acquired by one who lends money for its purchase, under a promise that he is to receive a mortgage, and in the meantime is given the undelivered deed to hold as security for the performance of that agreement.

Priority — As between Purchase-Money Mortgage and Deed.

A mortgage given at the time of the purchase of the mortgaged land by the mortgagor, to obtain the money used by him to pay the price, and thereby procure the deed, has priority over a deed made by the mortgagor at a time when he had no title, to a grantee who knew of the negotiations for the mortgage and had agreed to take the property subject to it, although the only reference to the mortgage in the deed is in an exception to the warranty of title.

[See note at end of this case.]

(Syllabus by court.)

Appeal from District Court, Sumner county: SWARTS, Judge.

Action to enforce lien against tract of land. Warren Mortgage Company, plaintiff, and Thomas F. Winters et al., defendants. Judgment for plaintiff. Roy Leben et al., defend-

ants, appeal. The facts are stated in the opinion. AFFIRMED.

R. L. Holmes, Charles G. Yankey and *W. E. Holmes* for appellants.

R. M. Hamer, H. E. Ganse, Henry Lampl and *M. M. Suddock* for appellees.

[616] MASON, J.—The Warren Mortgage Company brought an action to enforce a lien against a tract of land, the validity of which was denied by Roy Leben and S. B. Leben. The plaintiff recovered judgment, and the Lebens appeal. The principal question presented is whether the findings (only one of which is challenged as having no support whatever in the evidence) justify the judgment rendered. The matters shown by the findings will be spoken of as the established facts. In the following statement the December dates are in 1911 and the others in 1912.

On December 1 the land involved was owned by B. F. M. Klump and Lee Ward, who about that time gave B. M. LeGrande an option to purchase it, expiring March 1. A few days later LeGrande applied to the mortgage company for a loan of $3000 on the land, representing that Thomas F. Winters, his adopted son, was buying it. On December 25 the company's agent advised LeGrande that it would lend $2800 on the property. On the same day Winters made a formal application for the loan, which the company accepted January 4, subject to the approval of the title.

On December 21 LeGrande entered into a written contract with S. B. Leben to exchange the land and $500 for a stock of goods, which recited that the deed was to be received subject to a mortgage for $3000 to run seven years at seven per cent interest. Leben knew that the mortgage referred to had not been made, but that it had been applied for and that the negotiations were pending. The contract concluded: "This bill of sale or a copy is to be put up with the deed to be held in Escrow with J. Gardner until the abstract is brought up to date, and until a sufficient time is given to show the goods are all clear of debt." On the same day the stock of goods was delivered to LeGrande, who had learned that it was clear of debt. LeGrande and S. [617] B. Leben agreed that the deed should be made to the latter's brother, Roy Leben. A deed from Winters to Roy Leben, (intended to cover the land, but by a defective description omitting eleven acres of it) with a check for the $500, was placed in the hands of Gardner, it being the intention of all the parties that they were not to be delivered until the mortgage should be recorded and noted on the abstract of title. The warranty clause was followed by the words "except a mortgage for three thousand dollars." Roy Leben knew all about the transaction. The title to the land was still in Klump and Ward. The purpose of the loan was to pay the balance of the purchase price to them. They executed a deed to Winters, which was placed in a bank to be delivered on the payment of the price.

On February 12 Gardner and the Lebens, in violation of the agreement, delivered the deed to Roy Leben, and it was recorded on that day, all without the knowledge or consent of LeGrande, Winters or the mortgage company.

The mortgage company intended to place the loan with the Merchants Loan & Trust Company, for which it acted as agent, and the papers were made out in that name. As they were later assigned to the plaintiff, further reference to the Merchants company will be omitted. On February 16 Winters executed a mortgage for $2800, due in seven years, bearing 5½ per cent interest, and a commission (or interest) mortgage for $294, due in seven years, bearing interest at ten per cent after maturity. The mortgages were recorded May 10.

On March 4 the mortgage company paid the amount of the loan ($2795—a deduction of $5 being made for abstract and recording fees) to the banker who held the deed to Winters, and it was applied on the purchase price to Klump and Ward. This left a balance of $200, which was furnished by S. N. Brees, who had been acting as the agent of LeGrande, on his promise [618] that a second mortgage should be executed to secure its repayment, and the banker continued to hold the deed as security for this agreement. On April 29 Brees orally assigned his claim to the company, for $200, and it received the deed to hold as security for the execution of the second mortgage. On the same day Roy Leben orally promised to give the company a mortgage on the property for $3000, due in seven years, bearing seven per cent interest, and the company agreed upon the execution of such mortgage to deliver the deed to Winters. On April 22 Roy Leben had agreed with the company that he would make a deed back to Winters for the tract described in the deed to him, and that Winters should then execute the $3000 mortgage and reconvey to him the entire tract, including the part inadvertently omitted in the first deed. This arrangement failed because Winters at the time refused to make a new deed.

The interests of the two Lebens are substantially the same, as are those of LeGrande and Winters, and for the purpose of an abbreviated statement the acts of S. B. Leben may be regarded as those of Roy Leben, and the acts of LeGrande as those of Winters. The situation then presented is substantially this: Winters had an option on the land. He contracted for its sale to Leben subject to a mortgage for $3000, for which he was negotiating. He received his payment and

placed a deed to Leben with Gardner to hold until the mortgage should be of record and shown upon the abstract. Gardner delivered the deed before this condition was fulfilled. Winters obtained $2800, which he applied to the payment of the purchase price, by giving a mortgage for the money lent him for that purpose. This left $200 to be paid before he could obtain his deed. He procured this by a promise to make a second mortgage for the amount, and the undelivered deed was held as security for the performance of the agreement.

[619] As against Winters the mortgage company has a legal mortgage for $2800, and a claim for $200 which is secured by the deed which it still holds, and which has not been delivered to the grantee. This is not the case of an attempt to create a mortgage by the deposit of the title deeds—conveyances which have become effective by delivery. It is the retention of an undelivered deed as security for the purchase price by one who stands in the attitude of the unpaid vendor. Leben has no interest which can conflict with that of the mortgagee. The deed to him conveyed nothing, because it was not legally delivered, and because at the time of its manual delivery, Winters had no title to convey. The execution and delivery of a warranty deed by Winters before he himself had a title would have bound him personally, and by equitable estoppel as well as by the statute any title which he afterwards obtained would have inured to the benefit of the grantee. But by this principle, Leben could only get from Winters what Winters himself obtained, and Winters never did for a single instant have title to the property save in subjection to the mortgage. The mortgage was essentially—in view of the relations of all the parties—one for purchase money. One who executes a purchase-money mortgage is not regarded as obtaining the title and then placing an incumbrance on it. He is deemed to take the title charged with the incumbrance, which has priority ever over preëxisting claims. And a mortgage given to a third person to obtain the money used in buying the property is entitled to the same preference.

"The priority of the purchase-money mortgage to other liens created before the execution of the mortgage rests upon the doctrine that the deed from the vendor and the mortgage by the vendee are parts of one single and entire transaction. Because the seizin of the vendee is thus instantaneous, the title to the land does not for a single moment rest in him, but [620] merely passes through him and vests in the mortgagee without stopping beneficially in the purchaser, and during such instantaneous passage the prior lien cannot attach to the title." (23 Am. & Eng. Enc. of Law (2d ed.) 470.)

"A mortgage given for the unpaid balance of purchase-money on a sale of land, simultaneously with a deed of the same and as a part of the same transaction, takes precedence of prior judgments and all other existing and subsequent claims and liens of every kind against the mortgagor, to the extent of the land sold." (27 Cyc. 1160.)

"As a general rule, a mortgage given to secure purchase money is none the less a purchase-money mortgage because executed to one who lends the purchase money rather than to the vendor of the property." (23 Am. & Eng. Enc. of Law (2d ed.) 466.)

"Where a purchaser of land, at the same time he receives a conveyance, executes a mortgage to a third person, who advances the purchase-money for him, such mortgage is entitled to the same preference over other liens existing against the mortgagor as it would have had if it had been made to the vendor himself." (27 Cyc. 1182.)

The finding which is attacked as without support in the evidence is to the effect that the deed was delivered to Leben before LeGrande had time to have the abstracts brought down to date. The court also found that the parties contemplated that the mortgage should be shown on the abstract, and in this view the finding as to insufficient time was well founded.

Complaint is made of the rejection of evidence offered by the Lebens, chiefly relating to their information regarding the land. The rejected evidence has been examined and is not regarded as affecting the vital questions by which the controversy is to be determined. The court found that LeGrande had not been guilty of any fraud or misrepresentation in the deal with the Lebens.

The appellants also contend that they should have been allowed a jury trial on the ground that the essential [621] matter in controversy is the title to the real estate. It is conceded that Park v. Busenbark, 59 Kan. 65, 51 Pac. 907, is against the contention, but we are asked to review that decision. We think the present case falls in the class of those in which a jury trial is not a matter of right.

The judgment is affirmed.

NOTE.

In the reported case the court treats a mortgage given to secure money used in purchasing the property mortgaged as a purchase-money mortgage, and holds that the mortgage has priority over a deed to the same property executed by the mortgagor before he received the title from his vendor. The question of the priority as between a purchase-money mortgage and other claims is discussed

at length in the note to Western Tie, etc. Co. v. Campbell, reported ante, this volume, at page 943.

BUILDING COMMISSION OF CITY OF DETROIT

v.

KUNIN ET AL.

Michigan Supreme Court—July 24, 1914.

181 Mich. 604; 148 N. W. 207.

Municipal Corporations — Injunction against Violation of Ordinance.

A building ordinance which authorizes the department of buildings to stop the construction or removal of any building constructed in violation of the ordinance, and, if the order be not obeyed, to apply to any court to restrain any person from disobeying the order, empowers the department of buildings to sue to enjoin a threatened violation of the ordinance by the erection of a building.

[See note at end of this case.]

Burden of Showing Invalidity of Ordinance.

One asserting the invalidity of a municipal ordinance has the duty of establishing the invalidity, and the court must, if it can consistently do so, give to the ordinance such a reasonable construction as will sustain it, but it may not invade legislative power.

[See Ann. Cas. 1916B 502.]

Reasonableness of Building Ordinance.

A provision in a building ordinance of a city that in the rear of every tenement subsequently erected there shall be a yard across the entire width of the lot open from the ground to the sky, unobstructed except by fire escapes, or uninclosed outside stairs and porches, and the depth of the lot measured in the clear from the porches to the rear line of the lot shall not be less than 15 feet in any part, is reasonable, and the court cannot adjudge it invalid under its power to adjudge ordinances invalid when clearly unreasonable or oppressive.

[See, as to building lines, 19 Ann. Cas. 188.]

Construction of Building Ordinance.

A provision in a building ordinance that in the rear of every tenement subsequently erected there shall be a yard not less than 15 feet in depth, measured in the clear from the porches to the rear line and the provision that no tenement shall cover more than 80 per cent. of a lot bounded by two or more intersecting streets must be construed together and in harmony with each other, and a proposed tenement may not violate either provision.

Estoppel to Enforce Ordinance.

The granting by the building department of a city of a building permit under a misconception of the building ordinance not requiring a permit does not thereby estop the department from suing in equity to enjoin the construction of the building in violation of the ordinance.

[See 137 Am. St. Rep. 367.]

Same.

Where one constructing a building disregarded provisions of the building ordinance, and had early notice thereof, but continued the construction, he could not rely on an equitable estoppel to prevent the building department of the city, consenting by mistake of law to the erection of the building, from maintaining a suit to enjoin the construction because violative of the ordinance.

Appeal from Circuit Court, Wayne county; MURPHY, Judge.

Action for injunction. Building Commission of City of Detroit, plaintiff, and Samuel Kunin et al., defendants. Judgment for plaintiff. Defendants appeal. The facts are stated in the opinion. AFFIRMED.

McHugh, Gallagher, O'Neil & McGann for appellants.

Richard I. Lawson and *James H. Lee* for appellee.

[605] KUHN, J.—The bill of complaint in this cause prays [606] for an injunction restraining the defendants from continuing the construction of a building in the city of Detroit alleged to be in violation of an ordinance of said city known as the building code. The defendants demurrer to the bill of complaint, and, upon their demurrer being overruled, filed an answer and cross-bill denying complainant's right to injunctive relief. Upon hearing, the cross-bill was dismissed and the defendants enjoined, as prayed for in complainant's bill of complaint. From this decree the defendants have appealed, and counsel, in their brief, state that the questions involved are as follows:

(1) May a municipality enjoin a threatened violation of an ordinance?

(2) Is section 7, art. 31 of the building code valid?

(3) After issuing the permit and allowing defendants to expend from $10,000 to $12,000 upon the building, is the city estopped from complaining of the violation of the ordinance?

In support of the contention that equity will not enjoin a threatened violation of a municipal ordinance, the cases of St. Johns v. McFarlan, 33 Mich. 72, 20 Am. Rep. 671, and Micks v. Mason, 145 Mich. 212, 214, 215, 108 N. W. 707, 11 L.R.A.(N.S.) 653, 9 Ann. Cas. 291, are relied upon. In the latter case this court said:

"The question here is whether a municipality in pursuance to delegated authority to fix fire limits and to direct the manner of con-

structing buildings within such district with respect to protection against fire, may, by ordinance, provide that a building not so constructed shall be deemed a nuisance and authorize its abatement as such. Such right was not negatived by St. Johns v. McFarlan, supra, and has never been denied by this court. The question has often arisen in other jurisdictions, and, so far as our examination enlightens us, the authority to abate new buildings constructed in violation of existing ordinances has been affirmed whenever the question has arisen. Not in all cases has the right to abate been [607] rested on the ground that a building not constructed in compliance with the ordinance is a nuisance *per se*, but in some it has been deemed sufficient to say that the building so erected was erected in defiance of law; but, whatever the reasoning adopted, the right has been affirmed. See Hine v. New Haven, 40 Conn. 478; Baumgartner v. Hasty, 100 Ind. 575, 50 Am. Rep. 830; Mt. Vernon First Nat. Bank v. Sarlls, 129 Ind. 201, 28 N. E. 434, 13 L.R.A. 481, 28 Am. St. Rep. 185; Com. v. McDonald, 16 Serg. & R. (Pa.) 390; Arundel v. McCulloch, 10 Mass. 70; Klingler v. Bickel, 117 Pa. St. 326, 11 Atl. 555 (*distinguishing* Fields v. Stokley, 99 Pa. St. 306, 44 Am. Rep. 109, cited by the circuit judge); Ford v. Thralkill, 84 Ga. 169, 10 S. E. 600; McKibbin v. Ft. Smith, 35 Ark. 352; Eichenlaub v. St. Joseph, 113 Mo. 395, 21 S. W. 8, 18 L.R.A. 590; Freund on Police Power, § 528."

The ordinance in question provides, in addition to its penal provisions, that:

"The department of buildings shall have the power after notice and hearing to stop the construction, repair, alteration or removal of any building, fence, billboard, sign or other structure, when being constructed in violation of this ordinance, and to order in writing any and all persons in any way engaged, to stop and desist from such construction, and such construction shall not be resumed until the terms of this ordinance shall have been complied with.

"If such order is not obeyed, the department of buildings may apply to any court of competent jurisdiction to restrain any person from such disobedience, notwithstanding such disobedience may be punishable by fine or imprisonment as hereinafter provided."

It is true that the ordinance does not in terms declare a building erected in violation of its provisions a nuisance, but, by virtue of this provision for its enforcement, it does so in effect, and therefore, in our opinion, brings the situation within the spirit of decisions above cited.

[608] The other two questions involved in this appeal are clearly treated in the opinion of the learned trial judge in deciding the cause below, and, as we agree with his conclusions, will adopt his opinion as our own:

"Pursuant to a local act passed at the legislative session of 1907, authorizing the city of Detroit to regulate the construction of buildings, and to establish a department of buildings, the common council of that city duly adopted an ordinance known as the building code of the city of Detroit, which was in force at the time in issue herein.

"By the terms of the code, any building intended to be occupied, wholly or in part, as a residence for three or more families living independently of each other, and having cooking done on the premises, is called a 'tenement.' Apparently through omission no building permit is required to be issued by the department of buildings for the construction of a tenement, although permits must be obtained before the construction of any other kind of building may be begun.

"Upon July 21, 1913, however, the department of buildings issued a building permit for a tenement to the defendant Swirskey, as architect, and to the defendant Kunin, as owner of a lot situated on the northeast corner of Third and Merrick avenues, in the city of Detroit, this lot, having a frontage as platted of 45 feet on Third avenue, and a depth of 125 feet on Merrick avenue. The accompanying plans filed with the department of buildings showed that a brick veneered building of nine housekeeping apartments for families was intended to be built, entrance into three of which was to be had from Third avenue, and entrance to the others was to be had from Merrick avenue. One of the three apartments facing Third avenue was in the basement; the others, for the first and second floors of the building, had their entrance from the first floor. Work upon the construction of the building was begun soon after the permit was obtained. As planned, this tenement is in compliance with section 4 of article 31 of the code. By that section no tenement is permitted to cover more than 80 per cent. of a lot bounded by two or more intersecting streets.

[609] "It is contended in this case, however, that, as constructed, the building violates so much of section 7 of article 31 of the code as provides that: 'In the rear of every tenement hereafter erected, there shall be a yard, extending across the entire width of the lot, at every point open from the ground to the sky unobstructed except by fire escapes or uninclosed outside stairs and porches. The depth of said yard, measured in the clear from the porches to the rear line of the lot shall not be less than 15 feet in any part.'

"The defendant Philip H. Garelick is the contractor for the work of erecting the building; he also appears to have some interest in the land.

"Upon November 24, 1913, the department of buildings revoked the permit issued for the construction of the building, upon the ground that its erection would be contrary to that part of section 7 of article 31 just quoted. This action of the department was taken, pursuant to a writ of mandamus issued out of this court in the case of Stella W. Stewart, Relator, v. Department of Buildings, Respondent, being File No. 58,063. These defendants were not parties to that proceeding, and are therefore not bound by it. It was instituted by Mrs. Stewart as the owner of property immediately contiguous on the north of the premises herein involved. The writ which was granted provided that, as the building in question was being erected in violation of section 7 of article 31, cited above, the department of buildings should, after due notice to the defendants Kunin and Swirskey, enter an order stopping the construction of the building and preventing resumption of the work thereon until the building code had been complied with in the respect mentioned. This writ of mandamus issued November 20, 1913.

"After due revocation of the permit by the department of buildings, work was resumed by the defendants Kunin and Swirskey upon the building, and was continued, intermittently, if not consecutively, until as late a day as December 30, 1913. Some of this last-mentioned work, however, if not all of it, was prosecuted by them in order that thereby the issues raised herein might properly be made the basis of a suitable action.

[610] "This bill was filed by the department of buildings—described in the bill as the building commission of the city of Detroit—on January 10, 1914, and seeks permanently to enjoin the defendants from the further erection of the building until compliance has been had with the provisions of the building code.

"Demurrer was interposed by the defendants, and, coming on to be heard by Judge Van Zile in this court, was overruled by him, and the cause was set down for immediate hearing as soon as answer should be filed. The defendants have now answered, and also seek affirmative relief. They ask that the department of buildings be enjoined from in any manner interfering with the completion of the building.

"During the progress of the hearing a view of the premises was had. It was then learned by the complainant for the first time that there had been, without authority, a departure from the plan filed with it and pursuant to which its permit was originally granted. The plan providing for the entrances to the first and second floor apartments upon Third avenue has been abandoned, and these apartments have been constructed so that entrance to them would be from Merrick avenue. Thus the only apartment left facing Third avenue was the one in the basement upon that street. This has resulted practically in making the frontage of the tenement wholly upon Merrick avenue.

"As bearing upon the general attitude of the defendants, it is likewise significant to note that the view of the premises also disclosed their failure to comply with an alteration exacted by the department by which the rear porches were to be reduced in size. These porches have been constructed as originally planned, and not in conformity with the reduction in size ordered.

"The defendants take the position that the requirement of section 7 of article 31, above cited, is so unreasonable that it must be held invalid. They furthermore invoke the defense of estoppel. In this respect it is contended that the complainant is guilty of laches in the premises, in permitting the work to be undertaken under its permit and to be prosecuted until a time when the defendants, in good faith, had [611] expended a very large sum of money upon their undertaking.

"Approaching the question of the claimed invalidity of section 7, one is confronted with the presumption of the validity of this enactment. The duty of establishing invalidity rests upon the defendants. The court is required, if it can consistently do so, to give to the provision such a reasonable construction as will sustain it. It has no right to invade the legislative province. Its power is confined to those cases in which a municipal ordinance is clearly and manifestly made to appear to be unreasonable or oppressive in its operation.

"I am unable to reach the conclusion contended for in this respect by the defendants. Upon analysis of this section it may appear that some other or different provision might equally serve the demands of wholesome housing in a populous community such as the city of Detroit. That, however, is a matter for the legislative, and not the judicial, discretion. Such provisions as these are intended not solely for the welfare of the occupants of the premises being constructed; they are beneficial as well for those who live in buildings immediately adjacent and for the community as a whole. Just what specific considerations operated upon the common council in reaching the conclusion enacted by the ordinance does not appear; nor is there any testimony which, in my view, shows the application of section 7 to the lot in question to be unreasonable. This much must be taken for granted: The common council acted with knowledge of the prevailing width and depth of lots in this community. Even should some unreasonable result appear in an isolated case as the consequence of the council's action,

this could not be made to justify invalidating the enactment. In my judgment, therefore, neither in its general terms nor in its specific application is the ordinance shown to be unreasonable.

"The discovery upon the inspection of the premises that the plan of the building had been changed without authority so as to give it, as was said above, practically its whole frontage on Merrick avenue presents a situation not contemplated by the pleadings.

[612] "Under the plan as originally presented and approved by the department, the contemplated building was approved as coming within the provisions of section 4, and the position was taken that section 7, being in conflict therewith, was not applicable.

"In my view, however, these two sections must be read together, or construed as in harmony with each other, and not hostile to each other. This building, with these two sections so construed, must, in my judgment, as it now stands, be regarded as fronting upon Merrick avenue, and not on Third avenue, as the department viewed the matter when issuing the permit. This is the situation which has been created by the voluntary and unwarranted act of the defendant. It may be noted in passing that, even if the building were regarded as fronting on Third avenue and its rear as abutting the alley to the east, the provision of section 7 is violated.

"With section 7 held to be enforceable, is it shown that the defendants are entitled to any equitable relief under their claim that the complainant is estopped from maintaining its bill? No permit was required as a prerequisite to the commencement of this building. The issuance of one was a mere gratuity. The department acted under the misconstruction of the code in making the interpretation that section 7 had no application to the situation. Here, then, was a permit issued without sanction of the ordinance and under a misconstruction of it. The department files this bill under the authority given to it by section 7 of article 2, in which it is given power to 'apply to any court of competent jurisdiction to restrain any person from such disobedience [as is here involved] notwithstanding such disobedience may be punishable by fine or imprisonment.'

"The violation of article 7 of section 31 was brought to the attention of the complainant some time before September 25, 1913. It was brought to the attention of these defendants, surely, upon October 10, 1913, if not before. Upon this last-named date they received a written notice from the complainant, advising them that further continuance of the work must be done at their own peril.

"What, then, is the situation of the defendants? They procured a permit which had no legal status, [613] since no such authorization is warranted by the ordinance. The defendants must be held to have had notice of this. All persons dealing with municipalities and their agents act with constructive, if not actual, knowledge of the limitations upon the delegated powers of cities and their instrumentalities. The defendants took nothing with their permit. It was an extralegal instrument. Of itself, it was without efficacy.

"The complainant concededly did allow the defendants to proceed with the building until the formal order of revocation was made. Does this operate to estop it herein? In discussing this question, the conduct of the defendants must be considered.

"By the terms of section 2 of article 31 they were required to comply with the terms of the building code. By section 8 of article 3 it is made unlawful to alter or modify the plans approved by the department. Any alteration may be made only after written application therefor is presented in writing, and written approval obtained. Section 9, art. 3. The defendants have wilfully disregarded these important provisions. Furthermore, they had notice, as has already been stated, as early as October 10, 1913, and probably earlier, that this building, as approved, was in contravention of the ordinance.

"Keeping these facts in mind, what is to be said of the claim of estoppel? It is the position of the complainant that estoppel cannot be interposed to deprive the city of the beneficial enforcement of the ordinance. It is contended that a ministerial board, such as the complainant, cannot by such conduct as is here shown foreclose compliance with the ordinance. In my view, it is not necessary to pass upon that contention, for it is beside the facts of this case.

"The facts which call for the application of a principle are these: There was consent by the complainant to the erection of an unlawful building. There was notice while work was in progress to the defendants that their plan was unlawful, and some continuation of the work by them after such notice. They themselves disregarded the obligation of the ordinance by building, without consent, a structure different from the one for which they obtained approval. [614] They failed to comply with the valid order of the board with respect to the rear porches.

"In my judgment, they are not in a position to invoke the doctrine of equitable estoppel, even though, under other circumstances, where entire good faith upon the part of those making it is shown, it be available as against a municipality in an analogous situation.

"A decree may be taken dismissing the cross-bill and granting the relief sought in the bill."

The decree is affirmed, with costs to the complainant.

McAlvay, C. J., and Brooke, Stone, Ostrander, Bird, Moore, and Steere, JJ., concurred.

NOTE.

Right of Municipality to Enjoin Violation of Municipal Ordinance.

Generally.

While a violation of a municipal ordinance will ordinarily be enjoined at the suit of a private person sustaining a special injury (see the note to Bangs v. Dworak, 13 Ann. Cas. 202), a court of equity will not, at the suit of the municipality itself, restrain the threatened violation of an ordinance unless the violation of the ordinance constitutes a nuisance. De Queen v. Fenton, 98 Ark. 521, 136 S. W. 945; Rochester v. Walters, 27 Ind. App. 194, 60 N. E. 1101; St. Johns v. McFarlan, 33 Mich. 72, 20 Am. Rep. 671; Higgins v. Lacroix, 119 Minn. 145, 137 N. W. 417, 41 L.R.A.(N.S.) 737; Kansas City Gunning Advertising Co. v. Kansas City, 240 Mo. 659, 679, 144 S. W. 1099, 1104; Manchester v. Smyth, 64 N. H. 380, 10 Atl. 700, 18 Am. & Eng. Corp. Cas. 474; Brockport v. Johnston, 13 Abb. N. Cas. (N. Y.) 468; New Rochelle v. Lang, 75 Hun 608, 27 N. Y. S. 600; Mt. Vernon v. Seeley, 74 App. Div. 50, 77 N. Y. S. 250; Reynolds v. Harris, 11 Ohio Dec. (Reprint) 509, 27 Cinc. L. Bul. 229; Williamsport v. McFadden, 15 W. N. C. (Pa.) 269; Philadelphia v. Lyster, 3 Pa. Super. Ct. 475; Honesdale v. Weaver, 2 Pa. Dist. 344; Butler v. Logan, 19 Pa. Dist. 952; Ellwood City v. Mani, 16 Pa. Co. Ct. 474; Waupun v. Moore, 34 Wis. 450, 17 Am. Rep. 446; Janesville v. Carpenter, 77 Wis. 288, 46 N. W. 128, 20 Am. St. Rep. 123, 8 L.R.A. 808. And see Mt. Vernon First Nat. Bank v. Sarlls, 129 Ind. 201, 28 N. E. 434, 28 Am. St. Rep. 185, 13 L.R.A. 481, 37 Am. & Eng. Corp. Cas. 445; Monticello v. Bates, 163 Ky. 38, 173 S. W. 159.

In Kansas City Gunning Advertising Co. v. Kansas City, 240 Mo. 659, 679, 144 S. W. 1099, 1104, the court said: "The object of the cross-bills of defendants is to secure the enforcement of the ordinance by a mandatory injunction. The ordinance is a quasi-criminal enactment. Its sanction is a fine against the owner and the prevention of his injurious use of his property by causing its removal so as to conform to the ordinance in the event he should continue, after the passage of the ordinance and beyond the time limit for compliance therewith, to use his property to the public detriment as defined in said ordinance. The jurisdiction of equity to prevent irreparable injury to property is not divested by the fact that the act to be enjoined may also be a violation of the criminal law; neither does a court of equity lack power to enjoin the continuance of a public nuisance. Its action in these instances is incidental and grows out of its inherent jurisdiction to protect property rights from destruction and to conserve the morals of the people. . . . But a court of chancery is not a medium for the enforcement of the criminal law, hence it scans closely transactions having that aspect before entertaining jurisdiction. It may be that an exigency could arise which would warrant a suit in equity to enjoin the plaintiff and other persons from violating the terms of the ordinance under review, but we do not think that it now exists. The ordinance passed by Kansas City in the proper exercise of its governmental power contains within itself the efficient means of enforcement against this plaintiff and all other persons affected thereby. It points out in terms (sections 9 and 10) the proper methods by which and the time within which obedience to its commands may be compelled, thus affording to the city a full, complete and unembarrassed remedy by legal procedure, and leaving no present basis for its counter-suit in equity. . . . It follows that there is no impediment in the way of a full enforcement of all the provisions of said ordinance (except section 4) in the manner therein specified and defined, and plaintiff had the full measure of relief to which it was entitled by the injunction awarded against the enforcement of section 4; and that its bill should have been dismissed as to all other purposes and objects; and that the cross-bill filed by defendants should not have been sustained, for the reason that the city has a full, complete and unembarrassed remedy at law in the manner pointed out in its ordinance to enforce all the provisions thereof, except section 4, at once against plaintiff and other owners of bill boards, bulletin boards and advertising structures." In Butler v. Logan, 19 Pa. Dist. 952, it was said: "There remains, however, the question whether a court of equity has authority to intervene in order to the protection of an exclusive right granted by a municipal ordinance. That courts of equity may, in a proper case, exercise their authority to prevent or abate a nuisance is beyond question. But we are not now dealing with a public nuisance. It is not alleged, nor does the proof show, that the defendants were collecting garbage in a manner which created a public nuisance. Their equipment was of the kind required by the ordinance under consideration, and there was no complaint that their work was carried on in a negligent manner. In fact, their vocation was fostered to some extent by a lack of diligence on the part

of Wallace, the licensed agent of the borough, in looking after the collection of garbage. But this fact in no way affects the question now before the court. The defendants were not doing that which constituted a public nuisance per se or which had been made such by statute. They were simply violating a borough ordinance, without which their acts would not have been an offense. . . . In so far, therefore, as the mere question of the infraction of the ordinance is concerned, a court of equity is without authority to redress the public wrong growing out of the violation. The ordinance itself provides a penalty for its violation, and this remedy must be invoked for the desired redress, so far as the public right growing out of the provisions of the ordinance is concerned. . . . We conclude, first, that, in so far as the borough of Butler seeks to restrain by injunction violations of its ordinance by the defendants, a court of equity is without authority to intervene. If the penalty provided for in the ordinance is not such as to prevent its violation, the municipal authorities can so increase it as to make it prohibitive of the offense. This, as we take it, may be done in any case where prevention of an offense is justifiable." In Janesville v. Carpenter, 77 Wis. 288, 46 N. W. 128, 20 Am. St. Rep. 123, 8 L.R.A. 808, wherein it was charged that the erection of a building on piles driven in the bed of a river was a violation of a city ordinance, it was held that that fact would not give a cause of action for an injunction. In Mt. Vernon v. Seeley, 74 App. Div. 50, 77 N. Y. S. 250, which was an action to enjoin the posting of advertising bills within a city until an ordinance requiring the obtaining of a permit had been complied with, it was held that as there was no allegation in the complaint or any facts from which the conclusion could be derived that the act sought to be restrained was a nuisance, an injunction would be denied. In Borough of Forty Fort v. Forty Fort Water Co. 9 Kulp (Pa.) 241, the court said: "Conceding that the borough council has authority, under the general powers contained in its charter, to enact the ordinance in question, its violation by way only of a continuance after it went into effect of acts previously begun, and without knowledge of the pendency of such legislation, or by way of neglecting to ask a second time for a permit for which council had exacted a clearly unwarranted concession, is not shown to constitute any irreparable injury or to entitle the borough to specific relief, as by the provisions of the ordinance itself the prescribed remedy for a violation is a fine, and, as has been shown, an action is already pending to recover a fine for failing to file a map." In De Queen v. Fenton, 98 Ark. 521, 136 S. W. 945, which was a suit brought by the city of De Queen to enjoin the defendants from permitting stock and cattle owned by them from running at large within the limits of said city, it was alleged in the complaint that two ordinances had been passed by the proper authorities of the city prohibiting the running at large of cattle and other stock within its corporate limits, one of the ordinances declaring it to be unlawful for the owner of stock or cattle to allow the same to run at large in the city, and penalizing the owner and impounding the stock or cattle, and the other ordinance declaring the running at large of stock or cattle within the city to be a nuisance, and imposing a fine on the owner. The complaint further alleged that the defendants resided outside of the city and knowingly permitted their stock and cattle to run at large within the limits thereof in violation of the ordinances, thereby creating a public nuisance. It was alleged that the ordinances were difficult of enforcement, and that under the statutes of the state the defendant's cattle could not be impounded because the defendants resided outside of the city, and for these reasons it was alleged that the city had no adequate remedy to protect its citizens against the depredations of the cattle and stock, and on this ground it based its right to obtain an injunction against the defendants. The court said: "The violation of such ordinances is an infraction of the criminal law, and the police courts of cities and towns are the proper forums in which to pursue a criminal prosecution for the violation thereof. A chancery court has no criminal jurisdiction, and will not exercise its powers solely to enforce criminal laws. A complete and adequate remedy for the violation of the criminal statutes of the state and of municipal ordinances is afforded by the courts of law, and those courts have full power to pass upon the scope and validity of such laws and ordinances. It has been held by this court that the chancery court has no jurisdiction to restrain acts solely because they are criminal. . . . From the allegations of the complaint it appears that there are two ordinances of the city of De Queen prohibiting the acts complained of. Criminal prosecution can therefore be instituted against the defendants for these acts, which, it is alleged, are violations of these ordinances. If these ordinances have in fact and in law been violated by the defendants, there can be no legal difficulty in enforcing them."

In a few instances municipal ordinances have been enforced by injunction under a charter or statute expressly so providing. Stilwell v. Buffalo Riding Academy, 21 Abb. N. Cas. 472, 4 N. Y. S. 414; Ogden v. Welden, 61 Hun 621 mem. 15 N. Y. S. 790. And see Young v. Scheu, 56 Hun 301, 9 N. Y. S. 349. And see the reported case. In Rochester v.

Gutherlett, 2 N. Y. 309, Ann. Cas. 1915C 483, 105 N. E. 548, L.R.A.1915D 209, the court said: "The right to maintain an action to restrain violation of penal and other ordinances is expressly given to the plaintiff, as we have seen by its charter. Such right of action is concurrent with the legal action to recover for a violation of the ordinance. It is based upon the inadequacy as a remedy of successive actions following a series of violations. The equitable action is designed not only to prevent a multiplicity of legal actions, but to prevent a continuous injury to public health that might exist unabated while wilful violations of the ordinance were continued." So, in New York City, under its charter, it has been held that an action for an injunction will lie at the suit of the department of buildings for the enforcement of the sections of its building Code with respect to the erection of sky signs. New York v. M. Wineburgh Advertising Co. 122 App. Div. 748, 107 N. Y. S. 478; Kobbe Co. v. New York, 122 App. Div. 755, 107 N. Y. S. 489. And see Matter of New York, 122 App. Div. 741, 107 N. Y. S. 484.

If the violation of an ordinance constitutes a public nuisance it will be enjoined. Pine City v. Munch, 42 Minn. 342, 44 N. W. 197, 6 L.R.A. 763. And see the reported case. See also, as to ordinances establishing fire limits, the following subdivision of this note. In Pine City v. Munch, supra, the court said: "We can see no valid reason why, in proper cases falling within some recognized head of equity jurisdiction, a municipal corporation, as the representative of the state pro hac vice, may not, at its election, resort to a court of equity to aid in enforcing its public duties to preserve the health of its inhabitants. As there is, in analogous cases, a judicial remedy in favor of the citizen, it would seem, on principle, that the corporate authorities should be allowed to resort to the courts to aid them when the citizen is in the wrong. Limited strictly to such cases, we do not see that this right at all impinges upon the rule that a private person cannot maintain an action to abate a public nuisance not causing injury special in kind to himself. Neither would this be the exercise by the corporation of a control over nuisances not granted by its charter, but merely resorting to the courts for a more effectual judicial remedy to aid in enforcing its granted powers. There are many cases, of which this would seem to be one, where the remedy by injunction would be much more efficacious than by enforcing the penalties of an ordinance; and where the nuisance is one affecting only or principally the inhabitants of the municipality, and its abatement is among the powers granted or duties imposed upon it, there would seem to be no good reason why the action to abate might not be brought in the name of the municipality, as well as in the name of the state itself by the attorney general."

Ordinance Prohibiting Erection of Wooden Building within Fire Limits.

It has been held that a municipality cannot maintain a suit to restrain the threatened violation of a penal ordinance, which prescribes limits within which a wooden building may not be erected: Rochester v. Walters, 27 Ind. App. 194, 60 N. E. 1101; St. Johns v. McFarlan, 33 Mich. 72, 20 Am. Rep. 671; Manchester v. Smyth, 64 N. H. 380, 10 Atl. 700, 18 Am. & Eng. Corp. Cas. 474; Brockport v. Johnston, 13 Abb. N. Cas. (N. Y.) 468; New Rochelle v. Lang, 75 Hun 608, 27 N. Y. S. 600; Reynolds v. Harris, 11 Ohio Dec. (Reprint) 509, 27 Cinn. L. Bul. 229; Williamsport v. McFadden, 15 W. N. C. (Pa.) 269; Honesdale v. Weaver, 2 Pa. Dist. 344; Ellwood City v. Mani, 16 Pa. Co. Ct. 474; Waupun v. Moore, 34 Wis. 450, 17 Am. Rep. 446. And see Mt. Vernon First Nat. Bank v. Sarlls, 129 Ind. 201, 28 N. E. 434, 28 Am. St. Rep. 185, 13 L.R.A. 481, 27 Am. & Eng. Corp. Cas. 445; Monticello v. Bates, 163 Ky. 38, 173 S. W. 159.

In Rochester v. Walters, supra, the court said: "The only ground upon which an injunction was asked was because the erection of the building would be a violation of the ordinance. It is perhaps true that a municipality might restrain the erection or maintenance of anything within the corporate limits that was in and of itself a nuisance, or if the erection of the building would work special and irreparable injury to the municipality or to its property. But in the case at bar the erection of the prohibited building within the fire limits was not a nuisance per se, and the injunction was asked simply because the contemplated act was a violation of the ordinance. A city ordinance has to the people within its reach all the force and effect of a legislative enactment. The ordinance in question provides a penalty for its violation, and neither the municipality nor a private citizen can ask a court of equity simply to enforce the ordinance by injunction. The reasoning that would permit such a proceeding would authorize a court of equity to restrain by injunction the violation of a criminal statute." In Waupun v. Moore, 34 Wis. 450, 17 Am. Rep. 446, it was said: "The jurisdiction of courts of equity, in proper cases, to restrain the erection or maintenance of nuisances, public or private, is undoubted. But the defendant was not about to erect a nuisance. If it is unlawful for him to erect the building in question, it is made so by the ordinance alone. Without the ordinance, no one can successfully dispute his right to

do so. The question is, therefore, Will a court of equity enjoin an act which would otherwise be lawful, but which is made unlawful by a village ordinance or by-law? We find the principle stated in several very respectable authorities, that equity will not lend its aid to enforce by injunction the by-laws or ordinances of a municipal corporation, restraining an act unless the act is shown to be a nuisance per se. . . . None of the cases to which we have been referred by the counsel for the plaintiffs holds that an injunction can properly issue under such circumstances, and we have been unable to find a case holding that doctrine. To hold that an injunction can properly issue in this case, would be to overturn all of the authorities on the subject, and to interpolate into the law a new rule or principle of equity jurisprudence. This we have no right or authority to do. We may not make the law, but only declare it as we find it. We must hold, therefore, that, under the averments of the complaint, no injunction can properly be issued to restrain the defendant from proceeding with the erection of his building, and that the village authorities can only resort to their legal remedies in that behalf. The provision in the ordinance directing the board to proceed by injunction in such cases, cannot operate to extend the jurisdiction of a court of equity" In Manchester v. Smyth, 64 N. H. 380, 10 Atl. 700, 18 Am. & Eng. Corp. Cas. 474, the court said: "The plaintiff seeks the extraordinary remedy of a perpetual injunction against the defendant's proposed erection and enlargement of his building, claimed to be in violation of a penal ordinance of the city made to prevent the spread of fire. The equity powers of the court are not often, if ever, invoked or used to restrain or suppress the commission of crimes and misdemeanors, either as a substitute for the remedy by prosecution for the penalty affixed to the offense, or to obviate the necessity of repeated prosecutions. The equity jurisdiction of the court undoubtedly includes, in proper cases, the restraining by injunction of the erection and maintenance of nuisances, public and private. To warrant the application of this restraining power, the danger of irreparable mischief or injury must be imminent and clearly made to appear. . . . The act sought to be restrained must be one which, if performed or executed, will inevitably bring on the danger threatened by it. It must be a nuisance in fact, and not one created solely by statutory enactment or municipal ordinance. . . . In this case, the defendant's proposed raising and enlargement of his building, if carried to completion, would neither be a nuisance in fact, nor the occasion of irreparable mischief or injury. The ground of complaint is, that the danger from fire will be increased, but the case finds that the proposed change will neither increase nor diminish that danger. But for the ordinance prohibiting and restricting the change it would be lawful, and the defendant's right to carry out the undertaking would be unquestioned." In Williamsport v. McFadden, 15 W. N. C. (Pa.) 269, it was said: "The statute which confers the power on the city to establish by ordinance fire limits, provides that it may fix penalties for the violation of such ordinance. Here is a clear remedy fixed by law. It does not appear that the penalties now fixed are inadequate for the purpose. If the penalties now fixed by the ordinance are inadequate to secure its enforcement, the power to make them sufficient is vested in the city plaintiff. Until the city has exercised all its powers in endeavoring to enforce its ordinances, surely it has no right to complain. If the court has jurisdiction to aid by injunction in enforcing this ordinance, the same relief may be sought in enforcing the ordinances relating to the keeping open of barber shops on Sunday; the sale of quack medicines on the streets; the sale of unwholesome food in the markets, and indeed everything else which the city has the power to regulate."

In Skaneateles v. Hennessey, 62 Misc. 347, 116 N. Y. S. 788, it was held that where the trustees of a village, though empowered by statute "to prevent the construction or rebuilding of wooden buildings, or the use of any building within the fire limits of materials liable to take fire," had failed to establish any fire limits, they could not enjoin the erection in the village of a wooden building.

In Reynolds v. Harris, 11 Ohio Dec. (Reprint) 509, 27 Cinc. L. Bul. 229, wherein it appeared that the plaintiff had obtained a permit to build after the passage of an ordinance establishing a fire limit but prior to its publication, it was held that the erection of the building would not be restrained. The court said: "Now the question is whether the city can obtain an injunction after the plaintiff had gone on and expended $1,500 in order to get his building up, spent that amount of money to get his building almost completed. Can he be enjoined from completing it? In other words, can this court now, by its injunctive process, interfere with his right of property, the right to enjoy the property he lawfully erected? The claim that this court could do so, springs, as far as I am advised, from sec. 10 of this statute: 'All buildings hereafter erected within the fire limits of said city shall be enclosed with walls constructed of brick, stone or other hard incombustible substances, and the foundations shall rest upon solid ground, concrete, or other solid and sufficient structure.' That is the kind of building required. Here is the

remedy; sec. 7: 'That any person, firm or corporation, either as owner, contractor or architect, or any agent, trustee, director, officer or employee of any person, firm or corporation, who violates or authorizes a violation of any provision of this act, shall be guilty of a misdemeanor, and be subject to a fine not exceeding the sum of one thousand dollars, or an imprisonment not exceeding three months, or both in the discretion of the court or judge imposing the same.' Now, Mr. Reynolds, the plaintiff had done nothing down to the twenty-eighth in violation of this act or any other act. The city has no right to interfere with what has been legally done. If this statute provides otherwise it is unconstitutional. Private property cannot be violated under the terms of the constitution. The legislature has no more power than I have to deprive a person of his property without due process of law. It is inhibited from doing so both by the federal and state constitutions. The doctrine is settled, that a person may construct a wooden building, and no injunction will lie for doing so, although such erection is prohibited by ordinance, unless the erection is shown to be a nuisance per se. The remedy the courts say must be found in the penalty imposed in the statute. . . . Equity never lends its aid to enforce a forfeiture. I think this court has no right to interfere with what has been lawfully done by the plaintiff. It cannot interfere with his building. There is but one other question that suggests itself. The plaintiff having proceeded thus far by authority of law to construct the building, and nearly completed it, and made this large expenditure of money, it seems to me that a court of equity ought not to restrain him from completing it. There is nothing in this law against a man completing a building that is lawfully nearly completed. The provision is, 'All buildings hereafter erected within fire limits.' 'Hereafter' relates to the time after the twenty-eighth of February when the ordinance became operative. This building was not erected after the ordinance took effect, and therefore does not fall within the operations of this statute, which were set in operation by the ordinance. It is true that in the next to the last section of the statute it is said that a court of equity may, on the application of the inspector, in a suit brought in the name of the city, issue an injunction to enforce the provisions of the statute, but in the case at bar the building was not erected or altered in violation of the provisions of this act, because it was erected before the ordinance of February 15th went into effect. The conclusion reached is that the city is not entitled to an injunction, and its application for that relief is denied."

In Monticello v. Bates, 163 Ky. 38, 173 S. W. 159, the court said: "While it is the general rule that when there is an ordinance prohibiting the erection of buildings made of wood or other inflammable material within the limits of a designated fire district, which also provides a remedy for its violation by prosecution and the infliction of a penalty, a court of equity will not grant an injunction restraining the erection of such building; but this rule from its very nature is based upon the idea that the penalty provided therein furnishes a full, complete and adequate remedy, and for that reason, and that reason only, the chancellor will not resort to the writ of injunction. But in this case is any adequate or complete remedy provided? The ordinance prescribing the limits of the fire district provides no penalty by fine or imprisonment for its violation. But it is argued that the ordinance prohibiting the erection of buildings within the city without first procuring a permit does provide a penalty for its violation, and that if the appellee erected within the city and within the fire district such a building as was not contemplated by the permit issued to him, he was guilty of erecting the same without a permit, and could therefore be punished under the ordinance of 1904. Assuming this position to be correct, and that appellee might be punished by the police court for the violation of that ordinance, the question still remains, is that an adequate and complete remedy? That ordinance only provides for the infliction of a fine of not exceeding one hundred dollars, and if he was punished under it, even to the full extent, he, having been guilty of but one offense, could only be punished once. Ordinances creating fire districts in municipalities are upheld as being within the general police power; they are designed to prevent the erection of inflammable buildings in congested districts so as to lessen the danger from fire and conflagration to the adjoining and nearby property? To subject the appellee in this case to a petty fine for his violation of this ordinance would in no sense relieve the other residents and property owners within the fire district from the menace to their property which this building furnishes; that menace would still remain, and therefore necessarily it follows that the remedy against him would be inadequate and incomplete. It is conceded that the police court has no power to grant an injunction, and it is apparent that it would have had no power to direct or enforce the removal of this house from the fire district, as the house, after its erection, became a part of the real estate, and therefore it could have furnished no adequate remedy either by the exercise of its penal or civil processes."

But where the violation of an ordinance establishing fire limits constitutes a nuisance, an injunction will be granted. New Orleans

v. Lambert, 14 La. Ann. 247; Houlton v. Titcomb, 102 Me. 272, 66 Atl. 733, 120 Am. St. Rep. 492, 10 L.R.A.(N.S.) 580; Baxter v. Seattle, 3 Wash. 352, 28 Pac. 537. And see Rochester v. Walters, 27 Ind. App. 194, 60 N. E. 1101; St. Johns v. McFarland, 33 Mich. 72, 20 Am. Rep. 671; Rice v. Jefferson, 50 Mo. App. 464.

PATTERSON ET AL.

v.

STATE.

Alabama Supreme Court—January 11, 1915.

191 Ala. 16; 67 So. 997.

Homicide — What Constitutes "Lying in Wait."

Under Code 1907, § 7084, providing that every homicide perpetrated by lying in wait is "murder in the first degree," an instruction in a prosecution for murder, that if the defendants lay in wait for the deceased, and killed him with a gun while lying in wait, they were guilty of murder in the first degree, is proper; "lying in wait" meaning being in ambush for the purpose of murdering another.

[See note at end of this case.]

Instructions — Refusal of Instruction Given in Substance.

Where a requested instruction that the jury might disregard testimony of a witness if they found from the evidence that he had made contradictory statements as to material facts in the case is refused, but others substantially embodying it are given, any error in the refusal is not prejudicial.

Conduct of Judge — Rebuke to Witness.

Where the judge, following a question to a witness, stated that it looked like a man who had been justice of the peace ought to have sense enough to answer the questions asked, the statement being a reprimand addressed solely to the witness and not to the jury, and having no bearing upon his credibility, is within the court's proper function.

Witnesses — Impeachment — Stenographic Report of Previous Testimony.

In a prosecution for murder, where, after cross-examination of the defendants, the prosecution offered in evidence, for purposes of impeachment, a stenographic report of their previous inconsistent testimony before the coroner's jury, it being shown by the stenographer that he had taken down only part of the testimony, but that what he had taken down was correctly reproduced, and where the defendants objected to the admission of the report because it did not contain all the testimony, those parts of the report which tended to contradict defendants' testimony at the trial are admissible.

Same.

In a prosecution for murder, where defendants objected generally to the admission in evidence, to impeach their testimony on cross-examination, of a stenographer's transcript of portions of their testimony before the coroner's jury, and parts, at least, of such transcript were admissible, the whole is admissible, since the duty to separate by specific objection the inadmissible from the admissible parts rests upon the defendants alone, not upon the court.

Appeal from Circuit Court, Cullman county: ALSTON, Judge.

Criminal action. Clyde Patterson et al. convicted of murder and appeal. The facts are stated in the opinion. AFFIRMED.

F. E. St. John and *Callahan & Harris* for appellant.

R. C. Brickell and *T. H. Seay* for appellee.

[17] MCCLELLAN, J.—The appellants were adjudged guilty of the murder of Robert Miller, and are sentenced to imprisonment during their lives. Robert Miller and Rube Carter were shot to death, from a roadside, while traveling in a wagon. A clear case of assassination was made by the proof. The issue was whether appellants, father and son, were among the guilty agents. There was evidence which, if credited, supported the jury's finding. Able counsel appeared in their defense below and appear on this appeal, presenting in full brief the grounds upon which insistencies for reversible errors, are rested. In the order of their discussion by appellant's counsel in brief, we will treat in the opinion the asserted errors.

(1) At the instance of the prosecution the court gave the following special instruction to the jury: "I charge you, gentlemen of the jury, that if you believe from the evidence in this case, beyond a reasonable doubt, that the defendants were lying in wait for the deceased, Robert Miller, and killed him by shooting him with a gun while lying in wait, then they would be guilty of murder in the first degree."

This instruction was in accord with the pertinent language and legal effect of the statute (Code, § 7084), as well as with Mitchell v. State, 60 Ala. 28, 29.

According to Bouvier, "lying in wait" means "being in ambush for the purpose of murdering another." Such is the significance of the phrase, as employed in the quoted instruction.

(2) Appellants complain of the refusal of the court to give the jury this charge: "The

court charges the jury that if the witness Mac Miller willfully and intentionally [18] swore falsely that he did not have the conversation with Dr. Baird, as testified to by Dr. Baird, then they may discard all the testimony of Mac Miller."

The substance of the just quoted request for instruction was sufficiently contained in the following charges given at the defendant's instance: "The court charges the jury that if they find from the evidence that Mac Miller has made contradictory statements as to material facts in this case or any of such facts, the jury may look to these contradictory statements in order to determine what credence they will give to the testimony of Mac Miller.

"If the jury believe from the evidence that the witness Mac Miller swore willfully falsely in one particular, the jury are authorized to disregard the evidence of said Mac Miller.

"If the witness Mac Miller has been impeached, then the jury may disregard the entire testimony of said Mac Miller, unless it be corroborated by other testimony not so impeached.

So, even assuming (for occasion only) that there was error in refusing the quoted request for instruction, it was without prejudice to the appellants.

(3, 4) On the cross-examination of defendants' witness W. H. Waldrop, following a simple question propounded to him, the bill recites this matter: "Thereupon the presiding judge stated to the witness in the presence of the jury, and while the witness was on the stand, that it looks like a man who had been a justice of the peace ought to have sense enough or intelligence enough to answer the questions asked."

The evident purpose was to reprimand the witness for a failure to answer the "questions asked," and to promote the orderly, prompt taking of the testimony on [19] the trial. The statement of court had no bearing or effect upon the credibility of the witness or upon the credence to be accorded or that might be accorded the testimony the witness had given or would thereafter give. The statement was addressed to the witness, not to the jury, and was within the court's function to control, within proper limits, the examination of witnesses. There was no error in the utterance of the quoted remarks to the witness. None of the cases cited on brief are authority for a contrary conclusion. After the defendants (appellants) had been cross-examined by the prosecution, during which examination each was asked questions touching his testimony before the coroner's jury, the prosecution offered in evidence the stenographic report made of their testimony on that occasion. It was shown by the testimony of the stenographer who made the report that he did not take down parts of what defendants stated before the coroner's jury, being directed by the state's representative to omit certain matters which he described. The stenographic report was shown to be a correct reproduction of what it purported to reproduce. The bill recites: "The defendants objected to the introduction of said testimony on the ground that all of said testimony was not taken down by the stenographer who took down said testimony before the coroner's jury."

This was the only objection made to the admission in evidence of the stenographic report. All others were thereby waived.

(5) It is manifest that at least parts of the stenographic report were relevant and admissible under the familiar rule for impeaching a witness by showing statements previously made, contradictory of testimony he has given on the hearing or investigation in progress. [20] Those parts of the stenographic report which tended to contradict the testimony given by the defendants on the trial were admissible. The objection was addressed to the whole of the report offered. If any part of it was admissible, then the objection was due to be overruled. Hill v. State, 146 Ala. 51, 41 So. 621; Longmire v. State, 130 Ala. 66, 30 So. 413. There was no duty on the court to separate the admissible parts of the report from the inadmissible. It was the obligation of the objector to point out in his objection the parts that were inadmissible. In support of the contention for error in this particular, appellants' counsel cite the following decisions delivered here: Tharp v. State, 15 Ala. 755, 756; Horton v. State, 53 Ala. 488, 495; Magee v. Doe, 22 Ala. 699; Gildersleeve v. Caraway, 10 Ala. 260, 44 Am. Dec. 485. All of these decisions relate to previously given testimony of a witness who had since died. In such cases it is essential that the entire testimony of the deceased witness shall be proffered as evidence. The purpose there is the substitution of the attainable—the reproduction—for that which is made unattainable by the death of the witness. The rule there applicable has no application to circumstances here under review. No error appearing, the judgment must be affirmed.

Affirmed.

Anderson, C. J., and Sayre and de Graffenried, JJ., concur.

NOTE.

What Constitutes "Lying in Wait" within Statute Relating to Homicide.

General Rule.

The general rule is that to constitute lying in wait to commit murder the perpetrator

must be in ambush, or concealed for the purpose of taking his victim unawares.

Alabama.—See the reported case. *Compare* Williams v. State, 130 Ala. 107, 30 So. 484.

California.—See People v. Miles, 55 Cal. 207.

Iowa.—State v. Dooley, 89 Ia. 584, 57 N. W. 414; State v. Tyler, 122 Ia. 125, 97 N. W. 983. See also State v. Cross, 68 Ia. 180, 26 N. W. 62.

Kentucky.—See Turner v. Com. 89 Ky. 78, 1 S. W. 475.

Missouri.—State v. Kilgore, 70 Mo. 546.

North Carolina.—State v. Rose, 129 N. C. 575, 40 S. E. 83. *Compare* State v. Walker, 86 S. E. 1055.

Oregon.—See State v. Olds, 19 Ore. 397, 24 Pac. 394.

Tennessee.—Barnards v. State, 88 Tenn. 183, 12 S. W. 431.

Texas.—See Monmouth v. State, 54 Tex. Crim. 407, 114 S. W. 114.

Virginia.—See Burgess v. Com. 2 Va. Cas. 488.

West Virginia.—State v. Abbott, 8 W. Va. 741.

It is not enough to constitute homicide by "lying in wait" that the crime is committed from concealment. The concealment must be for the purpose of the homicide. People v. Miles, 55 Cal. 207, wherein the court said that "concealed" is not synonymous with "lying in wait" and added: "If the defendant concealed himself for the purpose of shooting the deceased unawares, then he was lying in wait."

It is not, however, necessary that the concealment should be with a deliberate and premeditated design to take life. Malice and premeditation are inferred in law from lying in wait. Riley v. State, 9 Humph. (Tenn.) 646; State v. Abbott, 8 W. Va. 741. However, in Burgess v. Com. 2 Va. Cas. 488, the court said: "We take the expression 'lying in wait,' not merely to mean his concealing himself in the path of his intended victim, for the purpose of killing him, but the deliberately, and premeditatedly seeking an occasion to effect the deadly purpose." *Compare* Com. v. Jones, 1 Leigh (Va.) 598.

A recumbent position is not essential to "lying" in wait. State v. Tyler, 122 Ia. 125, 97 N. W. 983, wherein the court said that lying in wait does not necessarily refer to the attitude of the body, but rather to its location, and the purpose of taking the person attacked unawares, and continued: "It is the mental poise of the wild beast in quest of prey, and necessarily implies malice, premeditation, deliberation, and the wilful intent. If the accused, armed with a club, was hiding in the darkness with the purpose of assaulting Failor when unaware of danger, he was, though standing, technically 'lying in wait.'" See also Monmouth v. State, 54 Tex. Crim. 407, 114 S. W. 114, wherein it appeared that the homicide was committed by a person standing behind a stump about six feet high and the court said: "The facts show a cold deliberate assassination by lying in wait."

Concealment is of course essential. State v. Cross, 68 Ia. 180, 26 N. W. 62; State v. Abbott, 8 W. Va. 741. "Three things must concur to wit, waiting, watching, and secrecy." Riley v. State, 9 Humph. (Tenn.) 646. "'Lying in wait' means hiding in ambush or concealment." State v. Tyler, 122 Ia. 125, 97 N. W. 983. "'Lying in wait,' according to Bouvier, is 'being in ambush for the purpose of murdering another.' It implies a hiding or secreting of one's self. It could hardly be claimed that a person walking on a public street in broad daylight in a populous town was lying in wait. I do not think, however, that the statute requires proof that the slayer in such case was secreted; but it requires proof of some fact, aside from the killing, showing that it was done in pursuance of a previous design." State v. Olds, 19 Ore. 397, 24 Pac. 394. In some cases, however, the term has been given a somewhat wider scope as including various instances of homicide under cover of darkness. See State v. Walker (N. C.) 86 S. E. 1055 and other cases set out infra in the subdivision *Application of Rule.*

Application of Rule.

In Barnards v. State, 88 Tenn. 183, 12 S. W. 431, the court reviewing the facts said: "Sutton owned and operated a licensed distillery on the north side of Clinch River, in Hancock county, and resided three and a half miles away, on the same side of the river. It was his known custom to spend Sunday at home with his family, going to his distillery Monday morning and returning to his home Saturday evening. Late in the afternoon of Saturday, January 12, 1889, while on his way home by his usual route, and when one mile and a half from his distillery, near a small ravine and in a narrow valley between two hills, he was shot from his horse and instantly killed. . . . Were the defendants lying in wait? Was the first shot fired from behind the log, as contended for the state, or from the mossy bank across the road, thirty to forty feet from end of log, as contended by the defendants? This is a vital question, and about it there is much dispute. . . . There were four fresh signs of men behind the log, and what seemed to be a rest under it, is positively and circumstantially sworn by several reputable witnesses, and disputed by none. These signs and this supposed rest are accounted for, in this record, solely and alone upon the theory that four of the de-

fendants were behind the log and made them. . . . We believe they were watching for Sutton's approach, besetting his pathway for the purpose of taking his life." In State v. Abbott, 8 W. Va. 741, in reversing the verdict of the jury and granting a new trial to the defendant the court stated the evidence as follows: "That Grass (the deceased) was killed by the defendant by shooting at the time alleged in the indictment, the evidence as certified seems to establish, but whether the evidence tends to prove that the killing was murder by lying in wait is another question. The only evidence in the cause bearing upon the question as to whether the killing was murder by lying in wait is . . . that on the morning Grass was shot, the defendant and one Anderson Jarrett were out on the "Highland Field," on the left hand side of the road going up Paint Creek, with their guns, looking for Southern soldiers who they had heard were coming in; while there they saw Grass and his three sons riding towards Grass' house; that defendant told said Anderson Jarrett to shoot Grass, which Jarrett declined to do; that the defendant then stepped behind a hickory tree and shot Grass, who had then gotten a short distance by the defendant and said Jarrett; that Grass being shot, jumped from the wagon and said he was killed, and got on one of the horses and rode off; that the defendant and Jarrett were about seventy-five yards from said Grass when the shot was fired, that it was two or three minutes from the time defendant and said Anderson Jarrett first saw Grass coming, to the time the shot was fired.'" Quoting Bouvier that "lying in wait is 'being in ambush for the purpose of murdering another'" the court said further: "The evidence which I have stated did not prove, or sufficiently tend to prove, that the killing amounted to murder by 'lying in wait.' It does not appear, nor does the evidence tend to prove, that the defendant was 'lying in wait' for the deceased, Grass, for any purpose whatever, on the occasion of the shooting." —

In some cases the scope of the term "lying in wait" has been applied to facts other than a concealment in ambush. Thus in Williams v. State, 130 Ala. 107, 30 So. 484, it appeared that "the defendant and his wife conspired together to kill Nicholson, that the wife's part in this conspiracy was to lure him to their house, that to this end she wrote him one, probably two, notes requesting him to come there, that in response to these notes he went there, that defendant loaded his gun and remained at home for the purpose of killing the deceased when he should come, . . . that Nicholson came up to where defendant and his wife were sitting in the door of their house, spoke to them, asked what Mrs. Williams wanted to see him about, and, after talking with her a few minutes on that matter, left them and started to leave the premises," and that defendant then "shot him, when fifty or sixty feet away, in the back." The court said that "the jury could not well escape from finding as they did, that this homicide was perpetrated by lying in wait." And in State v. Walker (N. C.) 86 S. E. 1055, wherein it was objected "that there was no evidence of lying in wait," the court said: "The precedents show that while being in ambush would be lying in wait it is not necessary that a person should be concealed. The testimony here is that the prisoners were waiting and watching for the deceased, or rather for some one whom they took the deceased to be, and that it was after six o'clock on January 20, so dark that the witness Rives testified that while he could see the forms of the men he could not see them well enough to recognize them, and the witness Plunkett says that though he passed within eight or ten feet of them he could not distinctly recognize them. Waiting on the side of the road in the dusk, when it is too dark to be recognized, for a man to shoot and rob is a sufficient 'lying in wait' within the meaning of the charge of the court." Likewise in State v. Dooley, 89 Ia. 584, 57 N. W. 414, where it appeared that the deceased, a "little girl came running in from the barn, and as she came through the door" the defendant "struck her on the head with the padlock, and knocked her down; then shot her in the forehead," the court said that "the jury may have found, from the circumsances connected with the killing of the mother, the fact that the child was at the barn when her mother was killed, the evident desire of the defendant to effect at least a temporary concealment of the crime, and the further fact that the child was killed at the house, that the murder of the latter was accomplished by means of lying in wait, within the meaning of the law." In Riley v. State, 9 Humph. (Tenn.) 646, the court said: "This was done when all was quiet, when there were no angry words between any of the parties, when the deceased and the balance of the company were about to separate for the night: in the darkness and unseen by anyone, the prisoner came behind the deceased, and with a piece of timber four or five feet long, and as large as a stake or small fence rail, with both hands, he struck the deceased a blow on the top of the head, shivering the skull and causing death. Any commentary to show that this is a case of wilful, deliberate, malicious and premeditated killing, would be wholly superfluous. Such clear and unquestionable evidence of a deliberate purpose to kill rarely exists. We think, also, that the jury might have been warranted in finding that there was a lying in wait."

In accord with the foregoing view it has been held that murder committed by shooting the deceased at his home under cover of darkness is committed by "lying in wait." People v. Repke, 103 Mich. 459, 61 N. W. 861; State v. Henderson, 186 Mo. 473, 85 S. W. 576. See also White v. State, 30 Tex. App. 652, 18 S. W. 462. Thus in People v. Repke, 103 Mich. 459, 61 N. W. 861, wherein it appeared that "twelve persons, among whom was respondent, met at a place known as 'Reinke's Hill,' about four and a half miles from Rogers City, in Presque Isle county; and after talking over the object of the meeting, and taking an oath to keep secret what should take place, they went together to Rogers City, arriving there in the evening, and shot through the window and killed Albert Molitor, while he was engaged in his business in the office connected with his store," the court held that "it was a wilful, deliberate murder, perpetrated by lying in wait." Likewise in State v. Henderson, 186 Mo. 473, 85 S. W. 576, the facts as disclosed in a confession of the defendant were as follows: "Brown testified defendant told him that Price Edwards, Bruz Costilo and defendant were together at Price's house and then went together to Joe Buckner's with the intention of killing him, and after they had gone a hundred yards, they stopped and Price told defendant to go back to the house and get the gun, which he did, and then they walked to Buckner's house and they separated, two going together, Edwards and defendant, and Costilo by himself. Costilo went in a little front gate that led to the house from the county road, and the other two went into a big gate some thirty or forty yards east of the little gate, into a road between the orchard and the yard. The dog barked at them. Bruz went into the house and Price and defendant got into the yard and the dog was still raising a racket and old man Buckner came to the door (the south door) to see what was the matter and he, the defendant, shot him. He said he fired the shot, that Price was standing at his side, and defendant hesitated about doing it, and Price nudged him and said, 'Shoot, shoot,' and then he shot." The court said: "If the defendant killed the deceased in the circumstances detailed in his own confession, it was a murder perpetrated by lying in wait and falls peculiarly within the class of murders defined by our statute as murders in the first degree." And in White v. State, 30 Tex. App. 652, 18 S. W. 462, the court said: "It was an assassination, committed by the perpetrator, who was lying in wait, and who under the cover of the darkness of night shot down his unsuspected victim upon his own threshold, after having purposely made a noise on his premises, which caused him to come out upon his gallery."

MORRIS

v.

WINDSOR TRUST COMPANY.

New York Court of Appeals—November 10, 1914.

213 N. Y. 27; 106 N. E. 753.

Set-Off — Claims Not Connected with Cause of Action.

In a suit for conversion, alleged counterclaims based on contracts, not connected with the transaction set forth in the complaint and growing out of the indorsement of promissory notes by the bankrupt, to whose estate plaintiff had succeeded, do not fall within the classes enumerated by Code Civ. Proc. § 501, defining counterclaims.

Bankruptcy — Right of Set-Off.

Bankruptcy Act July 1, 1898, c. 541, § 68, 30 Stat. 565 (1 Fed. St. Ann. 696; Fed. St. Ann. 1912 Supp. p. 805), declaring that in all cases of mutual debts or credits the account between the parties shall be stated and one debt set off against the other, was not intended to enlarge the doctrine of set-off, and does not give a party rights which he did not enjoy under previous statutes or general equitable principles.

[See note at end of this case.]

Same.

Neither under Bankruptcy Act § 68, providing for the set-off of mutual debts, nor under general principles of equity, can a party sued for conversion of a pledge set off as a counterclaim rights based on contracts unconnected with the conversion and growing out of the indorsement of notes by the bankrupt to whose estate plaintiff had succeeded.

[See note at end of this case.]

Same.

Bankruptcy Act July 1, 1898, c. 541, § 1, (11) 30 Stat. 544 (1 Fed. St. Ann. 527; Fed. St. Ann. 1912 Supp. p. 464), declaring that the term "debt" shall include any debt, demand, or claim provable in bankruptcy, does not increase rights of counterclaim against the bankrupt's estate.

[See note at end of this case.]

Morris v. Windsor Trust Co. 163 N. Y. App. Div. 955, reversed.

Appeal from Appellate Division of Supreme Court, First Judicial Department.

Action for conversion. Robert C. Morriss, as trustee in bankruptcy of estate of Patrick J. Keiran, plaintiff, and Windsor Trust Company, defendant. Judgment for defendant at Special Term of Supreme Court. Judgment by Appellate Division of Supreme Court. Plaintiff appeals. REVERSED.

[28] The Appellate Division certified the following questions:

"1. Is each of the counterclaims, numbered 1 to 13, inclusive, of the character specified in section 501 of the Code of Civil Procedure?

"2. Do each of said counterclaims, numbered 1 to 13, inclusive, state facts sufficient to constitute a cause of action?

"3. Is each of said counterclaims, numbered 1 to 13, inclusive, a proper offset to the cause of action set forth in the complaint under section 63a of the Bankruptcy Act?

"4. Are the facts pleaded in said counterclaims, numbered 1 to 13, inclusive, properly pleaded as offsets to the cause of action set forth in the complaint?"

Henry F. Parmelee and *Guthrie B. Plante* for appellant.

Thomas F. Gilroy, Jr., and *Thomas A. Byrne* for respondent.

[29] CARDOZO, J.—The action is for conversion. The plaintiff sues a pledgee for the refusal to deliver the subject of the pledge after the payment of the debt which it was intended to secure. The counterclaims are based on contracts not connected with the transactions set forth in the complaint. They grow out of the indorsement of promissory notes by the bankrupt to whose estate the plaintiff has succeeded. The question is whether the defendant, when sued for the conversion of the pledge, may counterclaim upon the notes.

That the counterclaims do not come within the classes enumerated in section 501 of the Code of Civil Procedure does not seem to be doubtful. (Britton v. Ferrin, 171 N. Y. 235, 63 N. E. 954.) The question remains whether they may be sustained as set-offs either under section 68 of the Bankruptcy Act (1 Fed. St. Ann. 696; Fed. St. Ann. 1912 Supp. p. 805), or, in view of the indorser's insolvency, under the general principles of equity. In reality this is a single rather than a two-fold question, for the Bankruptcy Act "was not intended to enlarge the doctrine of set-off, . . . in cases where the principles of legal or equitable set-off did not previously authorize it." (Sawyer v. Hoag, 17 Wall. 610, 622, 21 U. S. (L. ed.) 731; Libby v. Hopkins, 104 U. S. 303, 26 U. S. (L. ed.) 769; Western Tie, etc. Co. v. Brown, 196 U. S. 502, 509, 25 S. Ct. 339, 49 U. S. (L. ed.) 571.)

I think the set-off is without sanction, either statutory or equitable. A wrongdoer who has misapplied the subject of a trust is not entitled, either under the Bankruptcy [30] Act or under the rules of equitable set-off, to apply a credit that belongs to him in his own right in cancellation of his liability as a fiduciary. A leading case is Libby v. Hopkins, 104 U. S. 303, 26 U. S. (L. ed.) 769. That case construed section 20 of the Bankruptcy Act of 1867, which is the same, except for immaterial variances of phraseology, as section 68 of the Bankruptcy Act in force to-day. The bankrupt was indebted on a note secured by mortgage and also on an account. He sent some money to his creditors, A. T. Stewart & Co., with instructions to apply it on the note, but the instructions were not followed. When called upon by the trustee in bankruptcy to refund the money, the holders of the money attempted to offset the account. They invoked the provision of the Bankruptcy Act (14 Stat. 517, section 20, act of March 2, 1867, now section 68 of the act of July 1, 1898) that "in all cases of mutual debts or mutual credits between the parties, the account between them shall be stated, and one debt set off against the other, and the balance only shall be allowed or paid." The Supreme Court held that the terms "mutual debts" and "mutual credits" were used as correlative; that what is a debt on one side is a credit on the other; that Stewart & Co. held the money not as the bankrupt's debtors, but as his trustees; and hence, that there were no mutual debts within the meaning of the statute. The indebtedness was all on one side of Hopkins [the bankrupt]. The plaintiffs [A. T. Stewart & Co.] owed him nothing. They held his money in trust to apply it as directed by him. They refused to make the application as he directed. They held it, therefore, subject to his order. They continued so to hold it until the rights of the trustee in bankruptcy attached." (p. 309.)

The rule laid down in Libby v. Hopkins (supra) has been followed by the Supreme Court in bankruptcy proceedings under the present statute. (Western Tie, etc. Co. v. Brown, 196 U. S. 502, 509, 510, 25 S. Ct. 339, 49 U. S. (L. ed.) 571.) It has [31] been followed by the same court where, in proceedings not in bankruptcy, the right to set-off was asserted under the general principles of equity. (Hanover Nat. Bank v. Suddath, 153 Fed. 1022, 82 C. C. A. 677, 215 U. S. 122, 30 S. Ct. 63, 54 U. S. (L. ed.) 120; Cook County Nat. Bank v. U. S. 107 U. S. 445, 452, 2 S. Ct. 561, 27 U. S. (L. ed.) 537.) It has been approved and applied in the decisions of this court. (People v. City Bank, 96 N. Y. 32; Straus v. Tradesmen's Nat. Bank, 122 N. Y. 379, 25 N. E. 372. See also, People v. Flynn, 135 App. Div. 276, 281, 120 N. Y. S. 511, and Britton v. Ferrin, 171 N. Y. 235, 245, 63 N. E. 954.) It is in accord with the rule of set-off in bankruptcy enforced by the courts of England. (2 Halsbury, The Laws of England, Title Bankruptcy and Insolvency, pp. 211, 212.)

The law is thus settled that if the defendant held the pledge in trust for the bankrupt, it cannot offset a debt that belongs to it in

its own right. I think that, within the meaning of the rule which forbids the set-off of claims and liabilities held in inconsistent relations, a trust existed here. Within the meaning of that rule a trust may exist, though it results by implication of law from the relation between the parties. This court has many times held that a contract of pledge creates a fiduciary relation between the pledgor and the pledgee. (Toplitz v. Bauer, 161 N. Y. 325, 332, 55 N. E. 1059; Gillet v. Bank of America, 160 N. Y. 549, 560; Wheeler v. Newbould, 16 N. Y. 392, 398.) In so holding, its decisions have been in harmony with those of the Supreme Court of the United States. (Easton v. German-American Bank, 127 U. S. 532, 536, 8 S. Ct. 1297, 32 U. S. (L. ed.) 210; Pauly v. State Loan, etc. Co. 165 U. S. 606, 618, 620, 17 S. Ct. 465, 41 U. S. (L. ed.) 844.) That was the relation between the bankrupt and the defendant in the case at bar. After the debt secured by the pledge had been paid, the defendant held the pledge without beneficial interest or power of disposition. The one duty remaining was to preserve it safely and return it to the pledgor. The defendant from that moment held the collateral to the use of the bankrupt, just as truly as A. T. Stewart & Co. in Libby v. Hopkins [32] (supra), or the bank in People v. City Bank (supra), held in trust the money forwarded to them for application to a special purpose. To permit the duty that then arose to be avoided by the purchase and set-off of a claim in the fiduciary's own right is at war with the fundamental principle that a fiduciary may never deal for his own profit with the subject-matter of his trust. (Britton v. Ferrin, supra.) The courts have wisely been reluctant to give to the rules of equitable set-off a construction that would impair the obligation of that salutary principle.

Such cases as Hennequin v. Clews, 111 U. S. 676, 4 S. Ct. 576, 28 U. S. (L. ed.) 565, and Crawford v. Burke, 195 U. S. 176, 25 S. Ct. 9, 49 U. S. (L. ed.) 147, much relied on by the respondent, have little application here. They construed a provision excluding from the benefit of the act debts created by a bankrupt "in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary capacity." They held that "the cases enumerated, 'the defalcation of a public officer,' 'executor,' 'administrator,' 'guardian,' or 'trustee,' are not cases of implied, but special trusts, and the 'other fiduciary capacity' mentioned, must mean the same class of trusts. The act speaks of technical trusts, and not those which the law implies from the contract." (Chapman v. Forsyth, 2 How. 202, 208, 11 U. S. (L. ed.) 236; Hennequin v. Clews, supra, 111 U. S. 679.) Accordingly, factors and stockbrokers who misapplied the property intrusted to them by their principals, were held to be entitled to a discharge from the liability thus created. There was no suggestion, however, that a factor or a stockbroker may not be a trustee within the meaning of the rules of equitable set-off. That a factor is a trustee within the application of those rules has in effect been held by this court in Britton v. Ferrin (supra). Indeed, the trust that was held to exclude a set-off in Libby v. Hopkins, in Western Tile, etc. Co. v. Brown, and in Hanover Nat. Bank [33] v. Suddath (supra), was not a technical or special one. It was rather one implied by law from the receipt of property or money subject to prescribed conditions. (Kane v. Bloodgood, 7 Johns. Ch. (N. Y.) 90, 111, 112.) It had certainly no greater element of trust than results from the acceptance of property by an agent or factor. The defendants in those cases may not have been trustees in such a sense as to have excluded them, in the event of their becoming bankrupts, from the privilege of a discharge. They *were* trustees within the meaning of the rules of set-off, alike in bankruptcy and in equity.

The respondent insists that section 1, subdivision 11, of the present Bankruptcy Act (1 Fed. St. Ann. 527; Fed. St. Ann. 1912 Supp. p. 464) has changed the law of set-off in providing that "'debt' shall include any debt, demand or claim provable in bankruptcy." The act still provides, however, that set-off is not to be allowed unless the debts are mutual, and debts are not mutual unless held in the same right. (Sawyer v. Hoag, 17 Wall. 610, 622, 21 U. S. (L. ed.) 731; Middleton v. Pollock, L. R. 20 Eq. (Eng.) 29; Weston v. Barker, 12 Johns. (N. Y.) 276, 7 Am. Dec. 319.)

The conclusion to which I am thus led makes it unnecessary to consider the appellant's argument that a right of set-off, sanctioned by the Bankruptcy Act or by general equitable principles, but not recognized by section 501 of the Code of Civil Procedure, must be enforced through a separate suit in equity, and may not be made the subject of a counterclaim at law. I assume for the purpose of this appeal that the law is to the contrary. (Code Civ. Pro. section 507; Coffin v. McLean, 80 N. Y. 560, 563; Van Zandt v. Hanover Nat. Bank, 149 Fed. 127, 79 C. C. A. 23; Frank v. New York Mercantile Nat. Bank, 182 N. Y. 264, 268, 74 N. E. 841, 108 Am. St. Rep. 805.)

The order should be reversed, with costs, and the questions certified answered in the negative.

Werner, Hiscock, Chase, Collin, Hogan and Miller, JJ., concur.

Order reversed.

NOTE.

Set-Off under American Bankruptcy Acts.

Mutual Debts and Credits, 975.
Claims Not Provable against Estate, 978.
Purchase or Transfer for Purpose of Set-Off, 980.
Set-Off of New Credit after Preference, 981.
Practice, 983.

Mutual Debts and Credits.

By section 68 of the Bankruptcy Act of 1898 (30 Stat. L. 565, 1 Fed. St. Ann. p. 696, Fed. St. Ann. 1912 Supp. p. 805), it is provided that "in all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid." Under that provision when the transaction between the parties constitutes a mutual credit or a mutual debt, the risk of set-off exists and the balance only is payable in the bankruptcy proceedings. In re Myers, 99 Fed. 691; In re Little, 110 Fed. 621, 6 Am. Bankr. Rep. 681; In re Royce Dry Goods Co. 133 Fed. 100, 13 Am. Bankr. Rep. 258; In re Philip Semmer Glass Co. 135 Fed. 77, 67 C. C. A. 551, 14 Am. Bankr. Rep. 25; Tomlinson v. Lexington Bank, 145 Fed. 824, 76 C. C. A. 400, 16 Am. Bankr. 632; Walther v. Williams Mercantile Co. 169 Fed. 270, 94 C. C. A. 546, 22 Am. Bankr. Rep. 328; In re Harper, 175 Fed. 412, 23 Am. Bankr. Rep. 918; In re Bellevue Pipe, etc. Co. 189 Fed. 169; In re Searles, 200 Fed. 893; In re Hollins, 212 Fed. 317; West v. Cowan, 189 Ala. 138, 66 So. 816; Marcus Shipping Assoc. v. Barnes, 169 Ia. 377, 151 N. W. 525; Cromwell v. Parsons, 219 Mass. 299, 106 N. E. 1020; Wasey v. Whitcomb, 167 Mich. 58, 132 N. W. 572; De Long v. Mechanics, etc. Nat. Bank, 168 App. Div. 525, 153 N. Y. S. 1010; Mandel v. Koerner, 149 N. Y. S. 455; Wagner v. Burnham, 224 Pa. St. 586, 73 Atl. 990; Nashville Trust Co. v. Nashville Fourth Nat. Bank, 91 Tenn. 336, 15 L.R.A. 710. See also In re Gerson, 105 Fed. 803; In re Lebrecht, 135 Fed. 878, 14 Am. Bankr. Rep. 445.

Under section 20 of the Bankruptcy Act of 1867, mutual debts and mutual credits were likewise permitted to be set off one against the other. Carr v. Hamilton, 129 U. S. 252, 9 S. Ct. 295, 32 U. S. (L. ed.) 669; Drake v. Rollo, 3 Biss. 273, 4 Nat. Bankr. Reg. 689, 18 Int. Rev. Rec. 159, 7 Fed. Cas. No. 4,066; In re Farnsworth, 5 Biss. 223, 14 Nat. Bankr. Reg. 148, 8 Fed. Cas. No. 4,673; Robinson v. Wisconsin Marine, etc. Ins. Co. Bank, 9 Biss. 117, 18 Nat. Bankr. Reg. 243, 20 Fed. Cas. No. 11,969; Catlin v. Foster, 1 Sawy. 37, 3 Nat. Bankr. Reg. 540, 5 Fed. Cas. No. 2,519; Ex p. Caylus, 1 Lowell 550, 5 Fed. Cas. No. 2,534; In re Petrie, 5 Ben. 110, 7 Nat. Bankr. Reg. 332, 19 Fed. Cas. No. 11,040; Ex p. Howard Nat. Bank, 2 Lowell 487, 16 Nat. Bankr. Reg. 420, 12 Fed. Cas. No. 6,764; Harmanson v. Bain, 1 Hughes 291, 11 Fed. Cas. No. 6,073; Blair v. Allen, 3 Dill. 101, 3 Fed. Cas. No. 1,483; In re McVay, 13 Fed. 443; Warren v. Burnham, 32 Fed. 579; Goodrich v. Dobson, 43 Conn. 576, 30 Fed. Cas. No. 18,297; Cosgrove v. Cosby, 86 Ind. 511. See also In re Ford, 18 Nat. Bankr. Reg. 426, 9 Fed. Cas. No. 4,932; McKenna v. Kirkwood, 50 Mich. 544, 15 N. W. 898; Yarborough v. Wood, 42 Tex. 91, 19 Am. Rep. 44.

By section 5 of the Bankruptcy Act of 1841, it was provided that "in all cases where there are mutual debts or mutual credits between the parties, the balance only shall be deemed the true debt or claim between them, and the residue shall be deemed adjusted by the set-off." See Ex p. Newhall, 2 Story 360, 18 Fed. Cas. No. 10,159; Stow v. Yarwood, 20 Ill. 597.

By section 42 of the Bankruptcy Act of 1800, mutual credits and mutual debts were set off one against the other. Ward v. Winship, 12 Mass. 481; Murray v. Riggs, 15 Johns. (N.Y.) 571.

However, if the claims are not mutual credits or mutual debts they cannot be set off under section 68 of the Bankruptcy Act of 1898; Western Tie, etc. Co. v. Brown, 196 U. S. 502, 509, 510, 25 S. Ct. 339, 49 U. S. (L. ed.) 571; In re Fort Wayne Electric Corp. 95 Fed. 264, 2 Am. Bankr. Rep. 503; In re Bevins, 165 Fed. 434, 91 C. C. A. 302, 21 Am. Bankr. Rep. 344; Alvord v. Ryan, 212 Fed. 83; In re Hallock, 226 Fed. 821; Howard v. Magazine, etc. Co. 147 App. Div. 335, 131 N. Y. S. 916; Harris v. Second Nat. Bank, 110 Tenn. 239, 75 S. W. 1053. And see the reported case. To the same effect see the following cases decided under section 20 of the Bankruptcy Act of 1867; Gray v. Rollo, 18 Wall. 629, 21 U. S. (L. ed.) 927; Libby v. Hopkins, 104 U. S. 303, 26 U. S. (L. ed.) 769; In re Purcell, 18 Nat. Bankr. Reg. 447, 20 Fed. Cas. No. 11,470; Munger v. Albany City Nat. Bank, 85 N. Y. 580; Stewart v. Hopkins, 30 Ohio St. 502. See also In re Wheeler, 2 Lowell 252, 29 Fed. Cas. No. 17,488. Section 68a of the Bankruptcy Act of 1898, is almost a literal reproduction of section 20 of the Bankruptcy Act of 1867, and in construing the latter act the Supreme Court of the United States in Libby v. Hopkins, 104 U. S. 303, 26 U. S. (L. ed.) 769, said: "The terms 'credits' and 'debts' are used as correlative. What is a debt on one side is a credit on the other, so that the term 'credits' can have no broader meaning than the term 'debts.'" In Carr v. Hamilton, 129

U. S. 252, 9 S. Ct. 295, 32 U. S. (L. ed.) 669, it was said: "Natural justice and equity would seem to dictate that the demands of parties mutually indebted should be set off against each other, and that the balance only against each other, and that the balance only should be considered as due. But the common law, for simplicity of procedure, determined otherwise, and held that each claim must be prosecuted separately. 'The natural sense of mankind,' says Lord Mansfield, 'was first shocked at this in the case of bankrupts; and it was provided for by 4 Ann. c. 17, § 11, and 5 Geo. II. c. 30, § 28.' Green v. Farmer, 4 Burrow (Eng.) 2214, 2220, cited in 2 Story's Eq. Jur. § 1433; Green v. Farmer, 1 W. Bl. (Eng.) 651. In pursuance of these old statutes, and of the dictates of equity, the principle of set-off between mutual debts and credits has for nearly two centuries past been adopted in the English bankrupt laws, and has always prevailed in our own whenever we have had such a law in force on our statute book; and it mattered not whether the debt was due at the time of bankruptcy or not. See Babington on Set-off, 118; Ex p. Prescot, 1 Atk. (Eng.) 230, 231; Bacon's Abridg. tit. Bankrupt (K); Acts of Congress, 1800, c. 19, § 42; 2 Stat. 33; 1841, c. 9, § 5, 5 Stat. 445; 1867, c. 176, § 20, 14 Stat. 526; Bump on Bankruptcy, 10th ed. 91." And in Cumberland Glass Mfg. Co. v. De Witt, 237 U. S. 447, 35 S. Ct. 636, 59 U. S. (L. ed.) 1042, the court said: "Section 68a of the Bankruptcy Act of 1898 provides that 'in all cases of mutual debts or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.' The object of this provision is to permit, as its terms declare, the statement of the account between the bankrupt and the creditor, with a view to the application of the doctrine of set-off between mutual debts and credits. The provision is permissive rather than mandatory, and does not enlarge the doctrine of set-off, and cannot be invoked in cases where the general principles of set-off would not justify it. . . . In re Kyte, 182 Fed. 166. The matter is placed within the control of the bankruptcy court, which exercises its discretion in these cases upon the general principles of equity. Hitchcock v. Rollo, 3 Biss. 276, 4 Nat. Bankr. Reg. 690, 12 Fed. Cas. 6,535. The section was taken almost literally from section 20 of the act of 1867. In Sawyer v. Hoag, 17 Wall. 610, 21 U. S. (L. ed.) 731, in considering that section of the act of 1867, this court said: 'This section was not intended to enlarge the doctrine of set-off, or to enable a party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it.' While the operation of this privilege of set-off has the effect to pay one creditor more than another, it is a provision based upon the generally recognized right of mutual debtors, which has been enacted as part of the Bankruptcy Act, and when relied upon should be enforced by the court. New York County Nat. Bank v. Massey, 192 U. S. 138, 24 S. Ct. 199, 48 U. S. (L. ed.) 380. It hence appears that the object of this section was to give the District Court the right to apply the established principles of set-off to mutual credits, when its action was invoked for that purpose. The language of the act indicates the necessity of action by the court, for the statute provides that 'the account shall be stated' and the one debt set off against the other and the balance only allowed to be paid. This statute recognizes the nature of set-off, as established in common law and equitable procedure."

"The word 'debt' as used in section 68a includes any debt provable in bankruptcy." Germania Sav. Bank v. Loeb, 188 Fed. 285, 110 C. C. A. 263.

The mutual debts or credits must exist at the time of bankruptcy. See Shepherd v. Turner, 3 McCord L. (S. C.) 249, 15 Am. Dec. 631 (Act of 1800). Thus the obligation of a bankrupt prior to his discharge cannot be allowed to offset claims contracted since his discharge. Petitpain v. Redean, 6 La. Ann. 411. See also Crosbie v. Leary, 6 Bosw. 312; Barclay v. Carson, 3 N. C. 243. And "a debt to or from the trustee in bankruptcy and arising after the bankruptcy in the management of the estate cannot be set off against a debt due from or to the bankrupt before the bankruptcy." Howard v. Magazine, etc. Co. 147 App. Div. 335, 131 N. Y. S. 916 (Act of 1898). See also Moran v. Bogert, 14 Nat. Bank. Reg. 393, 3 Hun 603, 16 Abb. Pr. N. S. 303 (Act of 1867). But it has been held that a surety paying the principal's debt after an adjudication of bankruptcy may set off the payment against a claim of the principal existing at the time of bankruptcy. In re Dillon, 100 Fed. 627, 4 Am. Bankr. Rep. 63 (Act of 1898). *Compare* In re Bingham, 94 Fed. 796, 2 Am. Bankr. Rep. 223 (Act of 1898); Barclay v. Carson, 3 N. C. 243 (Act of 1800).

Unmatured claims may be used for the purpose of a set-off. In re Percy Ford Co. 199 Fed. 334 (Act of 1898); Drake v. Rollo, 3 Biss. 273, 4 Nat. Bankr. Reg. 689, 7 Fed. Cas. No. 4,066 (Act of 1867); In re City Bank, 6 Nat. Bankr. Reg. 71 (Act of 1867); Frank v. Mercantile Nat. Bank, 182 N. Y. 264, 74 N. E. 841, 108 Am. St. Rep. 805 (Act of 1898); Mandel v. Koener, 149 N. Y. S. 455 (Act of 1898); De Long v. Mechanics, etc. Nat. Bank, 168 App. Div. 525, 153 N. Y. S. 1010 (Act of 1898); Neely v. Grayson County

Nat. Bank, 25 Tex. Civ. App. 513, 61 S. W. 559 (Act of 1898); Conquest v. Broadway Nat. Bank (Tenn.) 183 S. W. 160 (Act of 1898). See also Germania Sav. Bank, etc. Co. v. Loeb, 188 Fed. 285, 110 C. C. A. 263 (Act of 1898). *Compare* Marks v. Barker, 1 Wash. 178, 16 Fed. Cas. No. 9,096 (Act of 1800).

An unliquidated claim based on a provable debt is available as a set-off. In re Harper, 175 Fed. 412, 23 Am. Bankr. Rep. 918 (Act of 1898); Lloyd v. Turner, 5 Sawy. 463 (Act of 1867). *Compare* In re Orne, 1 Ben. 361, 1 Nat. Bankr. Reg. 57, 6 Int. Rev. Rec. 84, 18 Fed. Cas. No. 10,581 (Act of 1867).

But it has been held that unliquidated damages arising out of tort are not available as a set-off. In re Becker, 139 Fed. 366, 15 Am. Bankr. Rep. 228 (Act of 1898); Pindel v. Holgate (Act of 1898) reported in full post, this volume, at page 983. However, where the tort can be waived and assumpsit brought it has been held that such a claim may be set off against a claim ex contractu. McCabe v. Winship, 17 Nat. Bankr. Rep. 113, 15 Fed. Cas. No. 8,668 (Act of 1867). See also Benoist v. Darby, 12 Mo. 196.

The mutual debts and credits must be in the same right. In re Lane, 2 Lowell 305, 13 Nat. Bankr. Reg. 43, 14 Fed. Cas. No. 8,043 (Act of 1867); Alvord v. Ryan, 212 Fed. 83, 128 C. C. A. 539 (Act of 1898); Rollins, Assignee, v. Twitchell, 14 Nat. Bankr. Reg. 201 (Act of 1867); Wright v. Rogers, 3 McLean 229, 30 Fed. Cas. No. 18,090 (Act of 1841); Davis v. Lohsen, 34 Misc. 769, 68 N. Y. S. 795 (Act of 1898). Thus it has been held that a claim in a representative capacity, as where one is simply the holder of the bare legal title, cannot be set off against a debt owing in a personal capacity. In re Lane, 2 Lowell 305, 13 Nat. Bankr. Reg. 43, 14 Fed. Cas. No. 8,043 (Act of 1867). And it has been held that a claim against an individual could not be set off against the claims of a corporation which carried on the business in the same name used by the individual. Davis v. Lohsen, 34 Misc. 769, 68 N. Y. S. 795 (Act of 1898). Under the rule that the mutual debts and credits must exist in the same right, a debtor cannot set off a claim due to him by the bankrupt estate against a trust fund claim which the bankrupt's estate has against him. Sawyer v. Hoag, 17 Wall. 610, 21 U. S. (L. ed.) 731 (Act of 1867); Libby v. Hopkins, 104 U. S. 303, 26 U. S. (L. ed.) 769 (Act of 1867); In re Davis, 119 Fed. 950, 9 Am. Bankr. Rep. 670 (Act of 1898); Alvord v. Ryan, 212 Fed. 83, 128 C. C. A. 539 (Act of 1898); Wagner v. Citizens' Bank, etc. Co. 122 Tenn. 164, 19 Ann. Cas. 483, 122 S. W. 245, 135 Am. St. Rep. 869, 28 L.R.A. (N.S.) 484 (Act of 1898). And see the reported case. See also Scovill v. Thayer, 105 U. S. 143, 26 U. S. (L. ed.) 968 (Act of 1867); Western Tie, etc. Co. v. Brown, 196 U. S. 502, 25 S. Ct. 339, 49 U. S. (L. ed.) 571, 13 Am. Bankr. Rep. 447 (Act of 1898); In re Troy Woolen Co. 8 Nat. Bankr. Reg. 412, 24 Fed. Cas. No. 14,203 (Act of 1867). So stockholders of a bankrupt corporation cannot set off debts owing to them by the bankrupt corporation against claims which the creditors have against them for unpaid subscriptions for stock. Babbitt v. Read, 173 Fed. 712, 23 Am. Bankr. Rep. 254 (Act of 1898); In re Howe Mfg. Co. 193 Fed. 524, (Act of 1898); Kiskadden v. Steinle, 203 Fed. 375, 121 C. C. A. 559 (Act of 1898); Wilbur v. Stockholders, 13 Phila. 479, 35 Leg. Int. 346, 18 Nat. Bankr. Rep. 178, 29 Fed. Cas. No. 17,636 (Act of 1867). And it has been held that the fact that the stockholders are also bondholders does not change the rule. Babbitt v. Read, 173 Fed. 712, 23 Am. Bankr. Rep. 254 (Act of 1898). In Kiskadden v. Steinle, 203 Fed. 375, 121 C. C. A. 559, the court said: "In Sawyer v. Hoag, supra, 17 Wall. at page 622, 21 U. S. (L. ed.) 731, when passing upon a provision of the Bankruptcy Act of 1867 (14 Stat. p. 526, § 20), similar to section 68 of the present act, Justice Miller said: 'This section was not intended to enlarge the doctrine of set-off, or to enable a party to make a set-off in cases where the principles of legal or equitable set-off did not previously authorize it. The debts must be mutual; must be in the same right. The case before us is not of that character. The debt which the appellant owed for his stock was a trust fund devoted to the payment of all the creditors of the company. As soon as the company became insolvent, and this fact became known to the appellant, the right of set-off for an ordinary debt to its full amount ceased. It became a fund belonging equally in equity to all the creditors, and could not be appropriated by the debtor to the exclusive payment of his own claim.'"

Generally a bank deposit may be set off against a debt due from a bankrupt depositor. See the note to Knoll v. Commercial Trust Co. reported post, this volume, at page 988.

The weight of authority would seem to be that a joint debt cannot be set off against a separate debt, or vice versa. In re Crystal Spring Bottling Co. 100 Fed. 265, 4 Am. Bankr. Rep. 55 (Act of 1898); In re Shults, 132 Fed. 573, 13 Am. Bankr. Rep. 84 (under Act of 1898); In re T. M. Lesher, 176 Fed. 650, (Act of 1898); In re Neaderthal, 225 Fed. 38, 140 C. C. A. 364, (Act of 1898). See also Clark v. Sparhawk, 2 W. N. C. 115, 5 Fed. Cas. No. 2,836 (Act of 1867). *Compare* Tucker v. Oxley, 5 Cranch 34, 3 U. S. (L. ed.) 29 (Act of 1800); In re Voetter, 4 Fed. 632 (Act of 1867); Bean v. Cabbaness,

6 Ala. 343; Hooks v. Gila Valley Bank, etc. Co. 12 Ariz. 315, 100 Pac. 806 (Act of 1898); Barclay v. Carson, 3 N. C. 243 (Act of 1800). In the case of In re Shults, 132 Fed. 573, the court said: "The next point urged is that, irrespective of the assignment by Henry P. Wilcox to the partnership of which he is a member, he may nevertheless legally set off and counterclaim the balance of the deposit after the payment of the Finch note against the liability of his firm to the bankrupts. The rule announced in Tucker v. Oxley, 5 Cranch 34, 3 U. S. (L. ed.) 29, upon which claimants place reliance, has no application to the facts of this case. The right to set off is invoked on account of the partnership liability in solido, and therefore it is contended the individual debt of Henry P. Wilcox must be set off against the joint indebtedness of the partners to the bankrupts. In the Tucker case the partners who were indebted to Tucker dissolved their relations, and Tucker in turn became indebted to the individual partner who continued the business and subsequently became bankrupt. His assignee brought an action against Tucker for this debt, and Tucker was allowed to set off his claim against the partners. The ground of the decision of the court, as stated in Gray v. Rollo, 18 Wall. 629, 21 U. S. (L. ed.) 927, rested upon the fact that the debt due from the partners to Tucker was enforceable against the property of either of them, and, such debt being provable in bankruptcy against the partner who became bankrupt, the set-off against the bankrupt's claim was a correct application of the law. The rule in the state of New York seems to be that a joint debt cannot be set off or operate as a counterclaim against a separate debt, or, conversely, a separate debt against a joint debt. Spofford v. Rowan, 124 N. Y. 108, 26 N. E. 350; Hunter v. Booth, 84 App. Div. 585, 82 N. Y. S. 1000. This sound rule is thought to be general in its application. Gray v. Rollo, supra; Scammon v. Kimball, 92 U. S. 367, 23 U. S. (L. ed.) 483. The bankrupts were not indebted to the claimants. No indebtedness was created by the transfer of the debts against the bankrupts, and therefore there exist no mutual debts or mutual credits between the estate of the bankrupts and the claimants. A different question would be presented if, for example, the firm of Wilcox & Son were insolvent, and the trustee sought to enforce the firm liability by proceeding against the partner to whom the bankrupts were indebted, or where the joint liability to the bankrupts and the debt to one of the partners grew out of the same transaction. See In re Crystal Spring Bottling Co. 100 Fed. 265. In such cases there would be a mutuality between the parties, and equitable considerations would not allow the trustee to retain the deposit, and also to collect the firm obligations from the separate estate of the partner to whom the bankrupts were indebted."

A nonassignable chose in action does not become a mutual debt or credit in the hands of an assignee so as to constitute a valid set-off free from equities. In re Wiener, etc. Shoe Co. 96 Fed. 949, 3 Am. Bankr. Rep. 200 (Act of 1898); Rollins v. Twitchell, 14 Nat. Bankr. Reg. 201 (Act of 1867); Hitchcock v. Rollo, 3 Biss. 276, 4 Nat. Bankr. Reg. 690, 12 Fed. Cas. No. 6,535 (Act of 1867); McIver v. Wilson, 1 Cranch 423, 16 Fed. Cas. No. 8,833 (Act of 1800). And it has been held that where a creditor assigns a negotiable paper after the bankruptcy of the maker, the bankrupt maker may set off the liabilities of the original payee existing at the time of bankruptcy. Humphries v. Blight, 1 Wash. C. C. 44, 4 Dall. 370, 1 U. S. (L. ed.) 870, 12 Fed. Cas. No. 6,870 (Act of 1800). It would seem that an assigned judgment is not a proper set-off. Weaver v. Voils, 68 Ind. 191 (Act of 1867).

It has been held that the words "without off-set" used in the body of a negotiable note do not prevent the proof of an off-set in bankruptcy proceedings. Harmanson v. Bain, 1 Hughes 391, 11 Fed. Cas. No. 6,073 (Act of 1867). See also Humphries v. Blight, 1 Wash. C. C. 44, 4 Dall. 370, 1 U. S. (L. ed.) 870, 12 Fed. Cas. No. 6,870 (Act of 1800).

On the dismissal of an involuntary petition in bankruptcy it has been held that the petitioner's claim against the alleged bankrupt cannot be set off against the petitioner's liability for costs. In re Lowenstein, 3 Ben. 422, 3 Nat. Bankr. Reg. 268, 15 Fed. Cas. No. 8,572 (Act of 1867).

Where an assignment under a state insolvency law has been set aside in bankruptcy it has been held that the assignee under the state insolvency law cannot set off his compensation from the property he is by law required to turn over to the trustee in bankruptcy. In re Stubbs, 4 Nat. Bankr. Reg. 376, 23 Fed. Cas. No. 13,557 (Act of 1867).

A preference is not a mutual debt or credit under the Bankruptcy Act of 1898. In re White, 177 Fed. 194, 101 C. C. A. 364, 24 Am. Bankr. Rep. 197; Moody v. Chicago Title, etc. Co. 138 Ill. App. 233, *affirmed* Chicago Title, etc. Co. v. Moody, 233 Ill. 634, 84 N. E. 656; Harris v. Second Nat. Bank, 110 Tenn. 239, 75 S. W. 1053. See also In re Ryan, 105 Fed. 760.

It has been held that a purely voluntary payment canot be used as a set-off. In re Hallock, 226 Fed. 821 (Act of 1898).

Claims Not Provable against Estate.

By clause b of section 68, Bankruptcy Act of 1898, (30 Stat. L. 544, 1 Fed. St. Ann. p.

696, Fed. St. Ann. 1912 Supp. p. 806) it is provided that "a set-off or counterclaim shall not be allowed in favor of any debtor . . . . which is not provable against the estate." Under that clause a claim is not available as a set-off or counterclaim when it is not provable against the estate. In re Bingham, 94 Fed. 796; In re Philip Semmer Glass Co. 135 Fed 77, 67 C. C. A. 551; In re Becker, 139 Fed. 366; Steinhardt v. National Park Bank, 52 Misc. 464, 102 N. Y. S. 546, 18 Am. Bankr. Rep. 86. To the same effect see Wilson v. National Bank, 1 McCrary (U. S.) 538, decided under the Bankruptcy Act of 1867.

A claim may be used as a set-off if it is one provable in its nature at the time the set-off is claimed, and it need not be one that was provable in time to be proved in the bankruptcy proceedings. Norfolk, etc. R. Co. v. Graham, 145 Fed. 809, 76 C. C. A. 385, 16 Am. Bankr. Rep. 615 (Act of 1898); In re Catlin, 3 Nat. Bankr. Reg. 540 (Act of 1867); Morgan v. Wordell, 178 Mass. 350, 59 N. E. 1037, 55 L.R.A. 33 (Act of 1898); Wagner v. Burnham, 224 Pa. St. 586, 73 Atl. 990 (Act of 1898). In Morgan v. Wordell, supra, the court said: "The defendant also claims a set-off by virtue of his covenant. We assume that it has been adjudicated between the parties in the district court that the defendant has not a claim which he could prove in his own name, and that this decision carries with it the corollary that he could not prove his claim on the covenant against the estate. If therefore the prohibition of a set-off of a claim 'which is not provable against the estate' is to be taken with simple literalness as applying to any claim that could not be proved in the existing bankruptcy proceedings, the defendant's set-off cannot be maintained. But we are of opinion that the seemingly simple words which we have quoted must be read in the light of their history and in connection with the general provision at the beginning of § 68 for a set-off of mutual debts 'or mutual credits,' and that so read they interpose no obstacle to the defendant's claim. The provision for the set-off of mutual credits is old. St. 4 & 5 Anne, c. 17, § 12. 5 Geo. II. c. 30, § 28. 46 Geo. III. c. 135, § 3. Gibson v. Bell, 1 Bing N. C. 743, 753, 27 E. C. L. 562; Ex p. Prescot, 1 Atk. (Eng.) 230. It was adopted in the United States acts of 1800, c. 19, § 42, 1841, c. 9, § 5, and 1867, c. 176, § 20. But while the provision as to mutual credits was thought to be more extensive than that as to mutual debts (Atkinson v. Elliott, 7 T. R. (Eng.) 378, 380,) it was held that even the broader phrase did not extend to claims which, when the moment of set-off arrived, still were wholly contingent and uncertain, such for instance as the claim upon this covenant would have been if the defendant had not yet been called upon to pay anything upon the original partnership debt. Abbott v. Hicks, 5 Bing. N. C. 578, 35 E. C. L. 237; Robson, Bankruptcy (7th ed.) 374. But the moment when the set-off was claimed was the material moment. The defendant's claim might have been contingent at the adjudication of bankruptcy, and so not provable in the absence of special provisions such as are to be found in the later bankrupt acts in England and in the United States act of 1867, although not in the present law, and yet if it had become liquidated, as here by payment, before the defendant was sued, he was allowed without question to set it off. Smith v. Hodson, 4 T. R. (Eng.) 211; Ex p. Boyle, re Shepherd, 1 Cooke B. L. (8th ed) 561; Ex p. Wagstaff, 13 Ves. (Eng.) 65; Marks v. Barker, 1 Wash. (C. C.) 178, 181, 16 Fed. Cas. No. 9,096. The limitations worked out by these decisions were expressed in the section of the act of 1867 cited above, in the words 'but no set-off shall be allowed of a claim in its nature not provable against the estate.' These words, as it seems to us, following the cases, referred to the nature of the claim at the moment when it was sought to set it off, not to its nature at the beginning of the pending bankruptcy proceedings, and did not prevent a set-off of a claim which was liquidated at the later moment merely because, when the bankruptcy proceedings began, for some reason it did not admit of proof. The present statute leaves out the words 'in its nature,' but we can have no doubt that it was intended to convey the same idea as the longer phrase in the last preceding act, from which in all probability its words were derived. 'Provable' means provable in its nature at the time when the set-off is claimed not provable in the pending bankruptcy proceedings. The right to set off the claim when liquidated after the beginning of the bankruptcy proceedings was based upon its being a mutual credit, not upon the claim being provable, which it was not until the later bankruptcy statutes. Russell v. Bell, 8 M. & W. 277, 281. Conversely, of course the exclusion of a set-off, when the claim still was contingent and the defendant had made no payment, did not stand on the ground that the claim was not provable in the existing bankruptcy proceedings, but on the ground that it was not provable in its nature and that there was no machinery available to liquidate it. If we are right in supposing that the act of 1867 meant merely to codify a principle or rather a limitation developed by the courts, and that the words of the present act mean no more than those of the act of 1867, it follows that, although the defendant's claim could not have been proved against the estate, still it is a mutual credit and may be set off when he is sued."

It has been held that unliquidated damages for tort are not provable in bankruptcy and hence are not available as a set-off. In re Becker, 139 Fed. 366, 15 Am. Bankr. Rep. 228 (Act of 1898); Pendel v. Holgate (Act of 1898) reported in full post this volume, at page 983. See also Brown v. Cuming, 2 Caines (N. Y.) 33 (Act of 1800). But *compare* In re Harper, 175 Fed. 412, 23 Am. Bankr. Rep. 918, wherein an unliquidated counterclaim for false and fraudulent representations was allowed as a set-off under section 68 b and the decision in the case of In re Becker, supra, was criticised.

Under the Bankruptcy Act of 1867 it was held that a judgment for a penalty for a violition of a state statute against usury was not a provable debt in bankruptcy, and hence not available as a set-off. Wilson v. National Bank, 1 McCrary (U. S.) 538.

Purchase or Transfer for Purpose of Set-Off.

By Clause 2 of section 68 b of the Bankruptcy Act of 1898 (30 Stat. L. 544, 1 Fed. St. Ann. p. 696, Fed. St. Ann. 1912 Sup. p. 806) it is provided that a set-off or counterclaim shall not be allowed in favor of any debtor of the bankrupt of a claim which "was purchased by or transferred to him after the filing of the petition, or within four months before such filing, with a view to such use and with knowledge or notice that such bankrupt was insolvent, or had committed an act of bankruptcy." Under that clause a set-off will not be allowed to one who, with knowledge of the bankrupt's insolvency, acquires claims against the bankrupt with a view to using the same by way of payment or set-off, or as to obtain an advantage over the creditors. Western Tie, etc. Co. v. Brown, 196 U. S. 502, 509, 510, 25 S. Ct. 339, 49 U. S (L. ed.) 571; Continental, etc. Trust, etc. Bank v. Chicago Title, etc. Co. 229 U. S. 435, 33 S. Ct. 829, 57 U. S. (L. ed.) 1268; In re Shults, 192 Fed. 573; Mason v. National Herkimer County Bank, 172 Fed. 529, 97 C. C. A. 155, *reversing* decree 163 Fed. 920. In Continental, etc. Trust, etc. Bank v. Chicago Title, etc. Co. supra, the court said: "It is the main purpose of this statute, as its terms show, to prevent debtors of the bankrupt from acquiring claims against the bankrupt for use by way of set-off and reduction of their indebtedness to the estate."

Thus where an indorser for a person who later became bankrupt took up the paper within four months of the filing of the petition and with a knowledge of the insolvency of the maker, with a view to using the same as a set-off against his liability to the bankrupt, it was held that the transaction came within the prohibition of the act. Mason v. National Herkimer County Bank, 172 Fed. 529, 97 C. C. A. 155. And where a corporation, with a knowledge of its debtor's insolvency, and within four months of the filing of a petition in bankruptcy against him, deducted from the payroll of its laborers the sum that the laborers owed the insolvent debtor for supplies, with a view of setting off the same against the debtor's liability to the corporation, it was held that the corporation had attempted to obtain an advantage over the other creditors to which it was not lawfully entitled. Western Tie, etc. Co. v. Brown, 196 U. S. 502, 25 S. Ct. 339, 49 U. S. (L. ed.) 571.

Where a bank which had issued certificates of deposit to a deposit, afterwards acquired them for the purpose of setting them off against the bankrupt's indebtedness to the bank, it was held that such a transaction did not come within the prohibition of the statute. Continental, etc. Trust, etc. Bank v. Chicago Title, etc. Co. 229 U. S. 435, 33 S. Ct. 829, 57 U. S. (L. ed.) 1268 (*distinguishing* Western Tie, etc. Co. v. Brown, 196 U. S 502, 25 S. Ct. 339, 49 U. S. (L. ed.) 571). And it has been held that a claim acquired for the purpose of set-off within the prohibited period may be used as a set-off against a claim assigned by the person contemplating bankruptcy. Stich v. Berman, 49 Misc. 104, 96 N. Y. S. 743.

Section 20 of the Bankruptcy Act of 1867, provided that "no set-off shall be allowed in favor of any debtor to the bankrupt of a claim purchased by or transferred to him after the filing of the petition." That section was amended by the Act of 1874, which added the words "or in cases of compulsory bankruptcy, after the act of bankruptcy upon or in respect of which the adjudication shall be made, and with a view of making such set-off." Under the amendment the statute in terms forbade a set-off of any claims purchased by or transferred to the debtor after the filing of the petition, or in case of involuntary bankruptcy, after the act of bankruptcy. Rollins v. Twitchell, 2 Hask. 66, 14 Nat. Bankr. Reg. 201, 20 Fed. Cas. No. 12, 627; Hunt v. Holmes, 14 Nat. Bankr. Reg. 101; Fleming v. Andrews, 3 Fed. 632. See also In re Cleveland Ins. Co. 22 Fed. 200. And see Lloyd v. Turner, 5 Sawy. (U. S.) 463, wherein it was held that a claim purchased for the purpose of set-off with full knowledge of insolvency was still available under the Amendment of 1874, in case of voluntary bankruptcy.

Under the Bankruptcy Act of 1867, prior to the amendment of 1874, the decisions were in conflict as to whether a claim acquired for the purpose of set-off before the filing of the petition could be used in case the person seeking to use the same had full knowledge

of the insolvency of the debtor at the time of acquiring the claim. The question was resolved in the affirmative in the following cases: In re City Bank, 6 Nat. Bankr. Reg. 71; Hovey v. Home Ins. Co. 10 Nat. Bankr. Reg. 224, 12 Fed. Cas. No. 6,743; Mattok v. Cady, 7 Am. L. Rec. 613, 16 Fed. Cas. No. 9,301; Mattocks v. Lovering, 3 Fed. 212. But an opposite conclusion was reached in Hitchcock v. Rollo, 4 Nat. Bankr. Reg. 690, and in Sawyer v. Hoag, 3 Biss. 293, 21 Fed. Cas. No. 12,400.

Under the Bankruptcy Act of 1841, a claim purchased after the petition was filed could not be used for the purpose of set-off. Smith v. Brinckerhoff, 6 N. Y. 305 *affirming* 8 Barb. 519.

Under the Bankruptcy Act of 1800 it seems that a claim could not be acquired for the purpose of set-off after the filing of the petition. Ogden v. Cowley, 2 Johns. (N. Y.) 274. *Compare* Humphries v. Blight, 1 Wash. C. C. 44, 4 Dall. 370, 1 U. S. (L. ed.) 870, 12 Fed. Cas. No. 6,870.

Set-Off of New Credit after Preference.

By section 60 c. of the Bankruptcy Act of 1898 (30 Stat. L. 544, 1 Fed. St. Ann. 677, Fed. St. Ann. 1912 Supp. p. 746) it is provided that "if a creditor has been preferred and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estates, the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him." Under that section a preferred creditor who has extended new credit, without security, may set off the amount of the new credit against the amount which would otherwise be recoverable against him. Pirie v. Chicago Title, etc. Co. 182 U. S. 438, 21 S. Ct. 913, 45 U. S. (L. ed.) 1171; Kaufman v. Tredway, 195 U. S. 271, 25 S. Ct. 33, 49 U. S. (L. ed.) 190, 12 Am. Bankr. Rep. 685; In re Morrow, 134 Fed. 686, 13 Am. Bankr. Rep. 392; In re Tanner, 6 Am. Bankr. Rep. 196; Rogers v. American Halibut Co. 216 Mass. 227, 103 N. E. 689. See also In re Dickson, 111 Fed. 726, 49 C. C. A. 574, 55 L.R.A. 349.

Before there can be a set-off within the foregoing section there must have been a preference prior to the extension of the new credit. In re Bailey, 110 Fed. 928. See also In re Ratliff, 107 Fed. 80; Price v. Derbyshire Coffee Co. 128 App. Div. 472, 112 N. Y. S. 830, 21 Am. Bankr. Rep. 280.

It has been held that there is no new credit within the foregoing section when the bankrupt receives property from a third person and afterwards grants a preference to the person seeking to set-off the same. Carleton Dry Goods Co. v. Rogers, 120 Fed. 14, 57 C. C. A. 34.

It has been held that where the new credit has passed the limit of a security given therefor, the credit in excess of the security will be held to be "without security of any kind" and entitled to be set off against the amount recoverable. In re Tanner, 6 Am. Bankr. Rep. 196.

If the creditor has acted in good faith, and extended credit without security, and the money or property has passed into the debtor's possession, the creditor is entitled to the offset provided for by section 60 c, without a showing that the money or property remained a part of the debtor's estate until the adjudication of bankruptcy. Kaufman v. Tredway, 195 U. S. 271, 25 S. Ct. 33, 49 U. S. (L. ed.) 190, wherein "it will be noticed that the words used in paragraph 'c' are not 'the bankrupt's estate,' but 'the debtor's estate.' 'Debtor' is also found in the preceding clause as descriptive of the one to whom the credit is given. While the same person is both debtor and bankrupt, first debtor and then bankrupt, the use of the former term is suggestive of the time of the transaction as well as the status of the recipient of the credit. The paragraph further provides that 'the amount of such new credit remaining unpaid at the time of the adjudication in bankruptcy may be set-off.' It is the nonpayment and not the fact that the property remains still a part of the debtor's estate which entitles to a set-off. It would seem that if Congress intended that which the trial court held to be the meaning of the statute it would have said 'which becomes a part of the bankrupt's estate' or 'which becomes and remains a part of the debtor's estate until the adjudication in bankruptcy.' Further, Congress provided that the creditor act in good faith. Thus it excluded any arrangement by which the creditor, seeking to escape the liability occasioned by the preference he has received, passes money or property over to the debtor with a view to its secretion until after the bankruptcy proceedings have terminated, or with some other wrongful purpose. It meant that the creditor should not act in such a way as to intentionally defeat the bankrupt act, but should let the debtor have the money or property for some honest purpose. Requiring that it should become a part of the debtor's estate excluded cases in which the creditor delivered the property to a third person on the credit of the debtor, or delivered it to him with instruction to pass it on to some third party. The purpose was that the property which passed from the creditor should in fact become a part of the debtor's estate, and that the credit should be only for such property. Still again, to re-

quire that the creditor should not only in good faith have extended the credit and that the money or property should have passed into and become a part of the debtor's estate, but that he should also show the actual disposition thereof made by the debtor would in many cases practically deny the creditor the benefit of a credit which he had extended in good faith. Suppose three months and a half before bankruptcy the creditor, in good faith, sells and delivers a bill of goods to the debtor, a merchant, how difficult it would be to show what had become of each particular article on that bill, or what was done with the money received for those that had been sold; and the same when, as in this case, money was delivered to the debtor. If Congress intended to require such proof it would seem that it would have used language more definite and certain. If the creditor has acted in good faith, extended credit without security, and the money or property has actually passed into the debtor's possession, why should anything more be required? Has the creditor not been already sufficiently punished when, having received money or property in payment of a just debt, he is compelled to refund that to the trustee because he believed, or had reason to believe, that the debtor, in paying that debt, preferred him? Why should he be punished in addition by the loss of the benefit of a credit given in good faith? We are of opinion that the state court erred in its construction of the statute and in peremptorily denying to the creditor the benefit of the credit."

Prior to the amendment of section 57g in 1903 (10 Fed. St. Ann. 45, Fed. St. Ann. 1912 Supp. p. 706), whereby only such preferences as are void or voidable under sections 60b or 67e need be surrendered as a condition of the allowance of a claim, the decisions were in conflict as to whether the right to set-off within section 60c was confined to a case where the trustee brought an action to recover the preference under 60b, or was equally applicable to a case where a preferred creditor surrendered his preference under section 57g in order to have his claim allowed. The dispute concerned the scope of the words "otherwise recoverable" in 60c, and some of the cases may not now be entirely destitute of value. The following cases, superseded as stated by the amendment of 57g, in 1903, held that the right of set-off was not restricted to a case where the trustee sued to recover the preference. In re Ryan, 105 Fed. 760, 5 Am. Bankr. Rep. 396; McKey v. Lee, 105 Fed. 923, 45 C. C. A. 127; In re Seckler, 106 Fed. 484; In re Soldosky, 111 Fed. 511; In re Southern Overalls Mfg. Co. 111 Fed. 518, *affirmed* Kahn v. Cone Export, etc. Co. 115 Fed. 290, 53 C. C. A. 92; Peterson v. Nash, 112 Fed. 311, 50 C. C. A. 260, 55 L.R.A. 344, 55 L.R.A. 344; In re Thompson, 112 Fed. 651; In re Topliff, 114 Fed. 323; C. S. Morey Mercantile Co. v. Schiffer, 114 Fed. 447, 52 C. C. A. 249; Gans v. Ellison, 114 Fed. 734, 52 C. C. A. 366; Kahn v. Cone Export, etc. Co. 115 Fed. 290, 53 C. C. A. 92. See also In re Abraham Steers Lumber Co. 112 Fed. 406, 50 C. C. A. 310 (Order 110 Fed. 738 *affirmed*). In C. S. Morey Mercantile Co. v. Schiffer, supra, the court said: "It is contended that this section authorizes these new credits to be set off only against amounts which might be recovered by the trustee from creditors who have knowingly received preferences in the way described in section 60, subd. 'b.' The question presented by this contention has been the subject of much debate. All the reasons for and against it have been repeatedly stated by the various courts, and it would be a work of supererogation to repeat or review them here. The arguments in support of the position of counsel for the trustee will be found in Re Christensen 101 Fed. 243; In re Arndt, 104 Fed. 234; In re Abraham Steers Lumber Co. 110 Fed. 738, 748. The reasons why, in our opinion, this contention cannot be and ought not to be sustained, have been presented in Peterson v. Nash, 112 Fed. 311, 50 C. C. A. 260, 55 L.R.A. 344; McKey v. Lee, 45 C. C. A. 127, 105 Fed. 923; In re Dickson, 111 Fed. 726, 49 C. C. A. 574, 55 L.R.A. 349; In re Ryan, 105 Fed. 760; In re Seckler, 106 Fed. 484; and In re Southern Overalls Mfg. Co. 111 Fed. 518. Since the decision in Peterson v. Nash, our attention has been called to the following remarks contained in the opinion of the supreme court in Pirie v. Chicago Title, etc Co. 182 U. S. 455, 21 S. Ct. 906, 45 U. S. (L. ed.) 1171; 'Nor, again, do we find anything which militates against our conclusion in subdivision 'c' of section 60. That subdivision is applicable to the cases arising under 'b' and allows a set-off which otherwise might not be allowed.' But there are at least two reasons why this remark is neither controlling nor persuasive: In the first place, the question whether or not the set-off provided for by subdivision 'c' might be allowed to creditors who had innocently obtained preferences, as well as to those who had done so with intent to evade the provisions of the bankrupt act, was not in issue in that case, and was not decided; and, in the second place, there is nothing in this remark inconsistent with the view that offsets against such preferences may be allowed. It merely states that subdivision 'c' is applicable to cases arising under subdivision 'b.' No one disputes that proposition. After a careful consideration of the authorities, and the arguments which they so forcibly present upon each side of the question

now under consideration, this court, at its last term, arrived at the conclusion that section 60c entitles an innocent creditor who comes within its provisions to set off the amount of his new credits against the amount he would otherwise be required by section 57g to surrender before proving his claim, and that it is not limited in its application to cases where the trustee may sue to avoid the preferences under section 60b. Peterson v. Nash, 112 Fed. 311, 50 C. C. A. 260, 55 L.R.A. 344. The circuit court of appeals of the First and Seventh circuits have arrived at the same conclusion. McKey v. Lee, 105 Fed. 923, 45 C. C. A. 127; In re Dickson, 111 Fed. 726, 49 C. C. A. 574, 55 L.R.A. 349. A thoughtful reconsideration of this question at this term in the light of subsequent decisions, and of the remark of the supreme court to which reference has been made, has served but to confirm us in the righteousness and soundness of that conclusion."

Besides the cases cited at the beginning of the foregoing quotation, the following cases held that the right to set-off was confined to a case where the trustee sued to recover the preference: In re Keller, 109 Fed. 118; In re Jones, 123 Fed. 128, 10 Am. Bankr. Rep. 513; In re Rosenberg, 27 Am. Bankr. Rep. 316.

Practice.

It is the duty of a trustee to interpose a set-off or counterclaim. In re Royce Dry Goods Co. 133 Fed. 100 (Act of 1898).

It has been held that a creditor by going to trial on an issue as to the allowance of a set-off consents to the jurisdiction of the court within section 23b of the Bankruptcy Act of 1898 (30 St. L. 552, 1 Fed. St. Ann. p. 590, Fed. St. Ann. 1912 Supp. p. 595). In re White, 177 Fed. 194, 98 C. C. A. 333, 26 L.R.A.(N.S.) 451.

The person asserting a set-off has the burden of proving it. In re Harper, 175 Fed. 412, 23 Am. Bankr. Rep. 918 (Act of 1898); Ogden v. Cowley, 2 Johns. (N. Y.) 274 (Act of 1800); Howard v. Magazine, etc. Co. 147 App. Div. 335, 131 N. Y. S. 916 (Act of 1898).

The person seeking to use a set-off may be barred by laches, or may be estopped to set up his counterclaim. Pindel v. Holgate (Act of 1898) reported in full, post, this page. Wagner v. Citizen's Bank, etc. Co. 122 Tenn. 164, 19 Am. Cas. 483, 122 S. W. 245, 135 Am. St. Rep. 869, 28 L.R.A.(N.S.) 484 (Act of 1898). Likewise a debtor by his conduct in the bankruptcy proceedings may waive his right subsequently to assert a set-off. Hunt v. Holmes, 16 Nat. Bankr. Rep. 101, 12 Fed. Cas. No. 6,890 (Act of 1867) Brown v. Farmers' Bank, 6 Bush (Ky.) 198, (Act of 1867). Thus where a creditor accepted a composition with full knowledge of the facts and without an endeavor to prove his set-off against the bankrupt, it was held that he had waived any set-off which he might have had against the bankrupt. Hunt v. Holmes, 16 Nat. Bankr. Reg. 101, 12 Fed. Cas. No. 6,890 (Decided under Act of 1867).

Under the Bankruptcy Act of 1867, it was held that the statute of limitations might have barred the right of action against the bankrupt, without affecting a set-off which existed at the time of the adjudication in bankruptcy. Von Sachs v. Kretz, 10 Hun (N. Y.) 95. *Compare* Harwell v. Steel, 17 Ala. 372.

Where pending an action by a bankrupt the bankrupt obtains a discharge, the discharge does not affect the right of the other party to set up a counterclaim against the bankrupt. Wyckoff v. Williams, 136 App. Div. 495, 121 N. Y. S. 189 (Act of 1898).

PINDEL
v.
HOLGATE ET AL.

IN RE PINDEL.

United States Circuit Court of Appeals, Ninth Circuit.—March 18, 1915.

221 Fed. 342.

Bankruptcy — Review of Allowance of Claim.

Under Bankr. Act July 1, 1898, c. 541, § 25 (3), 30 Stat. 553 (1 Fed. St. Ann. 602; Fed. St. Ann. 1912 Supp. p. 634), authorizing appeals as in equity cases from a judgment allowing or rejecting a debt or claim of $500 or over, an order allowing such a claim is not reviewable by a petition to revise, as each method of procedure for the review of orders in bankruptcy is exclusive of the other.

[See generally 3 R. C. L. tit. *Bankruptcy*, p. 347.]

Review of Confirmation of Sale.

Under Bankr. Act, § 24b (1 Fed. St. Ann. 595; Fed. St. Ann. 1912 Supp. p. 611), providing that the several Circuit Courts of Appeal shall have jurisdiction to superintend and revise in matters of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction, an order confirming the sale of the land of a bankrupt in which he had a homestead interest is properly reviewable in matters of law by a petition to revise.

Review of Allowance of Claim in Conjunction with Another Order.

Though an order allowing a claim is not, standing alone, reviewable on a petition to re-

vise, where there was only one other small claim, and the necessity for a sale of land in which the bankrupt had a homestead interest depended mainly upon the validity of the claim in question, the allowance of such claim will be reviewed on a petition to revise the order confirming a sale of the homestead.

Set-Off in Bankruptcy — Estoppel of Bankrupt.

A voluntary bankrupt in his schedules listed the claim of a bank based upon a judgment without mentioning any offset, and stated that he held no unliquidated claims or choses in action of any kind against any person, and in a proceeding to sell land in which he had a homestead interest, in which the necessity for making the sale rested upon the assumption that the claim of the bank was valid, resisted a sale on other grounds. An order of sale was affirmed on appeal, and a sale had. On application for an order confirming the sale, the bankrupt, more than four years after the petition was filed, for the first time set up an offset or counterclaim for wrongful attachment in the action in which the bank's judgment was obtained. It is held that he was estopped by the representations in the schedules and the order of sale from setting up such counterclaim, as a judgment is an adjudication, not only of all defenses actually interposed, but of all which might have been interposed.

[See note at end of this case.]

Judgments — Matters Concluded.

Under the rule established in Idaho, a judgment concludes all claims for wrongful attachment in the action in which the judgment is obtained.

Set-Off in Bankruptcy — Laches of Bankrupt.

Where, at the time a bankrupt sought to set up a claim for damages from an attachment as a counterclaim against the judgment obtained in the action in which the attachment was issued, an action by the judgment creditor against the sheriff for his negligence in caring for the attached property was barred by Rev. Codes Idaho, § 4055, subd. 1, requiring actions against sheriffs upon a liability incurred by the doing of an act in their official capacity and by virtue of their office, or by the omission of an official duty, to be brought within two years, and an action against the judgment creditor would have been barred by section 4054, subds. 2, 3, requiring actions for trespass upon real property and for taking or injuring personal property to be brought within three years, the bankrupt is barred by his laches from setting up such claim.

[See note at end of this case.]

Right to Set Off Unliquidated Claim.

In a bankruptcy proceeding, a claim for unliquidated damages for a tort could not be set off against a claim upon a judgment, whether the matter was controlled by Rev. Codes Idaho, § 4184, providing that a counterclaim must be a cause of action arising out of the transaction set forth in the complaint as the foundation of plaintiff's claim or connected with the subject of the action, or, in an action arising upon contract, any other cause of action also arising upon contract, or by Bankr. Act, § 63 (1 Fed. St. Ann. 679: Fed. St. Ann. 1912 Supp. p. 753), specifying in subdivision "a" the claims which may be proved, and providing in subdivision "b" that unliquidated claims may be liquidated in such manner as the court shall direct, and may thereafter be proved and allowed against the estate, and section 68 (1 Fed. St. Ann. 696; Fed. St. Ann. 1912 Supp. p. 805) providing for a set-off of mutual debts and credits, and providing that a set-off or counterclaim shall not be allowed which is not provable against the estate, as section 63b does not enlarge the scope of subdivision "a," and unliquidated claims arising out of torts are not covered by subdivision "a."

[See note at end of this case.]

Petition to revise orders of United States District Court for Central District of Idaho.

Bankruptcy proceedings. Frank M. Pindel, bankrupt, and Norman J. Holgate, trustee. Bankrupt petitions to revise orders reversing orders of referee and allowing claim of Bank of Nez Perce and confirming sale of homestead. The facts are stated in the opinion. AFFIRMED.

Edwin H. Williams and *Ben F. Tweedy* for petitioner.

Finis Bentley for trustee.

Eugene O'Neill for claimant.

Sitting: GILBERT, ROSS and MORROW, Circuit Judges.

[344] MORROW, J.—The controversy involved in this case was before this court on a petition for revision of an order in bankruptcy proceedings in the District Court of the United States for the District of Idaho, in the case of Nez Perce Bank v. Pindel, 193 Fed. 917, 113 C. C. A. 545. The Bank of Nez Perce had recovered a judgment in the state court of Idaho against Frank M. Pindel, on February 15, 1909, for $5,382.28. Upon this judgment the proceeds of the sale of certain attached property, amounting to $1,956.25 had been credited, leaving a balance of $3,426.03. While proceedings were still pending in the state court upon this judgment upon a claim of homestead made by the judgment debtor, he filed his petition in voluntary bankruptcy in the United States District Court for the District of Idaho. The petition was filed on February 10, 1910, and on February 14, 1910, Pindel was adjudicated a bankrupt, and thereafter a trustee was regularly appointed. In Pindel's petition in bankruptcy he listed the balance of the judgment in favor of the Nez Perce Bank as an unsecured claim against his estate. No set-off or counterclaim was stated.

The question before this court upon revision related to certain exemptions of property claimed by the bankrupt under the statute laws of Idaho and the Bankruptcy Act.

Among others was the claim of homestead which had been pending in the state court. The judgment of the state court in favor of the bank and against the bankrupt, and the balance due thereon, were not questioned by the bankrupt or his wife. The statutes of Idaho provide that a homestead may be selected and claimed by the head of a family of not exceeding $5,000 in value. Where the homestead is of a value exceeding $5,000, a method of procedure is provided in execution proceedings whereby, if the land claimed can be divided without material injury, it shall be so divided, and a homestead, including the residence, of the value of $5,000, be set apart for the claimant, and execution enforced against the remainder; but if the land cannot be so divided it shall be sold and out of the proceeds of sale $5,000 shall be paid to the homestead claimant. The District Court, in the exercise of its jurisdiction "to determine all claims of bankrupts to their exemptions" (clause 11, § 2, Bankruptcy Act; 1 Fed. St. Ann. 535; Fed. St. Ann. 1912 Supp. p. 478), found the value of the property claimed as a homestead to be $9,000, or $4,000 in excess of the exemption provided in the state law. The court directed that upon the payment into court by the bankrupt, for the benefit of the creditors of the estate, of the sum of $4,000 within [345] 30 days, the entire tract should be set apart as a homestead. In default of such payment the trustee was authorized to sell the land, under the direction of the referee in the manner provided by law, for not less than $5,000. Out of the proceeds of the sale $5,000 was to be paid to the bankrupt and his wife, and the balance, if any, was to be distributed in due course of administration. Being dissatisfied with this order of the court, the bankrupt and his wife petitioned this court for a revision of the order, on the ground that the District Court was without jurisdiction to determine their homestead rights, and that the matter rested entirely with the state court. It was also contended that the District Court erred in directing that the exemptioner pay the sum of $4,000 into the estate; otherwise, that the homestead be sold for a sum not less than $5,000, and when sold that the said sum of $5,000 be paid to Mrs. Pindel, and the surplus, if any, to the trustee. In the petition to this court the petitioners alleged "that the Bank of Nez Perce, with a claim of $3,427.93, and C. C. Triplett, with a claim of $70.85, were the only judgment creditors." No question was raised as to the balance due the bank, nor was any claim made that there was any set-off or counterclaim as against the bank. The order of the District Court was affirmed. 193 Fed. 917, 113 C. C. A. 545.

Upon the question there reviewed the decision of this court became the law of the case. The mandate of this court was sent down on October 21, 1912, and thereafter, and after the bankrupt had refused to pay the trustee for the benefit of the creditors of the estate the sum of $4,000, a sale of the property was ordered, and a sale was made for the sum of $10,500 (being $5,500 in excess of the exemption). Thereupon the referee, upon petition of the trustee, proceeded with a hearing which involved, among other things, a set-off or counterclaim of the bankrupt against the judgment of the Bank of Nez Perce and also the confirmation of the sale of the property. The result of this hearing was an order of the referee providing, among other things, that the claim of the Bank of Nez Perce be disallowed, because of a set-off or counterclaim exceeding the judgment, and that the sale of the homestead be not confirmed. The trustee in bankruptcy and the bank thereupon petitioned the District Court for a review of this order of the referee.

Upon a hearing before the District Court, the order of the referee was reversed, the claim of the bank was allowed for the principal sum of $3,294.53, together with interest thereon at the rate of 7 per cent. per annum from February 15, 1909, to February 10, 1910, the date of the filing of the petition, amounting to $227.30, making a total of $3,521.83, interest to be thereafter allowed pursuant to the general rules of law and as the facts might warrant. The set-off or counterclaim was disallowed. The order further provided that the order of the referee refusing to confirm the sale of the homestead be reversed, and that the sale be confirmed. Such confirmation was not, however, to become absolute or final until the expiration of 35 days from the date of the order, and if during that period the bankrupt or his wife should cause to be paid to the trustee the sum of $5,500 [346] (being the excess over the exemption of $5,000), with interest at the rate of 7 per cent. per annum until paid, to be applied and distributed as assets of the estate, thereupon the order should become of no effect, and said lands and the whole thereof should be set apart as the homestead of the bankrupt and his wife, and should be exempt from administration and free from all claims of creditors. Upon the other hand, if the payment was not made within the time specified, upon the expiration of said period the order should be deemed to be final, and the trustee should, upon receiving the full purchase price, execute and deliver to the purchaser or his assigns a proper instrument of conveyance, and said conveyance should be deemed to relate back to the date of the order. The bankrupt is dissatisfied with these orders, and now petitions this court for a review of these two orders of the District Court in matters of law, under section 24b of the Bankruptcy Act (1 Fed. St. Ann. 595; Fed. St. Ann. 1912 Supp. p. 611).

It is assigned as error that the District Court erred in reversing the order of the referee, disallowing the claim of the Bank of Nez Perce, and allowing such claim, and in the conclusions of law allowing the claim of the bank against the bankrupt estate.

Clause 3 of section 25 of the Bankruptcy Act (1 Fed. St. Ann. 602; Fed. St. Ann. 1912 Supp. p. 634), provides that appeals as in equity cases may be taken in bankruptcy proceedings from the courts of bankruptcy to the Circuit Court of Appeals, from a judgment allowing or rejecting a debt or claim of $500 or over. It is obvious that the order of the District Court allowing the claim of the Bank of Nez Perce comes under this review of orders in bankruptcy is exclusive of the other. In the case of In re Loving, 224 U. S. 183, 32 S. Ct. 446, 56 U. S. (L. ed.) 725; In re Mueler, 135 Fed. 711, 68 C. C. A. 349; Bothwell v. Fitzgerald, 219 Fed. 408, 135 C. C. A. 212. Standing alone, this order is, therefore, not reviewable on this petition. But it appears that the petition in bankruptcy was because of this claim against the petitioner. The only other claim against his estate set forth in the petition in bankruptcy was a small one, amounting to only $70.85. The sale of the homestead and the bankruptcy proceedings connected with the distribution of the estate are mainly dependent upon the validity of this claim, and the increase in the value of the homestead during the bankruptcy proceedings has made the homestead itself an important factor in the case. The order confirming the sale of the homestead is properly before us, and is reviewable, under section 24b, upon matter of law. In re Knosher, 197 Fed. 136, 116 C. C. A. 560. But we cannot review the question involved in that order without considering the validity of the claim of the bank. Whether the homestead shall be sold or not is the controlling question, but we cannot determine that question without knowing whether a sale of the homestead is in fact required to pay the debts of the estate; that is to say: Are there any creditors to whom the proceeds of sale will be distributed in the event a sale is made? If there are no debts, the only other ground for a sale would be to pay the expenses of the bankruptcy proceedings; but that question is not before us. In this situation of the case, we are of opinion that we may, in carrying out the [347] manifest purpose of the Bankruptcy Act, review the order allowing the claim as involved in the order of sale; but in such a review we are limited to questions of law.

The evidence is not in the record, and the only question open to us is whether the findings of the court are sufficient to support the order of the court allowing the claim. There are no formal findings by the court, but they are sufficiently stated in the opinion of the court to enable us, with the record, to review the order upon its merits. In addition to the facts already stated, the court finds that the petitions and schedules in bankruptcy were filed by Frank M. Pindel on February 10, 1910, and the adjudication was made February 14, 1910, and thereafter a trustee was appointed for the estate; that in the schedules filed by the bankrupt the claim of the Bank of Nez Perce was listed for the amount of $3,427.93; that the claim was founded upon a judgment obtained by the bank against Frank M. Pindel and his wife, Sarah E. Pindel, in the state district court of Idaho on February 15, 1909, for $3,635.16, and costs taxed at $1,747.12, making a total of $5,382.28; that upon this judgment there were credited the proceeds of the sale of certain attached property, amounting to $1,956.25, leaving a balance of $3,426.03, which, together with interest, constituted the claim as set forth in the schedules; that in the schedules of the bankrupt, under appropriate headings, he represented that he held no unliquidated claims or choses in action of any kind against any person, and in the special proceeding relating to the sale of real estate, which resulted in the order of court providing for such sale, and which was brought to this court for review in the former case, and affirmed, the necessity for making the sale rested upon the assumption that the claim of the bank was valid; that in these proceedings the bankrupt and his wife resisted the making of the order of sale, but at no time was the validity of the judgment or the amount due thereon put in issue, nor was the suggestion ever made that the sale should not be ordered because there was no indebtedness to pay.

Referring now to the petition of the bankrupt and his wife in this court for review of the order of sale, we find that it was represented that the Bank of Nez Perce, with a claim of $3,427.93, and C. C. Triplett, with a claim of $70.85, were the only judgment creditors. The affirmance of the order of sale by this court left nothing to be done but to make the sale, or release the property to the bankrupt, in accordance with the terms therein provided. Referring now to the record, it appears that on March 1, 1913, a sale of the property was ordered, the bankrupt having refused to pay to the trustee the sum of $4,000 for the benefit of the creditors of the estate. It appears further from the record that the land was sold on April 5, 1913, after due notice published and posted, for the sum of $10,500. The return of sale was made on April 23, 1913, and an order of confirmation was asked by the trustee. To this return the bankrupt caused certain objections to be made, among others that there

was nothing due to the Bank of Nez Perce, and he claimed damages against the bank for the taking of his wife's property under the execution issued by the state court. The damages claimed upon the hearing were for wrongful attachments, [348] and exceeded the judgment. These objections, setting up a set-off or counterclaim in the identical case heard and determined in the state court, were filed more than four years after the bankrupt had filed his petition in bankruptcy, wherein he had listed the balance due the bank as an unsecured claim against the estate, and no set-off or counterclaim was stated. It appears further that under appropriate headings in the schedules the bankrupt represented that he held no unliquidated claims or choses in action of any kind against any person. The bank and the trustee answered the objections of the bankrupt, and thereupon the referee proceeded to a hearing upon the issues thus presented.

The evidence taken upon this hearing is, of course, not in the record. The judge of the District Court, referring to it, says:

"A voluminous and complicated record is presented, a mere sketch of which would be of inordinate length, and therefore I shall attempt little more than to state in brief the reasons upon which my conclusions are based."

The conclusions which the court drew from the record are, however, sufficiently supported by the facts already stated. The court says:

"Surely, if there had been any suggestion of the issue now presented for the first time, the court would not have ordered a sale to pay a debt which might, in fact, prove to have no existence at all. It would have required that issue to be first tried out. That was the time for the bankrupt to speak, and to claim his defense, if any he had. The courts will not try a controversy in piecemeal. There must be an end to litigation. The bank was then seeking a sale of the real estate for the payment of its claim. If we credit him, the bankrupt had two defenses. He pleaded one of them, went to trial, failed, went to the appellate court, again failed, and after all the delay and expense, and when the order of sale is about to be made effective, he draws from its concealment his other defense. Under a familiar rule, he should not again be heard. A judgment is an adjudication, not only of all defenses actually interposed, but as well all of which might have been interposed. It is thought that not only by the representations made in the schedules, but by the order of May 20th, the bankrupt is estopped from setting up the counterclaims at this time. . . . The judgment in the state court is unquestionably valid, and the sale of the attached property was legally made. Under the rule established by the Supreme Court of the state, the judgment concluded all claims for wrongful attachment. Willman v. Friedman, 4 Idaho 209, 38 Pac. 937, 95 Am. St. Rep. 59."

Referring to a claim that the property was worth more than it sold for, and that it might have had better care, the court says:

"It is, of course, easy enough at this late date to produce opinion testimony tending to show that the property was worth much more than it sold for, and that it might have had better care. Upon such an issue the passing of time usually operates in favor of the claimant and against the officer, especially in cases where, as here, the officer is without notice that any claim of damages will be asserted, and therefore has no reason to fortify himself by gathering and preserving the necessary evidence. It was doubtless for that reason that the Legislature has provided (section 4055, subd. 1, Revised Codes of Idaho), that an action upon such a claim against an officer must be commenced within two years from the time the cause of action accrues. The theory of the law urged by counsel for the bankrupt is that the defendant may maintain his action against the plaintiff for the negligence of the sheriff in executing the writ, and that the plaintiff's remedy in turn is against that officer and his bondsmen. But here the defendant waits until any remedy the bank may have [349] had against the sheriff is cut off by the statute of limitations, and then for the first time asserts his claim. As a further consideration it is to be observed that upon his appointment these counterclaims vested in the trustee, and it is apparent that if he had brought a plenary suit thereon against the bank at the time they were first put forward by the bankrupt in this proceeding, section 4054, subds. 2, 3, of the Idaho Revised Codes, providing for a three-year period of limitations for actions for trespass upon real property and for taking or injuring personal property, could have been successfully pleaded in bar. While in terms these statutes do not apply to a proceeding of this character, the principle is the same; in equity the bankrupt should be held to be barred by his own laches.

"Thus far the discussion has been upon the assumption that a claim for unliquidated damages for a tort may be set off against a claim upon a judgment; but may this be done? If the question be referred to the Idaho Statutes, it is plain that under section 4184 of the Revised Codes the answer must be in the negative, for clearly the claim does not fall within subdivision 2 thereof, and in so far as it comes within the first subdivision, it should have been set up in the original action, and must therefore be held to be barred or extinguished under the rule of sec-

tion 4185 and Willman v. Friedman, supra. If the view be taken that the Idaho Statutes do not apply, and that the question is to be referred to the Bankruptcy Act alone, seemingly the same conclusion is unavoidable. Section 68 (1 Fed. St. Ann. 696; Fed. St. Ann. 1912 Supp. p. 805) provides for a set-off of 'mutual debts and credits,' but declares that a counterclaim cannot be allowed in favor of a debtor unless the claim is provable against the estate. Section 63 (1 Fed. St. Ann. 679; Fed. St. Ann. 1912 Supp. p. 753) defines the claims which may be proved, and provides in subdivision 'b' that 'unliquidated claims against a bankrupt may, pursuant to application to the court, be liquidated in such a manner as it shall direct and may thereafter be proved and allowed against the estate;' but this provision is held not to enlarge the scope of subdivision 'a,' and unliquidated claims arising out of torts, such as are here relied upon, are not covered by subdivision 'a.' See Remington on Bankruptcy, §§ 704, 705, 706, and cases cited thereunder. In the case of In re Becker, 139 Fed. 366, the precise question was involved. The impropriety of the course here pursued is shown in the counterclaims. He [the referee] simply finds that they exceed the bank's claim; but if they may be waged as counterclaims at all, and if this proceeding be adopted as a method for the liquidation of the damages growing out of the alleged torts, they should be fully liquidated and determined, so that the estate may have the benefit of the surplus, if any there be, after offsetting the claims of the bank."

In these conclusions we entirely concur. We need not, therefore, enter into a useless discussion of the various phases of the controversy as presented by the briefs in this court; but after a careful consideration of all the matters therein stated we are entirely satisfied with the orders of the District Court allowing the claim of the Bank of Nez Perce and ordering confirmation of the sale of the property.

The orders of the District Court are accordingly affirmed.

NOTE.

In the reported case it is held that a set-off in bankruptcy may be barred by laches or estoppel, and that an unliquidated claim for tort is not available as a set-off under the Bankruptcy Act of 1898. For a comprehensive discussion of set-off under American Bankruptcy Acts, see the note to Morris v. Windsor, reported ante, this volume, at page 972.

KNOLL
v.
COMMERCIAL TRUST COMPANY.

Pennsylvania Supreme Court—April 19, 1915.

249 Pa. St. 197; 94 Atl. 750.

Bankruptcy — Voidable Transfer — Set-Off of Deposit against Debt to Bank.

While, in the absence of fraud, a bank having a bankrupt's funds on deposit may set off a debt owing it by the bankrupt against the trustee's claim for the deposit and may prove any balance against the estate, yet where a bank holding a depositor's notes accepts payment thereof by check against the deposit within four months of the bankruptcy of the depositor and with full knowledge of his insolvent condition, it receives an "unlawful preference," within the meaning of Bankr. Act July 1, 1898, c. 541, § 60 (a) (b) 30 Stat. 562 (1 Fed. St. Ann. 672, 674; Fed. St. Ann. 1912 Supp. p. 729, 739), and its right to set off the notes is thereby forfeited, and it becomes liable to the trustee for the amount of the check.

[See note at end of this case.]

Appeal from Court of Common Pleas, Berks county: WAGNER, Judge.

Assumpsit to recover alleged preference given by bankrupt. John J. Knoll, trustee of Walley-Sarge Company, plaintiff, and Commercial Trust Company of Reading, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. AFFIRMED.

Cyrus G. Derr for appellant.

E. H. Deysher and *William Rick* for appellee.

[198] JUSTICE FRAZER, J.—Defendant bank held an overdue note of $4,000 against the Walley-Sarge Company, one of its depositors, and on September 30, 1912, the latter gave to defendant its check for $3,500 drawn against its account. A week later a petition in bankruptcy was filed against the Walley-Sarge Company and it was subsequently adjudged a bankrupt. The trustee in bankruptcy sued to recover the $3,500 claiming the payment was a preference of creditors within the meaning of Sec. 60, (a) and (b) of the National Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 544 (1 Fed. St. Ann. 672, 674; Fed. St. Ann. 1912 Supp. p. 729, 739), which provides that such transfer of property, made within four months of the date of filing the petition, shall be voidable by the trustee. Defendant, appellant, contended that the transaction was within the provision of Sec. 68a of the Bankruptcy [199] Act (1 Fed. St. Ann. 696; Fed. St.

Ann. 1912 Supp. p. 805), which permits a set-off of mutual debts or credits.

The principal question for determination is whether the acceptance of a check, from a depositor, by a bank which holds an overdue note of the latter, operates as a forfeiture of the right of the bank to set-off the note against the deposit in event of bankruptcy of the depositor within four months from the date of the transaction.

Before considering this question it is necessary to dispose of another question raised by appellant, in the "statement of the questions involved," namely, whether any right of set-off by the bank existed independently of the effect of payment by means of a check drawn by the depositor against the bank. This question is well settled. In New York County Nat. Bank v. Massey, 192 U. S. 138, 24 S. Ct. 199, 48 U. S. (L. ed.) 380, it was held that, in absence of fraud, a bank may set-off its notes against a bankrupt and prove its balance against his estate.

Mr. Justice Day, delivering the opinion of the court, said (page 145): "It cannot be doubted that, except under special circumstances, or where there is a statute to the contrary, a deposit of money upon general account with a bank creates the relation of debtor and creditor. The money deposited becomes part of the general fund of the bank, to be dealt with by it as other moneys, to be lent to customers, and parted with at the will of the bank, and the right of the depositor is to have this debt repaid in whole or in part by honoring checks drawn against the deposits. It creates an ordinary debt, not a privilege or right of a fiduciary character. . . . . Page 146, Section 68a of the Bankruptcy Act of 1898 is almost a literal reproduction of Sec. 20 of the Act of March 2, 1867, c. 176, 14 Stat. 517. So far as we have been able to discover, the holdings were uniform under that act that set-off should be allowed as between a bank and depositor becoming bankrupt." This decision has been frequently cited and followed, having [200] been reaffirmed in the recent case of Studley v. Boylston Nat. Bank, 229 U. S. 523, 33 S. Ct. 806, 57 U. S. (L. ed.) 1313, and disposes of the question of right of set-off.

The main question in the present case is, as was stated at the outset, whether such right was forfeited, or whether the status of the parties was changed, by the fact that the same result, which would have been reached by the exercise of the right of set-off by the creditor, was accomplished by the act of the depositor in giving the bank a check against the deposit prior to bankruptcy. The lower court instructed the jury that such transaction was a preference under the bankruptcy laws, thus in effect deciding the right of set-off was, under the circumstances, not properly exercised by the acceptance of a check for the amount in controversy. The question is not without precedent. It was raised in Traders' Bank v. Campbell, 14 Wall. 87, 20 U. S. (L. ed.) 832, where the creditor gave his bank a check for the balance of his account, which the bank applied to the indebtedness. The bank contended that, as it had a right to set-off its claim against the deposit, it was immaterial that the same thing was accomplished by the check. The court held this was a payment, not a set-off, and as both creditor and bank knew of the insolvency of the former, the payment was a preference in violation of the Bankrupt Act. The court said (pages 97–98) that "if they had stood on their right of set-off it might possibly have been available, but when they treat it as the bankrupt's property and endeavor to secure an illegal preference by getting the bankrupts to make a payment in one case, and seizing it by execution in the other, when they knew of the insolvency, both appropriations are void."

The question again arose in Studley v. Boylston Nat. Bank, 229 U. S. 523, 33 S. Ct. 806, 57 U. S. (L. ed.) 1313, relied upon by appellant as supporting its contention. In that case the bankrupts had been large depositors and also borrowers from defendant bank. As notes, representing loans, matured they were charged to the general account, but on three [201] occasions payment was made by check of the depositor. It was alleged these credits and payments, made within four months of filing the petition in bankruptcy, amounted to an illegal preference; and even if the notes charged were not such, payments made by check were clearly improper transfers. The court, by Mr. Justice Lamar, said (pages 528–529): "There is nothing in Sec. 68a which prevents the parties from voluntarily doing, before the petition is filed, what the law itself requires to be done after proceedings in bankruptcy are instituted. . . . It cannot have been illegal for the parties, on September 12th, 20th, 30th, October 3d and 14th, to do what the law would have required the trustee to do in stating the account after the petition was filed on December 16, 1910. No money passed in either instance: for, whether the checks for $5,000 were paid or notes for $5,000 were charged, was, in either event, a book-entry equivalent to the voluntary exercise by the parties of the right of set-off."

While the foregoing language appears to be contrary to the earlier case of Traders' Bank v. Campbell, supra, a reference to the facts of the two cases shows there is in fact no conflict. In the earlier case the creditor and the bank both knew of the fact of insolvency, while in the later case the decision was based on the fact that the bank had no knowledge thereof. This is shown by the following lan-

guage on page 526: "But if, as found by the referee, the bank had no reasonable cause to believe such transfers would effect a preference, the payments by checks for $15,000, drawn on the deposit account, are as much protected as if on the same dates similar checks had been given in payment of like amounts due another bank with which the Collver Company, the depositor, kept no account." It appears from this the decision was based, not on the question of right of set-off, but on absence of the creditor's knowledge of the debtor's insolvent condition.

Traders' Bank v. Campbell was followed by In re [202] Starkweather, 206 Fed. Rep. 797, where a bank, with knowledge of the depositor's financial condition, threatened to charge a note against his account unless paid, and the depositor gave his check for it. This was held a voidable preference.

Under the above decisions, the transaction between the parties in this case was a payment, not a set-off, and the instruction which forms the basis of the eighth assignment of error was correct if the defendants had reasonable cause to believe the result of the transaction would be a preference, that is, if they had such knowledge of the depositor's financial condition as would lead a reasonable business man to foresee the probable result of such payment to them. This question was submitted to the jury, who found they had such knowledge, and, since there is ample evidence in the case to support such finding, there is no reason for interfering therewith.

There was no error in admitting the record of the bill in equity brought by a stockholder creditor of the Walley-Sarge Company asking for the appointment of a receiver on the ground of insolvency, the offer of the bill being accompanied by an offer to show it was handed to the general counsel of defendant. While there was a denial of the authority of the attorney to represent defendant in the particular matter, there was sufficient evidence in the case to warrant a submission of the question to the jury, which was done by the trial judge in his charge. It was further shown that the Walley-Sarge Company passed a resolution authorizing their attorney to file an answer to the bill admitting insolvency and joining in the request for the appointment of a receiver on that ground, and that the whole matter was called to the attention of defendants' attorney. There was also evidence of notice to the treasurer of defendant of a proposition having been made to settle with creditors at forty cents on the dollar. Although denied by him, this was competent evidence for the jury of notice to the bank. The schedules, accounts and distribution sheets [203] were also competent on the question of insolvency: In re Docker-Foster Co., District Court, Eastern District of Penna., McPherson, Dist. Judge, 123 Fed. 190. All this was evidence tending to establish reasonable cause for defendant to believe its transaction with its depositor would effect a preference. Nothing further in the record calls for comment.

Judgment affirmed.

NOTE.

Set-Off by Bank of Deposit against Debt Due Bank by Depositor as Voidable Transfer under Bankruptcy Law.

The recent cases are in accord with the rule laid down in Booth v. Prete, 81 Conn. 636, 15 Ann. Cas. 306, that a bank deposit may be set off against a debt due to the bank from the depositor who becomes bankrupt, without creating a voidable preference under the Bankruptcy Act of 1898 (1 Fed. Stat. Ann. 525). Continental, etc. Trust, etc. Bank v. Chicago Title, etc. Co. 229 U. S. 435, 33 S. Ct. 829, 57 U. S. (L. ed.) 1268; Studley v. Boylston Nat. Bank, 229 U. S. 523, 33 S. Ct. 806, 57 U. S. (L. ed.) 1313; In re Myer, 167 Fed. 86; Germania Sav. Bank, etc. Co. v. Loeb, 188 Fed. 285, 110 C. C. A. 263; In re Percy Ford Co. 199 Fed. 334; In re Wright-Dana Hardware Co. 212 Fed. 397, 129 C. C. A. 73; In re Radley Steel Const. Co. 212 Fed. 462; Chisholm v. Le Roy First Nat. Bank, 269 Ill. 110, 109 N. E. 667; Shields v. John Shields Const. Co. 83 N. J. Eq. 21, 89 Atl. 1022; De Long v. Mechanics, etc. Nat. Bank, 168 App. Div. 525, 153 N. Y. S. 1010; Whitaker v. Crowder State Bank, 26 Okla. 786, 110 Pa. 776. See also Continental, etc. Trust, etc. Bank v. Chicago Title, etc. Co 229 U. S. 435, 33 S. Ct. 829, 57 U. S. (L. ed.) 1268; Walsh v. Maysville First Nat. Bank, 201 Fed. 522, 120 C. C. A. 30. In Studley v. Boylston Nat. Bank, supra, the court said: "The money so deposited was the proceeds of the sale of tickets to a large party of round-the-world tourists and was put in bank, not for the purpose of preferring it, but in the expectation of being used for carrying on the business in the future as in the past. Indeed, the payments were made with the statement that the company would expect the Bank to discount other notes. We find nothing in the record to indicate that the deposits were made for the purpose of enabling the Bank to secure a preference by the exercise of the right of set-off. The case, therefore, comes directly within the decision in New York County Nat. Bank v. Massey, 192 U. S. 138 [24 S. Ct. 199, 48 U. S. (L. ed.) 380], where $3,884 deposited by an insolvent customer, in good faith, four days before the filing of the petition against him was allowed to the Bank by way of set-off on notes of the

bankrupt held by it. An effort is made to distinguish that case from this, by calling attention to the fact that here, by checks drawn on the account or notes charged to the account, the parties themselves voluntarily made the set-off before the petition was filed, —while in the Massey Case the Trustee, under the supervision of the Referee stated an account and allowed the set-off as permitted by section 68a, which provides 'that in all cases of mutual debts, or mutual credits between the estate of a bankrupt and a creditor the account shall be stated and one debt shall be set off against the other, and the balance only shall be allowed or paid.' That section did not create the right of set-off but recognized its existence and provided a method by which it could be enforced even after bankruptcy. What the old books called a right of stoppage—what business men call set-off, is a right given or recognized by the commercial law of each of the States and is protected by the Bankruptcy Act if the petition is filed before the parties have themselves given checks, charged notes, made book entries, or stated an account whereby the smaller obligation is applied on the larger. The banker's lien on deposits, the right of retention and set-off of mutual debts are frequently spoken of as though they were synonymous, while in strictness, a set-off is a counterclaim which the defendant may interpose by way of cross-action against the plaintiff. But, broadly speaking, it represents the right which one party has against another to use his claim in full or partial satisfaction of what he owes to the other. That right is constantly exercised by business men in making book entries whereby one mutual debt is applied against another. If the parties have not voluntarily made the entries and suit is brought by one against the other, the defendant, to avoid a circuity of action, may interpose his mutual claim by way of defense and if it exceeds that of the plaintiff, may recover for the difference. Such counterclaims can be asserted as a defense or by the voluntary act of the parties, because it is grounded on the absurdity of making A pay B what B owes A. If this set-off of mutual debts has been lawfully made by the parties before the petition is filed, there is no necessity of the Trustee doing so. If it has not been done by the parties, then, under command of the statute, it must be done by the Trustee. But there is nothing in section 68a which prevents the parties from voluntarily doing, before the petition is filed, what the law itself requires to be done after proceedings in bankruptcy are instituted." So, in Mandel v. Koerner, 149 N. Y. S. 455, it was held that a tenant might set off a deposit in the private bank of his bankrupt landlord against a claim of his landlord for rent.

The right of a bank to set off a deposit against a debt due to the bank is not affected by the fact that the debt is not due at the date of the adjudication in bankruptcy. Germania Sav. Bank, etc. Co. v. Loeb, 188 Fed. 285, 110 C. C. A. 263; In re Percy Ford Co. 199 Fed. 334; De Long v. Mechanics, etc. Nat. Bank, 168 App. Div. 525, 153 N. Y. S. 1010; Conquist v. Broadway Nat. Bank (Tenn.) 183 S. W. 160; Neely v. Grayson County Nat. Bank, 25 Tex. Civ. App. 513, 61 S. W. 559. In Germania Sav. Bank, etc. Co. v. Loeb, 188 Fed. 285, 110 C. C. A. 263, the court said: "The word 'debt,' as used in section 68a includes any debt provable in bankruptcy. Bankr. Act 1898, sections 1, cl. 11; . . . And a debt is provable, whether due or not at the time of bankruptcy. Bankr. Act 1898, section 63a (1). It is thus immaterial to the application of section 68a whether or not the notes were due."

However in case of collusion between the bank and the bankrupt with a view of creating a preferential transfer which would operate as a fraud on the other creditors of the bankrupt, it has been held that the bank will not be allowed to set off the deposit against the bankrupt's indebtedness. In re Starkweather, 206 Fed. 797; In re Wright-Dana Hardware Co. 207 Fed. 636; In re National Lumber Co. 212 Fed. 928, 129 C. C. A. 448; Heyman v. Jersey City Third Nat. Bank, 216 Fed. 685; Schmidt v. Bank of Commerce, 15 N. M. 470, 110 Pac. 613, 33 L.R.A.(N.S.) 558. And see the reported case. Thus, where a bank solicited a deposit for the express purpose of using it as a set-off against the bank's debt, it was held that the set-off was voidable by the trustee. Schmidt v. Bank of Commerce, 15 N. M. 470, 110 Pac. 613, 33 L.R.A. (N.S.) 558. And where a depositor gave the bank a post-dated check for the express purpose of enabling the bank to set off the same against the deposit, it was held to create a voidable preference. In re Starkweather, 206 Fed. 797. And, see the reported case wherein it is held that the acceptance of a check from a depositor by a bank which holds an overdue note of the latter, operates as a forfeiture of the right of the bank to set off the note against the deposit in the event of the bankruptcy of the depositor within four months from the date of the transaction.

The rule does not permit a special deposit to be set off against the bankrupt's general indebtedness to the bank. Bank of Brodhead v. Smith, 199 Fed. 703, 118 C. C. A. 141; Continental, etc. Trust, etc. Bank v. Chicago Title, etc. Co. 199 Fed. 704, 118 C. C. A. 142; Farmer's, etc. State Bank v. Park, 209 Fed. 613, 126 C. C. A. 607; Wagner v. Citizens' Bank, etc. Co. 122 Tenn. 164, 19 Ann. Cas. 483, 122 S. W. 245, 135 Am. St. Rep. 869, 28 L.R.A.(N.S.) 484.

It has been held that a bank cannot set off a deposit made after the filing of the petition against a claim against the bankrupt. In re Michaelis, 196 Fed. 718. *Compare* Toof v. City Nat. Bank of Paducah, 206 Fed. 250, 124 C. C. A. 118. And where it appeared that a bank accepted a check for collection on the same day the petition in bankruptcy was filed but at an hour subsequent to the filing it was held that the proceeds of the check could not be set off against the bankrupt's liability to the bank on the ground that the petition in bankruptcy related back to the first moment of the day on which it was filed. Moore v. Philadelphia Third Nat. Bank, 41 Pa. Super. Ct. 497.

LESLIE ET AL.

v.

SHEILL.

England—Court of Appeal—April 6, 1914.

[1914] 3 K. B. 607.

Infants — Liability on Contract — Money Loaned.

No recovery can be had at law or in equity against an infant for money loaned, though the loan was procured by false representations of the infant as to his age.

[See note at end of this case.]

[607] Appeal of the defendant from a decision of Horridge J. after trial with a common jury.

The plaintiffs were a firm of registered money-lenders, and they sued the defendant, to whom they had made two advances [608] of 200*l.* each, to recover 475*l.*, being the amount of the advances with interest, on the ground that the defendant had obtained the advances by fraudulently representing that he was of full age at the time; in the alternative, they claimed 475*l.* as money had and received by the defendant to the use of the plaintiffs; the defendant was still a minor at the date of the issue of the writ, though he attained full age before the trial. The learned judge left the following question to the jury: "Were the plaintiffs induced to make the two advances of 200*l.* each, or either of them, by the fraudulent misrepresentation of the defendant that he was twenty-one?"; to which the jury answered, "Yes—both." Upon further consideration, Horridge J. ordered judgment to be entered for the plaintiffs for 400*l.*

The defendant appealed.

Harry Dobb for appellant.

J. B. Matthews, K.C., and *G. F. Spear* for respondents.

M. A. Jacobs solicitor for appellant.

Dresser & Earl solicitors for respondents.

[611] LORD SUMNER.—At the time of the transaction in question the appellant was an infant. He succeeded in deceiving some money-lenders by telling them a lie about his age, and so got them to lend him 400*l.* on the faith of his being adult. Perhaps they were simpler than money-lenders usually are; perhaps the infant looked unusually mature. At any rate when they awoke to the fact that they could not enforce their bargain and sought to recover the 400*l.* paid, charging him with fraud, the jury found that the appellant had been guilty of fraud, and he does not now complain of the verdict. On further consideration Horridge J. gave judgment against him for the full amount that he received.

It is not a pretty story to begin life with, and one might have expected that the appellant's chief anxiety would have been to live it down, but money is money, and I suppose 400*l.* is more than he cares to pay, or rather to repay, if he can manage to avoid it. Accordingly he appeals, alleging that there is no process of law by which the money-lenders can get their money back from him, and, if this is so, he must succeed on this appeal.

The claim first pleaded is for the amount of principal and interest, as damages sustained because by his fraud the plaintiffs have been induced to make and act upon an unenforceable contract. So long ago as Johnson v. Pye, 1 Sid. 258, it was decided that, although an infant may be liable in tort generally, he is not answerable for a tort directly connected with a contract which, as an infant, he would be entitled to avoid. "One cannot make an infant liable for the breach of a contract by changing the form of action to one ex delicto:" per Byles J. in Burnard v. Haggis, 14 C. B. N. S. 45, 108 E. C. L. 45 (1863) 32 L. J. C. P. 189. "A married woman," says Pollock C.B. in Liverpool Adelphi Loan Assoc. v. Fairhurst (1854) 9 Exch 422, 23 L. J. Exch. 163, speaking before the common law had been altered by Married Women's Property Acts, "is liable for frauds committed by her on any person as for any other personal wrong. But when the fraud is directly connected with the contract with the wife and is the means of effecting it and parcel of the same transaction, the wife cannot be responsible or the husband be sued for it together with the [612] wife. If this were allowed, it is obvious that the wife would lose the protection which the law gives her against contracts made by her during coverture, for there is not a contract of any kind, which a feme covert could make whilst she

knew her husband to be alive, that could not be treated as a fraud, for every such contract would involve in itself a fraudulent representation of her capacity to contract. . . . In the case of an infant it was held for a similar reason that he could not be made liable for a fraudulent representation that he was of full age, whereby the plaintiff was induced to contract with him. . . . If the action should be maintainable all the pleas of infancy would be taken away, for such affirmations are in every contract.'" The Chief Baron's quotation is from Johnson v. Pye, 1 Sid. 258. As Lord Kenyon says in Jennings v. Rundall (1765) 3 Burr. 1804, alluding to Zouch v. Parsons (1799) 8 T. R. 335, at p. 337, "this protection was to be used as a shield and not as a sword; therefore if an infant commit an assault or utter slander God forbid that he should not be answerable for it in a Court of justice. But where an infant has made an improvident contract with a person who has been wicked enough to contract with him, such person cannot resort to a Court of law to enforce such contract." It is perhaps a pity that no exception was made where, as here, the infant's wickedness was at least equal to that of the person who innocently contracted with him, but so it is. It was thought necessary to safeguard the weakness of infants at large, even though here and there a juvenile knave slipped through. The rule is well settled. No action of deceit lay against the present appellant and this claim was abandoned, but for the purposes of this case it is important to observe the principles on which an infant's immunity is established in this regard.

Nor does the other cause of action pleaded fare any better. To the claim for return of the principal moneys paid to the infant under the contract that failed, as money had and received to the plaintiffs' use, there are at least two answers: the infancy itself was an answer before 1874 at common law, and the Infants' Relief Act, 1874, is an answer now. An action for money had and received against an infant has been sustained, where in substance [613] the cause of action was ex delicto: Bristow v. Eastman, 1 Esp. 172, approved before 1874 in In re Seager, 60 L. T. N. S. 665, and cited without disapproval in Cowern v. Nield [1912] 2 K. B. 419. Even this has been doubted, but where the substance of the cause of action is contractual, it is certainly otherwise. To money had and received and other indebitatus counts infancy was a defence just as to any other action in contract: Alton v. Midland R. Co. per Willes J. 19 C. B. N. S. 213, 115 E. C. L. 213 (1865) 34 L. J. C. Pl. 292 at pp. 297, 298; In re Jones, per Jessel M.R. 18 Ch. D. 118; Dicey on Parties, p. 284; Bullen and Leake's Precedents of Pleadings, 3rd ed. p. 605. Further, under the statute the principle, which at common law relieved an infant from liability for a tort directly connected with a voidable contract, namely, that it was impossible to enforce in a roundabout way an unenforceable contract, equally forbids Courts of law to allow, under the name of an implied contract or in the form of an action quasi ex contractu, a proceeding to enforce part of a contract, which the statute declares to be wholly void. This has been recently illustrated in the closely analogous case of a claim on the footing of money had and received for moneys paid but irrecoverable under what in law was a lending and borrowing ultra vires: Sinclair v. Brougham [1914] A. C. 398.

The ground on which Horridge J. held the appellant liable was that by reason of his fraud he was compellable in equity to repay the money, actually received and professedly borrowed, and compellable too by a judgment in personam for the amount, not by any mere proprietary remedy. The rule in equity has been so stated at times by text-writers, both remote and recent (Fonblanque's Equity, 1820, 5th ed. i. 77; Roscoe's Nisi Prius, 16th ed. 642; Wace on Bankruptcy, ed. 1904, p. 6), but of authority for it there is very little. Esron v. Nicholas, 2 Eq. Cas. Abr. 488, a decision of Lord King's, was much relied upon. He is reported to have said "infants have no privilege to cheat men," a wholesome truth indeed, but I should hardly call it a principle. The case was examined by Knight Bruce V.-C. in Stikeman v. Dawson, 1 De G. & Sm. 90, who concluded that the facts as reported do not [614] support the decree as made. He procured the note in the registrar's book and found it impracticable to appreciate the decision without knowing the evidence and the pleadings in full, and these unfortunately are not forthcoming. It is a case in which an infant stood by (apparently without actual fraud) while his guardian, or a person purporting to be his guardian, granted a lease. He received or took the benefit of the fine, but when he came of age he repudiated the lease. In a suit to compel him either to grant the plaintiff a new lease or refund the fine, the decree was that, if he did not grant the lease, he should pay back the fine. This seems to be the converse of a line of decisions, both at law and in equity, the gist of which is that a person who takes and keeps property cannot rely on infancy to release him from its burdens, especially if sued when of age, as in some instances was the case: see Year Book, 2 Hen. 6, 318; Kirton v. Eliott (1613) 2 Bulst. 69; Buckinghamshire v. Drury (1761) 2 Eden 61; Evelyn v. Chichester (1765) 3 Burr. 1717; Lemprière v. Lange (1879) 12 Ch. D. 675; whatever may be thought of some of these decisions, they do not touch the present case. There is a long

gap in the cases relied on after Esron v. Nicholas, 2 Eq. Cas. Abr. 488.

For a very long time and in many forms equity has interfered to give relief against frauds commited by infants, or has refused it to infants guilty of fraud; but the practice and even the principles applicable to such cases were long ill-defined. "An infant," says Knight Bruce V.-C. in Stikeman v. Dawson, 1 De G. & Sm. 90, "however generally for his own sake protected by an incapacity to bind himself by contracts, may be doli capax in a civil sense and for civil purposes in the view of a Court of Equity, though perhaps only when pubertati proximus, or older . . . , and may therefore commit a fraud for which or the consequences of which he may after his majority be made civilly liable in equity. . . . I agree . . . . that in what cases in particular a Court of Equity will thus exert itself it is not easy to determine." Though many cases have been decided on this subject, none has been cited to us till one in last year in which the decision has directly been [615] that the defendant must pay back under a judgment purely in personam a sum equal to that which he obtained during infancy under a purported contract of lending and borrowing, which was entered into by the lender on the faith of the borrower's fraudulent assertion that he was of full age.

There are, however, some dicta of importance and some decisions which are alleged to bear indirectly on the point. In Nelson v. Stocker, 4 De G. & J. 464, Turner L.J. says: "if the case had depended simply upon the point of the defendant having represented himself to be of age, when he was not of age, I should have felt no doubt about it. . . . Infants are no more entitled than adults are to gain benefit to themselves by fraud, and had the case therefore depended upon this point alone I should have agreed most fully with the decision of the Vice-Chancellor," which was that the defendant should be decreed to pay 1000*l.* under his covenant, made when an infant, to place that sum in the hands of trustees, contained in a marriage settlement executed by him and by other parties after he had fraudulently represented himself to be of full age. As, however, the party to the settlement who was most concerned, namely the infant's wife, knew the truth, the Lords Justices allowed the appeal. It will be seen that the actual decision in Nelson v. Stocker, 4 De G. & J. 458, does not touch the present case, nor does the dictum, if its principle be estoppel after majority against denying the truth of a statement made when under age, as explained by Sir Ford North in Mohori Bibee v. Dhurmodas Ghose (1903) L. R. 30 Ind. Ap. at p. 122; and see Wright v. Snowe (1848) 2 De G. & Sm. 321. The observations of the Court of Appeal in Levene v. Brougham, 25 Times L. Rep. 265, that there could be no such estoppel were made apparently without citation of any of these cases, but in such a case the Infants' Relief Act would be an answer to estoppel now.

Much reliance was placed on Ex p. Unity Joint Stock Mut. Banking Assoc. 3 De G. & J. 63, with which should be read the comments on it by Bacon V.-C. in In re Jones, 18 Ch. D. 115 (which are in point though his actual decision was overruled) and by [616] Baggallay L.J. at p. 123. In that case the debtor King, while under age, had obtained advances from the association by a fraudulent misrepresentation that he was of full age. He was adjudicated bankrupt after he came of age and the association was admitted to prove in the bankruptcy for the amount advanced. The Lords Justices arrived at this conclusion somewhat reluctantly on the authority of uncited decisions of Lord Cowper, Lord Hardwicke, and Lord Thurlow. Lord Cowper's case is probably Watts v. Creswell, 9 Vin. Abr. tit. Enfant, N. pl. 24, p. 415, in which he says that if an infant was old enough and cunning enough to carry on a fraud he ought in a Court of Equity to make satisfaction for it. Lord Hardwicke's opinion may be that in Buckinghamshire v. Drury, 2 Eden 71—"minors are not allowed to take advantage of infancy to support a fraud," against which should be set Lord Mansfield's more particular statement in the same case at p. 72, that if the infant took an estate and was to pay rent for it, he should not hold the estate and defend himself against payment of the rent by pretence of infancy. The allusion to Lord Thurlow probably is to the case of Beckett v. Cordley (1784) 1 Bro. C. C. 358, where he said, "if there was fraud of which the infant was cognizant, she would be bound as much as an adult." If these be the authorities relied on in Ex p. Unity Joint Stock Mut. Banking Assoc. 3 De G. & J. 63, and I can find none nearer, they hardly touch the decision in that case, nor do they, or the decision itself in Ex p. Unity Joint Stock Mut. Banking Assoc. 3 De G. & J. 63, affect the case now before us. There, the bankruptcy standing unchallenged and the question being how the assets should be administered among competing creditors or claimants, it was held that persons who had been defrauded by the bankrupt when under age and thereby induced to lend him money had a claim on his assets, not against him personally, which was available in competition with creditors in the full sense of the word. It is clear that Jessel M.R. thought the decision anomalous and one not to be extended: see In re Jones, 18 Ch. D. at pp. 120, 121. Since then it has been decided in Reg. v. Wilson (1879) 5 Q. B. D. 28, [617] that an infant cannot be convicted, under s. 12 of the Debtors Act, 1869,

of quitting the country fraudulently with property that ought to be divided among his creditors, since in law he has none. Whatever may be said of Ex p. Unity Joint Stock Mut. Banking Assoc. 3 De G. & J. 63, now, it does not govern the present case, but it must be admitted that the language of the Lords Justices is hardly consistent with any other view than that the bankrupt was in equity personally liable to pay the debt in question. There is further language of a similar kind in Maclean v. Dummett (1869) 22 L. T. N. S. 711, where the Privy Council speaks of an infant as "contracting debts" in his trade by fraudulently asserting himself to be of full age, but this again was not necessary to the decision. These seem to be all the material dicta.

As to the cases, Clarke v. Cobley [1789] 2 Cox Ch. 173, is one in which the Court restored the status quo affected by an infant's fraud by ordering him to return promissory notes, the surrender of which he had procured by falsely stating that he was of age, and by putting him under terms not to plead the Statute of Limitations if sued upon them, but a decree against him to pay the amount of the notes, though he was now of age, was expressly refused. In Cory v. Gertcken (1816) 2 Madd. 40, where Sir T. Plumer says "though in general a payment to an infant may be bad, yet if the infant practises a fraud he is liable for the consequences," he only decided that a person could not make his trustee pay over again a sum that he had got from him by fraudulently representing himself, while still an infant, to be already of full age, and in Chubb v. Griffiths (1865) 35 Beav. 127, Lord Romilly M.R., when saddling an infant defendant with costs who had been passing off his safes as Chubb's safes, says that he does so "on the principle laid down in Cory v. Gertcken." (1816) 2 Madd. 40. What he conceived this principle to be I can hardly tell, but at any rate it is not a general liability in equity for fraud. Jessel M.R. in In re Jones, 18 Ch. D. 118, regards Cory v. Gertcken as a pure action of tort. The grounds of an infant defendant's liability for costs were again discussed in Woolff v. Woolff [1899] 1 Ch. 343, another case of similar dishonesty, and the liability [618] was rested on the above principle and authority, also without any hint of a wider one that in equity an infant is generally liable for fraud. I think that the whole current of decisions down to 1913, apart from dicta which are inconclusive, went to shew that, when an infant obtained an advantage by falsely stating himself to be of full age, equity required him to restore his ill-gotten gains, or to release the party deceived from obligations or acts in law induced by the fraud, but scrupulously stopped short of enforcing against him a contractual obligation, entered into while he was an infant, even by means of a fraud. This applies even to Ex p. Unity Joint Stock Mut. Banking Assoc. 3 De G. & J. 63. Restitution stopped where repayment began; as Kindersley, V.-C. puts in Vaughan v. Vanderstegen (1854) 2 Drew. 363, an analogous case, "you take the property to pay the debt."

Last year, in Stocks v. Wilson [1913] 2 K. B. 235, an infant, who had obtained furniture from the plaintiff by falsely stating that he was of age and had sold part of it for 30*l.*, was personally adjudged by Lush J. to pay this 30*l.* as part of the relief granted to the plaintiff. This is the case which more than any other influenced Horridge J. in the Court below. I think it is plain that Lush J. conceived himself to be merely applying the equitable principle of restitution. The form of the claim was that, by way of equitable relief, the infant should be ordered to pay the reasonable value of the goods, which he could not restore because he had sold them. The argument was that equity would not allow him to keep the goods and not pay for them, that if he kept the property he must discharge the burden, and that he could not better his position by having put it out of his power to give up the property. Lush J. expressly says [1913] 2 K. B. 247, "it is a jurisdiction to compel the infant to make satisfaction," and, at p. 246, "the remedy is not on the contract." At pp. 242–243 he says "what the Court of Equity has done in cases of this kind is to prevent the infant from retaining the benefit of what he has obtained by reason of his fraud. It has done no more than this, and this is a very different thing from making him liable to pay damages and compensation for the loss of the other party's [619] bargain. If the infant has obtained property by fraud he can be compelled to restore it;" but now comes the proposition, which applies to the present case and is open to challenge, "if he has obtained money he can be compelled to refund it." The learned judge thought that the fundamental principle in Ex p. Unity Joint Stock Mut. Banking Assoc. 3 De G. & J. 63, was a liability to account for the money obtained by the fraudulent representation, and that in the case before him there must be a similar liability to account for the proceeds of the sale of the goods obtained by this fraud. If this be his ratio decidendi, though I have difficulty in seeing what liability to account there can be (and certainly none is named in In re King, Ex p. Unity Joint Stock Mut. Banking Assoc. 3 De G. & J. 63, the decision in Stocks v. Wilson [1913] 2 K. B. 235, is distinguishable from the present case and is independent of the above dictum, and I need express no opinion about it. In the present case there is clearly no accounting. There is no fiduciary rela-

tion: the money was paid over in order to be used as the defendant's own and he has so used it and, I suppose, spent it. There is no question of tracing it, no possibility of restoring the very thing got by the fraud, nothing but compulsion through a personal judgment to pay an equivalent sum out of his present or future resources, in a word nothing but a judgment in debt to repay the loan. I think this would be nothing but enforcing a void contract. So far as I can find, the Court of Chancery never would have enforced any liability under circumstances like the present, any more than a Court of law would have done so, and I think that no ground can be found for the present judgment, which would be an answer to the Infants' Relief Act.

Accordingly the appeal succeeds; the judgment must be set aside and entered for the defendant. He will have the costs here, where he succeeds, and of the further consideration below, where he ought to have succeeded. Further than this there should be no costs given him. He cannot be made to pay the costs of the action, in which he was entitled to judgment, but I think that, as he was charged with fraud and found guilty of it, he must pay the costs of that issue, to be set off against such [620] costs as he gets, and as to any other general costs of the action, which must be small, I think there is good ground for saying that there be no order for payment on either side.

. . . . . .

KENNEDY, L.J.—The plaintiffs, a firm of money-lenders, sue in this action the defendant, an infant, claiming 475*l.* and interest as damages for fraudulent misrepresentation, and, alternatively, 475*l.* as money had and received by the defendant to the use of the plaintiffs. The alleged misrepresentation was a statement of the defendant that he was of age, made by him in order to induce the plaintiffs to lend him, as they did, two sums of 200*l.* each in December, 1911. The case was heard by Horridge J. sitting with a common jury. The verdict was that the plaintiffs were induced to make both loans by the fraudulent misrepresentation.

Horridge J. has held that an action ex delicto raising a claim for damages for fraud would not lie against an infant when, as in this case, the fraud was an inducement to the contract, the nonperformance of which was the basis of the pecuniary injury for which the plaintiff claims compensation in damages. This, in my judgment, was clearly right. The law is well put by Sir Frederick Pollock in his Principles of Contract, 8th ed. at p. 78: "He" (i. e., the infant) "cannot be sued for a wrong when the cause of action is in substance ex contractu, or is so directly connected with the contract that the action would be an indirect way of enforcing the contract—which, as in the analogous case of married women, the law does not allow. . . . But if an infant's wrongful act, though concerned with the subject-matter of a contract, and such that but for the contract there would have been no opportunity of committing it, is nevertheless independent of the contract in the sense of not being an act of the kind contemplated by it, then the infant is liable." The first proposition was established as long ago as the year 1665 in the case of Johnson v. Pye, 1 Sid. 258, and was dwelt upon by the judges of the King's Bench in Jennings v. Rundall, 8 T. R. 335; the second is illustrated, in regard to an infant, by Burnard v. Haggis (1863) 14 C. B. N. S. 45, 108 E. C. L. 45, [621] in the year 1863, and, in regard to the analogous case of a married woman who has represented herself as a feme sole or sui juris, by the judgment of the Court of Exchequer pronounced by Pollock C.B. in Liverpool Adelphi Loan Assoc. v. Fairhurst (1854) 9 Exch. 422, in the year 1854.

In regard to the second and alternative claim in this action—a claim, as pleaded, for 475*l.* as money had and received by the defendant to the use of the plaintiffs, which the learned judge has in his judgment reduced to 400*l.* by the omission, I presume, of interest—I am equally of opinion that the plaintiffs' case cannot be maintained. I venture, with all due deference to the fact of the citation of it with approval in 1889 by Kay J. in In re Seager, 60 L. T. N. S. 665, and by my brother Phillimore in 1912 in Cowern v. Nield [1912] 2 K. B. 423, to entertain a doubt whether in Bristow v. Eastman, 1 Esp. 172, tried by Lord Kenyon, where an infant had fraudulently converted moneys of the plaintiff to his own use, (and therefore there was a good cause of action substantially ex delicto and wholly independent of contract upon which the plaintiff was entitled to succeed) the plaintiff's claim, if and so far as it depended upon an indebitatus count, ought to have prevailed against a plea of infancy. Be that as it may, I am certainly of opinion that in the present case, where the defendant is an infant, the cause of action is in substance ex contractu and is so directly connected with the contract of loan that the action would be an indirect way of enforcing that contract. "So far as regards the principal moneys lent the plaintiffs were not entitled to recover upon their alternative common law claim for money had and received by the defendant for their use." I think that this would be so as the law stood before 1874, and further that to hold otherwise now would be improperly to open the door to a serious inroad upon the statutory provisions of the Infants' Relief Act, 1874, ss. 1, 2, and the Betting and Loans (Infants) Act, 1892, s. 5. It appears to me that Horridge J. intended so to hold

and to dismiss the plaintiffs' claim not only so far as it rested upon the claim for damages for fraudulent misrepresentation, but also so far as it rested upon the claim on an implied contract for money had and [622] received to the use of the plaintiffs. I think that is so, although he gave judgment for the plaintiffs in an action in which those were the only claims pleaded, and in which, so far as the report informs us, no amendment of the plaintiffs' pleadings was asked for or granted. Reading the concluding portion of the judgment commencing with the words "There remains, however, the question whether or not a Court of Equity would order restitution to be made by an infant who had obtained property by fraud" (1913) 29 Times L. Rep. 555, I think that the learned judge held that, having all the facts and the finding of the jury before him, the just and proper course was, without requiring any formal amendment, to treat the plaintiffs as basing their claim upon an assertion such as was pleaded by the plaintiff in the recent case of Stocks v. Wilson [1913] 2 K. B. 235, before Lush J., to which Horridge J. expressly refers in an earlier passage in his judgment. Such a course was, in my opinion not only unobjectionable, but right.

We have, therefore, to consider in this Court whether or not the defendant lay under such an equitable liability to the plaintiffs as entitled them to the judgment for 400*l.* which the learned judge has entered in their favour. Now, beyond all question, there are cases in which a Court of Equity will interfere to prevent the fraud of an infant, such as an express misrepresentation of full age, from working an injustice. There is, at the same time, excellent authority for declining to define in positive terms the range of such interference. In Stikeman v. Dawson, 1 De G. & Sm. 90, at p. 109, a case in the year 1847 referred to by counsel in the course of their arguments, Knight Bruce V.-C., after quoting certain language of Ulpian and Paulus to shew the view of the civil law in regard to the fraud of infants, proceeded thus: "Unquestionably it is the law of England that an infant, however generally for his own sake protected by an incapacity to bind himself by contracts, may be doli capax in a civil sense and for civil purposes in the view of a Court of Equity, though perhaps only when pubertati proximus or older, and not, I suppose, at so early an age as in a criminal sense and for criminal purposes, and may therefore commit a fraud for which [623] or the consequences of which he may, after his majority, be made civilly answerable in equity. I am not now speaking of cases in which infants, if liable at all, are liable at law only, or in which adults, if suable in respect of acts done during infancy, are suable at law only. But, as far as equity is concerned, the practical application of the rule or doctrine to which I have just been referring must not seldom, I conceive, be matter of much delicacy and difficulty. I agree with a learned author who says that in what cases in particular a Court of Equity will thus exert itself it is not easy to determine." I shall certainly not embark upon an adventure of which so eminent a master of equity as Sir J. L. Knight Bruce has spoken thus discouragingly. Happily, it is not necessary to do so for the decision of the present case. We have not to discover to what other cases the rule or doctrine ought to be held to extend, but whether there is either principle or binding judicial authority for its application to this particular case, in which the plaintiffs have been held by Horridge J. entitled in virtue of it to obtain by an action in personam repayment from an infant of the principal money owing to them under a contract of loan into which the lenders were induced to enter by a fraudulent representation of the borrower that he was of full age. After a careful consideration of the numerous reported decisions which have been brought to our attention by the industry of counsel, I have come to the conclusion that the judgment of Horridge J. cannot be supported. I am not satisfied that the rule or doctrine of equity referred to by Knight Bruce V.-C. has ever been so applied. Lord Sumner in his judgment, which I have had the opportunity of reading, has so fully, and, in my judgment, so satisfactorily, dealt with the equity cases and the judicial dicta in which the plaintiffs' counsel seek to find support for the judgment in their favour, as well as the recent judgment of Lush J. in Stocks v. Wilson [1913] 2 K. B. 235, that it is quite useless for me to consider those cases or those dicta in detail. I desire, however, to add a few further observations.

In the first place, it appears to me that whilst Courts of Equity have interfered to make an infant restore property found in his possession which he had obtained by fraudulent misrepresentation, [624] as, e. g., the promissory note in the old case of Clarke v. Cobley, 2 Cox Ch. 173; to compel the recognition, in regard to property in his possession, of rights and interests of persons whom he has misled into entering into transactions in regard to it (cf. Watts v. Creswell, 9 Vin. Abr. 415); and to prevent the payment over again to the infant of moneys of which he has procured the payment already by a representation of full age, as in Cory v. Gertcken, 2 Madd. 40; there is no case in which I can find that a Court of Equity has given judgment against an infant in circumstances like the present, that is to say, in which it has interfered on the ground of the fraud of the

infant, whereby he induced the making of the contract of loan, to order the infant to pay the plaintiff a sum equal to the sum borrowed under the void contract, and so, in effect, to the amount of the principal lent, to give validity as against the infant to a void contract.

In the next place, I desire to say that in my view, whilst there are no doubt dicta in the judgments of the Lords Justices in Ex p. Unity Joint Stock Mut. Banking Assoc. 3 De G. & J. 63, upon which the plaintiffs in this case naturally lay stress, the decision ought, as I understand the judgment of Lindley J. in Miller v. Blankley (1878) 38 L. T. N. S. 527 at p. 530 (and the language used by Jessel M.R. in the later case of Ex p. Jones, 18 Ch. D. 120, appears to me to be in accord), to be treated as expressing the law in bankruptcy and not as expressing a doctrine of general application. The action in Miller v. Blankley, 38 L. T. N. S. 527, was an action of debt against a builder for goods supplied. He pleaded infancy as a defence. The plaintiff's counsel relied upon Ex p. Unity Joint Stock Mut. Banking Assoc. 3 De G. & J. 63. In the course of this judgment Lord Lindley (then Lindley J.) said: "We are now asked to carry further the doctrine which Turner L.J. in Ex p. Unity Joint Stock Mut. Banking Assoc. 3 De G. & J. 63, expressed his reluctance to act upon. He concurred, however, in the judgment of Knight Bruce L.J.; and no doubt that case must be taken to decide that where an infant borrows money upon a fraudulent misrepresentation and subsequently becomes bankrupt the debt is proveable in his bankruptcy. [625] I think that is still law in bankruptcy; but we should not take the doctrine any further."

In my judgment the nature of the claim in the present case is not one to which the equitable rule or doctrine invoked by the respondents applies so as to make the action maintainable, and this appeal must be allowed. As to costs, I concur in the special order stated by the president of this Court in his judgment.

A. T. LAWRENCE, J.—The plaintiffs sue for 475*l*., first, as damages for deceit, secondly, for money had and received to their use. The plaintiffs are money-lenders, who made loans to the defendant while he was an infant. They were induced to do so upon the faith of false representations made by the defendant as to his age.

The defendant pleads his infancy.

It was admitted that upon the authorities the cause of action in deceit must fail: Johnson v. Pye, Sid. 258, 1 Keb. 913; Bartlett v. Wells, 1 B. & S. 836, 101 E. C. L. 836. The defendant was of an age when he would be responsible criminally and also for his torts independent of contract, but not for frauds in obtaining a contract, because to hold him responsible in damages for such frauds would in effect be to hold him responsible for the contract so obtained.

It would be a simple thing for those who prey upon infants to obtain from them materials which could be used to support a charge of fraud—as easy as obtaining the usual promissory note. The result would be that the infant would have both to establish his infancy and to face a charge of fraud.

It has been the policy of the law to protect infants; they have been held incapable of binding themselves by their contracts—with certain exceptions not material to this case. That this is the law was admitted. But it was argued for the plaintiffs that these considerations do not affect the claim for "money had and received." Horridge J. was induced to take the view (following a decision of Lush J. in Stocks v. Wilson [1913] 2 K. B. 235) that there was in equity a right to relief to the extent of the money actually [626] received. It was said for the plaintiffs that the action for money had and received was not founded upon a promise implied by law, but rested upon what was called by counsel a "doctrine of equity." I do not think this argument is well founded. There are no doubt many cases in which equity will give relief against frauds perpetrated by infants. Wherever the infant requires as a plaintiff the assistance of any Court, it will be refused until he has made good his fraudulent representation. Wherever the infant is still in possession of any property which he has obtained by his fraud he will be made to restore it to its former owner. But I think that it is incorrect to say that he can be made to repay money which he has spent, merely because he received it under a contract induced by his fraud.

The contracts of an infant, which were formerly voidable only, are now by the Infants' Relief Act, 1874, made absolutely void. He is further protected in respect of loans by 55 & 56 Vict. c. 4, ss. 3, 4, 5. These statutes are as binding upon the equitable, as they are upon the common law, jurisdiction of the Court. I do not think that it is correct to say that the action for money had and received is wholly independent of contract. It arises wherever money has been received which ex æquo et bono belongs to the plaintiff. In such case the law implies a promise to pay it to the plaintiff, but where the express promise to repay the money is by statute "absolutely void" it is impossible to imply a promise to repay the same money: see observations of Jessel M.R. in Ex p. Jones, 18 Ch. D. 118. To do so would be to (in large part) defeat the policy of the statute, and would violate the well-established

principle that where there is an express promise no other like promise can be implied.

Lord Mansfield in Moses v. Macferlan, 2 Burr. 1005, excepted debts "contradicted during infancy" from the operation of the action for money had and received, shewing that he regarded it as an action depending upon an implied promise.

None of the authorities cited to us in my opinion extend to establish the plaintiff's claim in this case.

The judgment in Stocks v. Wilson [1913] 2 K. B. 235, seems to treat the [627] subsequent sale of the property by the infant as wrongful, and as affording a foundation for treating the money obtained thereby as received to the plaintiff's use. If this had been so, if it had been a wrong independent of contract, it would no doubt have made a case in which the plaintiff could, by waiving the tort, have afforded a consideration for the implied promise to pay over the proceeds, and he could have recovered on the common count for "money had and received." But this is rendered impossible by the judge's finding that the property in the goods had passed to the infant before he disposed of them (and as to the major portion thereof that he did so with the concurrence of the plaintiff in the action). The really wrongful act was the obtaining the goods under the contract of purchase by the pretence that he was of full age; as to that, it was admitted that he could not be sued in tort for the fraud. There was therefore no actionable tort independent of contract which could be waived to form a consideration for the implied promise.

In the case of Watts v. Creswell, 9 Vin. Abr. 415, which was relied upon the fraudulent infant was in possession of the lands as to which he had misrepresented the title, and was setting up a former settlement upon himself to defeat the mortgagee under that title. It was held that he could not do so in equity without making satisfaction for the fraud. This is a long way from establishing anything like an equity to sue as for "money had and received." If when the action is brought both the property and the proceeds are gone, I see no ground upon which a Court of Equity could have founded its jurisdiction.

In the case of Esron v. Nicholas, 2 Eq. Cas. Abr. 488, 1 De G. & Sm. 118 (which is very imperfectly reported), the defendant was ordered to repay a premium received while he was an infant in respect of a lease granted by a person whom he had falsely represented to be his guardian. He was now claiming to receive the rents and profits reserved under a subsequent lease of this very property granted by himself after he came of age. Knight Bruce V.-C. does not seem to have approved of the case: see Stikeman v. Dawson, 1 De G. & Sm. 90; but at least it can be said that the infant's possession of the property and [628] claim to set up the later lease and to receive the rents and profits thereof afforded a ground for the intervention of the Court of Equity. In Stikeman v. Dawson, 1 De G. & Sm. 90, the Vice-Chancellor, it is true, refused relief against the infant upon the ground that he had made no express misrepresentation; but there the infant was seeking to recover certificates of shares he had sold and handed over to the purchaser. In such a case, if fraud were established against the infant, there would be ground for equity to interfere to restrain him from recovering the certificates without making compensation for the money obtained by the fraud.

The only case which has been cited to us which gives rise to any difficulty is Ex p. Unity Joint Stock Banking Mut. Assoc. 3 De G. & J. 63, where a proof in bankruptcy was allowed in respect of a loan made to the bankrupt when an infant on the faith of a fraudulent misrepresentation that he was of full age. Knight Bruce L.J. treated himself as bound by authority, and the Court reluctantly allowed the proof. I have examined all the cases cited on that occasion, and cannot find that any one of them goes to the length supposed. The case may be applicable in bankruptcy, but certainly ought not to be extended generally so as to impair the protection which the law affords to infants. I think it cannot now be regarded as of general application: see Reg. v. Wilson, 5 Q. B. D. 28; Ex p. Jones, 18 Ch. D. 118; Lovell v. Beauchamp [1894] A. C. 607.

If the cause of action for money had and received existed, I should expect to find ample authority for it, as, whenever an honest money-lender lends to an infant, he has probably been deceived as to the age of the borrower.

I think that this appeal should be allowed and judgment entered for the defendant.

Appeal allowed.

NOTE.

Infancy as Defense to Action for Money Loaned.

General Rule.

A plea of infancy is good against an action at law for money loaned, where the money was not borrowed directly for the purpose of buying necessaries, although it may later have been expended in the purchase of them, as money is not classed under the head of necessaries in the contemplation of the law. Price v. Sanders, 60 Ind. 310; Beeler v. Young, 1 Bibb (Ky.) 519; Watson v. Cross, 2 Duv. (Ky.) 147; Denning v. Nelson, 1 Ohio Dec. (Reprint) 503, 10 West. L. J. 215; West v. Gregg, 1 Grant Cas. (Pa.) 53; Bent v. Manning, 10 Vt. 225. And see Swift v. Bennett,

10 Cush. (Mass.) 436; Smith v. Oliphant, 2 Sandf. (N. Y.) 306; Meyers v. Blackburn, 38 Nova Scotia 50. Thus in Price v. Sanders, supra, the court said: "A minor cannot be held liable at law on his note or other contract for money, even though he expends the money for necessaries. The indebtedness must be created directly for the necessaries, or he will not be liable at law. The reason of the law is, that the minor might waste the money, and no matter ex post facto can entitle the plaintiff to his action." In West v. Gregg, 1 Grant Cas. (Pa.) 53, it was said: "This is an action against a minor for money lent to him, and to meet the defense of infancy, it was offered to prove that the money was lent to him for the purpose of making repairs and removing encumbrances upon land devised to him by his father, and that it was so used. The court below rejected the evidence on the ground that the infant had no power to make such a contract, and we think they were right. The general rule is that an infant can bind himself or his estate only for necessaries, and the plaintiff can escape from this rule only by showing a case which ought to be treated as an exception to it; which he has not done. Necessity has certainly demanded many exceptions to this rule, but here it demands none; for this minor had a guardian acting for him, and the law has provided the very mode in which the end might have been reached." In Beeler v. Young, 1 Bibb (Ky.) 519, the court said: "As to the money lent the law will never trust the infant with the application and laying of it out; for it might be lent to purchase necessaries, but squandered in luxuries and dissipation. So if one lends money, which the infant actually lays out afterward in necessaries, yet he shall not be subject to the action of the lender. For it is upon the lending that the liability must arise, after that no assumpsit can be raised to bind the infant; the application of the loan cannot, ex post facto, entitle the lender to his action." In Ayers v. Burns, 87 Ind. 245, 44 Am. Rep. 759, the court said: "The suit is founded upon an implied contract of the appellant Ayers to repay the money which the administrator of his surety had been compelled to pay on his promissory notes. Such an implied contract, if it existed, was not binding and could not be enforced against him during his infancy. Indeed, it may well be doubted if his promissory notes, even though given for necessaries, could have been enforced against him during infancy in suits thereon by the payees thereof."

In Dorrell v. Hastings, 28 Ind. 478, an action to recover money paid to relieve an infant from a military draft to which the law held him subject, which payment had been made at his request, it was held that a plea of infancy was a good defense. The court said: "No particular objection to the answer is pointed out, or reason given why it is not good, and we are not able to discover any. We are not aware of any authority that would justify us in holding that money paid to relieve an infant from a military draft to which the law subjects him, comes within the exception of necessaries. Upon principle, we think it clear that it does not." In Turner v. Gaither, 83 N. C. 357, 35 Am. Rep. 547, it was held that infancy was a good defense to an action on a bond of an infant for money advanced by his father's administrator and used by him in the acquirement of a professional education, as such expenses were not necessaries. In Burton v. Anthony, 46 Ore. 47, 79 Pac. 185, 114 Am. St. Rep. 847, 68 L.R.A. 826, wherein it appeared that the plaintiff loaned an infant money to redeem land of his (the infant's) on which a mortgage had been foreclosed, with the understanding that he was to be subrogated to the rights of the judgment creditor, it was held that the infant was under no binding obligation to repay the money. The court said: "Though the redemption of the land conferred on him a pecuniary benefit, the furnishing of the money for that purpose at his request does not, by reason of his incapacity to enter into a valid contract, create a binding obligation, because it was not necessary to his sustenance." In Magee v. Welsh, 18 Cal. 155, it was held that a plea of infancy was good against a note and mortgage which had been given to raise money to pay off another mortgage on the same property and that the money so raised could not be considered necessaries in the contemplation of the law.

It has been held that one who has paid off a mortgage on the land of certain infants, though at the request of their guardian, cannot maintain an action against them for money had and received or for money lent. Bicknell v. Bicknell, 111 Mass. 265.

In Cane v. Cawthon, 32 La. Ann. 953, it was held that a person who loaned money to certain minors, under the authority of the court, was protected by the decree, whether or not the loan was necessary and for the use of the minors.

Money furnished for the purpose of supplying an infant with mourning goods on the death of her mother has been held to be classed as necessaries and to be recoverable as such. De Moss v. Giltner, 5 Ky. L. Rep. 691.

An agreement to repay money borrowed on a joint account by an infant and another is voidable, but if affirmed by the infant after her coming of age, is binding on her. Kennedy v. Doyle, 10 Allen (Mass.) 161.

In *England*, since 1874 a transaction whereby an infant borrows money is absolutely void under the Infants Relief Act, 1874.

Levene v. Brougham, 53 Sol. J. (Eng.) 243, 25 Times L. Rep. 265; Nottingham Permanent Ben. Bldg. Soc. v. Thurstan, [1903] A. C. 6, 72 L. J. Ch. 134, 87 L. T. N. S. 529, 51 W. R. 273, 67 J. P. 129, 19 Times L. Rep. 54. Thus where it appeared that an infant member of a building society borrowed from it to buy land and complete houses which were being built on it, giving in consideration thereof a mortgage, it was held that the mortgage was void under the Infants Relief Act, 1874, as against the infant. Nottingham Permanent Ben. Bldg. Soc. v. Thurstan, supra. In Levene v. Brougham, 53 Sol. J. (Eng.) 243, 25 Times L. Rep. 265, it appeared that an infant had obtained a loan, giving his promissory note therefor, and at the time the loan was made had represented himself as being of age. It was held that the contract was void under the Infants Relief Act, 1874, and the infant could rely on the statute, as his misrepresentation as to his age did not operate as an estoppel. The reported case is to the same effect. In Baterman v. Kingston, 6 L. R. Ir. (Eng.) 328, wherein in an action on certain promissory notes one of the makers set up a plea of infancy, it was held that a reply alleging that at the time the loan was made, the defendant represented himself to be of age, thereby fraudulently inducing the plaintiff to lend him the money, was bad. *Compare* the following English cases decided prior to the enactment of the statute: Probart v. Knouth, 2 Esp. 472; Clark v. Leslie, 5 Esp. 28; Darby v. Boucher, 1 Salk 279, 91 Eng. Rep. (Reprint) 244; Earle v. Peale, 1 Salk 386, 91 Eng. Rep. (Reprint) 336; Smith v. Gibson, Peake Add. Cas. 52, 4 Rev. Rep. 888; Marlow v. Pitfield, 1 P. Wms. 558; Martin v. Gale, 46 L. J. Ch. 84, 4 Ch. Div. 428, 36 L. T. N. S. 357, 25 W. R. 406; Rearsby's Case, Godb. 219, 78 Eng. Rep. (Reprint) 133; Ellis v. Ellis, 12 Mod. 197, 3 Salk 197, 1 Ld. Raym. 344; Ex p. Unity Joint Stock Mut. Banking Assoc. 3 De G. & J. 63, 44 Eng. (Reprint) 1192.

Exceptions to Rule.

In equity a person who lends money to an infant to pay a debt incurred for necessaries, will be subrogated to the rights of the original creditor, and the minor will be liable to him. Price v. Sanders, 60 Ind. 310; Watson v. Cross, 2 Duv. (Ky.) 147; Hickman v. Hall, 5 Litt. (Ky.) 338; Beeler v. Young, 1 Bibb (Ky.) 519. If a creditor furnishes money to a minor, which he uses to purchase necessaries, and the creditor shows its application for the purchase of necessaries, the minor will be liable in equity; or if a person lends money to a minor to pay a debt incurred for necessaries, and the debt is so paid, he will stand in equity in the place of the original creditor, and the minor will be liable to him. Price v. Sanders, supra. In Watson v. Cross, 2 Duv. (Ky.) 147, which was an action brought by an infant for the recovery of a watch and a trunk, it appeared that when the property came into the possession of the appellant, he was a licensed innkeeper in Frankfort. The infant became his guest, and remained with him two weeks. The infant's entertainment, for that time, was worth twenty-eight dollars. The appellant also loaned the infant fifteen dollars to go after his trunk, and twelve dollars to pay his traveling expenses to Maysville, where he resided. The appellant had a lien on the watch and trunk, as an innkeeper, and in addition thereto, the infant also pledged them as security for the payment of the sums of money mentioned, amounting to fifty-five dollars. The court said: "As to the twelve dollars furnished to pay traveling expenses to the home of appellee, although it cannot be recovered as borrowed money from the infant, yet, as the parties to whom it was paid for traveling expenses of appellee could have recovered of him the value of their respective services as necessaries, the appellant may, equitably, be substituted to their rights, as he, in effect, paid them what the infant was bound for, and on that ground recover the twelve dollars, which does not seem to have been more than was necessary and proper to be furnished to pay the expenses of a trip from Frankfort to Maysville. The appellant has manifested no right to recover the fifteen dollars, there being nothing in the record to show that the money was furnished, or that it was expended for necessaries; and the infant had no legal capacity to borrow money and bind himself therefor. It is a well-settled principle that an innkeeper has a lien on the property of his guests for the price of his entertainment; and upon this ground appellant had a right to retain the property sued for until the twenty-eight dollars and its accruing interest was paid or tendered; and as the twelve dollars was furnished upon the faith of his being in the possession of the property, and under circumstances to make the infant liable therefor, the chancellor will not permit the possession to be disturbed until it is paid. The appellee seeking equity must do equity, and his infancy cannot take him out of the operation of this principle."

The same principle has been applied at law, when a person, at the request of a minor, has advanced the money for, or has himself paid a bill for necessaries previously contracted by the infant. Kilgore v. Rich, 83 Me. 305, 22 Atl. 176, 23 Am. St. Rep. 780, 12 L.R.A. 859; Swift v. Bennett, 10 Cush. (Mass.) 436; Conn v. Coburn, 7 N. H. 368, 26 Am. Dec. 746; Randall v. Sweet, 1 Denio (N. Y.)

460; Equitable Trust Co. v. Moss, 149 App. Div. 615, 134 N. Y. S. 533; Bradley v. Pratt, 23 Vt. 378. So in Kilgore v. Rich, supra, wherein it appeared that an infant induced another to pay a board-bill contracted while attending school, the court said: "It was also ruled at the trial, that an infant being liable to one person for such a bill, could make himself liable to another who should pay such bill for him a his request; the liability to such other person not to be measured by the amount actually paid, but limited, irrespective of the contract price, to such sum as would be a reasonable compensation for the board. This ruling does not appear to infringe against any legal principle, and an examination of the cases satisfies us that it is well supported by the authorities. The infant's liability is in no way enlarged by owing the debt to one rather than to another. The rule lends no temptation to create a debt as it is already created. The right to transfer the liability from one to another might be a great convenience to a minor. One creditor might be unable or unwilling to wait for payment, while a friend and acquaintance, as a substituted creditor, might be accommodating in that respect. It would give a self-supporting minor more facilities for support. We have not, in our examination of authorities, noticed any case that opposes the principle. . . . The defendant relies on the rule generally prevailing in the cases that money is not a necessary, though lent to an infant who afterwards purchases necessaries with it. 'But,' says Mr. Bishop, 'one who pays money at his (infant's) request to a third person for necessaries can recover it.' Bish. Con. § 914. The difference is between lending or paying. Mr. Wharton (Whar. Con. § 72) finds the doctrine adopted in late American cases, that a person who lends money to an infant to purchase 'specific' necessaries stands in the position of the tradesman who furnishes the necessaries. In the case at bar the plaintiff could have taken an assignment of the claim, and been entitled to recover it, and there really is no good reason to defeat his claim as it is here presented." In Swift v. Bennett, 10 Cush. (Mass.) 436, wherein it appeared that the plaintiff, at the request of an infant, paid a note given for certain necessaries for a whaling trip, the court said: "The suit is not brought upon the order or draft of the defendant, which was accepted and paid by the plaintiffs. They do not seek to charge him as drawer of this order. The action is brought to recover money paid, laid out, and expended by the plaintiffs at the defendant's request, for necessaries furnished to him. The order is introduced only as evidence of the request and of the amount furnished and paid for by the plaintiffs. The gist of the defendant's liability in this action is the payment of money, by the plaintiffs, at his request, for necessaries. We suppose the rule to be well settled, that an infant is liable to an action at the suit of a person advancing money to a third party to pay for necessaries furnished to the infant, but that he is not liable for money supplied to him, to be by him expended, although it may actually be laid out for necessaries. The reason for this distinction is, that in the latter case the contract arises upon the lending, and that the law will not support contracts which are to depend for their validity upon a subsequent contingency. . . . The present case seems very clearly to fall within the principle recognized and established in these decisions, by which an infant is held liable for money advanced to pay for necessaries furnished to him. The transaction between the parties was equivalent to an advancement by the plaintiffs to Brown & Co. to pay for the articles furnished by them to the defendant. The goods were, in fact, not sold by Brown & Co. to the defendant, on his credit, but they were delivered to him on the credit of the plaintiffs. Brown & Co. were, in a certain sense, the agents of the plaintiffs in supplying the defendant with the goods. The dealing between the parties was tantamount to an agreement between them, that Brown & Co. should furnish necessaries to the defendant for which the plaintiffs were to pay. It does not, therefore, come within the rule that money lent to an infant, to be expended by him in the purchase of necessaries, cannot be recovered. It is the payment, by the plaintiffs, of money to a third person, for necessaries supplied to the defendant, for which an action may well be maintained against him."

In Conn v. Coburn, 7 N. H. 368, 26 Am. Dec. 746, it was held that where a person who became a surety on an infant's note given for necessaries paid the same, he could recover the amount paid as money paid for the benefit of the infant, but could not sue on the note. To the same effect see Haine v. Tarrant, 2 Hill L. (S. C.) 400. And in Bradley v. Pratt, 23 Vt. 378, the court said: "The case of Conn v. Coburn, 7 N. H. 368, 26 Am Dec. 746, where it was held, that an infant was liable to one who signed a note with him, as surety, given for necessaries, who had paid the money, goes to that extent, we think. Here the plaintiff has, at the defendant's request, paid Legrand Bradley for necessaries for the defendant, and agreed to look solely to the defendant. And if in such a case the law implies a promise on the part of the infant to indemnify his surety, and the cause of action arises, when the surety pays the money, how does the case differ from the present, except that the defendant has ex-

ecuted a promissory note to his surety? Upon the view taken of this case in the county court, it seems to us identical with that of Conn v. Coburn. We see no good reason to distinguish between this case and that of a promissory note given to the party providing the necessaries. It is equally open to examination as to the consideration. The chief reason, perhaps, why an infant is not liable at law, and is liable in equity, for money borrowed, and which is actually expended for necessaries, is the want of privity between the lender and the one who furnishes the necessaries. If one buy necessaries for an infant with money, or if, at the request of the infant, he pay for those already furnished, the infant is liable, I apprehend. That privity is here established. It is difficult to perceive, why, if an infant is liable on a single bill, which is a bond without penalty, given for necessaries, he should not be equally so on a promissory note, or an account stated." But in Ayers v. Burns, 87 Ind. 245, 44 Am. Rep. 759, it was held that such an action was not maintainable by the surety during the infancy of the minor.

Likewise, where the loan and the use of money form but one transaction, as where the lender of the money does not pay it over to the infant, but himself applies it directly to the purchase of necessaries, it has been held that the transaction is beneficial to the infant, and therefore he will be bound by it. Smith v. Oliphant, 2 Sandf. 306, wherein the court said: "It is true, that in general, an infant is not liable for money which he has borrowed; and it has been decided that the lender cannot recover, although it be proved that the infant actually laid out the money in necessaries. The reason given is, that by intrusting the money to the infant, he was enabled to spend it in dissipation if he had been so minded; and his subsequent judicious use of it could not confer a right of action, when none existed at the time of the loan. On the other hand, there are many authorities which show, that where an infant has incurred a debt for necessaries, one who, at his request, pays such debt, may recover against him for the money paid. On the same principle, and with greater reason, should the infant be deemed liable for money lent and applied by the lender in procuring him necessaries. But it is said, that such an application establishes a demand for money paid for the infant's use; not a demand for money lent. It may well be, that the person so applying his money, can recover it under a count for money paid, laid out and expended. Money lent is not unfrequently applied by the lender, directly to the use for which the borrower obtains it; but it is nevertheless money lent and advanced. In the case made by this replication the lender, upon the request of the infant, advanced money to the latter, by laying it out in the purchase of necessaries; thus using his more mature judgment in respect of price and quality. No debt was incurred to the one who furnished the necessaries; and there was no liability of the infant to be discharged by the payment of the money. This was strictly money lent and advanced. In the instances of money paid, for which infants have been held liable, the debts had been previously incurred, and the party furnishing the money, simply discharged such debts. It is manifest, that the true interests of an infant would be more likely to be promoted by the direct application of the money to the purchase by the lender; and that the claim founded upon such an advance, stands on higher ground than that for money paid."

Where an infant borrows money on the strength of a fraudulent representation that he is of age, and the representation is relied on by the lender, infancy is no defense to an action for the recovery of the money so loaned. Ostrander v. Quin, 84 Miss. 230, 36 So. 257, 105 Am. St. Rep. 426; Pemberton Bldg. etc. Assoc. v. Adams, 53 N. J. Eq. 258, 31 Atl. 280. Thus, in Ostrander v. Quin, supra, it was held that where an infant by representations that he was of age borrowed money, giving a mortgage as security therefor, which money was used by him for the purchase of necessaries, he could not avoid the mortgage on the ground of infancy at the time of the loan and the giving of the mortgage. But in Baker v. Stone, 136 Mass. 405, it was held that where a minor, not disclosing her minority, borrowed money from a person who believed her to be of full age, and gave a note and mortgage of land to secure it, these facts would not estop her from avoiding the note and mortgage.

STATE
v.
BUNTING.

Oregon Supreme Court—March 17, 1914.

71 Oregon 259; 139 Pac. 731.

Labor Laws — Limiting Hours of Labor.

Laws 1913, c. 102, prohibiting the employment of any person in any mill, factory, or manufacturing establishment more than 10 hours in a day, can be sustained only under the police power, since the right to labor or employ labor on terms stipulated by the parties is a property right guaranteed by U.

S. Const. Amend. 14, providing that no state shall make any law abridging the privileges or immunities of citizens of the United States, nor deprive any person of property without due process of law, nor deny the equal protection of the law.

[See note at end of this case.]

Same.

The right to labor and to employ labor is subject to reasonable limitations necessary to promote the health, general welfare, and intelligence of the citizens, and the peace and good order of the state; U. S. Const. Amend. 14, not being designed to limit the right of the state under its police power to prescribe such regulations.

[See note at end of this case.]

Same.

The hours of labor in industries in which too many hours of service in one day would be injurious to the health and well-being of the operatives may be reasonably regulated by the state under the police power, and this power legitimately exercised can neither be limited by contract nor bartered away by legislation.

[See note at end of this case.]

Constitutional Law — Police Power.

While the police power cannot excuse the enactment of unreasonable, oppressive, or unjust laws, it may be legitimately exercised to preserve the public health, safety, morals, and general welfare.

[See 6 R. C. L. tit. *Constitutional Law*, p. 183.]

Labor Laws — Limiting Hours of Labor.

The limitation of Laws 1913, c. 102, prohibiting employment of labor for more than 10 hours in one day to mills, factories, and manufacturing establishments, is not an unconstitutional discrimination.

[See note at end of this case.]

Constitutional Law — Presumption in Favor of Statute.

All reasonable intendments will be made in favor of a law not obviously void on its face, and it will be presumed that the Legislature has acted within constitutional limitations.

[See 6 R. C. L. tit. *Constitutional Law*, p. 97.]

Labor Laws — Limiting Hours of Labor.

Laws 1913, c. 102, prohibiting the employment of any person in any mill, factory, or manufacturing establishment for more than 10 hours in one day, except night watchmen, persons engaged in making necessary repairs, and, in cases of emergency, providing that employees may work overtime not to exceed three hours in a day at the rate of time and one half of the regular wage, is a proper police regulation, and does not violate the Constitution of the United States or of the state.

[See note at end of this case.]

Same.

In Laws 1913, c. 102, prohibiting the employment of labor in mills, factories, and manufacturing establishments for more than 10 hours per day, a proviso permitting employees to work overtime not to exceed three hours in a day at the rate of time and a half the regular wage does not render the whole act void.

[See note at end of this case.]

Appeal from Circuit Court, Lake county: BENSON, Judge.

Criminal action. F. O. Bunting convicted of violating statute relating to hours of labor and appeals. The facts are stated in the opinion. AFFIRMED.

W. Lair Thompson for appellant.

Andrew M. Crawford, James W. Crawford and *O. C. Gibbs* for appellee.

[261] BEAN, J.—Section 1 of the act declares as follows:

"It is the public policy of the State of Oregon that no person shall be hired, nor permitted to work for wages, under any conditions or terms, for longer hours or days of service than is consistent with his health and physical well-being and ability to promote the general welfare by his increasing usefulness as a healthy and intelligent citizen. It is hereby declared that the working of any person more than ten hours in one day, in any mill, factory or manufacturing establishment is injurious to the physical health and well-being of such person, and tends to prevent him from acquiring that degree of intelligence that is necessary to make him a useful and desirable citizen of the state."

Section 2 enacts the following:

"No person shall be employed in any mill, factory or manufacturing establishment in this state more than ten hours in any one day, except watchmen and employees when engaged in making necessary repairs, or in case of emergency, where life or property is in imminent danger; provided, however, employees may work overtime not to exceed three hours in any one day, conditional that payment be made for said overtime at the rate of time and one half the regular wage."

Section 3 provides a penalty for a violation of the statute.

Defendant demurred to the indictment upon the ground that the legislative enactment alleged to have been violated is invalid, because repugnant to the Constitution of the United States and to that of the State of Oregon.

1. It is contended that the statute violates the right of contract, the right of property, and that it is class legislation and void. The fourteenth amendment to the Constitution of the United States, which it is claimed the act contravenes, declares, *inter alia*, that "no state shall make or enforce any law which shall [262] abridge the privileges or immunities of citizens of the United States; nor shall any

state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Article I, Section 20, of the Constitution of this state is as follows:

"No law shall be passed granting to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."

To give the act vitality it must be done by virtue of the police power of the state.

2. It is an announced principle of law that the right to labor or to employ labor on such terms and conditions as may be stipulated by the contracting parties is not only a liberty, but a property right guaranteed to every citizen by the fourteenth amendment above quoted. Such right cannot be arbitrarily or unreasonably interfered with by the legislature: State v. Muller, 48 Ore. 252, 85 Pac. 855, 120 Am. St. Rep. 895, 11 Ann. Cas. 88; *affirmed* in 208 U. S. 412, 52 U. S. (L. ed.) 551, 28 S. Ct. 324, 13 Ann. Cas. 957. The right to labor and to employ labor, like all other rights, is itself subject to such reasonable limitations as are necessary to promote the health, general welfare, and intelligence of the citizens, and the peace and good order of the state. To this end a large discretion is from necessity vested in the lawmakers to determine not only what the interest of the public require but what measures are necessary for the protection of such interests: State v. Muller, 48 Ore. 252, 85 Pac. 855, 120 Am. St. Rep. 805, 11 Ann. Cas. 88, 208 U. S. 412, 52 U. S. (L. ed.) 551, 28 S. Ct. Rep. 324, 13 Ann. Cas. 957; State v. Baker, 50 Ore. 391, 92 Pac. 1076, 13 L.R.A. (N.S.) 1040; Lawton v. Steele, [263] 152 U. S. 133, 136, 38 U. S. (L. ed.) 385, 14 S. Ct. 499; Mugler v. Kansas, 123 U. S. 623, 31 U. S. (L. ed.) 205, 8 S. Ct. 273, 296; Holden v. Hardy, 169 U. S. 366, 42 U. S. (L. ed.) 780, 18 S. Ct. 383; Ritchie Co. v. Wayman, 244 Ill. 509, 91 N. E. 695, 27 L.R.A. (N.S.) 994; State v. Buchanan, 29 Wash. 602, 70 Pac. 52, 92 Am. St. Rep. 930, 59 L.R.A. 342; Ex p. Boyce, 27 Nev. 299, 75 Pac. 1, 1 Ann. Cas. 66, 65 L.R.A. 47, 57; Cooley, Const. Lim. p. 830. By the adoption of the fourteenth amendment it was not designed nor intended to curtail or limit the right of the state under its police power to prescribe such reasonable regulations as might be essential to the promotion of the peace, welfare, morals, education, or good order of the people. It was adopted primarily to protect the then newly liberated negroes of the south from practical re-enslavement by their former masters, and to authorize Congress to protect the civil rights of these persons by appropriate legislation: Reports of Committees of House, 39th Congress, 1st Sess. Vol. 2, p. 13 et seq. To now invoke its provisions to perpetuate industrial servitude would be a perversion of its beneficent purposes.

3. The hours of labor in certain industries, in which too many hours of service in one day would be injurious to the health and well-being of the operatives, may be reasonably regulated by the state, under its police power. This power legitimately exercised can neither be limited by contract nor bartered away by legislation. We quote from Hurtado v. California, 110 U. S. 516, 530, 28 U. S. (L. ed.) 232, 4 S. Ct. 111, 118: "The Constitution of the United States was ordained, it is true, by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future, [264] and for a people gathered and to be gathered from many nations and of many tongues:" See Holden v. Hardy, 169 U. S. 388, 42 U. S. (L. ed.) 780, 18 S. Ct. 383: The extent and limitations upon the police power of a state are well stated by Mr. Chief Justice Shaw in Com. v. Alger, 7 Cush. (Mass.) 53, 84:

"We think it is a settled principle, growing out of the nature of well-ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well that in the interior as that bordering on tide waters, is derived directly or indirectly from the government, and held subject to those general regulations which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient."

4. The police power cannot be forwarded as an excuse for the enactment of unreasonable, oppressive, or unjust laws. Yet it may be legitimately exercised for the purpose of preserving the public health, safety, morals, and general welfare: Davidson v. New Orleans, 96 U. S. 97, 24 U. S. (L. ed.) 616; Yick Wo v. Hopkins, 118 U. S. 356, 30 U. S. (L. ed.) 220, 6 S. Ct. 1064. We quote from the majority opinion in Re Ten-Hour Law for Street Ry. Corp. 24 R. I. 603, at page 605, 54 Atl. 602, at page 603, 61 L.R.A. 612:

[265] "There is also a common assent that the legislature has the right of control in all matters affecting public safety, health, and

welfare, on the ground that these are within the indefinable but unquestioned purview of what is known as the police power. It is indefinable, because none can foresee the ever-changing conditions which may call for its exercise; and it is unquestioned, because it is a necessary function of government to provide for the safety and welfare of the people. Private rights are often involved in its exercise, but a law is not on that account rendered invalid or unconstitutional."

The police power comprehends by far the greater portion of the powers which may be exercised by a state. As stated by Judge Cooley in his work on Constitutional Limitations (7 ed.), page 829, it "embraces its whole system of internal regulation, by which the state seeks not only to preserve the public order and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own so far as is reasonably consistent with a like enjoyment of rights by others."

5. The limitation of the law to mills, factories, or manufacturing establishments is not in itself an unconstitutional discrimination. The work in factories is as different from that in mercantile houses as that in mines is from either: Freund, Police Power, § 313. It is conceded that the state by virtue of its police power may regulate the hours of labor of women and minors (Com. v. Riley, 210 Mass. 387, 97 N. E. 367, Ann. Cas. 1912D 388); State v. Shorey, 48 Ore. 396, 86 Pac. 681, 24 L.R.A.(N.S.) 1121, also of [266] persons in underground mines, reduction plants, and smelters, and of men in the employ of common carriers.

6. All reasonable intendments will be made in favor of a law not obviously void upon its face: Cline v. Greenwood, 10 Ore. 230; Crowley v. State, 11 Ore. 512, 6 Pac. 70. It will therefore be presumed that the legislature has acted within constitutional limitations. Mr. Justice Brewer in Atchison, etc. R. Co. v. Matthews, 174 U. S. 96, 104, 43 U. S. (L. ed.) 909, 913, 19 S. Ct. 609, 612, said:

"It is also a maxim of constitutional law that a legislature is presumed to have acted within constitutional limits, upon full knowledge of the facts, and with the purpose of promoting the interests of the people as a whole, and courts will not lightly hold that an act duly passed by the legislature was one in the enactment of which it has transcended its power."

The legislature is the exclusive judge of the propriety and necessity of legislative interference within the scope of legislative power. If a state of facts could exist which would justify legislation, it would be presumed that it did exist: In re Ten-Hour Law for Street Ry. Corp. supra; State v. Peckham, 3 R. I. 289; Munn v. Illinois, 94 U. S. 113, 24 U. S. (L. ed.) 77. As a general rule statutes should be sustained unless their unconstitutionality is clear beyond a reasonable doubt. Such doubt should be solved in favor of a legislative enactment and the act sustained: Cooley, Const. Lim. (7 ed.), pp. 252, 253; State v. Narragansett, 16 R. I. 424, 16 Atl. 901, 3 L.R.A. 295; State v. Schluer, 59 Ore. 18, 35, 115 Pac. 1057. See dissenting opinions of Mr. Justice Harlan, Mr. Justice White and Mr. Justice Day concurring, and of Mr. Justice Harlan in Lochner v. New York, 198 U. S. 45, 49 U. S. (L. ed.) 937, 25 S. Ct. R. 539, 3 Ann. Cas. 1133, 1139.

7. In order to render a statute invalid by reason of discriminations which are clearly unreasonable, arbitrary, [267] oppressive, or partial, the vice of the law must be apparent upon its face. One of the objects of resorting to the governmental function known as the police power is for the betterment of social and economic conditions which affect the community at large, with a view of accomplishing "the greatest good of the greatest number." A certain minimum of physical well-being is necessary in order that social life may exist, the usefulness and intelligence of the citizens be increased, and the progress of civilization accelerated: Freund, Police Power, §§ 8, 10. The conditions which may call for the exercise of this power are continually changing. For this reason the police power is sometimes referred to as if it were elastic. We are of the opinion, however, that the changes refer to the application of the function, and that the power remains immutable, being called into requisition when the conditions authorize and demand legislative action. The required minimum of well-being varies in different periods, but rises with advancing civilization until it includes a certain standard of comfort. We quote Mr. Justice Holmes in Noble State Bank v. Haskell, 219 U. S. 104, 111, 55 U. S. (L. ed.) 112, 31 S. Ct. 186, 188, Ann. Cas. 1912A 487, 32 L.R.A.(N.S.) 1062:

"It may be said in a general way that the police power extends to all the great public needs. . . . It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

In the latter case the constitutionality of a statute of Oklahoma requiring the payment of contributions by banks toward a depositors' guaranty fund for the protection of depositors was under consideration upon the ground that the legislature of Oklahoma had by implication [268] declared free banking a public

danger, and it was held that it was not palpable or beyond doubt that it was not true.

In Powell v. Pennsylvania, 127 U. S. 678, 32 U. S. (L. ed.) 253, 8 S. Ct. 992, 1257, the constitutionality of a statute of Pennsylvania prohibiting the manufacture or sale of oleomargarine was questioned. No evidence was offered on the trial to show that the article was impure or unwholesome. On the contrary, there was an offer to prove that it was a wholesome, nutritious food, in all respects as healthful as butter produced from pure cream. The court held that whether the manufacture of oleomargarine of the kind described in the statute involved such danger to the public health as to require for the protection of the people the entire suppression of the business, rather than its regulation in such manner as to prevent its manufacture and sale to go on, were questions of fact and of public policy which belonged to the legislative department to determine, and that the court could not interfere without usurping the powers of the legislative department.

By the code of the State of Georgia, 1895, Sections 2615, 2619, the hours of labor in cotton or woolen manufacturing establishments were limited to 11 hours, except in case of engineers, etc., and help employed to make repairs, the aggregate of working hours per week was not to exceed 66, and contracts for a long time were declared void: See 2 Labatt's Master and Servant (2 ed.), § 886.

Judge Cooley says:

"Whether a statute is constitutional or not is always a question of power; that is, a question whether the legislature in the particular case, in respect to the subject matter of the act, the manner in which its object is to be accomplished, and the mode of enacting it, [269] has kept within the constitutional limits and observed the constitutional conditions. In any case in which this question is answered in the affirmative the courts are not at liberty to inquire into the proper exercise of the power. They must assume that legislative discretion has been properly exercised": Cooley Const. Lim. (7 ed.), p. 257.

A note to Com. v. Riley, Ann. Cas. 1912D at page 393, reads thus:

"It is generally held that a statute limiting the length of a day's labor is a valid exercise of the police power"—citing, among other cases, Ex parte Boyce, 27 Nev. 299, 75 Pac. 1, 1 Ann. Cas. 66, 65, L.R.A. 47; U. S. v. St. Louis S. W. R. Co. (D. C.) 189 Fed. 954; In re Martin, 157 Cal. 51, 106 Pac. 235, 26 L.R.A.(N.S.) 242; In re Miller, 162 Cal. 687, 124 Pac. 427; Inland Steel Co. v. Yedinak, 172 Ind. 423, 87 N. E. 229, 139 Am. St. Rep. 389; St. Louis, etc. R. Co. v. McWhirter, 145 Ky. 427, 140 S. W. 672; Withey v. Bloem, 163 Mich. 419, 128 N. W. 913, 35 L.R.A.(N.S.) 628; People v. Erie R. Co. 198 N. Y. 369, 91 N. E. 849, 139 Am. St. Rep. 828, 19 Ann. Cas. 811, 29 L.R.A.(N.S.) 240; Byars v. State, 2 Okla. Crim. 481, 102 Pac. 804, Ann. Cas. 1912A 765; State v. Somerville, 67 Wash. 638, 122 Pac. 324.

In Chicago v. Schmidinger, 243 Ill. 167, 90 N. E. 369, 17 Ann. Cas. 614, 44 L.R.A.(N.S.) 632, it was held that the bread ordinance of the City of Chicago which fixed the size of loaves and regulated the sale of bread was a valid exercise of the police power. And in Chicago v. Bowerman Dairy Co. 234 Ill. 294, 84 N. E. 913, 123 Am. St. Rep. 100, 14 Ann. Cas. 700, 17 L.R.A.(N.S.) 684, it was held that the regulation by the city of the sale of milk and cream in bottles and glass jars was a proper exercise of the police power.

[270] In Freund, Police Power, Section 310, it is stated:

"Legislation for the protection of labor which restrains individual liberty and property rights falls under the police power, but the object is not necessarily an economic one. The great mass of labor legislation is enacted in the interest of health and safety, and in factory and mining regulations we find, especially where women and young persons are concerned, provisions to promote decency and comfort. Laws of this character rest upon a clear and undisputed title of public power."

In Otis v. Parker, 187 U. S. 606, 608, 609, 47 U. S. (L. ed.) 323, 23 S. Ct. 168, 170, Mr. Justice Holmes uses this language:

"While the courts must exercise a judgment of their own, it by no means is true that every law is void which may seem to the judges who pass upon it excessive, unsuited to its ostensible end, or based upon conceptions of morality with which they disagree. Considerable latitude must be allowed for differences of view as well as for possible peculiar conditions which this court can know but imperfectly, if at all. Otherwise a Constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions, which by no means are held *semper ubique et ab omnibus.*"

The restriction as to the hours of labor is in the same category as safe and sanitary regulations. The need of the restriction arises out of the employment and because of it. There is a real substantial relation between the need and the particular employment. It is therefore a proper police regulation.

The act in question is a human life, health, and welfare statute. While a penalty for a violation of its provisions is provided, it is remedial in its nature, and [271] should be given an interpretation in the interest of the

public good, so as to carry out the legislative intent: State v. Ottawa, 84 Kan. 100, 113 Pac. 391, 394. Legislative regulation of the hours of labor of men and that of women differ only in the degree of necessity therefor. In the judgment of the legislature the interest of the public requires that no person be employed in any manufacturing establishment more than 10 hours in any one day, except watchmen, employees, engaged in making repairs, or in case of emergency. Obviously, in addition to the reasons declared in the law, it was in the legislative mind that the regular employment of persons for longer hours in factories where different kinds of machinery and facilities are operated under the present day high-pressure power would tend to increase the danger of accidents, and to a greater extent jeopardize life and limb, thereby increasing the demand for compensation for such injuries, a portion of which, under certain circumstances, would ultimately be borne by the state: See Industrial Act, chapter 112, Laws 1913, pp. 188, 198, § 20. It is worthy of note that in the latter act, filed in the office of the Secretary of State on the same date as the one in question, mills and factories in which machinery is used are classed as places of hazardous occupations: See § 13 of the act.

Another consideration not without weight is that suggested in the preamble to the act, which discloses, among other things, that the working of any person more than 10 hours a day in any mill, factory, or manufacturing establishment "tends to prevent him from acquiring that degree of intelligence that is necessary to make him a useful and desirable citizen of the state." While labor is heaven's first law and a reasonable amount of physical exertion is salutary, it is [272] an undeniable fact that prolonged and excessive physical labor is performed at the expense of the mental powers, and it requires no argument to show that a man who day in and day out labors more than 10 hours must not only deteriorate physically, but mentally. The safety of a country depends upon the intelligence of its citizens, and if our institutions are to be preserved and the state must see to it that the citizen shall have some leisure which he may employ in fitting himself for those duties which are the highest attributes of good citizenship. As a voter, a juror, and, in this state, as a legislator, the best results can only be attained by so limiting the hours of toil that they may not be unduly prolonged to the extent of causing that mental deterioration that is sure to accompany undue and long-continued physical exertion. In view of the well-known fact that the custom in our industries does not sanction a longer service than 10 hours per day, it cannot be held, as a matter of law, that the legislative requirement is unreasonable or arbitrary as to hours of labor. Statistics show that the average daily working time among workingmen in different countries is, in Australia, 8 hours; in Great Britain, 9; in the United States, 9¾; in Denmark, 9¾; in Norway, 10; Sweden, France, and Switzerland, 10½; Germany, 10¾; Belgium, Italy, and Austria, 11; and in Russia, 12 hours: Lochner v. New York, 198 U. S. 45, 49 U. S. (L. ed.) 937, 25 S. Ct. 539, 3 Ann. Cas. 1141.

In order to warrant declaring the act violative of the fundamental law, it should be shown that in the light of the world's experience and common knowledge the act under consideration is palpably and beyond reasonable doubt one that will not tend to protect or conserve the public peace, health, or welfare in its enforcement. It is by no means clear beyond a reasonable [273] doubt that the law will not promote the peace, health, and general welfare of citizens of the state, or that longer hours of labor in factories would not be injurious to the health as declared by the act, or that the act is repugnant to the Constitution. The presumption, therefore, is in favor of the wisdom and the correctness of the legislative finding and determination that the law is a necessity for the protection of the health, well-being, and general welfare of the public; that the regulation prescribed by the enactment will tend to correct the evil at which it is aimed. The courts cannot set aside the legislative decree without intrenching upon the prerogatives of a co-ordinate branch of the state government, and usurping the powers of the legislature.

The law does not prevent the laborer from working as many hours per day as he sees fit, and does not violate his right to labor as long as he may desire, but only prohibits his being employed in any mill, factory, or manufacturing establishment more than a certain number of hours in any one day: Com. v. Hamilton Mfg. Co. 120 Mass. 383, and cases there cited. It is urged by the learned counsel for defendant that if it is possible for the legislature to make the declaration that to work in a factory more than 10 hours in one day is injurious to the health, then that body can make four hours a day's work, and require two hours of the work to be performed before 8 o'clock A. M. It is sufficient to say that the question of four hours constituting a day's labor, or when any part of it shall be done, is not now before this court. When our journey has so far progressed as to arrive at that bridge, if it ever does, it will then be an opportune time to cross it. We have, however, already adverted to the rule that the governmental [274] power in question cannot be made an excuse for arbitrary, unreasonable, or oppressive legislation.

The act applies to all the people of the state who employ labor in mills, factories, or manufacturing establishments. In the very nature of things the occupations affected by the law furnish a reasonable basis for the statutory regulation. In the light of the former decisions of this court the classification is not unreasonable: In re Oberg, 21 Ore. 406, 28 Pac. 130, 14 L.R.A. 677; State v. Frazier, 36 Ore. 178, 59 Pac. 5; State v. Thompson, 47 Ore. 492, 84 Pac. 476, 8 Ann. Cas. 646, 4 L.R.A.(N.S.) 480; State v. Muller, 48 Ore. 252, 85 Pac. 855, 120 Am. St. Rep. 805, 11 Ann. Cas. 88, 208 U. S. 412, 52 U. S. (L. ed.) 551, 13 Ann. Cas. 957, 28 S. Ct. 324. See, also, Com. v. Riley, 210 Mass. 394, 97 N. E. 370, Ann. Cas. 1912D 388.

8. It is contended by counsel for defendant that the provision for employees to work overtime not to exceed three hours in any one day, conditioned that payment be made for said overtime at the rate of time and one half the regular wage, renders the whole act void. It is clear that the intent of the law is to make 10 hours a regular day's labor in the occupations to which reference is made. Apparently the provisions permitting labor for the overtime on express conditions were made in order to faciliate the enforcement of the law, and in the nature of a mild penalty for employing one not more than three hours overtime. It might be regarded as more difficult to detect violations of the law by an employment for a shorter time than for a longer time. This penalty also goes to the employee in case the employer avails himself of the overtime clause. Reasonable modes of enforcing a statute should be upheld: Fisher v. McGirr, 1 Gray [275] (Mass.) 1, 61 Am. Dec. 381; Com. v. Riley, 210 Mass. at page 394, 97 N. E. at page 370, Ann. Cas. 1912D 388, at page 392, where Mr. Chief Justice Rugg says:

"When the constitutionality of the statute limiting the hours of labor of women is settled, the means by which the aim of the statute may be forwarded within reasonable bounds are matters for legislative determination."

Legislative provisions are frequently made that a portion of a fine for the infraction of a statute shall be paid to the informer. The aim of the statute is to fix the maximum hours of service in certain industries. The act makes no attempt to fix the standard of wages. No maximum or minimum wage is named. That is left wholly to the contracting parties.

The statute under which the complaint is made in this case is not violative of the Constitution of the United States or of this state. As a consequence, the judgment of the lower court is affirmed.

Affirmed.

Ann. Cas. 1916C.—64.

Eakin, J., took no part in the consideration of this case.

Rehearing denied July 7, 1914.

NOTE.

The reported case holds that a statute limiting the length of a day's labor is valid, although it is restricted to persons employed in mills, factories and manufacturing establishments. It holds also that such an act is not invalidated by a proviso permitting employees to work overtime not to exceed three hours a day at one and one-half times the regular wage. The cases discussing the validity of a statute limiting the length of a day's labor are reviewed in the notes to Ex parte Boyce, 1 Ann. Cas. 66; State v. Muller, 11 Ann. Cas. 88; Muller v. Oregon, 13 Ann. Cas. 957; Com. v. Riley, Ann. Cas. 1912D 388; Booth v. People, 78 Am. St. Rep. 243.

PEOPLE

v.

CASSIDY ET AL.

New York Court of Appeals—January 12, 1915.

213 N. Y. 388; 107 N. E. 718.

Conspiracy — Acts and Declarations of Co-conspirators Admissible.

Where evidence of a conspiracy has been given to make the question of its existence one for the jury, any evidence of the acts and declarations of the conspirators in furtherance of the common purpose is competent, and it is unnecessary that the conspiracy should be charged in the indictment to make the proof competent.

[See 3 Am. St. Rep. 486; 5 R. C. L. tit. *Conspiracy*, p. 1089.]

Same.

Where, on the trial of C., a political leader, for selling a nomination to W. for a public office there was evidence sufficient to make a question of the existence of a conspiracy between C., W. and a third person to bring about the nomination of W., the testimony of a witness as to what W. said to him after W. and C. and the third person had conferred about the nomination, and later at the time he procured a loan for W. on a note, and before the money was paid over to him, is admissible.

Evidence — Relevancy — Rebutting Inference.

Where there is testimony justifying an inference that a portion of the amount sub-

sequently borrowed by W. was used by him to discharge the note, evidence of the payment of the note by W.'s brother, limited to contradict the inference, is admissible.

Same.

Where evidence is elicited on cross-examination from which an inference of a fact favorable to accused may be drawn, subsequent evidence of other facts showing that the inference is not warranted is competent and material.

Witnesses — Privilege against Self-Crimination — Scope.

The personal privilege guaranteed by Const. art. 1, § 6, against self-incrimination cannot be asserted unless the person to whom the privilege is given is subject to criminal prosecution or a forfeiture, though the constitutional provision must receive a broad construction in favor of the right which it is intended to secure.

[See 75 Am. St. Rep. 318.]

Waiver of Privilege.

The personal privilege against self-incrimination guaranteed by Const. art. 1, § 6, may be waived in any case by the person offering himself as a witness, and, when the privilege is waived, the person is subject to cross-examination like any other witness.

Effect of Waiver — Subsequent Proceeding.

A person cannot waive the privilege against self-incrimination guaranteed by Const. art. 1, § 6, and give testimony to his advantage or the advantage of his friends, and at the same time and in the same proceeding assert his privilege to answer questions to his disadvantage or to the disadvantage of his friends, but a waiver of the privilege cannot extend to new and independent proceedings, where the circumstances, surroundings, and prospective criminal charges are different.

[See note at end of this case.]

Immunity as to Self-Criminating Testimony.

Penal Law (Consol. Laws, c. 40) § 770, declaring that a person committing offenses against the elective franchise is a competent witness against another person so offending, and may be compelled to testify, but the testimony shall not be used in any prosecution or proceeding, civil or criminal, against him, provides for immunity, and one may be compelled to testify, but his testimony cannot be used against him unless he has previously waived his right to claim immunity.

Effect of Waiver of Privilege — Subsequent Proceeding.

One who voluntarily testified before a Supreme Court justice, investigating a charge in connection with a nomination of a candidate by a judicial convention for a public office, and who expressly waived immunity, did not thereby waive his constitutional right to decline to give testimony on the trial of one subsequently indicted for crime in connection with the nomination, because one who is entitled to the constitutional protection is so entitled in each new and independent proceeding, for otherwise he would subject himself to a new cross-examination and be required, under new and changed conditions, to give testimony that might not have been anticipated or intended in subjecting himself to examination in the prior and different proceeding.

[See note at end of this case.]

People v. *Cassidy*, 164 N. Y. App. Div. 15, affirmed.

People v. *Walter*, 164 N. Y. App. Div. 25, reversed.

Appeal from Appellate Division of Supreme Court, Second Judicial Department.

Criminal action. Joseph Cassidy and Louis T. Walter, Jr., convicted in Trial Term of Supreme Court, Kings county, of making, tendering, and offering to procure and cause nomination to public office on payment and contribution of valuable consideration. Judgment affirmed by Appellate Division of Supreme Court. Defendants appeal. The facts are stated in the opinion. AFFIRMED as to defendant Cassidy, and REVERSED as to defendant Walter.

Robert H. Elder for appellant Cassidy.

Robert M. Moore for appellant Walter.

James C. Cropsey, *Hersey Egginton* and *Ralph E. Hemstreet* for respondent.

[391] CHASE, J.—The defendant Cassidy in this case based his motion in arrest of judgment upon the ground, among others, that the indictment did not state facts sufficient to constitute a crime. In this respect the record on his appeal differs from the record in the Willett appeal. The judgment of the Appellate Division affirming the judgment of the trial court as against the defendant Cassidy was unanimous. Most of the questions presented on this appeal by the defendant Cassidy, and on which he claims that the judgment should be reversed, have been discussed in the opinion in the case of People v. Willett, 213 N. Y. 368, 107 N. E. 707, the decision in which case is handed down herewith.

When sufficient evidence of a common design and purpose amounting to a conspiracy has been given to make the question one for the jury, any evidence of the acts and declarations of the conspirators in furtherance of the common purpose is competent. In a case like this it is not necessary in order to make such proof competent that the conspiracy should be charged in the indictment. (People v. McKane, 143 N. Y. 455, 38 N. E. 950.) There is evidence in this case sufficient to make the question whether the defendants and one Willett unlawfully conspired to bring about the nomination of Willett for the office of justice of the Supreme Court in the Democratic judicial convention for the second judicial district in 1911 one of fact. The tes-

timony of Merrill as to what Willett said to him after Willett and defendants had conferred about the nomination, and October 23d, at the time he procured a loan of $5,000 for Willett on a thirty-day note, and before the money was paid over to him, was not error in view of the agreement which the jury had a right to find was entered into by and between Willett and the defendants herein, relating to the nomination.

[392] The testimony as to the payment of the note by Willett's brother was also properly received, because of the fact that testimony had then been elicited from which as stated by the Appellate Division in their opinion, the jury could have been asked to draw the inference that a portion of the amount subsequently borrowed by Willett was used by him to discharge the $5,000 thirty-day obligation which came due in the latter part of October and thus account for some of the moneys borrowed by him. The evidence as to the payment of the note by Willett's brother was expressly limited by the court for use in contradiction of such inference.

When upon the trial of an action evidence is elicited on cross-examination from which an inference as to a fact favorable to a defendant may be drawn, subsequent evidence of other facts or circumstances showing that the inference sought to be drawn is not warranted becomes competent and material. (People v. Buchanan, 145 N. Y. 1, 24, 39 N. E. 846; People v. Zigouras, 163 N. Y. 250, 255, 57 N. E. 465.)

The defendants criticise in many ways the charge made by the court to the jury. Most of such criticisms have been answered by what has been said in this opinion and in the Willett opinion. Taken in its entirety, we do not think that the charge was prejudicial to the defendant Cassidy.

A question has been raised by the defendant Walter that does not apply to the defendant Cassidy. It is of supreme importance to Walter.

After the nominating convention referred to in the indictment and information was presented to Supreme Court Justice Scudder, charging that a crime had been committed in connection with the nomination of candidates at such judicial convention, witnesses were sworn and examined before said justice in Queens county, and the defendant Walter appeared voluntarily and offered himself as a witness. He expressly waived immunity and was also told that any testimony that he might give [393] could be used against him at any time thereafter. He was sworn and gave testimony on the day of such appearance and also at an adjourned day. On a day to which the proceeding was subsequently adjourned he was duly subpœnaed and attended pursuant to such subpœna. In response to the justice he said that the testimony that he had given was given voluntarily, but that if he gave any further testimony he would expect immunity. He was not called as a witness on such adjourned day, but was compelled to sign a transcript of the testimony that he had voluntarily given as stated. The result of the Queens county proceeding was the discharge of the persons there charged with crime. (People v. Quinn, 150 App. Div. 813, 135 N. Y. S. 477.) Sometime thereafter an investigation was conducted by the grand jury of Kings county and an indictment was found in Kings county against Willett and a separate joint indictment against Cassidy and Walter. The indictment against Willett was first tried and a few days thereafter the indictment against Cassidy and Walter was tried. The appeal now under consideration by this court is from the judgment of the Appellate Division of the Supreme Court affirming the judgment convicting the defendants of the crime found pursuant to the indictment in Kings county. on the Willett trial Walter was called as a witness by the People, but declined to testify on the ground that his testimony might tend to convict him of a crime. He was compelled to attend and testify in that case and was examined at great length therein. On the trial of the joint indictment against him and Cassidy, Walter pleaded giving his testimony as a witness in the Willett trial in bar of his prosecution under the indictment.

The fifth article or amendment to the Constitution of the United States, and section 6 of article 1 of the Constitution of this state provide that no person shall "be compelled in any criminal case to be a witness against himself." The constitutional provisions quoted gave [394] expression to public sentiment. Public sentiment on the subject grew out of an abhorrence of the inquisitional rack. The personal privilege became a part of the common law of England and has been made secure by constitutional provision in the Federal and most of the State Constitutions. The constitutional provisions must have a broad construction in favor of the right which it was intended to secure. (Counselman v. Hitchcock, 142 U. S. 547, 12 S. Ct. 195, 35 U. S. (L. ed.) 1110.) It is a privilege, but a privilege that cannot be asserted unless the person to whom the privilege is given is subject to criminal prosecution or forfeiture. It cannot be asserted in a case where the person offered as a witness has been tried upon the charge and acquitted, nor in a case where the Statute of Limitations has run against the crime or where full pardon has been granted covering the alleged criminality. (Wigmore on Evidence, sections 2279, 2280.) It can be waived in any case by the person offering himself as a witness. When the privilege is so waived the person becomes subject to cross-examination the

same as any other witness examined in the case. (Brandon v. People, 42 N. Y. 265; Connors v. People, 50 N. Y. 240; People v. Tice, 131 N. Y. 651, 30 N. E. 494, 15 L.R.A. 669; People v. Webster, 139 N. Y. 73, 84, 34 N. E. 730; Fitzpatrick v. U. S. 178 U. S. 304, 20 S. Ct. 944, 44 U. S. (L. ed.) 1078; People v. Casey, 72 N. Y. 393.)

A person cannot waive his privilege under the constitutional provisions and give testimony to his advantage, or the advantage of his friends, and at the same time and in the same proceeding assert his privilege and refuse to answer questions that are to his disadvantage or the disadvantage of his friends. A confidential communication once published to the world cannot be recalled. The seal of confidence, once broken, remains broken forever. (People v. Bloom, 193 N. Y. 1, 15 Ann. Cas. 932, 85 N. E. 824, 127 Am. St. Rep. 931, 18 L.R.A.(N.S.) 898.) The giving of testimony by a person that can be used in a criminal case against him like disclosing conversations between persons occupying confidential relations, makes it thereafter impossible to recall the admission or the disclosures resulting from the evidence.

[395] The admissions made by a person who gives testimony in court of a transaction without asserting his constitutional privilege cannot be recalled, but the waiver of the privilege does not by any fair reasoning extend to new and independent proceedings where the circumstances, surroundings and prospective criminal charges may be entirely different. A person who is entitled to the benefit of the constitutional provisions is so entitled in each new and independent proceeding, otherwise he would subject himself to a new cross-examination and be required under new and changed conditions to give testimony that may not have been anticipated or intended in subjecting himself to examination as a witness in a prior and different proceeding.

The defendant Walter's examination in the Willett trial subjected him to a general cross-examination and exposed him to such charges as might result from a new, complete and adverse examination in a criminal case in which his testimony was apparently deemed important in order to convict one who was charged with him in the violation of the elective franchise. It is provided by section 770 of the Penal Law as follows: "A person offending against any section of this article is a competent witness against another person so offending and may be compelled to attend and testify on any trial, hearing or proceeding or investigation in the same manner as any other person. The testimony so given shall not be used in any prosecution or proceeding, civil or criminal, against the person testifying. Any such person testifying shall not thereafter be liable to indictment, prosecution or punishment for the offense with reference to which his testimony was given, and may plead or prove the giving of testimony accordingly, in bar of such an indictment or prosecution."

Under this section of the Penal Law Walter was obliged to testify and, having testified, the statute expressly provides for immunity. The immunity is not [396] disputed unless Walter by testifying in the examination before Justice Scudder waived all right thereafter to claim of immunity.

Wigmore in his work on Evidence (Section 2276, page 3158) says: "The waiver involved in the accused taking the stand is limited to the particular proceeding in which he thus volunteers testimony. His voluntary testimony before a coroner's inquest or a grand jury or other preliminary and separate proceeding is therefore not a waiver for the main trial; nor is his testimony at a first trial a waiver for later trial."

The weight of authority is against the claim of the People that Walter by giving testimony before Justice Scudder waived his constitutional right to decline to give testimony on the trial of Willett that could be used against him in a criminal case. (Emery v. State, 101 Wis. 627, 78 N. W. 145; Overend v. Superior Court, 131 Cal. 280, 63 Pac. 372; State v. Burrell, 27 Mont. 282, 70 Pac. 982; Temple v. Com. 75 Va. 892; Cullen v. Com. 24 Grat. (Va.) 624; In re Mark, 146 Mich. 714, 110 N. W. 61; Samuel v. People, 164 Ill. 379, 45 N. E. 728; Georgia R. etc. Co. v. Lybrend, 99 Ga. 421, 27 S. E. 794; Miskimmins v. Shaver, 8 Wyo. 392, 58 Pac. 411, 49 L.R.A. 831 Boston Marine Ins. Co. v. Slocovitch, 55 Super. Ct. 452, 14 N. Y. St. Rep. 718; Cullinan v. Quinn, 95 App. Div. 492, 88 N. Y. S. 963; Com. v. Phœnix Hotel Co. 157 Ky. 180, 162 S. W. 823; State v. Lloyd, 152 Wis. 24, Ann. Cas. 1914C 415, 139 N. W. 514; Ex parte Wilson, 39 Tex. Crim. 630, 47 S. W. 996.)

The judgment of conviction as against the defendant Cassidy should be affirmed, and the judgment of conviction as against the defendant Walter should be reversed, and the defendant Walter discharged.

Willard Bartlett, Ch. J., Werner, Hiscock, Collin, Cuddeback and Miller, JJ., concur.

Judgment accordingly.

NOTE.

Waiver by Witness of Constitutional Privilege as Extending to Subsequent Trial or Proceeding.

General Rule.

It is well settled that a person who has waived his constitutional privilege of refusing to give self-incriminating testimony in a trial or proceeding is not estopped from as-

serting the privilege as to the same matter in a subsequent trial or proceeding. Overend v. Superior Court, 131 Cal. 280, 63 Pac. 372; Georgia R. etc. Co. v. Lybrend, 99 Ga. 421, 27 S. E. 794; Samuel v. People, 164 Ill. 379, 45 N. E. 728; Com. v. Phœnix Hotel Co. 157 Ky. 180, 162 S. W. 823; In re Mark, 146 Mich. 714, 110 N. W. 61, 13 Detroit Leg. N. 917; Boston Marine Ins. Co. v. Slocovitch, 55 Super. Ct. 452, 14 N. Y. St. Rep. 452; Cullen v. Com. 24 Grat. (Va.) 624; Temple v. Com. 75 Va. 892; Emery v. State, 101 Wis. 627, 78 N. W. 145; State v. Lloyd, 152 Wis. 24, Ann. Cas. 1914C 415, 139 N. W. 514; Miskimmins v. Shaver, 8 Wyo. 392, 58 Pac. 411, 49 L.R.A. 831. And see the reported case. See also State v. Burrell, 27 Mont. 282, 70 Pac. 982; Cullinan v. Quinn, 95 App. Div. 492, 88 N. Y. S. 963. *Compare* State v. Van Winkle, 80 Ia. 15, 45 N. W. 388; State v. Simmons, 78 Kan. 852, 98 Pac. 277. "A witness is not estopped by his previous statements, voluntarily made, either in court or out of it, from claiming his privilege when introduced as a witness. The privilege attaches to the witness in each particular case in which he may be called on to testify, and whether or not he may claim his privilege is to be determined without reference to what he said when testifying as a witness on some other trial, or on a former trial of the same case, and without reference to his declarations at some other time or place." Com. v. Phœnix Hotel Co. 157 Ky. 180, 162 S. W. 823.

"It has, it is true, been very justly held that if a witness, being fully aware of his right to maintain silence, nevertheless voluntarily enters upon a partial disclosure concerning matters as to which he could claim his privilege, he will be deemed to have waived it, and may be compelled by a rigid cross-examination to disclose the whole truth regarding such matters. The reason of this rule is, that a witness cannot arbitrarily in part waive, and in part reserve, his privilege for the purpose of becoming a partisan in the case, revealing only so much of the truth as will benefit one of the parties, and asserting his privilege when interrogated as to facts which would cut the other way. . . . There is, however, no necessity or reason for extending this rule to cover a case where a witness voluntarily testifies as to privileged matters upon one trial, and subsequently, at a second and entirely different trial, claims his privilege of giving no testimony whatever in regard thereto. The second trial is a de novo investigation before another jury, whose duty it is to consider the case in the light only of the evidence adduced at that hearing; and to allow the witness to assert his privilege could result in no undue advantage or injustice to either party to the cause." Georgia R. etc. Co. v. Lybrend, 99 Ga. 421, 27 S. E. 794.

Application of Rule.

In Samuel v. People, 164 Ill. 379, 45 N. E. 728, it was contended that a witness who caused a prosecution to be commenced by his voluntary act of swearing to the truth of an information thereby waived his right to insist on his privilege not to answer a question on the ground that the answer would incriminate him or expose him to a penal liability, when called on to testify at the trial subsequently taking place. The court said: "The privilege in question is a constitutional right, of which the citizen cannot be deprived by either legislatures or courts. . . . It cannot be regarded as released or waived by some disclosure, which he may have made elsewhere and under other circumstances. If the answer to a question put to him as a witness upon the stand might tend to criminate him, it would not tend any the less to do so because he had elsewhere made a statement having such a tendency. The question is not as to what he may have previously said in an affidavit, but the question is whether the disclosure he is asked to make as a witness upon the trial of the case will have a tendency to expose him to a criminal charge or penalty. We are of the opinion that his constitutional right in this regard is not abridged or waived by the fact of making the ex parte affidavit indorsed upon the information filed by the prosecuting attorney." In Overend v. Superior Court, 131 Cal. 280, 63 Pac. 372, the court in holding to be void an order declaring a witness guilty of contempt said: "It appears that the trial court based its judgments of contempt largely upon the ground that the witness had, without objection, testified at the preliminary examination of Minnie Campbell, and for that reason had waived his right to refuse to testify at the trial upon the ground that his evidence would tend to convict him of a felony. The position of the trial court in this regard is untenable." In Georgia R. etc. Co. v. Lybrend, 99 Ga. 421, 27 S. E. 794, it was contended that a waiver of the privilege to refuse to give self incriminating evidence by a party as a witness binds him in a subsequent trial of the same cause. The court said: "It was urged, however, that the waiver was binding upon him, because he was not simply a witness but a party to the case. This cannot be a sound position. A party often waives at one trial what he has an undoubted right to object to at a subsequent hearing of the same case. For instance, he may permit irrelevant testimony to be introduced, or may allow the contents of a writing to be proved by parol without accounting for the paper, or he may allow an unrecorded deed to go in evidence without proof of its execution. Surely, it cannot be said that because he does these, or similar things, at one investigation, he is until the

end of that particular case estopped from making objections he had formerly chosen not to urge. We therefore conclude that Lybrend's right as a witness to decline answering the objectionable questions was not lost because, as a party swearing in his own behalf, he had on a previous trial answered similar questions without objection." In Cullen v. Com. 24 Grat. (Va.) 624, it was held that where a witness testified before a coroner's inquest to facts criminating him without being warned, there was no waiver of his privilege and that on a subsequent trial he could assert his privilege. The court said: "But it has been earnestly argued that this is not a proper case to recognize the privilege, because the witness has already made elsewhere a full and voluntary disclosure of the facts, and that nothing he could now say would do more to criminate him than has been done already by that statement. Conceding this to be so, we are by no means prepared to say that it answers the claim of the witness to his privilege. If, as we have held to be the case, a full disclosure of the facts might tend to criminate the witness, we cannot see how that tendency is at all removed by showing that the witness had elsewhere made a statement tending to criminate him. The question before us is not what the witness may have said elsewhere; but whether, when it is apparent that a disclosure from him may tend to criminate him, he shall now, in a pending trial, be compelled to make that disclosure, although he claims his constitutional right of refusal. We do not see that his statements elsewhere have anything to do with the question. They are matters of fact wholly collateral, on which issues might be taken. . . . . Without deciding that a witness can be held in any case to have waived his privilege by answering before a different tribunal, we are clearly of opinion that there has been no such waiver in this case." In Temple v. Com. 75 Va. 892, which followed Cullen v. Com. supra, it was said: "These sound views of Judge Bouldin may be applied *verbatim et literatim* to the case before us. The only difference is that in Cullen's case the disclosure was made before a coroner's inquest, and in the other before a grand jury. In principle there is no difference between the two cases. So I think there is nothing in the fact that Temple had already testified before the grand jury—and especially in view of the circumstances under which he was brought before the grand jury, and in view of the further fact, that after he was in jail, held as a witness, he consulted counsel, who advised him that his testimony in court would criminate himself." In Boston Marine Ins. Co. v. Slocovitch, 55 Super. Ct. (N. Y.) 452, a ruling declaring to be incompetent a deposition which showed that at another trial a witness had given evidence which was a waiver of the privilege to refuse to testify which the witness claimed, was upheld. The court said: "We think that there was no error in this ruling. The witness had not waived his privilege by testifying on another occasion, nor was what he had testified to on another occasion admissible as evidence on this trial. The testimony given by the witness on the former examination could only be used for the purpose of contradicting the testimony given by him on this examination or of refreshing his memory, neither of which contingencies existed on this trial."

State v. Van Winkle, 80 Ia. 15, 45 N. W. 388, cannot be said to be directly opposed to the general doctrine. In that case it appeared that during the trial a witness refused to answer a question on the ground that the answer would incriminate him and the refusal being sustained by the court the witness was retired. Without any further proceedings intervening the witness was recalled when objection was made by the attorneys of the defendant to the testimony because the witness had claimed his privilege, but the objection was overruled. The court in upholding the ruling said: "The court held that the privilege was personal to the witness; that the defendant could not claim it in his favor; that it appeared from the records of the court that the witness testified before the grand jury in this case, and there disclosed what he claimed to know about it, without claiming his privilege; therefore he ought not to be permitted to claim it here. These rulings are fully supported by the authorities. . . . The only reason for excluding this testimony is that the witness claimed his privilege. Had he waived his privilege, and testified, the defendant had no grounds for objecting. If his privilege was denied him wrongfully, the wrong was to the witness, and not to the defendant, and the testimony was admissible as to the defendant, though it might not thereafter be used against the witness."

RENSCHLER

v.

STATE EX REL. HOGAN

Ohio Supreme Court—June 26, 1914.

90 Ohio St. 363; 107 N. E. 758.

Insurance — Burial Contract.

Contracts under which an undertaker agreed, in consideration of the payment of monthly interest on so-called mutual notes issued by him during the lives of the makers, that he would provide them with respectable

funerals, are contracts of insurance, rendering the undertaker, in the transaction of such insurance business, subject to regulation by the insurance department, under Gen. Code, § 670.

[See note at end of this case.]

Error to Court of Appeals. Franklin county.

Quo warranto proceeding. Timothy S. Hogan, relator, and John Renschler, defendant. Judgment for relator. Defendant brings error. The facts are state in the opinion. AFFIRMED.

Axline, Betts & Kerns for plaintiff in error.

Timothy S. Hogan, Frank Davis, Jr., and *Chas. J. Pretzman* for defendant in error.

[363] BY THE COURT.—In February of 1913, the relator, Timothy S. Hogan, attorney general of Ohio, filed his petition in *quo warranto* in the court of appeals of Franklin county against John Renschler, resident of Hancock county, Ohio, charging the [364] respondent with unlawfully exercising the franchise and privilege of writing life insurance.

It appears from the agreed statement of facts set forth in the record that the respondent, Renschler, was, at the time of the institution of this action and at the time of making the contracts hereinafter mentioned, engaged as an individual in the undertaking business in the city of Findlay, Hancock county, Ohio; that in connection with such business and to further its volume, Renschler, during the last two years, not acting as a corporation, partnership, firm or association, or as the agent or member of any such, but wholly in his individual capacity as a natural person, entered into certain written contracts with certain other parties, of the following nature:

The contract was termed a mutual note whereby the party of first part promised to pay to respondent during the natural life of first party the sum of fifteen cents (termed "interest") on or before the 10th of each month in advance. The face value of the note varied from $50 to $100. The contract or note provides that if the said first party be not in default at time of his or her death, the second party, Renschler, agrees to furnish funeral for said first party.

There are many stipulations in the so-called mutual note, among which are these provisions:

1. That any person in *good health* from *one* to *sixty* years of age can purchase one note as follows: one to ten years of age shall pay eight cents interest per month on a $50-note contract; ten to sixty years of age shall pay fifteen cents interest per month on a $100-note contract.

[365] 2. The object of the note is to provide the holder with a respectable burial, such funeral to be furnished and conducted by the respondent *his heirs* or *assigns only*.

3. After period of one year's payments has been completed, the holder may discontinue payments and will receive a credit slip, which slip may be applied on his or her funeral expenses, provided the funeral be conducted by respondent.

4. Note not payable in cash and redeemable for its face in such goods as handled by the respondent to be selected by his or her heirs, or friends making funeral arrangements.

5. If holder of note was not in good health at time of issue or if obtained through fraud, it shall be deemed void.

It further appears from the agreed statement of facts that the respondent has entered into a number of such contracts, all, however, confined to the territory within which he operates as undertaker; that he is receiving monthly payments, termed "interest," on mutual notes from many parties, both young and old, and has been ready, able and willing to comply with the terms of the contract, and as an individual undertaker has in fact complied with the terms thereof on the death of any holder of such mutual note and is now furnishing funeral outfits whenever any of the holders of such notes decease.

It is also made to appear that the respondent has never applied for or received any license or permission to transact any insurance business, from the superintendent of insurance of Ohio, or from [366] any other officer or branch of the state government, nor has he made any report of the nature or extent of his business to the said insurance department.

In February, 1914, the court of appeals of Franklin county, on the foregoing agreed facts, entered its decree of ouster against the respondent, and error was thereupon prosecuted by respondent to this court.

Held: The so-called mutual note is clearly insurance. By all the tests to which the contract may be subjected, it unerringly leads one to the conclusion that the intention of the parties was on the one hand to receive and no other to provide a fund to pay the burial expenses of the insured.

The contract being naked insurance and nothing else, it is subject to regulation by the insurance department. State v. Wichita Mut. Burial Ass'n, 73 Kan. 181, 84 Pac. 757; Fikes v. State, 87 Miss. 251, 39 So. 783; State v. Willett, 171 Ind. 296, 86 N. E. 68, 23 L.R.A.(N.S.) 197; Guenther on Insurance, section 191; I May on Insurance (4th ed.) section 27; Robbins v. Hennessey, 86 Ohio St. 181, 99 N. E. 319.

Even if individuals, acting as purely natural persons, can carry on the business of insurance and exercise the functions of such, they must comply with all of the laws of

Ohio on the subject of life insurance, Section 670, General Code, reading: "The provisions herein relating to the superintendent of insurance shall apply to all persons, companies and associations, whether incorporated or not, engaged in the business of insurance."

It may well be questioned whether a franchise of this character, which by its very nature presupposes perpetuity, could be granted to an individual. [367] See Robbins v. Hennessey, 86 Ohio St. 181, 99 N. E. 319; State v. Ackerman, 51 Ohio St. 163, 37 N. E. 828, 24 L.R.A. 298. But if it be granted that Section 670, General Code, above quoted, would authorize the issuing of such a franchise to an individual, such individual would be bound by all the restrictions and requirements of an incorporated company.

To hold otherwise would work a far-reaching hardship on that part of our population most needful of the protection of the state and lead to a recrudence of the old wildcat insurance days, now happily a thing of the past.

Judgment affirmed.

Nichols, C. J., Shauck, Johnson, Donahue, Wanamaker, Newman and Wilkin, JJ., concur.

NOTE.

Burial Insurance.

The reported case holds that a contract whereby one party is to be buried at the expense of the other, in consideration of a sum paid in installments during the life of the beneficiary, is a contract of insurance and that a person cannot make such a contract without complying with the restrictions imposed on insurance companies. That decision is in accord with what appears to be the only other case passing directly on the point. State v. Globe Casket, etc. Co. 82 Wash. 124, 143 Pac. 878, L.R.A. 1915B 976. In that case the facts were stated by the court as follows: "The appellant has not, in so far as the pleadings disclose, engaged in the general undertaking business, nor has it engaged in the manufacture or sale of general burial supplies, or acquired any of the named facilities therefor. Its business is confined solely to the sale of the certificates named in its articles, and the performance, through the agency of others, of the obligations assumed thereby. These certificates are in two forms. In the one, the corporation agrees, on the death of the holder, 'to take charge of the burial of said holder, and provide the necessary furnishing and materials therefor to the value of one hundred ($100) dollars,' as follows: One black broadcloth, white or plush colored casket; one outside box for casket; one hearse; two carriages; one burial robe; necessary embalming; necessary accessories; and services of funeral director.' The other is similar in form, with the exception that it does not name the value of the furnishings, and provides that the corporation will take charge of the funeral of the holder 'on the surrender of this receipt,' and will furnish the hearse and two carriages in places only where they are obtainable. Sales of the certificates are made through the agency of solicitors, on the installment plan. An applicant is required to sign a written application according to a form provided by the corporation. In this form is given a somewhat minute description of the applicant, his age, date and cause of his last illness, and his present condition of health, which the applicant warrants and declares to be true. His application is subject to the approval of the corporation. If approved, and the first installment is paid, the applicant is given a 'contract . . . as binding on the company as the certificate, provided payments are made according to contract.' When the installments are fully paid, the contract is taken up and one or the other of the certificates before mentioned is issued him. The cost of a certificate is not shown, although it is alleged that the sum collected in each case is a certain fixed sum." Passing on the nature of the contract the court said: "The contract evidenced by the certificate has all of the elements of a life insurance contract. It is an agreement to perform a service which can become obligatory only on the death of the certificate holder. While no beneficiary of the promise is named, in reality one exists, and may be ascertained with as much certainty as if directly and specifically named. It is the person who would otherwise be obligated to pay the expenses of the burial. This may be the heir or estate of the decedent, his relatives, or the state; but whoever such person may be, he is relieved of his obligation to the extent of the value of the service agreed to be performed by the terms of the certificate. There is, therefore, a promise by one person to perform a valuable service on the death of another, a valuable consideration paid for the promise, and a person to whom the benefit of the promise will inure. Had the ordinary nomenclature been used to designate the person making the promise, the person to whom the promise is made, the person who will receive the benefit of the promise, and the consideration paid for the promise, no one would question that it was an insurance contract. But a contract is to be determined from its nature and effect, not by the terminology used to characterize it. Here there is an 'insurer,' an 'insured,' a 'premium,' and a 'beneficiary,' and we think the contract nothing else than a plain,

ordinary insurance contract. Again, the contract is not one that the courts will strain the laws to uphold. It is freighted with the greatest possibilities for fraud. Since the corporation was organized under the general incorporation laws, it could enter upon its business when its capital stock was all subscribed. It is not required to have or keep any paid up capital. Its duration is limited to fifty years. The officers of the corporation may handle and dispose of the funds received in payment of the certificates in any manner they please. It is certain that many of these certificates will not be ripe for redemption for a number of years, and it is reasonably certain that some of them will survive the life of the corporation itself. If, therefore, the company were permitted to continue the business, and all, or any considerable proportion, of these certificates were ever redeemed, it would be a consummation unique in human experience."

This note does not discuss the status of mutual benefit associations formed for the purpose of providing burial for their members, or of insurance contracts whereby a sum of money is to be paid to the beneficiary for the funeral expenses of the insured.

STATE EX REL. FISHBACK
v.
UNIVERSAL SERVICE AGENCY.

Washington Supreme Court—September 25, 1915.

87 Wash. 413; 151 Pac. 798.

Insurance — What Constitutes Insurance Contract.

Where a corporation contracts with its subscribers to procure for them medical services, drugs, and merchandise, at a relatively low rate, not guaranteeing performance by the individuals who are to furnish services and goods, such corporation is not engaged in the insurance business subjecting it to the authority of the insurance commissioners, since by Laws 1911, p. 161 (the Insurance Code), "insurance" is a contract whereby one party, called the "insurer," for a consideration, undertakes to pay money or its equivalent, or to do an act valuable to another party, called the "insured," or his beneficiary, upon the happening of the hazard or peril insured against, whereby the party insured or his beneficiary suffers loss or injury, while in the instant case there is no hazard or peril whereby the purchasers of contracts may suffer a loss or injury which the corporation insures against.

[See note at end of this case.]

Appeal from Superior Court, Yakima county: PREBLE, Judge.

Action to forfeit corporate franchise. H. O. Fishback, relator, and Universal Service Agency, defendant. Judgment for defendant. Relator appeals. The facts are stated in the opinion. AFFIRMED.

The Attorney General, John M. Wilson and *L. L. Thompson* for appellant.

Wilson & Hatfield for respondent.

[414] FULLERTON, J.—This action was instituted on the relation of the insurance commissioner of the state of Washington against the Universal Service Agency, a corporation, organized under the laws of this state, to forfeit its corporate franchise and wind up its affairs. A demurrer was interposed and sustained to the complaint, and from an adverse judgment rendered thereon, the relator appeals. The grievance specially complained of in the complaint is that the respondent corporation has been, and is now, doing an insurance business without complying with the statutes regulating the doing of such business. The nature of the business conducted by the respondent can best be illustrated by setting forth the actual transactions, and this we do, although necessitating quotations from the complaint at a somewhat tedious length.

As initiatory of its business, the respondent entered into separate contracts with a dealer in shoes, a dealer in groceries, a dealer in harness, a dealer in clothing, certain dealers in drugs, and a physician, whereby the dealers agreed to enter into a contract to sell their wares, and the physician agreed to enter into a contract to sell his services, to such persons as the corporation might direct; the dealers, at stated discounts from their regular rates, and the physician, for a consideration to be paid him by the corporation. The contract with the dealers in drugs is typical of the contracts with the other dealers, and we set the same out in full:

[415] "This memorandum of agreement made this 24th day of April, A. D. 1914, by and between the Universal Service Agency, a corporation of the state of Washington, party of the first part, and W. V. Blackwell and E. A. Isaacson, co-partners doing business under the firm name and style of Reading Drug Co. Central Drug Co. a corporation and Fred L. Janeck, as parties of the second part,

"Witnesseth: That whereas, the party of the first part proposes to act as agent of various persons in securing for them certain privileges and benefits, and

"Whereas, the parties of the second part, being each engaged in business as retail druggists in the city of North Yakima, and the

custom of said persons will be of benefit to them, and will reduce their advertising expenses.

"Now Therefore, the said second parties, in consideration of the premises, agree that they and each of them will contract direct with all persons complying with the stipulations required by the first party, to fill for said persons and the members of their families dependent on them, any and all prescriptions of physicians that may be presented by the holder or any member of his family dependent on him, at a flat and uniform rate of thirty-five cents ($0.35) per prescription, for a period of one year from and after the date of said contract, provided, it be delivered in the year 1914; said contract to be evidenced by a printed form delivered to the holder by the party of the first part as follows, to-wit:

"'We, the Reading Drug Co. a co-partnership, Central Drug Co. a corporation, and Fred L. Janeck, do hereby agree that we and each of us will fill for the holder and the members of his family dependent on him, any and all prescriptions of physicians that may be presented by the holder or any member of his family dependent on him, at a flat and uniform rate of thirty-five cents ($0.35) per prescription, for a period of one year from and after the date and delivery of this contract No. .... dated and delivered this .... day of ....., A. D. 1914.

"'The delivery of this contract and continuing compliance with the stipulations required by the Universal Service Agency, hereto attached and made a part hereof, shall constitute an acceptance of this offer by the holder, the sufficiency of the consideration therefor being admitted. . . .'

[416] "It being understood and agreed that a printed copy of the foregoing form, when delivered by the party of the first part and accepted by the holder, shall constitute an irrevocable offer to the holder thereof, provided that he has complied with the stipulations required of him by the party of the first part, and compliance with such stipulations shall constitute an acceptance of the terms thereof by the holder. The said second parties hereby admit the sufficiency of the consideration therefor and their liability to the holder for any breach thereof."

The contract with the physician was in the following form:

"This Memorandum of Agreement made this 15th day of April, 1914, by and between the Universal Service Agency, a corporation of the state of Washington, party of the first part, and Dr. H. B. Pratt, a licensed physician and surgeon as party of the second part,

"Witnesseth: That Whereas, the party of the first part proposes to act as agent of various persons in securing for them certain privileges and benefits and among other things, desires to procure to said various persons, reduced rates for medical services and to act as agent for certain physicians in collecting their fees,

"Now Therefore, in consideration of the premises and the mutual covenants hereinafter contained, the said party of the first part agrees that he will contract directly with all persons complying with the stipulations required by the first party and will render to them and to the members of their families dependent on them, as their names shall appear upon the card furnished by the party of the first part, certain limited professional services hereinafter defined, for a period of one year beginning two weeks from and after the date of said contract, provided it be delivered in the year 1914; said contract to be evidenced by a printed form and delivered to the holder by the party of the first part as follows, to-wit:

"'Dr. H. B. Pratt, a licensed physician and surgeon, does hereby agree that he will furnish to the holder and to the members of his family dependent on him as their names shall appear upon the card furnished by the Universal Service Agency, and that the holder and his said family shall be entitled to all reasonable physician's services falling within the scope of duties of a physician and surgeon, including treatment of all physicial diseases and ailments of every kind, nature [417] and description, excepting: first, venereal diseases; second, chronic and incurable diseases; third, major surgery. Provided, however, that the holder must at all times come to the office of the physician for treatment if physically able so to do. That the holder shall pay to the physician one-half the regular professional fee in obstetrical cases. That the holder shall pay one-half the usual mileage for necessary trips outside the limits of the city of North Yakima. That the holder shall at all times be entitled to call in other physicians for consultation or assistance and pay therefor such fees as such consulting or assisting physicians may demand Provided, further, that the expense of all medicines and appliances shall be at the expense of the holder; said services to be rendered for a period of one year beginning two weeks from and after the date and delivery of this contract number .... dated and delivered this .... day of ..... A. D 1914.'"

"The delivery of this contract and the continued compliance with the stipulations required by the Universal Service Agency hereto attached and made a part hereof, and the strict payment of all sums required by the Universal Service Agency at the time and in the manner in said contract required, shall constitute an acceptance of

this offer by the holder; the consideration for the services above enumerated being limited to the payment made by the holder to the said Universal Service Agency. The receipt of said sums by the said Universal Service Agency in my behalf being sufficient consideration for the services herein offered and not otherwise provided for.

"Witness my hand and seal this ..... day of April, 1914.

" 'Dr. H. B. Pratt.'

"It being understood and agreed that a printed copy of the foregoing form when delivered to the party of the first part and accepted by the holder, shall constitute an irrevocable offer to the holder thereof provided, that he has complied with the stipulations required of him by the party of the first part; that compliance with such stipulations shall constitute an acceptance of the terms thereof by the holder. In full consideration of the services rendered as above provided and not otherwise provided for, the said party of the first part agrees with the party of the second part that it [418] will collect from and of each person to whom said policy is delivered, the sum of $3 and the further sum of $1 for each child of the holder whose name shall appear on the card issued by the party of the first part, the said dollar for each child to be collected from the holder by the party of the first part when this contract is delivered; the further sum of $3 to be collected as follows: $1.25 within two months after delivery; $1.25 within three months after delivery; $0.50 within four months after delivery, provided that in cases where the holder shall pay the party of the first part the full amount of his premium when the policy is delivered, then the said sum of $3 shall be forthwith due and payable to the party of the second part. And provided further that if the holder shall drop his contract after the first payment of five dollars, then the party of the second part shall be entitled to the sum of $0.50 of the sum received from the said holder.

"It is further understood and agreed that the party of the first part shall make and render to the party of the second part, on or before the 10th day of each and every month, a statement of the contracts issued, the dates thereof, and the amounts due thereon, to the party of the second part, and shall thereupon pay the amounts so found due the said party of the second part; it being understood and agreed by and between the parties hereto that the party of the second part hereby agrees to contract directly with the holder to furnish the services herein specified. That the party of the first part has no interest therein except to secure acceptances of the offer herein made by the party of the second part and to collect from such persons the fees herein specified for the use and benefit of the party of the second part. And the party of the first part assumes no liability for any negligence, lack of professional skill, or failure of attention to any or all persons accepting the offer herein contained, and that the party of the second part does hereby assume all liability that may be incurred by any negligence or lack of professional skill to the holder of the contract herein offered.

"It is further understood and agreed by and between the parties hereto that the payment to the party of the first part by the holder, of the sums herein specified, shall be in full compensation of the services herein offered, except such as in said offer are excepted. That when said sums are [419] paid to the party of the first part, the party of the second part shall be bound to render to the holder, the services herein enumerated for the period of one year beginning two weeks from and after the date and delivery of said contract. And in the event of the failure of the party of the first part to pay said sum to the party of the second part, then the said party of the second part shall look only to the party of the first part for said sums; and that receipts of the party of the first part for the payment of said sums by the holder, shall be binding upon the party of the second part hereto."

After procuring the contracts mentioned, the corporation proceeded to sell, for a fixed consideration, the privileges therein acquired to any person or family of persons whom it could induce to purchase the same, taking from such person an application as follows:

"The Universal Service Agency
302 Miller Building
"North Yakima, Washington.

"I hereby apply for the service furnished by the Universal Service Agency for the period of one year, and agree that if a contract is issued to me that I will abide by the rules and regulations in said contract contained, and will pay therefor the sum of fifteen dollars ($15) and one dollar ($1) for each of my children, as follows: Five dollars ($5) and one dollar ($1) for each of my children cash and the balance in not more than four equal payments, beginning on or before the 10th of the month after my contract is issued; and I hereby consent that my contract may be cancelled upon default of any payment or upon my breach of any of the rules and regulations in said contract specified. [Names and ages of the family of the applicant.]

"A fee of .. dollars accompanies this application. . . . "

On receipt of the application and the payments specified, it delivered to the purchaser the following instrument:

"Application No .... Contract No. ....

"Medical, Pharmaceutical and Mercantile Benefits Offered by The Universal Service Agency, a Corporation, of North Yakima, Washington.

"In consideration of the compensation hereinafter provided and upon compliance with the stipulations hereinafter [420] contained, the Universal Service Agency, hereinafter called the Agency, hereby offers the Holder and the members of his family dependent upon him, whose name is [Naming applicant's wife and children] the special contracts with their privileges and benefits which are hereto attached and enumerated as contracts A, B, C, D, E, F, .., the enjoyment of the privileges and benefits in said contracts offered, subject always to the conditions following, to-wit:

"I. That it is agreed and understood that the agency is acting as the agent of the holder in securing the propositions contained in riders 'A,' 'B,' 'C,' 'D,' 'E,' and 'F,' that said propositions are contingent offers which become contracts upon their acceptance by the holder and his continued compliance with the conditions herein stipulated and that acceptance thereof shall at all times be evidenced by the payment to the agency of the compensation hereinafter provided and the delivery of these presents to the holder.

"II. The life of said contracts and each of them shall continue for a period of one year after the date of these presents, it being agreed that delivery and acceptance shall be considered made as of the date of said contracts.

"III. The holder shall not be entitled to the privileges or benefits in said contracts offered unless he is in possession of, and exhibits to the persons or firms, from whom said privileges and benefits are claimed, evidence of his right thereto.

"IV. The agency will furnish to each holder a card showing the persons and firms offering privileges and benefits to him, the names of his family dependent on him and the time for which he has paid the compensation due the agency. Said cards shall be sufficient evidence of the holder's acceptance of the offers herein contained and when exhibited will entitle the holder to all the privileges and benefits herein offered. The agency reserves the right to change the list of persons or firms appearing thereon without notice. Said card shall be non-negotiable and non-transferable.

"V. In presenting the various offers herein contained the agency acts only as the agent of the parties and assumes no liability for the breach of any one or all of said contracts. The agency agrees, however, that in the event of a breach, it will use its best efforts to procure other persons or firms to offer the same or similar service.

[421] "VI. The agency shall use its discretion in selecting the physicians and pharmacists, but in no case is it an insurer against the negligence of any physician or pharmacist offering services or benefits herein.

"VII. The contracts herein contained offering reduced rates on merchandise or for the performance of service are made contingent upon cash payments by the holder.

"VIII. The privileges and benefits in these presents offered are contingent upon the holder paying to the agency its compensation at the time and in the manner following: that is to say, fifteen dollars ($15) per year, and one dollar ($1) additional for each child which the holder may have dependent upon him, five dollars and one dollar for each child, payable cash in advance, and the balance in not more than four equal monthly payments on or before the 10th day of each and every month until paid.

"Said amounts to be in full compensation to the agency in securing the contracts herein offered and in payment of the services of physicians not otherwise provided for.

"The agency grants to the holder without charge the privilege of consulting with and the advice and services of its attorneys on all legal matters in which he is personally interested, including conveyanceing and all matters within the scope of service usually rendered by attorneys and counsellors at law, excepting: (1) Matters involving his domestic relations, (2) Matters requiring an appearance in any court, (3) Matters in which the agency's attorneys represent opposite parties, (4) Collections will be taken by the agency's attorneys for a fee of fifteen (15) per cent. of the amount collected, provided it be collected without suit."

The attached contract of the shoe dealer mentioned in the instrument is as follows:

"SHOES.

"Allen & Mackie do hereby agree that they will sell to the holder and members of his family dependent on him any of their merchandise in the regular course of trade at ten per cent discount from the current retail prices on cash sales of one dollar or more or on such credit sales as they may at their option make, except special sales, for a period of one year from and after the date and delivery of this contract No. ...., dated and delivered this .... day of ....., [422] 1914. The delivery of this contract and the continuing compliance with the stipulations required by the Universal Service Agency hereto attached and made a part hereof shall constitute an acceptance of this offer by the holder, the sufficiency of the consideration therefor being admitted.

"Allen & Mackie

"Per J. H. Allen."

That of the dealers in drugs and medicines:

"DRUGS.

"We, the Reading Drug Co., a co-partnership, Central Drug Co., a corporation, and Fred L. Janeck, do hereby agree that we and each of us will fill for the holder and the members of his family dependent on him any and all prescriptions of physicians that may be presented by the holder or any member of his family dependent on him, at a flat and uniform rate of thirty-five cents ($0.35) for a period of one year from and after the date and delivery of this contract No. ...., dated and delivered this .... day of ....., 1914. The delivery of this contract and the continuing compliance with the stipulations required my the Universal Service Agency hereto attached and made a part hereof, shall constitute an acceptance of this offer by the holder, the sufficiency of the consideration therefor being admitted.

"Reading Drug Co.,
"By E. A. Isaacson.
"Central Drug Co., a corporation,
"By J. E. Barkes,
"Fred L. Janeck."

And that of the physician:

"Dr. H. B. Pratt, a licensed physician and surgeon, does hereby agree that he will furnish to the holder and to members of his family dependent on him as their names shall appear upon the card furnished by the Universal Service Agency, and that the holder and his said family shall be entitled to all reasonable physician's services falling within the scope of the duties of a physician and surgeon, including treatment of all physical diseases and ailments of everykind, nature and description, excepting: first, venereal diseases; second, chronic and incurable diseases; third, major surgery. Provided, however, that the holder must at all times come to the office [423] of the physician for treatment if physically able so to do. That the holder shall pay to the physician one-half the regular professional fee in obstetrical cases. That the holder shall pay one-half the usual mileage for necessary trips outside the limits of the city of North Yakima. That the holder shall at all times be entitled to call in other physicians for consultation or assistance and pay therefor such fees as such consulting or assisting physicians may demand. Provided, further, that the expense of all medicines and appliances shall be at the expense of the holder; said services to be rendered for a period of one year beginning two weeks from and after the date and delivery of this contract No. .... dated and delivered this .... day of ....., A. D. 1914.

"The delivery of this contract and the continued compliance with the stipulations required by the Universal Service Agency hereto attached and made a part hereof, and the strict payment of all sums required by the Universal Service Agency at the time and in the manner in said contract required shall constitute an acceptance of this offer by the holder; the consideration for the services above enumerated being limited to the payment made by the holder to the said Universal Service Agency. The receipt of said sum by the said Universal Service Agency in my behalf being sufficient consideration for the services herein offered and not otherwise provided for.

"Witness my hand and seal this 15th day of April, 1914.

"Dr. H. B. Pratt."

Section 1 of the insurance code (Laws 1911, ch. 49, p. 161; 3 Rem. & Bal. Code, § 6059–1), defines insurance as follows:

"Insurance is a contract whereby one party called the 'insurer,' for a consideration, undertakes to pay money or its equivalent, or to do an act valuable to another party called the 'insured,' or to his 'beneficiary,' upon the happening of the hazard or peril insured against, whereby the party insured or his beneficiary suffers loss or injury."

The question therefore is, does the business of the corporation constitute an insurance business within the meaning of that term as defined by the statute. If it does, then the corporation is subject to restraint at the suit of the insurance [424] commissioner, otherwise it is not. The essential elements of an insurance contract, it will be observed from the definition given, are (1) an insurer, (2) a consideration, (3) a person insured or his beneficiary, (4) a hazard or peril insured against whereby the insured or his beneficiary may suffer loss or injury.

Testing the business of the respondent by these essentials, it seems to be wanting in the principal essential necessary to make it an insurance contract. Clearly there is no hazard or peril whereby the purchasers of these contracts may suffer loss or injury, which the respondent insures against. It does not guarantee that any of the contracting parties, even the physician, will perform the services agreed upon. On the contrary, in the paragraph lettered V of its offer of benefits, it expressly declares that it "assumes no liability for the breach of any one or all of such contracts." It is true that it does say in the same paragraph that, in the event of a breach of the agreement by the dealers or physician, it will use its best efforts to procure other persons or firms to offer the same or similar service. But this, while it may require the respondent to use reasonable dili-

gence to procure another person to perform the services in case the contracting party for any reason fails therein, and may render it liable to the contract holder in damages if it should fail to exercise such diligence, it is in no sense a guarantor or an insurer that the service will be performed. There is, therefore, as we see it, no hazard or peril insured against, and the transaction being lacking in this essential element, it is not an engaging in the insurance business.

As authority for his position, the insurance commissioner relies principally upon the so-called Physicians' Defense Co. Cases, found in 199 Fed. 576, 118 C. C. A. 50, 47 L.R.A.(N.S.) 290, and in 100 Minn. 490, 111 N. W. 396, and perhaps somewhat upon the case from this court of State v. Globe Casket, etc. Co. 82 Wash. 124, 143 Pac. [425] 878, L.R.A. 1915B 976. But the contracts in these cases which were held to be contracts of insurance differ widely from the contract in the case at bar. In the Physicians' Defense Co. Cases, the company agreed, for a stated consideration paid to it by a physician, to defend the physician against "all civil suits for damages for malpractice, based on professional services rendered by himself or his agent during the time of the contract at its own expense, not exceeding five thousand dollars," subject to certain defined conditions. There was in those cases a contract for indemnity against a hazard which might cause the physician loss, but, as we have attempted to show, no hazard or peril is insured against by the contract in the case at bar. So with the case cited from this court. There was an insurance against loss to the beneficiary of the insured. We cannot, therefore, think them conclusive, or even in point in the case at bar.

Our conclusion requires the affirmance of the judgment below. It is so ordered.

Morris, C. J., Ellis, and Main, JJ., concur.

NOTE.

What Is an "Insurance Company" or "Contract of Insurance."

Generally, 1022.
Contracts Held to be of Insurance, 1022.
Contracts Held Not to be of Insurance, 1023.

Generally.

The earlier cases discussing what constitutes an "insurance company" or a "contract of insurance" are reviewed in the note to American Surety Co. v. Folk, Ann. Cas. 1912D 1024. This note presents the recent cases on that point.

The elements of a contract of insurance were stated in Physicians' Defense Co. v. Cooper, 199 Fed. 576, 118 C. C. A. 50, 47 L.R.A.(N.S.) 290, as follows: "The principal ingredients of such a contract are the consideration, the risk, and the indemnity. The consideration is the premium for the insurer's undertaking; the risk may be be said to be the perils or contingencies against which the assured is protected; and the indemnity is the stipulated desideratum to be paid to the assured in case he has suffered loss or damage through the perils and contingencies specified." In People v. May, 162 App. Div. 215, 147 N. Y. S. 487, *affirmed* 212 N. Y. 561, 106 N. E. 1039, it was said: "'Insurance, in its most general and comprehensive signification, is a system of business by which one party, for an agreed consideration, proportionate to the risk involved undertakes to a specified extent and under stipulated conditions to indemnify another against pecuniary loss arising from the destruction of or injury to property from certain perils,' says the American & English Encyclopedia of Law (volume 16, p. 838), and this is in substance stated by the court in Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, 462, 14 S. Ct. 379, 38 U. S. (L. ed.) 231. The contract of insurance has been termed an aleatory contract, for the reason that it is one involving risk or hazard. It is, however, very different in its nature from a mere wager. In the latter the risk of loss is created by the contract itself; in the former the risk exists independently of the contract, and the insurance merely shifts the liability from the one party to the other."

For a discussion of burial contracts as insurance see the note to Renschler v. State, reported ante, this volume, at page 1014.

Contracts Held to Be of Insurance.

A contract in consideration of a stated annual fee to assume the defense of any action which may be brought against the payor for malpractice as a physician is an insurance contract. Physicians' Defense Co. v. Cooper, 199 Fed. 576, 118 C. C. A. 50, 47 L.R.A.(N.S.) 290, *affirming* 188 Fed. 832. In that case it was said: "Now we may look to the contract in question, and determine whether it falls within the category of insurance, and whether a continuance of the issuance of such contracts does or does not constitute insurance business. In case the holder of the contract is sued for damages for civil malpractice, the Defense Company engages to employ a local attorney, in whose selection the holder of the contract shall have a voice, who, together with the company's attorney, will defend the case without expense to the holder, and this to the extent of the exhaustion of the sum named in the policy,

which for the defense of one suit is five thousand dollars; if others in one year, ten thousand dollars. It seems plain that when the holder is sued for civil malpractice, which he deems is wrongful, and the necessity of making defense is thrust upon him, he must suffer loss, damage, or liability within the meaning of the contract to the extent that he is obliged to employ attorneys and meet the expenses of the trial in regular course. He must pay his attorneys for their services in his behalf, and he must pay his costs on the trial. These are the contingencies which the Defense Company agrees to meet. True, the company does not agree to pay the holder of the contract the amount of such expenses incurred up to the sum of five thousand dollars; but it does agree to lift them from the burden or liability of the holder, so that he will not be required to use his own money to meet them. The contingency of paying the expenses of attorneys and cost of defense in case of suit for civil malpractice is the risk or peril which the company agrees that it will meet, and it can make no difference whether it pays the amount of the expenses and costs incurred to the parties doing the service or to the holder of the contract, so that he may himself meet such expenses and costs. The indemnity is the amount of such expenses and costs to be paid. Or, to put it another way, the Defense Company agrees to hold the holder of the contract harmless in that respect to the extent of five thousand dollars in the event of the happening of the contingency specified. Such a contract, in our opinion, cannot be classed as a contract for personal services. The company is not itself an attorney, and does not undertake the defense as such. What it does undertake is, in case of suit, to employ a local attorney, in whose selection the holder shall have a voice, who, with the company's attorney, will defend the case, and to relieve the holder from the expense thereof, an expense which must follow the happening of the very contingency provided against. Not only this, but the company must relieve the holder of paying the costs of suit. Suppose the contract had been to repay to the holder whatever sums, not exceeding five thousand dollars, he should be required to pay out for attorneys and costs in case of such litigation. Could there be any question that there would be a contract of insurance? We think not. Can it change the character of the contract in this respect that it purports to hold the holder harmless against the payment of such expenses and costs? The contract, reduced to its simplest idea, is but an agreement to pay the expenses and costs that the holder would have to pay in the contingency specified. This is the indemnity pure and simple, and with whatever verbiage the contract may be clothed it does not serve to cover its real purpose, which is one to indemnify the holder against damage and liability for attorney's expenses and costs of defense, in the event he is sued for malpractice."

So in People v. Standard Plate Glass etc. Co. 156 N. Y. S. 1012, it was held that an agreement to care for and replace plate glass was an insurance contract, the court saying: "Defendant's proposed contract provides for the care for a fixed term, for a certain consideration, of plate glass, and in the event that the glass is broken within the period of the running of the contract the defendant agrees to replace the broken glass. A plate glass insurance policy issued by a company authorized to do plate glass insurance provides for the replacing of glass in the event of its being broken or for the payment of a given sum of money, either one or the other. The fact that the defendant's contract provides, in addition to the replacing of a broken glass to keep the glass puttied in the frame during the period of the contract is quite beside the mark. This provision of the contract is simply in the nature of an inspection, and is really for the protection of the company insuring the glass. Because the company agrees to inspect and to putty does not alter in any way the nature of the contract. No plate glass owner enters into one of these contracts, agreeing to pay a stipulated sum for the purpose of having his window glass puttied, he takes it for the purpose of insuring himself against loss by reason of the breakage of the glass. It looks like an attempt to evade the provisions of the insurance law."

Contracts Held Not to Be of Insurance.

In Curtis v. New York Life Ins. Co. 217 Mass. 47, 104 N. E. 553, a contract in consideration of a single payment to pay a specified endowment if the promisee was living at the end of five years was held not to be an insurance contract. The court said: "The contract in question does not provide for payment upon the 'destruction, loss or injury' of anything. Under it the defendant assumed the obligation of payment, not upon the destruction or loss during the period named, but upon the continuance of the life of Jenness during that period. It is not what ordinarily is known as an endowment insurance policy, under which the sum named in the policy is payable to the insured himself, if he lives a certain length of time, and in the event of his prior death is payable to his beneficiaries, as in the ordinary life policy." In Colaizzi v. Pennsylvania R. Co. 208 N. Y. 275, 101 N. E. 859, *affirming* 143 App. Div. 638, 128 N. L. S. 312, . . . a railroad relief department was held not to be engaged in the business of insurance. In People v. May, 162

App. Div. 215, 147 N. Y. S. 487, *affirmed* 212 N. Y. 561, 106 N. E. 1039, an agreement by a mercantile agency to guarantee the accuracy of its reports was held not to be an insurance contract. Referring to the contract, the court said: "It does not guarantee the solvency of any one; it merely guarantees that the report which it makes is at the date of such report a true statement of the facts which it sets forth, and limits its responsibility to such report, stipulating that in no event shall the damages exceed the amount of the credit which may be extended upon the basis of such report. This does not assume to pay any damages where the report is truthful and accurate; it does not assume any liability whatever for the credit extended, unless the credit was extended upon the basis of a report which was in fact inaccurate and false in material respects; and then it merely seeks to have the amount of the damages fixed by contract rather than by actions at law. It is one thing to guarantee the accuracy of one's own work, and quite another to assume the risk of future insolvency. We apprehend that any individual could make a contract with a merchant that he would investigate the financial condition of the customers of such merchant, guaranteeing the accuracy of his statements in material respects and provide for liquidated damages, and that no one would ever suggest that he was violating the Insurance Law, or that the contract amounted to insurance; and, as the Business Corporation Law contemplates a system of corporate business such as individuals may properly carry on, we see no reason why the relator should not be permitted to amend its certificate of incorporation in the manner suggested." In Isaac H. Blanchard Co. v. Hamblin, 162 Mo. App. 242, 144 S. W. 880, an agreement of several persons to indemnify each other in case of a loss of property by fire was held not to be an insurance contract the court saying: "It is argued by counsel for defendant that the association was unlawful and its policies void for the reason that the purpose of its members was to do an insurance business without complying with the statutes of this state relating to such business. [Arts. 5 and 6, Ch. 119, Rev. Stat. 1899.] This contention is not without support in the authorities. The most apposite case to which we are referred is State v. Alley [96 Miss. 720] 51 So. 467, decided by the Supreme Court of Mississippi. We are much impressed by the reasoning of that decision but have concluded that a proper construction of our statutory law relating to insurance discloses the inapplicability of the rules announced in that and similar cases. A contract between a limited number of individuals, partnerships, and corporations engaged in the same line of business by which they merely undertake to indemnify each other against loss by fire, and do not purpose to issue policies to others not parties to the contract is not a contract for the creation of an insurance business within the meaning of that term expressed in our statutes. It is to be classified as an interindemnity contract and, therefore, as a contract outside the purview of the insurance law in force at the time the contract was made." In John Church Co. v. Aetna Indemnity Co. 13 Ga. App. 826, 80 S. E. 1093, the question whether a contract was one of suretyship or of fidelity insurance was discussed but not decided. In Hampton v. Toxteth Co-operative Society [1915] 1 Ch. (Eng.) 721, in holding a contract of an industrial society not to be one of insurance it was said: "It is now necessary to consider the nature of the defendant society and what it is that they are doing which is said to amount to a carrying on of life assurance business. The defendant society is an industrial and provident society duly registered under the Act of 1876. Its objects as defined by the rules are to carry on the trades of general dealers, both wholesale and retail, and it appears to be a highly prosperous company. By rule 14 the net profits are to be applied in paying or providing for (1.) expenses of management; (2.) and (3.) interest on paid up capital and loan capital; (4.) depreciations; (5.) 'such other sums as any quarterly meeting may vote for the objects of the society;' (6.) a reserved fund for any purpose whether charitable, philanthropic, of public utility, or any other purposes whether within the objects for which the society is formed or not; (7.) any other sums the committee consider necessary for contingencies; and (8.) 1½ per cent. to the educational fund and the remainder to be divided amongst members and non-members in proportion to their purchases from the society, but non-members are only to receive half the rate which is allocated to members. The society for some years affected what is described as a collective policy with the Co-operative Insurance Society, Limited, to provide for each member who should die during the currency of the policy 4*s.* in respect of each 1*l.* of his average purchases. No question arises on this policy. It occurred, however, to the managers that it might be advantageous to drop this policy and to arrange for equivalent benefits to be given to members out of the profits of the company, and on October 31, 1911, new rules were passed by adding to rule 1 the words 'and to carry on the business of insurance as provided in rule 14a,' and by adding to rule after '(6.) reserve fund' the words 'to an insurance fund, by such appropriation as the general meetings may from time to time determine.' Rule 14a was a new rule headed 'Insurance Fund.' It

authorized the committee of management to form a fund (inter alia) for providing a sum to be paid on the death of a member or the wife or husband of a member, to be proportioned to one year's average purchases of the member from the society during the three years immediately preceding death. On June 8 it was resolved that the benefits of the collective assurance scheme be extended so as to provide for the payment of 2s. in the pound on purchases on the death of married women members or the wives of male members. All these new rules have been registered under the Act. The defendant society is not subject to the statutory restriction imposed by the Companies Acts; the members can apply both income and capital to any purpose they think fit. A person desiring to become a member applies to the committee, pays 1*l.* for a share, and receives a membership card in which his or her name is inserted and a registered number, together with a member's purchase book in which the amount of purchases is entered. There is no other document of any kind except so far as the rules may be considered a document. These being the admitted facts, I think there is no carrying on life assurance business within the meaning of the Act. No policy has been issued, no premium has been paid, there is no obligation upon the society to appropriate any further sum to the insurance fund. It seems to me that it is an abuse of language to call the membership card a policy or an instrument evidencing a contract."

In the reported case a corporation which contracts for the sale of various commodities and the services of professional men at stated discounts from their regular rates and sells to subscribers the benefit of those contracts, is held not to be engaging in the insurance business.

BABER ET AL.

v.

CAPLES.

Oregon Supreme Court—February 3, 1914.

71 Oregon 212; 133 Pac. 472.

Gifts — Causa Mortis — Evidence Sufficient.

Evidence held to show that decedent gave the promissory notes in controversy to defendant; that she indorsed each of them with her own hand, and delivered them to the defendant with intent to vest title in him, and that he accepted them as a gift causa mortis.

Requisites of Gift Causa Mortis — Delivery.

A "gift causa mortis," like a gift inter vivos, must be completely executed and go into immediate effect, and be accompanied by an actual and complete delivery.

[See 99 Am. St. Rep. 895.]

Sufficiency of Delivery — Gift of Note.

Whether a gift of a promissory note or other chose in action is causa mortis or inter vivos, the actual delivery of the written evidence of the debt is sufficient, without any assignment or indorsement.

Validity of Gift Causa Mortis.

Gifts causa mortis, if made by competent persons, and fully executed, are valid, in the absence of fraud or undue influence, if the rights of creditors are not affected.

Same.

While gifts causa mortis are sustained only on clear proof of the essential facts, there is no presumption of law against them.

Evidence — Opinion Evidence — As to Handwriting — Weight.

Opinion evidence in relation to handwriting is generally viewed with caution by the courts.

Undue Influence — Persons Engaged to be Married — Presumption.

Where a relation of confidence exists, as between a man and woman engaged to be married, it is incumbent upon the donee causa mortis to show that the gift was not obtained by fraud or undue influence.

[See note at end of this case.]

Laches — Setting Aside Gift.

Where plaintiffs, in a suit to set aside a gift causa mortis, knew as much about the facts 12 years before as when suit was commenced, their acquiescence in the gift for that time was laches.

Gifts — Fraud and Undue Influence.

Evidence held to show that a gift causa mortis was not induced by fraud or undue influence of the donee.

Appeal from Circuit Court, Multnomah county; McGINN, Judge.

Action to set aside gift causa mortis, for accounting, etc. Minnie Baber, et al., plaintiffs, and C. C. Caples, defendant. Judgment for plaintiffs, Defendant appeals. The facts are stated in the opinion. REVERSED.

John T. McKee and *Cake & Cake* for appellant.

Munoho I. Langley and *King & Seaton* for respondents.

[213] RAMSEY, J.—On July 3, 1912, the plaintiffs began this suit to set aside a gift *causa mortis* made by Liverne H. Baber, to the defendant, in March, 1900, and for an accounting, etc.

The complaint is lengthy; and, as no questions arise as to its sufficiency, it is unnecessary to set it forth in this opinion.

Granville H. Baber, the father of Liverne H. Baber and the plaintiff Josephine Baber MacLeod, and husband of the plaintiff Minnie Baber, died testate in Washington County on August 1, 1898, leaving an [214] estate of the value of $33,000. Said Liverne H. and Josephine were his sole heirs, and Minnie Baber, his widow. At the time of his death Josephine was 12 years old and Liverne was about 22. The decedent in his will appointed the defendant executor thereof, and trustee. The will was admitted to probate by the County Court of Washington County, and letters testamentary were duly issued to the defendant. By the terms of said will the defendant, as executor, was directed to pay to Liverne a legacy of $5,000 upon the death of the testator, or as soon thereafter as he could collect the same out of the assets of the estate, and she was given also one third of the residue of the estate when she should reach the age of 23 years. The defendant paid said sums to Liverne in accordance with the terms of the will, and took her receipts therefor. The last payment amounted to $6,203.25 in money, notes, mortgages, and land, and was made in November, 1899. The defendant resigned the trusteeship of said estate, created by said will, before this suit was commenced. A few weeks after the death of Granville H. Baber, the defendant and Liverne became engaged to be married, and this engagement continued until the death of Liverne. She died on March 22, 1900, intestate. Prior to the death of her father, the defendant "went with" her, but there was no engagement until shortly after his death. This engagement was known to the plaintiffs prior to the death of Liverne. Liverne went to Stanford University in December, 1898 (after her father's death, and after the engagement to the defendant), and remained there as a student until the close of the college year in May, 1899, and then she went to Pacific Grove for awhile. She returned home in the summer of 1899, and resided at home with her mother, at Forest Grove, until her [215] death on March 22, 1900. She died of consumption, but she was not known to be dangerously ill until a short time before her death. She was not a robust person, but no one knew that she had consumption until a short time before her decease.

The complaint alleges, in substance, that the defendant, at the time of the death of Liverne, had possession of about $8,000 in notes belonging to her, and falsely and fraudulently represented to the plaintiffs that Liverne had given him said notes, and it alleges, also, as a separate cause of suit, that the defendant induced Liverne, by fraud and undue influence, to give him said notes. These matters were put in issue by the answer. The defendant asserts that Liverne told him several times before her death that she was likely to die soon, and asked him to have someone prepare for her a will, giving all of her property to him, and saying that she wanted to give all of her property to him. He testified that he told her that she was not going to die, and urged her not to think of such a thing. He testified that he was in her room at her mother's house about two weeks before her death, and that she then asked him whether he had had her will prepared as she had requested, and that he told her he had not, and that he remonstrated against her saying that she was going to die. He says that she then asked if she could dispose of her property without making a will, and he told her she could transfer the real estate by making a deed, and that she could transfer the notes and mortgages by indorsing them. He testifies that she then said, "Can I indorse the notes over, and, if so, would that be legal?" and that he told her it would be legal, and that she then went and got her notes and indorsed them. He testified that she wrote her name on the backs of the notes, and then gave and [216] delivered them to him. He says that she had the notes in her room, and got them and indorsed them by writing her name on the backs of each of them, in his presence, and delivered them to him. He says that she was reclining on the couch when she indorsed the notes and gave them to him, and that she placed the notes on a book when she indorsed them. Shortly after the death of Liverne, the defendant told Mrs. Minnie Baber that Liverne had given him those notes, and he told others of it, and, a little later, he showed to Minnie Baber all of the notes that Liverne had given him and her signature on the back of each note. The defendant testified that when Liverne gave him the notes, he put them in his pocket, and took them away. The evidence of the defendant shows, if it is true, a gift of *causa mortis*. The defendant testified that Liverne told him that she wanted him to have the property, and that she did not want her mother to have it. The defendant says that when he told Mrs. Baber that Liverne had given him the notes, she protested a little against it, and asked him to show them to her, which he did. Mrs. Baber says that defendant told her that Liverne had given him the notes, and that, when he showed her the notes and the indorsements on them, she remarked that the writing did not look like Liverne's.

About two weeks after Liverne's death, the plaintiffs signed a petition, asking the County Court of Washington County, to appoint the defendant administrator to Liverne's estate, and in this petition, signed by the plaintiffs, is the following statement:

"Your petitioners desire to show unto your honor that the estate of the above deceased

originally consisted of more personal property than the amount above stated, but that said personal property was given to C. C. Caples by the deceased a considerable time [217] before her death; and your petitioners wish to state that the gift as above stated is in accordance with the wish of your petitioners, and entirely satisfactory to them in every respect."

This petition seems to have been written by the defendant's brother.

In her evidence (page 59), Mrs. Minnie Baber says that, if her daughter gave the notes to the defendant, she wanted him to have them, and that she had no disposition to break what her daughter had done. The plaintiffs testified that Liverne never told them that she had given any property to the defendant; nor did she say anything to either of them about disposing of her property, and the defendant did not tell either of them, until after Liverne's death, that she had given him any property. No person was present when the gift was made but Liverne and the defendant.

Shortly after Liverne's death, Mrs. Baber employed S. B. Huston, Esq., to investigate the gift of the notes to the defendant, with the intention of instituting legal proceedings to recover the notes from him if grounds therefor should be found; and Mr. Huston made the examination. The plaintiffs produced him as a witness, and examined him in relation to that matter. Mr. Huston said this examination was made within a few months after the death of Liverne, and hence it must have been in 1900.

Mrs. Baber furnished Mr. Huston with genuine signatures of Liverne's for comparison with the indorsements on the notes, and Mr. Huston called on the defendant and informed him what he was doing. The defendant delivered the notes in question to Mr. Huston for examination, and he permitted Mr. Huston to retain the notes for quite awhile. Mr. Huston says that he went over the matter carefully, and compared [218] the signatures of Liverne's which her mother had furnished him with her name on the notes, and he says that the indorsements on the notes seemed to him to be genuine and all right, and he so informed Mrs. Baber. He asked Mrs. Baber, if she had any reason to doubt the genuineness of the signatures on the indorsements, and, according to his recollection, she said "No."

The defendant settled the estate of Liverne and turned over to the plaintiffs, as her heirs, the real estate, appraised in 1900, at $2,700, and there are receipts in evidence showing that, on January 26, 1902, Minnie Baber received of the defendant, as administrator of the estate of Liverne H. Baber, deceased, in full of her interest in the personal property of said estate, the sum of $1,029.31, and another receipt of the same date, showing that she, as guardian of Josephine Baber, received from the defendant the further sum of $1,029.31 in full of Josephine's interest in the personal estate of Liverne. This indicates that the plaintiffs received at least $4,758.62 from the estate of Liverne. On page 60 of the evidence Minnie Baber, in answer to the question whether the defendant told her how much Liverne had given him, answered, "He gave us $3,000 and said the rest was his." We are not certain just how much the plaintiffs received of the estate of Liverne, but it seems certain that they received at least $4,758.62.

The plaintiffs produced a handwriting expert, named W. W. Williams, who was not acquainted with Liverne H. Baber, and did not know her handwriting. Two of the promissory notes that Liverne gave to the defendant, and several signatures of Liverne's that were shown to be genuine, were submitted to this witness for examination and comparison. He compared the [219] signatures that were shown and admitted to be genuine with her name on the indorsements on the notes. He testified that the name of "Liverne H. Baber" written on the backs of the said two notes was a "simulated forgery," and not written by her, and gave his reasons for his opinion.

That is all of the evidence that was produced to show that the said indorsements were not genuine. The defendant testified that these signatures were genuine, and that he saw Liverne write them. His testimony is the same as to the indorsements on the other notes.

There was no evidence tending to show that the gift of the said notes to the defendant was the result of fraud or any undue or improper influence, excepting the evidence showing the relations between the defendant and Liverne. The evidence of the defendant was positive that he exerted no persuasion or other influence to induce Liverne to give him the property.

There was considerable said in the evidence about his accounts as executor and trustee of the estate of Granville H. Baber, and as administrator of the estate of Liverne H. Baber; but these accounts were approved and settled in the probate court, and there was no evidence showing that they were incorrect. However, they had little bearing on the issues of this case.

1. The first point for consideration is whether Liverne H. Baber gave these notes to the defendant, or whether the indorsements on the notes were genuine or forgeries.

2. If the indorsements on the notes were *forgeries*, it would be probable that the defendant's contention that the notes were given to him was false, although the indorsements

of promissory notes is not necessary to the validity of a gift of promissory note, *causa mortis*. A gift *causa mortis*, like a gift *inter vivos*, [220] must be completely executed, and go into immediate effect.

A gift *causa mortis*, to be valid, must be accompanied by an actual and complete delivery of the property by the donor to the donee. In this respect there is no difference between a gift *causa mortis* and a gift *inter vivos*: 14 Am. & Eng. Enc. of Law (2d ed.) 1056.

3. However, whether the gift is *causa mortis* or *inter vivos*, if the subject of the gift is a promissory note or other chose in action, the actual delivery of the written evidence of the debt is valid, without any assignment or indorsement: 14 Am. & Eng. Enc. of Law (2d ed.) p. 1059.

4. The disposition of personal property by gift *causa mortis* has been recognized and upheld by the courts from an early period, and is a fixed principle of jurisprudence in all civilized countries, and such gifts, if made by competent persons, and fully executed, are perfectly valid, in the absence of fraud or undue influence, provided the rights of creditors are not affected.

5. The common law does not encourage gifts of this nature, and they are sustained only upon clear proof of all the essential facts necessary to constitute such a gift. The rule, however, is not carried to the extent of holding that the presumption of law is against such gifts. Notwithstanding the fact that gifts of this nature are watched with jealousy on account of the opportunity they afford for fraud, there is no presumption, either in favor of or against such gifts, and the quantity of evidence necessary to sustain them is no greater than that required in other civil causes. Such gifts may be supported by a fair preponderance of the evidence: 14 Am. & Eng. Enc. of Law (2d ed.) 1067.

[221] 6. Mr. Williams, the handwriting expert, testifies that he is positive that the name of Liverne H. Baber on the backs of the two notes shown him are forgeries. These papers and others were submitted to him for his opinion by one of the plaintiffs' attorneys, several months before he gave his evidence, and before the suit was commenced. Opinion evidence in relation to handwriting is generally viewed with caution by the courts. Such experts are usually very ardent supporters of the side that calls them.

Taylor, in Volume 1 of his work on Evidence (8 ed.) Section 58, speaking of skilled witnesses generally, says:

"Perhaps the testimony which least deserves credit with a jury is that of *skilled witnesses*. These gentlemen are usually required to speak, not to facts, but to *opinions*; and, when this is the case, it is often quite surprising to see with what facility and to what an extent their views can be made to correspond with the wishes or the interests of the parties who call them. They do not, indeed, willfully misrepresent what they think; but their judgments become so warped by regarding the subject in one point of view that, even when conscientiously disposed, they are incapable of expressing a candid opinion."

This author in the same section, appositely, but reverently, adds:

"Being zealous partisans, their belief becomes synonymous with faith as defined by the apostle, and it too often is 'but the substance of things hoped for—the evidence of things not seen.'"

In the case of The Tracy Peerage, 10 Cl. & F. (Eng.) 191, Lord Campbell says:

"Hardly any weight is to be given to the evidence of what are called scientific witnesses. They come, with a bias on their minds, to support the cause in which they are embarked."

[222] In Wendl v. Fuerst, 68 Ore. 283, 136 Pac. 1, this court held:

"We believe the rule stated by Rogers, supra, is the correct one, and that the evidence of experts in all cases should be received and weighed with caution."

We find from the evidence that Liverne H. Baber did give the promissory notes in controversy to the defendant; that she indorsed each of them with her own hand, and delivered them to the defendant with the intention to vest the title of these notes in him, and that he received and accepted said notes as a gift *causa mortis*. The gift was complete in every respect.

The other question for our determination is, was the gift of the promissory notes by Liverne H. Baber to the defendant the result of fraud or undue influence, exerted upon her by the defendant? It is admitted that the defendant was executor and trustee of her father's estate, and that, after the defendant turned over to her her portion of said estate, he assisted her in managing her estate to some extent, and that he attended to business for the plaintiff Minnie Baber. It is also admitted that he was engaged to marry Liverne, and that he called upon her often. Apart from these facts, there is no evidence before the court tending to prove that the plaintiffs' contention that said gift was obtained by fraud or undue influence. The plaintiffs testified to nothing tending to show undue influence. No witness gave evidence tending to prove fraud. The defendant swears fully and positively that he was not guilty of any fraud or of any undue influence, and that he did nothing to induce her to make said gift.

Liverne was about 24 years of age when she died, and she had had advantages of

education. It is not claimed that she was a person of weak mind, or that [223] she was not a person of at least average intelligence and ability.

7. A relation of confidence exists between a man and a woman that are engaged to be married.

Bigelow, in his work on Fraud (1 ed.) page 271, says:

"Undue influence may be exercised under the intimate relation created by an engagement to marry. Thus if a woman gives a man land upon a promise of marriage, and he then refused to marry her and continues to hold the land, this is a fraud for which the law will give the woman proper relief. So, on the other hand, if a man should, after such solicitation and hesitancy, convey land, without adequate pecuniary consideration to a woman who had promised to marry him, and who had thereby gained great influence over him, her refusal to marry him would afford him ground for rescinding the conveyance."

In the case of Rockafellow v. Newcomb, 57 Ill. 194, the facts were that the plaintiff and the defendant were engaged to be married, and the plaintiff, at the persistent solicitations of the defendant, conveyed to her certain lands in Chicago, and the defendant, at the same time, conveyed to him lands in Iowa. The woman refused to marry the man, and he brought suit to rescind the conveyance on the ground of fraud. Passing on the case, the court says, *inter alia*:

"The relation of the parties [who are engaged to be married] was of the most confidential character. . . . She [the defendant] had an undue influence over him, and took advantage of the relation between them. That this influence existed, and was exercised to the great benefit of one, and to the great disadvantage of the other, there can be no doubt. There could be no relation between persons where a greater influence could be exerted and an undue purpose more easily achieved. The situation of the parties; the close intimacy; the loving correspondence; the threat to [224] annul the marriage contract; the great difference in the value of the two pieces of property—all raise the presumption of undue influence. She worked upon his passions, excited his fears, and alarmed him by the dread of separation. The relief to be granted in such cases stands upon a general principle, which applies to all the variety of relations in which dominion may be exercised by one over another."

In cases like this, where a confidential relation exists, and there is great opportunity for fraud, it is incumbent on the donee to show that the gift was not obtained by fraud or undue influence: Gilmore v. Burch, 7 Ore. 374, 33 Am. Rep. 710; Baldock v. Johnson, 14 Ore. 542, 13 Pac. 434; Wade v. Pulsifer, 54 Vt. 45; Gilmore v. Lee, 237 Ill. 402, 86 N. E. 568, 127 Am. St. Rep. 330; Caspari v. New Jerusalem First German Church, 12 Mo. App. 293; Jenkins v. Jenkins, 66 Ore. 12, 132 Pac. 542; 1 Story, Eq. Jur. (13 ed.) § 312; Page v. Horne, 11 Beav. (Eng.) 235; Huguenin v. Baseley, L. C. in Equity, note pp. 119, 120.

In Page v. Horne, 11 Beav. (Eng.) 235, the master of the rolls, says:

"It is true that no influence is proved to have been used; but no one can say what may be the extent of the influence of a man over a woman whose consent to marriage he has obtained. Here, the husband having mortgaged the property, we are told by the report of the master that no undue influence was used. The court, however, will look with great vigilance at the circumstances and situation of the parties in such cases as the present, and will not only consider the influence which the intended husband, either by soothing or violence, may have used, *but require satisfactory evidence that it has not been used.*"

In the note of Huguenin v. Baseley, L. C. in Equity, note page 119, it is said:

"The influence of a man over a woman to whom he is engaged to be married is presumed to be so great [225] that the court will look with great vigilance at the circumstances and situation of the parties, and will consider, not only the influence which the intended husband, either by soothing or violence, may have used, but require satisfactory evidence that it has not been used."

In Gilmore v. Burch, 7 Ore. 374, 33 Am. Rep. 710, the court says:

"The law seems to be well settled that when one accepts a confidential or fiduciary relation to another, . . . where the donee or grantee is supposed to exercise an unusual and commanding influence over the grantor, the courts will set aside the conveyance, unless the grantee can show that the transaction was fair, and without fraud or undue influence."

The rule is well settled in this state and elsewhere that where a confidential relation is shown to have existed between a donor and a donee, and a gift was made by the former to the latter during the existence of this relation, courts of equity will annul the gift, unless the donee shows that the gift was made without fraud or undue influence. This principle applies to a gift *causa mortis* made by a young woman to a young man to whom she was engaged to be married.

It appears that the plaintiffs were informed by the defendant, in March, 1909, a few days after the death of Liverne, as stated supra, that she had given the promissory notes in disputa to him, and that he exhibited the notes to Minnie Baber, shortly after he in-

formed her of the gift. Soon after that, the latter caused an attorney to investigate the gift with a view of recovering the notes, if possible. This attorney, as stated supra, obtained from the defendant the notes in question, and compared the indorsements on the notes with the handwriting of Liverne, and informed Mrs. Baber that he believed the indorsements to be genuine, [226] and he asked her at that time whether she had any reason to doubt the genuineness of the indorsements on the notes, and she answered in the negative. Mr. Huston made this investigation in 1900, about 12 years before this suit was begun. Minnie Baber knew the facts concerning said gift then as fully as she knew them in 1912, when she instituted this suit. The evidence given by her and Josephine shows that they knew as much about the case in 1900 as they did when they testified. They had the opinion of the handwriting expert to the effect that he believed the indorsements to be forgeries, but that opinion was of no value to them. They *acquiesced* in this gift for the period of more than 12 years after they knew as much about it as they did when they commenced this suit, and this acquiescence is *laches*. It is one of the principal maxims of equity jurisprudence that equity aids the vigilant and not those who slumber on their rights.

16 Cyc. page 152, says:

"No arbitrary rule exists for determining when a demand becomes stale or what delay will be excused, and the question *of laches* is to be decided upon the particular circumstances of each case. No greater certainty of treatment is therefore practicable than to indicate the elements generally considered. While some delay in the assertion of a right is always an essential element of laches, unreasonable delay alone, independently of any statute of limitations will often operate as a bar to relief. . . ."

The same volume, on page 156, says:

"The border land between laches proper and mere staleness of demand is found in those cases where mere lapse of time is added to an element of assent to or acquiescence in the adverse claim. Starting with the doctrine that one who has affirmatively, by words or conduct, indicated his assent to the claims of another is guilty of laches, if he thereafter, for a long time, [227] makes no assertion of his own conflicting claim, the courts apply the same rule where there has been acquiescence alone, and presume assent from lapse of time, and failure to assert their right. Particularly is this so where the plaintiff attempts to assert an interest in land after long acquiescence in defendant's possession under claim of right, or when he attempts to enforce a covenant or a condition after considerable acquiescence in continuing breaches."

In Sullivan v. Portland, etc. R. Co. 94 U. S. 807, 24 U. S. (L. ed.) 324, the court says:

"To let in the defense that the claim is stale, and that the bill cannot therefore be supported, it is not necessary that a foundation be laid by any averment in the answer of the defendants. If the case, as it appears at the hearing, is liable to the objection by reason of the laches of the complainant, the court will, upon that ground, *be passive and refuse relief*. Every case is governed chiefly by its own circumstances; sometimes the analogy of the statute of limitations is applied; sometimes a longer period than that prescribed by statute is required; in some cases a shorter period is sufficient; sometimes the rule is applied when there is no statutable bar. It is competent for the court to apply the inherent principles of its own system of jurisprudence, and decide accordingly."

In Smith v. Clay, Ambl. (Eng.) 647, Lord Camden says:

"Nothing can demand the assistance of the court (of chancery) *but conscience and reasonable diligence. Laches and neglect are discountenanced here.*"

In Hayward v. Eliot Nat. Bank, 96 U. S. 617, 24 U. S. (L. ed.) 855, the court says:

"Courts of equity often treat a lapse of time, less than prescribed by the statute of limitations, as a presumptive bar, on the ground 'of discouraging stale claims, or gross laches, or unexplained *acquiescence* in the assertion of an adverse right.'"

[228] In Sedlak v. Sedlak, 14 Ore. 541, 13 Pac. 452, the court says:

"The general rule, without doubt, is that no lapse of time or delay in bringing the suit will be a bar to the remedy in equity, providing the injured party, during the interval, was ignorant of the fraud. But the ignorance of such party must not have been negligent; for if, by reasonable diligence, the fraud could have been discovered, or ought to have been known, he will be deemed guilty of laches, or of acquiescence, and equity will refuse to interfere. In many cases courts of equity act upon the analogy of the statute of limitations. But independent of this, it is a favorite doctrine of equity to allow a defense to be based on a mere lapse of time, and staleness of the claim, denominated laches, when the delay has been passive and acquiesced in for a great length of time."

If the plaintiffs had a right of suit, they should have instituted the suit a long time before they did. By delaying to commence their suit for about 12 years, they very likely made it more difficult than it otherwise would have been for the defendant to obtain evidence for his defense. After the lapse of a dozen years, facts are more or less forgotten, and proof becomes difficult.

We think that the plaintiffs have been guilty of laches sufficient to bar their right of suit.

The notes in question were the absolute property of the donor, Liverne H. Baber, and she had a legal right to dispose of them in any manner that she desired. There may be a difference of opinion as to whether she acted wisely in giving them to the man to whom she was engaged to be married. But *she* was the person to decide that question, and we have no authority to pass on the wisdom of her act, or to annul what she did, if she was not imposed upon by fraud or undue influence. Persons have the right to give [229] away all of their property to whomsoever they wish, and, if they do so, and the gift is not induced by fraud or undue influence, no one can legally impeach it but the creditors of the donor. Gifts are void as to creditors, as donors are required to be just before they are generous. Liverne gave the defendant about 61 per cent of her property and left the residue for the plaintiffs.

If the defendant's evidence is true, he was not guilty of any fraud or undue influence, and the property in question was given to him by Liverne as her free act, without persuasion or any influence from him. His evidence is the only testimony on the subject, and he is not impeached or discredited to any extent. His interest, however, in the result of the suit has to be considered in weighing his evidence. We cannot *know* what the truth is in relation to this gift. When the facts are in dispute, courts are constrained to act on probabilities, as indicated by the evidence before them.

We find that the promissory notes in question were given to the defendant by Liverne H. Baber as her free act, and that said gift was not induced by any fraud or undue influence on the part of the defendant, and that the decree of the court below is erroneous, and should be reversed.

The decree of the court below is reversed, and this suit is dismissed; but neither party shall be allowed costs or disbursements, either in this court or in the court below.

Reversed and Suit Dismissed.

McBride, C. J. and Moore and Burnett, JJ., concur.

Rehearing denied June 30, 1914.

NOTE.

Presumption of Undue Influence Arising from Relation of Man and Woman Engaged to Be Married.

The relation of a man and a woman who are engaged to be married, is a confidential one, and the courts will scrutinize closely any business dealing between them which operates to the disadvantage of the woman, presuming that she acts therein under the influence of the man and in reliance on his good faith. Page v. Horne, 11 Beav. (Eng.) 227; Lovesy v. Smith, 15 Ch. D. (Eng.) 655; In re Kline, 64 Pa. St. 122; Ellis v. Ellis, 1 Tenn. Ch. App. 198. See also Landes v. Landes, 268 Ill. 11, 108 N. E. 691. And see the reported case. "The rule is well established that after a marriage engagement is entered into, the relationship between the parties is a confidential or fiduciary one, and the woman is supposed to confide in the man to whom she is betrothed to deal with her fairly and justly." Martin v. Collison, 266 Ill. 172, 107 N. E. 257. "There is perhaps no relation of life in which more unbounded confidence is reposed than in that existing between parties who are betrothed to each other. Especially does the woman place the most implicit trust in the truth and affection of him in whose keeping she is about to deposit the happiness of her future life. From him she has no secrets; she believes he has none from her." Kline v. Kline, 57 Pa. St. 120, 98 Am. Dec. 206. "The relationship of parties who are about to enter into the married state, is one of mutual confidence, and far different from that of those who are dealing with each other at arms length." Pierce v. Pierce, 71 N. Y. 154, 27 Am. Rep. 22. In Gilmore v. Burch, 7 Ore. 374, 33 Am. Rep. 710, it was said obiter: "It is laid down as a rule that the influence of a man over a woman to whom he is engaged to be married is presumed to be so great that the court will look with great vigilance at the circumstances and situation of the parties, and will not only consider the influence which the intended husband, either by soothing or violence, may have used, but require satisfactory evidence that it has not been used to sustain such a conveyance."

However in Atkins v. Withers, 94 N. C. 581, the foregoing view was repudiated. After stating various relations wherein a presumption of undue influence arises the court said: "But the learned counsel for the defendant insists, that there should be added to these classes, the relation subsisting between a lover and his affianced, and has permitted his wonted zeal, in behalf of his client, to lead him to the unchivalrous conclusion that, in that relation, the man holds the superior position, and the affianced is so much under his influence, that the law looks with suspicion upon any contract made between them, and will throw the burden of showing its fairness upon him. We know of no such principle of law, and the counsel has failed to furnish us with any authority to support his position. Fraud in such a contract, like all others not falling within one of the abovementioned clauses, where undue influence is alleged, presents a question of fact for the jury, and the onus is on the plaintiff."

In Rockafellow v. Newcomb, 57 Ill. 186, stated at length in the reported case, a conveyance was set aside for undue influence exercised by the woman over the man, the court saying: "This man, with his fervid passion and strong love, was not well matched against an accomplished woman, in the incipient stage of their engagement. She requests, he demurs; she urges, he yields."

DILLON

v.

MYERS ET AL.

Colorado Supreme Court—January 4, 1915.

58 Colo. 492; 146 Pac. 268.

Corporations — Mortgage — Consent of Stockholders — Effect of Failure to Obtain.

Notwithstanding Rev. St. 1908, § 865, providing that the directors of a manufacturing corporation shall have no power to mortgage the corporation's plant until the question shall have been submitted to the stockholders, and the majority of all the shares of stock shall have been voted in favor of the proposition, a mortgage given by the directors of a manufacturing corporation, without the consent of the stockholders, is not void but voidable only at the suit of the stockholders.

[See note at end of this case.]

Ultra Vires Mortgage — Enforcement.

A corporate mortgage, though ultra vires, will be enforced where the corporation received the proceeds, and the mortgagee entered into the contract, which was fully executed, in good faith.

Effect of Failure to Obtain Consent of Stockholders.

A subsequent judgment creditor of a manufacturing corporation cannot question the validity of a prior mortgage given by the directors of the corporation without the concurrence of the stockholders, where the stockholders, who could have questioned the mortgage, did not attack it; the transaction having been in good faith at least on the part of the mortgagee, and the corporation having received the proceeds of the loan.

[See note at end of this case.]

Ultra Vires Contract — Annulment — Return of Consideration.

Where the contract was fully executed on both sides, a court of equity will not set aside, as ultra vires, a mortgage given by the directors of a manufacturing corporation, which received and enjoyed the proceeds of the loan, without first ordering a return of the consideration.

[See 70 Am. St. Rep. 173.]

Error to District Court, El Paso county: SHEAFOR, Judge.

Action for cancellation and annulment of trust deed. Helen T. Myers et al., plaintiffs, and Florence A. Dillon, administratrix, substituted for John K. Dillon, defendant. Judgment for plaintiffs. Defendant brings error. The facts are stated in the opinion. REVERSED.

Robert Kerr for plaintiff in error.

Franklin E. Brooks and *Michael B. Hurley* for defendants in error.

[493] SCOTT, J.—The Rocky Mountain Can Company, a Colorado corporation, on the 5th day of March, 1908, borrowed from John K. Dillon the sum of $4,000, and thereupon executed and delivered to said Dillon its promissory note in that amount, and to secure the payment thereof, executed and delivered to the Public Trustee of El Paso county, its trust deed covering certain of its property, which trust deed was immediately filed for public record.

The note was payable two years after date. Interest payments were made for one year, but the corporation thereafter made default in its interest payments, and taxes, and as provided in the trust deed, and on the 19th day of October, 1909, the premises were sold at Public Trustee's sale. Dillon purchased the property at such sale for the sum of $4,291.91, being the amount due on the note, with interest and costs. Thereafter the Public Trustee issued his trustee's deed conveying the premises to Dillon. The proceedings in the foreclosure sale, [494] and in the issuance of the deed, were in all respects regular. The contention of the defendants in error, is that the trust deed, so executed, was not only void, but wholly without effect, as against all persons, and that there can be no relief in equity to innocent injured persons, in such a case.

Before the execution and delivery of the trustee's deed, but after the expiration of the period for redemption, this action was instituted.

The complaint alleged in substance that the name of the corporation was changed, after the transaction with Dillon, to "The Rocky Mountain Manufacturing Company," and that on September 29, 1909, the plaintiffs, Myers and McDonald, obtained a judgment against the corporation in the sum of $2,186.03, and that a transcript thereof was on the following day, filed with the County Clerk and Recorder.

It is then alleged that the corporation executed and delivered the said trust deed unlawfully and without authority, in that such corporation was a manufacturing corporation, and the trust deed was made without the

consent of the stockholders. The prayer was for the cancellation and annulment of the trust deed and all proceedings under it. Dillon died during the pendency of the action, and his widow, Florence A. Dillon, as administratrix, was substituted as party defendant.

It clearly appears that the transaction between the company and Dillon was in perfect good faith upon the part of Dillon at least. The sum of money which the trust deed was given to secure was received by the company and used by it in the conduct of its business, and in the improvement of its property. Neither the loan, nor the trust deed to secure it, was authorized at any meeting of the stockholders of the company. It appears that the officers of the company believed at the time, that [495] the corporation had power under its charter to execute the trust deed, without the consent of the stockholders. Neither the corporation nor any stockholder thereof, has ever questioned, and does not now question, or object to the validity of the transaction.

The plaintiffs below, defendants in error, rely upon that portion of Section 865 Rev. Stat. 1908, as follows:

"The board of directors or trustees of a mining or manufacturing corporation shall not have power to encumber the mines or plant of such corporation, or the principal machinery incident to the production from such mine or plant until the question shall have been submitted at a proper and legal meeting of the stockholders and a majority of all the shares of stock shall have been voted in favor of such proposition; and any mortgaging or incumbering of such property, without such consent shall be absolutely void, and the vote upon such proposition shall be entered on the minutes of the corporation."

The trust deed covered the building of the company erected for a proposed manufacturing plant.

1. The plaintiff in error, contends that the corporation was not a manufacturing corporation within the meaning of the statute, but on the contrary that its real purpose was to conduct a general real estate business, and with express power conferred by its charter, to do the very thing it did do in this instance.

The purposes for which the corporation was organized as recited in the articles of incorporation, are:

First:—To buy, sell, exchange, hold, own, acquire, and encumber real estate and personal property, to buy, sell, exchange, hold, own, acquire and encumber a certain invention for improvement in oil and gasoline cans under Latest Patent dated January 10, 1905, No. 779, 983, and any and all improvements that may be made to or upon said invention within the states of Colorado and Wyoming and the territory of New Mexico.

[496] Second:—To erect and operate manufactories for the purpose of manufacturing oil and gasoline cans, to sell and deal in said cans after the same are manufactured, to manufacture and sell said cans according to any improvements that may be made upon the invention hereinbefore mentioned.

Third:—To mortgage, encumber and pledge the real estate and personal property and privileges or franchises belonging to the said company, or any part thereof, for the funds with which to purchase real estate, erect buildings and manufacture and deal in said cans, and also for the purpose of acquiring other property.

Fourth:—To pay cash or issue full-paid and non-assessable stock for and in exchange for real and personal property, to manufacture and deal in other articles than the said cans hereinbefore mentioned, and to do a general manufacturing business, in other articles similar to said cans, and generally to prosecute, do and perform any and all business and to do any and all things that may in any wise be necessary, convenient, incidental and appurtenant, or either, to the powers, purposes or objects for which this company is organized; and to do and perform any and all other acts and things in connection therewith which a natural person might or could do, and which a corporation is not prohibited by law from doing, as the Directors of our said Company may deem expedient and proper.

The good faith purpose of the incorporators to engage in a legitimate manufacturing enterprise may be seriously questioned. The corporation was organized by a firm of real estate dealers. Its original capital stock authorized by the charter was $6,000, but before it transacted any business, this was increased to $300,000. The conduct of the corporation makes it appear to have been a promotion scheme pure and simple. Its first and principle [497] operations were to trade its corporation stock for real estate of any kind, and located in no particular state or locality. It manufactured none of the cans mentioned in the charter. Its manufacturing operations were confined to the plating of certain wares, for use in hotels and similar places, and the making of lamps, trays, etc., and this in a limited way. It contracted with the plaintiffs below for the right to manufacture iceless refrigerators, upon the basis of a royalty, and upon which plaintiffs seem to have had a patent, or some rights under a patent, and it is upon this contract that the plaintiffs obtained the default judgment upon which they rely, and which judgment was rendered after the company had failed, and its officers had left the county. But it did not manufacture any such refrigerators in its building, though it had some samples

made by others. It constructed a large building and installed certain machinery, which latter seems to have been removed afterward, by those who sold it to the company, because of non-payment, and which machinery was never in operation. The whole scheme was plainly either in fraud, or it was an iridescent dream.

It may be assumed for the purposes of the case, but not decided, that the corporation was technically a manufacturing corporation, and that the building so encumbered was its plant. What has been said is for the purpose of throwing light upon the equities of the parties rather than to determine this question.

It will be seen that the trust deed was executed and recorded on the 5th day of March, 1908, and that plaintiff's judgment was rendered September 29, 1909, or about eighteen months afterward.

2. The question remaining to be considered is as to what are the rights of the parties under the state of facts presented, conceding the company to have been a manufacturing [498] corporation. The case of Beecher v. Marquette, etc. Rolling Mill Co. 45 Mich. 103, 7 N. W. 695, involved a similar statute to ours. That was an action to foreclose a mortgage executed by a corporation without the consent of the stockholders, and the provision of the statute considered, was as follows:

"That no alienation, diversion, sale or mortgage of any or any part of the mine works, real estate or franchise of any corporation mentioned in the first section of this act shall have any force or effect, or pass any title thereto, or interest therein, unless expressly authorized by the vote of three-fifths in interest of the entire stock of said company actually present or legally represented at some meeting of stockholders called and notified."

Judge Cooley, the writer of the opinion, there said:

"Courts often speak of acts and contracts as void when they mean no more than that some party concerned has a right to avoid them. Legislators sometimes use language with equal want of exact accuracy; and when they say that some act or contract shall not be of any force or effect, mean perhaps no more than this: That at the option of those for whose benefit the provision was made it shall be voidable, and have no force or effect as against his interests. This was found to be the meaning in the mind of the legislature in enacting the Massachusetts usury law. It was declared in most positive terms that mortgages on usurious considerations should be 'utterly void,' but a consideration of its purpose; which was to protect debtors against the enforcement of unconscionable demands, made it clear that it never was intended that strangers to the title should be at liberty to question such a mortgage.—Green v. Kemp, 13 Mass. 515, 7 Am. Dec. 169. Mr. Justice Bayley in one case intimated that the word void in a statute might be construed voidable where the provision is introduced for the [499] benefit of parties only, but not where it is introduced for public purposes and to protect those who are incapable of protecting themselves (Rex v. Hipswell, 8 B. & C. 466, 470 [15 E. C. L. 267]), and though this distinction has been questioned (Rex v. St. Gregory, 2 Ad. & El. 99, 107 [29 E. C. L. 42]), much good reason lies at the foundation of it. If it is apparent that an act is prohibited and declared void on grounds of general policy, we must suppose the legislative intent to be that it shall be void to all intents; while if the manifest intent is to give protection to determine individuals who are *sui juris*, the purpose in sufficiently accomplished if they are given the liberty of avoiding it. A statute would strike blindly if the letter alone were to be regarded, not the spirit. A statute declares that certain indentures not made as by the statute provided should 'be clearly void in law to all intents and purposes;' and it was nevertheless held that, if acted upon, the apprentice gained a settlement thereby.—St. Nicholas v. St. Peter, Stra. (Eng.) 1086. And in Ohio a purchase at a judicial sale by one who acted as appraiser of the property, though the statute declared it should be 'considered fraudulent and void,' was held to be voidable only on an interposition or proceeding by a party in interest, directly for the purpose of avoiding it.—Terrill v. Auchauer, 14 Ohio St. 80. This subject is considered at length and many authorities examined in State v. Richmond, 26 N. H. 232, to which we refer.

The statute now under consideration was passed to protect the interests of stockholders in mining companies. It intends that their mining property shall not be conveyed away or mortgaged except by their deliberate action after they have been notified of a proposal to do so, and have had time to deliberate upon and fully consider it. But the matter does not concern the public at large; no principle of public policy is at stake; no wrong [500] direct or indirect, is done to any human being, if conveyance is made or mortgage given without the exact notice required unless it be a wrong to the stockholders themselves. And as others are not concerned, why should the statute give them the right to raise questions of regularity which the stockholders elect to waive? We are satisfied such was not its purpose."

The doctrine thus announced, has been adopted and the reasoning approved by text writers and by the courts, now in all juris-

dictions, though the contrary has been held in some instance, notably in the earlier cases in Pekin Mining, etc. Co. v. Kennedy, 81 Cal. 356, 22 Pac. 679; McShane v. Carter, 80 Cal. 310, 22 Pac. 178.

Counsel for defendants in error, cite Williams v. Gaylord, 186 U. S. 157, 46 U. S. (L. ed.) 1102, 22 S. Ct. 798. This was not the independent judgment of that court. The case arose in California and the decision was based upon the rule of plenary power of the state court, to construe a statute of the state, and it was therefore held that the case of McShane v. Carter, supra, was controlling in that case.

The Circuit Court of Appeals in the case of Louisville Trust Co. v. Louisville, etc. R. Co. 75 Fed. 433, 43 U. S. App. 550, 22 C. C. A. 378, Judge Taft speaking for the court said:

"Referring to the same proviso as that considered in the Zabriskie Case, the supreme court of New York, in Connecticut Mut. Life Ins. Co. v. Cleveland, etc. R. Co. 41 Barb. 9–24, said that 'these provisos were intended for the protection of the shareholders, and relate rather, to the mode or manner of the execution of the power.' This view of the purpose and effect of such a provision is enforced by the construction put by the Supreme Court of the United States on a statute of Illinois much more emphatic and prohibitory in form than [501] that here in controversy, in St. Louis, etc. R. Co. v. Terre Haute, etc. R. Co. 145 U. S. 393, 12 S. Ct. 953, 36 U. S. (L. ed.) 748. The act there provided that it should not be lawful for a railroad company of Illinois to lease a railroad in another state without having first obtained the written consent of all the stockholders of said roads residing in the state of Illinois, and any contract for such lease made without having first obtained said written consent should be null and void. Of this, the supreme court, speaking by Mr. Justice Gray, said: 'Although this statute in terms, declares that any such lease made without the written consent of the Illinois stockholders, 'shall' be null and void,' it would seem to have been enacted for the protection of such stockholders alone, and intended to be availed of by them only. It did not limit the scope of the powers conferred upon the corporation by law, and excess of which could not be satisfied by estoppel, but only prescribed regulations as to the manner of exercising corporate powers, compliance with which the stockholders might waive, or the corporation might be estopped, by lapse of time or otherwise, to deny.' Mr. Justice Harland, at the circuit, took the same view of a similar statute in Hervey v. Illinois Midland R. Co. 28 Fed. 169, 174."

The court then quotes with approval the language of Judge Cooley in Beecher v. Marquette, etc. Rolling Mill Co. supra, heretofore cited. The principle announced in these cases has been recognized by this court. In Denver Fire Ins. Co. v. McClelland, 9 Colo. 11, 9 Pac. 771, 59 Am. Rep. 134, the court said:

"Corporations have the capacity to do wrong, and may overstep the limits placed by the law to their powers, and when they violate their charters in this respect their acts are illegal, but not necessarily void.—Bissell v. Michigan Southern, etc. R. Co. 22 N. Y. 258. The plea of *ultra* [502] *vires* is not to be understood as an absolute and peremptory defense in all cases of excess of power without regard to other circumstances and considerations. The plea is not to be entertained where its allowance will do great wrong to innocent third persons.

Bissell v. Michigan, Southern, etc. R. Co. 22 N. Y. 258. Where a certain act is prohibited by statute, its performance is to be held void because such is the legislative will. So where the consideration of a contract is by law illegal, as where the cause of action arises *ex turpi*. But where the act is not wrong per se, where the contract is for a lawful purpose in itself, has been entered into with good faith, and fairly executed by the party who seeks to enforce it, we must assent to the doctrine of those authorities which hold that the excess of the corporate powers of the contracting party which has received the benefit of the contract is an unconscionable defense, which may not be set up to exempt from liability the party so pleading it. And such, we think, is the case before us."

The principle which would seem to control in the case at bar is admirably stated in the joint concurring opinion of Beck, C. J., and Melm, J., in that case.

It will be observed that there is a distinction usually made by the authorities, as between executory, and fully executed contracts, as applicable to the doctrine of *ultra vires*. It was said in Denver Fire Ins. Co. v. McClelland, supra, that "the executed dealings of corporations must be allowed to stand when the plainest rules of good faith require."

It is said by Thompson in his work on corporations:

"It is a principle of universal application that whenever an illegal, immoral, or prohibited contract has been fully executed on both sides, the law will not lend its aid to either of the parties for the purpose of unraveling it and enabling him to recover what he may have lost [503] through it. In such cases the governing maxim is, *in pari delicto, potior est conditio defendentis*. When therefore, a contract with a corporation, the making of which is beyond its granted powers, has been fully executed by both parties,

neither of them can assert its invalidity as a ground of relief against it."—Thompson on Corp. Secs. 6023–6024.

It is said by Bouvier, vol. 2, 1153, under the title of *ultra vires;*

"There is said to be a tendency of the courts based upon the strongest principles of justice, to enforce contracts against corporations, although in entering into them they have exceeded their chartered powers, where they have received the consideration and the benefit of the contract; Chicago, etc. R. Co. v. Howard, 7 Wall. 392, 19 U. S. (L. ed.) 117; National Bank v. Matthews, 98 U. S. 621, 25 U. S. (L. ed.) 188. See Campbell v. Argenta Gold, etc. Min. Co. 51 Fed. 1; Sherman Center Town Co. v. Fletcher, 46 Kan. 524, 26 Pac. 951; and the rule that the charter of a corporation is to be construed strictly against the grantee does not apply to a case where the corporation seeks to repudiate contracts whereof it has enjoyed the benefits, or where such contracts are attacked by creditors after the corporation became insolvent; Tod v. Kentucky Union Land Co. 57 Fed. 47; Chicago, etc. R. Co. v. Union Pac. Co. 47 Fed. 22. The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong; Ohio, etc. R. Co. v. McCarthy, 96 U. S. 258, 24 U. S. (L. ed.) 693. The executed dealings of corporations should be allowed to stand for and against both parties, when good faith so requires; Bissell v. Michigan Southern, etc. R. Co. 22 N. Y. 258, 494; Whitney Arms Co. v. Barlow, 63 N. Y. 62. Where a corporation has entered into a contract which has been been fully executed on the other part, and nothing remains but the payment by the corporation [504] of the consideration, it will not be allowed to set up that the contract was *ultra vires;* Oil Creek, etc. R. Co. v. Pennsylvania Transp. Co. 83 Pa. St. 160. Corporations should be restricted so far as courts can, in the exercise of their powers, limit them; but the plea is not a gracious one, that a contract which they have deliberately made, and of which they have received the full benefit, is void for want of power in them to make it."

The contract in the present case, between the company and Dillon, was fully executed. Clearly then under the rule thus stated, the company cannot raise the question of *ultra vires.* The plaintiffs below had knowledge of the transaction involved, at the time of their dealings with the corporation and upon which their judgment was obtained. They became creditors subsequent to the delivery and recording of the trust deed.

It is also held that where a corporation has waived or omitted to exercise the right to institute proceedings to recover lands, even in case of fraud, such right does not inure to the benefit of subsequent creditors or purchasers, clearly not in case of a good faith transaction.—Graham v. La Crosse, etc. R. Co. 102 U. S. 148, 26 U. S. (L. ed.) 106. It has been held also, that one holding a valid second mortgage, not made expressly subject to an invalid mortgage, cannot maintain an action for the cancellation of the void mortgage, and thus to remove a cloud upon the title.—Com. v. Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672.

In Gordon v. Preston, 1 Watts (Pa.) 385, 26 Am. Dec. 75, it was said:

"Now the validity of this mortgage is unquestioned by the corporation, even at this day, though its existence has all along been known to the corporate officers whose duty it was to disavow it, had there been an intent to contest it. The corporation then being satisfied with [505] it, who has a right to object? . . . Then, granting the defendant as a judgment creditor, to have succeeded to the rights and capacity of the corporation, his succession did not occur till after more than eight months from the performance of the act, during all which time the corporation was silent, though the absent members had notice of the mortgage by the minutes. At the period of the defendant's succession, then the time for objection had gone by, and if it had not, still even he was quiescent till about the time of awarding the issue in which the validity of the mortgage is drawn into question. To disaffirm it now, when every opportunity of obtaining any other security is lost, would be unconscionable: and the act, therefore, though originally unauthorized, must be taken to have been subsequently ratified."—Campbell v. Argenta Gold, etc. Min. Co. (C. C.) 51 Fed. 1; Head v. Horn, 18 Cal. 211; Boston, etc. Copper, etc. Min. Co. v. Montana Ore-Purchasing Co. (C. C.) 89 Fed. 529; Beach v. Wakefield, 107 Ia. 567, 76 N. W. 688, 78 N. W. 197; Tyrell v. Cairo, etc. R. Co. 7 Mo. App. 294; De Kay v. Voorhis, 36 N. J. Eq. 37; Com. v. Smith, 10 Allen (Mass.) 448, 87 Am. Dec. 672; Boyce v. Montauk Gas Coal Co. 37 W. Va. 73, 16 S. E. 501; Jones on the Law of Real Property in Conveyancing, § 153; Beach on Private Corporations, § 744.

We must hold therefore that the plaintiffs below have no right to maintain this suit in equity. In the comparatively recent case of Westerlund v. Black Bear Min. Co. 203 Fed. 599, 121 C. C. A. 627, will be found a most careful and exhaustive review of the authorities upon this subject. This case had under consideration the Colorado statute. Two distinct propositions are there laid down, which seem irrefutable, either in reason or upon authority, and which we quote. The first of these is;

[506] "Another principle of law so firmly established as to be no longer debatable, is that an act or contract of a corporation, which is beyond the scope of its corporate powers, an act that it cannot lawfully do in any way or manner under any circumstances, is incapable of ratification by estoppel or otherwise, and the corporation itself may challenge it. But an act or contract of a corporation which is within its general corporate powers, which is neither wrong in itself nor against public policy, but which is defective from a failure to observe in its execution a requirement of law enacted for the benefit or protection of a third party or parties, is voidable only. Such an act or contract is valid, until avoided, not void until validated, and it is subject to ratification and estoppel.—Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 60, 11 S. Ct. 478, 35 U. S. (L. ed.) 55; Campbell v. Argenta Gold, etc. Min. Co. (C. C.) 51 Fed. 1, 8; Zabriskie v. Cleveland, etc. R. Co. 23 How. 381, 398, 16 U. S. (L. ed.) 488; St. Louis, etc. R. Co. v. Terre Haute, etc. R. Co. 145 U. S. 393, 402, 408, 12 S. Ct. 953, 36 U. S. (L. ed.) 748; Boston, etc. Copper, etc. Min. Co. v. Montana Ore-Purchasing Co. (C. C.) 89 Fed. 529, 530; Miners' Ditch Co. v. Zellerbach, 37 Cal. 543, 578, 99 Am. Dec. 300; Bishop v. Kent, etc. Co. 20 R. I. 680, 684, 41 Atl. 255; Beecher v. Marquette, etc. Rolling Mill Co. 45 Mich. 103, 105, 108, 109, 7 N. W. 695; Eastman v. Parkinson, 133 Wis. 375, 113 N. W. 649, 13 L.R.A. (N.S.) 921, 928, 929, 932; State v. Richmond, 26 N. H. 232; Rochester Sav. Bank v. Averell, 96 N. Y. 467, 471, 475; Paulding v. Chrome Steel Co. 94 N. Y. 334, 341; Boyce v. Montauk Gas Coal Co. 37 W. Va. 73, 85, 16 S. E. 501; Watts' Appeal, 78 Pa. St. 370, 394; Manhattan Hardware Co. v. Phalen, 128 Pa. St. 110, 118, 18 Atl. 428; Thomas v. Citizens' Horse R. Co. 104 Ill. 462, 467."

The second proposition is as follows:

[507] "But a corporation which has executed and accepted the benefits of a contract within the scope of its powers, that is neither wrong in itself nor against public policy, and that is defective only because in its execution the corporation has failed to comply with some legal requirement enacted for the sole benefit of third persons, is estopped to assail it, and the beneficiaries of the requirement alone may avoid it. Hence the stockholders of this corporation, and they alone, have the right to avoid this lease because they alone had any interest in a compliance with the legal requirement that they should assent to its execution.—Hervey v. Illinois Midland R. Co. (C. C.) 28 Fed. 169, 174; In re New York Economical Printing Co. 110 Fed. 514, 519, 49 C. C. A. 133; Rogers v. Nashville, etc. R. Co. 91 Fed. 299, 304, 307, 314, 315, 316 [62 U. S. App. 49] 33 C. C. A. 517; Beecher v. Marquette, etc. Rolling Mill Co. 45 Mich. 103, 108, 109, 7 N. W. 695; Boyce v. Montauk Gas Coal Co. 37 W. Va. 73, 85, 16 S. E. 501; Eastman v. Parkinson, 133 Wis. 375, 113 N. W. 649, 13 L.R.A. (N.S.) 921, 928, 929, 930; Campbell v. Argenta Gold, etc. Min. Co. (C. C.) 51 Fed. 1, 8; Wood v. Waterwoods Co. (C. C.) 44 Fed. 146, 150, 12 L.R.A. 168; St. Louis, etc. R. Co. v. Terre Haute, R. Co. 145 U. S. 393, 402, 408, 12 S. Ct. 953, 36 U. S. (L. ed.) 748; Antietam Paper Co. v. Chronicle Pub. Co. 115 N. C. 143, 145, 20 S. E. 366; Alabama Iron, etc. Co. v. McKeever, 112 Ala. 134, 145, 20 So. 84, Bishop v. Kent, etc. Co. 20 R. I. 680, 684, 686, 41 Atl. 255; McKee v. Title Ins. etc. Co. 159 Cal. 206, 113 Pac. 140; Nelson v. Hubbard, 96 Ala. 238, 11 So. 428, 433, 17 L.R.A. 375; Barrett v. Pollak Co. 108 Ala. 390, 18 So. 615, 620, 54 Am. St. Rep. 172; Jones on Real Property, § 153; 2 Beach on Private Corporations, p. 1165, § 744."

It is contended by defendants that in the Carlsbad Water Co. v. New, 33 Colo. 389, 81 Pac. 34, this [506] court intended to and did adopt the doctrine of the early California cases. A consideration of that case discloses that the principal question was as to whether or not the Carlsbad Water Company, was a manufacturing corporation within the meaning of the statute. There are but two sentences contained in the opinion that may be said to have bearing upon the question here. These are:

"It was competent for appellant trustee to question the validity of the mortgage.—In re Antigo Screen Door Co. 123 Fed. 249, 254, 59 C. C. A. 248; McShane v. Carter, 80 Cal. 310, 22 Pac. 178; Pekin Mining, etc. Co. v. Kennedy, 81 Cal. 356, 22 Pac. 679. . . . For the reason above assigned—want of proper authority from the corporation for the execution of the mortgage—the same was void, and the following authorities sustain this conclusion.—Duke v. Markham, 105 N. C. 131, 10 S. E. 1017; Mannhardt v. Illinois Staats Zeitung Co. 99 Ill. App. 315; McShane v. Carter, supra; Vail v. Hamilton, 85 N. Y. 453."

There was no attempt to support either of these statements by reason, and with the exception of the now overruled California cases, the authorities cited do not in any sense support the contention of the defendant in error here.

The now uniform holding of the courts of this country, that the provisions of the statute were for the benefit of stockholders only, and that they alone, may question the validity of a transfer or encumbrance made in violation of the statute, was not raised nor argued in that case. The court of appeals in Firestone Coal Co. v. McKissick, 24 Colo.

App. 294, 134 Pac. 147, in distinguishing that case, speaking through Presiding Judge Cunningham, said:

"But it does not appear from the opinion that the point raised by Judge Sanborn in the Westerlund case, [509] viz: that only the stockholders of the corporation, for whose benefit the section of the statute was passed, could invoke its provisions, was in any manner called to the attention of or considered by our supreme court in connection with the Carlsbad Water Company case. We have examined the briefs filed in the Carlsbad case, both the original briefs and those filed on rehearing, without being able to discover that this matter was even mooted in that case."

A further examination of the record and briefs in the Water Company case, fully justifies such statement. The sole question presented to the court was that of *ultra vires* because of the prohibition of the statute, and not as to whom may be entitled to raise that question. Clearly these statements of the law were made without sufficient consideration and without being properly before the court. While the bare statement by the court, that a trustee in bankruptcy may question the validity of the mortgage, was then sustained by the California case cited, that doctrine has since been repudiated by the supreme court of that state. In McKee v. Title Ins. etc. Co. 159 Cal. 206, 113 Pac. 140, the court said:

"He is not suing in behalf of the stockholders, or in their interest, and, there being no fraud, he stands in the shoes of the corporation with regard to the bonds. The corporation has received the money obtained by means of the bonds, and has applied it to the payment of its debts and the completion of the hotel. The money has thus inured to the benefit of the corporation and its stockholders, and of the general creditors also, since it has unquestionably given a substantial value to a structure which would otherwise be comparatively worthless. The corporation is therefore estopped to dispute the validity of the bonds and the creditors are likewise bound thereby. The real point of the objection is that the manner [510] of issuing the bonds was so defective that the transaction was *ultra vires*, and void notwithstanding that the corporation received and holds the benefits thereof. In regard to a similar claim the New York court of appeals said: 'That kind of plunder which holds on to the property, but pleads *ultra vires* against the obligation to pay for it, has no recognition or support in the laws of this state.' (Seymour v. Spring Forest Cemetery Ass'n, 144 N. Y. 333, 39 N. E. 366, 26 L.R.A. 859.) The following cases declare that neither the corporation nor its creditors can, under like circumstances to those here existing and under similar provisions of the law, maintain such an attack on bonds irregularly issued, and that the provisions of such laws are for the protection of stockholders only.—Anderson v. Bullock County Bank, 122 Ala. 275, 25 So. 523; Bishop v. Kent, etc. Co. 20 R. I. 685, 41 Atl. 257; Rochester Sav. Bank v. Averell, 96 N. Y. 475; Paulding v. Chrome Steel Co. 94 N. Y. 334; In re New York Economical Printing Co. 110 Fed. 519, 49 C. C. A. 133; Hervey v. Illinois Midland R. Co. (C. C.) 28 Fed. 174; Manhattan Hardware Co. v. Phalen, 128 Pa. St. 110, 18 Atl. 428; Wood v. Corry Water Works Co. 44 Fed. 150, 12 L.R.A. 168; Nelson v. Hubbard, 96 Ala. 252, 11 So. 428, 17 L.R.A. 375; Eastman v. Parkinson, 133 Wis. 375, 113 N. W. 649, 13 L.R.A.(N.S.) 921. In Boyd v. Heron, 125 Cal. 453, 58 Pac. 64, it was a stockholder who made the objection and it was in defense to a suit to enforce his individual liability as such stockholder. It comes clearly within the rule that the provision is for the benefit of stockholders and it does not conflict with the cases just cited."

The action in the Carlsbad case was to foreclose a mortgage executed by New, as vice-president of the company to Young as an individual, but who was at the time its president, and who transferred the mortgage to Maud New, wife of the vice-president, who instituted the suit. [511] Both New and Young as the chief executive officers of the company and constituting a majority of its board of directors, must have conclusively presumed to know of the absence of authority by the stockholders. Equity does not look with favor upon such a transaction.

One of the strongest claims for the interposition of equity in the case at bar, and others cited to sustain it, is that the mortgagee was an innocent party, acting in good faith and without knowledge of the failure of the corporation to comply with the term of the charter or statute. But a careful examination of the additional authorities cited by the court in the Carlsbad case, makes it plain that these do not support the conclusion contended for by defendants.

In re Antigo Screen Door Co. supra, the question whether or not a corporation, its creditors or assigns, had the right to question the validity of an incumbrance for its lack of the requisite assent of the stockholders, was neither presented nor considered. The question there was whether or not a trustee in bankruptcy could assail a chattel mortgage which was fraudulent as to creditors, and the court held that he could.

In Duke v. Markham, supra, and in Mannhardt v. Illinois Staats Zeitung Co. supra, the question here was neither raised, considered nor decided. In the Westerlund case the court considers the Carlsbad case as con-

trary to the conclusion there stated, but says of it:

"The result is that, laying aside the overruled California cases, but one opinion in Carlsbad Water Co. v. New, 33 Colo. 389, 81 Pac. 34, in which the question here at issue was presented, considered, and decided, has come to our attention in which it has been held that a corporation has the right to challenge its otherwise valid contract, on the ground that it was made without the required assent of its stockholders. That decision is fortified [512] by no argument or reason and by no authorities that have not been overruled."

It is inconceivable that the court in Carlsbad Water Co. v. New, 33 Colo. 389, 81 Pac. 34, intended to squarely overrule the doctrine of Denver Fire Ins. Co. v. McClelland, 9 Colo. 11, 9 Pac. 771, 59 Am. Rep. 134, without so much as offering a reason for so doing. The latter case is not cited in the briefs filed, and presumably not otherwise called to the attention of the court. It is even more to be doubted that with the question fairly presented, the court would have ignored entirely the vast array of decisions of our courts, both State and Federal, including the Supreme Court of the United States holding to the contrary.

By reason of the state of facts presented in the Carlsbad case, upon which the decision was rendered, and because of the overwhelming weight of authority against the conclusion there stated upon the question here considered, we cannot consider that case as controlling.

It is an unquestioned rule that a court of equity in the absence of fraud, will not set aside a contract that has been fully executed and closed on both sides, where each party has received and holds the proceeds and consideration for the contract, without first ordering a return to each party of the consideration paid by it, and thereby placing the respective parties as near as may be *in statu quo*. The record shows that the plaintiff in error here has tendered an adjustment in accord with this principle.

Under this rule, the Dillon estate, being in possession of the real estate under the trust deed, and the Public Trustees' deed based thereon, must be held to have a prior equitable lien on the premises for the amount of the loan, even though the mortgage be regarded as void.—Madison Ave. Baptist Church v. Baptist Church, 73 N. Y. 82.

To permit the judgment creditors to recover under such circumstances would in the language of the New York court, Seymour v. Spring Forest Cemetery Ass'n, 144 N. Y. [513] 333, 39 N. E. 365, 26 L.R.A. 859, be to sanction a species of plunder which has no recognition or support in law or equity.

The judgment is reversed with instructions to enter judgment for the defendant below.

En banc.

White, J., not participating.

Rehearing denied February 1, 1915.

NOTE.

Right of Creditor to Object to Mortgage of Property of Corporation Made without Required Consent of Stockholders.

A creditor has ordinarily no right to object to a mortgage of the property of a corporation because a statutory requirement of the consent of the stockholders to a mortgage is not strictly complied with. Such a requirement is solely for the protection of the stockholders.

United States.—Hervey v. Illinois Midland R. Co. 28 Fed. 169; Firth Co. v. South Carolina Loan, etc. Co. 122 Fed. 569, 59 C. C. A. 73, 118 Fed. 892. See also Wood v. Corry Water-Works Co. 44 Fed. 146, 12 L.R.A. 168; G. V. B. Min. Co. v. Hailey First Nat. Bank 95 Fed. 23, 36 C. C. A. 633; In re New York Economical Printing Co. 110 Fed. 514, 49 C. C. A. 133.

Alabama.—Nelson v. Hubbard, 96 Ala. 238; Barrett v. Pollak Co. 108 Ala. 390, 18 So. 615, 54 Am. St. Rep. 172; Alabama Iron, etc. Co. v. McKeever, 112 Ala. 134, 20 So. 84; Anderson v. Bullock County Bank, 122 Ala. 275, 25 So. 523.

Colorado.—See the reported case.

Illinois.—See Thomas v. Citizens' Horse R. Co. 104 Ill. 462.

Michigan.—See Escher v. Marquette, etc, Rolling Mill Co. 45 Mich. 103, 7 N. W. 695.

New York.—See Greenpoint Sugar Co. v. Whitin, 69 N. Y. 328; Paulding v. Chrome Steel Co. 94 N. Y. 334; Rochester Sav. Bank v. Averell, 96 N. Y. 467; Atlantic Trust Co. v. Crystal Water Co. 72 App. Div. 539, 76 N. Y. S. 647.

Pennsylvania.—Manhattan Hardware Co. v. Phalen, 128 Pa. St. 110, 18 Atl. 426; Manhatten Hardware Co. v. Roland, 128 Pa. St. 119, 18 Atl. 429.

Rhode Island.—Bishop v. Kent, etc. Co. 29 R. I. 680, 41 Atl. 255.

West Virginia.—See Boyce v. Montauk Gas Coal Co. 37 W. Va. 73, 16 S. E. 501.

Wisconsin.—Eastman v. Parkinson, 133 Wis. 375, 113 N. W. 649.

Thus in Firth Co. v. South Carolina Loan, etc. Co. 122 Fed. 569, 59 C. C. A. 73, it was held that the general creditors of a corporation could not impeach the validity of bonds issued by it on account of informalities at a meeting of the stockholders authorizing the issuance. The court said: "Was there such

a formal and legal meeting of the stockholders as is required by law to be held before the mortgage could be given? The court below reviewed the testimony on this point, and answered this query in the affirmative. Upon examining the testimony, we fully concur with the court below. Even were there informalities, we would not lay any stress on them. All the formalities required to be used before bonds of corporations are issued are for the protection of stockholders." In Bishop v. Kent, etc. Co. 20 R. I. 680, 41 Atl. 255, the court said: "The only remaining question which we need to consider, therefore, is whether the creditors of the corporation, who are represented by the assignee, can take advantage of the defect in the mortgage. The answer to this question depends upon the construction to be put upon the charter provision above recited. Does it include creditors, or does it apply solely to the stockholders of the corporation? We think, as already intimated, that it was enacted solely for the protection and benefit of the stockholders, and hence that creditors of the corporation cannot be heard to question the validity of the mortgage on the ground that the requisite amount of stock was not represented." So in Hervey v. Illinois Midland R. Co. 28 Fed. 169, it was said: "The provision in the act of 1872, making the assent of a given number of stockholders essential to the validity of a mortgage, is primarily, if not exclusively, for the benefit of stockholders. If it be conceded that stockholders of a railroad corporation, formed under the act of 1872, could, as against bona fide holders of bonds secured by a mortgage executed by such corporation, defeat a mortgage not executed with the expressed assent of the requisite number of stockholders, it does not follow that the creditors of the corporation could raise any such question." Likewise in Barrett v. Pollak Co. 108 Ala. 390, 18 So. 615, 54 Am. St. Rep. 172, it was held that a statute prohibiting the pledge of its property save in the manner prescribed therein, was enacted for the benefit of stockholders and could not be invoked by a creditor of the corporation. And in Beecher v. Marquette, etc. Rolling Mill Co. 45 Mich. 103, 7 N. W. 695, the court said: "The statute now under consideration was passed to protect the interests of stockholders in mining companies. It intends that their mining property shall not be conveyed away or mortgaged except by their deliberate action, after they have been notified of a proposal to do so, and have had time to deliberate upon and fully consider it. But the matter does not concern the public at large; no principle of public policy is at stake; no wrong, direct or indirect, is done to any human being if conveyance is made or mortgage given without the exact notice required, unless it be a wrong to the stockholders themselves. And as others are not concerned, why should the statute give them the right to raise questions of regularity which the stockholders elect to waive? We are satisfied such was not its purpose."

MURPHY

v.

VILLAGE OF FORT EDWARD.

New York Court of Appeals—January 12, 1915.

213 N. Y. 397, 107 N. E. 716.

Municipal Corporations — Failure to File Claim — Infancy as Excuse.

General Village Law (Consol. Laws, c. 64) § 341, provides that no action shall be maintained against a village for injuries by reason of the negligence, etc., unless commenced within one year after the cause of action accrued, nor unless, within 60 days thereafter, a written verified statement, etc., shall be filed with the village clerk. Held that, where a child of five was injured by the alleged negligence of a village, the fact of infancy did not incapacitate the infant from bringing a suit at once under Code Civ. Proc. § 468, providing that an infant's right of action shall not be deferred on account of infancy; and hence the cause of action accrued at the time of the injury, and not from the date of the subsequent appointment of a guardian ad litem.

[See note at end of this case.]

Same.

Where an infant five years of age was injured by the alleged negligence of a village on September 28, 1910, its right of action is not barred because it did not file the notice required by General Village Law, § 341, within the 60 days required by such section, nor until August 5, 1912, under the rule that the law does not seek to compel a man to do that which he cannot possibly perform; the failure of the father or mother to file the notice not being chargeable to the infant.

[See note at end of this case.]

Murphy v. *Fort Edward*, 159 N. Y. App. Div. 471, affirmed.

Appeal from Appellate Division of Supreme Court, Third Judicial Department.

Action for damages. Celia Murphy, infant, by Mary Ann Murphy, her guardian ad litem, plaintiff, and Village of Fort Edward, defendant. Judgment for defendant at Trial Term of Supreme Court. Judgment reversed by Appellate Division of Supreme Court. De-

fendant appeals. The facts are stated in the opinion. AFFIRMED.

Wyman S. Bascom for appellant.
Erskine C. Rogers for respondent.

[399] COLLIN, J.—The action is for negligence. The infant plaintiff was, when injured on September 28, 1910, five years old. The question presented arises from a failure of the plaintiff to comply with section 341 of the General Village Law (Laws of 1909, chap. 64; Cons. Laws, ch. 64). The language of the section is:

"No action shall be maintained against the village for damages for a personal injury or an injury to property alleged to have been sustained by reason of the negligence of the village or of any officer, agent or employee thereof, unless the same shall be commenced within one year after the cause of action therefor shall have accrued nor unless a written verified statement of the nature of the claim and of the time and place at which such injury is alleged to have been received shall have been filed with the village clerk within sixty days after the cause of action shall have accrued. An action on such a claim shall not be commenced until the expiration of thirty days after it is presented."

A written verified statement under and complying with the requirements of the section, except the requirement that it be filed within sixty days after the cause of action shall have accrued, was filed August 5, 1912; that is, about twenty-three months after the injury. The appellant presents the sole question (duly preserved by an [400] exception to the admission of the statement in evidence) whether or not the failure to file the statement within sixty days after the injury is a bar to the maintenance of the action.

The plaintiff was defeated in a former action against the Delaware and Hudson Company to recover for this injury. (See 151 App. Div. 351.) Her mother, her guardian *ad litem* in this action, was appointed her guardian *ad litem* for the purposes of that action, October 20, 1910. That action was commenced November 15, 1910. Her mother was appointed guardian *ad litem* for the purposes of this action August 3, 1912. This action was commenced October 14th, 1912.

In Winter v. Niagara Falls, 190 N. Y. 198, 202, 13 Ann. Cas. 486, 82 N. E. 1101, 123 Am. St. Rep. 540, the statutory provision under consideration was: "All claims for damages founded upon alleged negligence of the city shall be presented to the common council, in writing, within thirty days after the occurrence causing such damages; . . . the omission to present any claim in the manner, or within the time, in this section provided shall be a bar to an action against the city therefor." Judge Gray, writing for the court, said: "The provision, therefore, became an essential part of a complainant's cause of action and compliance with its requirement was a fact to be alleged and proved, like any other condition precedent to the existence of an obligation. (Reining v. Buffalo, 102 N. Y. 308; Curry v. Buffalo, 135 N. Y. 366; MacMullen v. Middletown, 187 N. Y. 37.) Municipal liability for injuries is a matter that is within the control of the legislature and when it is enacted what that liability shall be, and the conditions upon which it may be enforced are prescribed, the statutory provisions are controlling upon the subject. To require the presentation of a claim within a specified time is quite a reasonable provision; inasmuch as thereby the municipality is afforded a measure of protection against stale claims, or the possible [401] connivance of corrupt officials." It permitted an investigation into the occurrence to be had at a time when the evidence relating to it might more readily be collected. The provision is not so rigid as to be beyond a construction, which admits of a substantial compliance with its requirement, or of an excuse for delay in performance, when caused by the inability of the injured person to comply. (Walden v. Jamestown, 178 N. Y. 213.)" The language of section 341, "No action shall be maintained . . . unless a written verified statement . . . shall have been filed with the village clerk within sixty days after the cause of action shall have accrued," is the equivalent of the statutory language considered by Judge Gray, and such conclusion the respondent here does not oppose. The respondent does, however, asserting an analogy between an infant and an administrator of an estate, urge that the plaintiff's cause of action did not accrue until the appointment of her guardian *ad litem* for the purpose of bringing this action, even as an administrator's cause of action does not accrue until his appointment. (Crapo v. Syracuse, 183 N. Y. 395.) It seems to me the distinction between the two cases is quite clear and certain. The right of action of an infant at its origination is and remains in the infant, who is of course in being. Infancy does not incapacitate the infant from bringing the action. The infant is the real party although he sues by the guardian *ad litem*. Such fact is recognized and declared in the Code of Civil Procedure, section 468: "Where an infant has a right of action, he is entitled to maintain an action thereon; and the same shall not be deferred or delayed, on account of his infancy." The guardian *ad litem* manages the suit for the infant and protects his interests, but is not, and the infant is, the real party to the action. The decision

in Winter v. Niagara Falls, 190 N. Y. 198, 13 Ann. Cas. 486, 82 N. E. 1101, 123 Am. St. Rep. 540, above cited, may be deemed an authority overruling the respondent's assertion in that it [402] held, in effect, that infancy, in and of itself, did not prevent the operation of the requirement that the notice or statement be filed.

The requirement of the statute, however, as Judge Gray wrote, is not absolute and unyielding. Judge Gray further said: "The question was well discussed below and I think it needs no further discussion here." The court below said: "No rigid rule can be established. If an infant of ten years is injured, with no one capable of presenting a claim to the common council, the strict limitation of the statute should not be raised against him. If twenty years of age and mature, and not disabled unduly by his injuries, then the statutory requirements should be applicable. 'Each case must be a law unto itself' within reasonable limits." The Appellate Division held in the case at bar "that a child five years of age is not precluded from bringing an action against a village by failure to file, within the time prescribed by law, the notice specified in section 341 of the Village Law, and, further, that a child of that age should not be prejudiced by the failure of its father or mother to file the same."

In this state the maxim that the law does not seek to compel a man to do that which he cannot possibly perform has been made the basis for the principle that physical and mental inability to comply with a statutory provision of the kind under consideration excuses the non-compliance. (Waldan v. Jamestown, 178 N. H. 213, 70 N. E. 466; Whiteside v. North American Acc., Ins. Co. 200 N. Y. 320, 323, 93 N. E. 948, 35 L. R. A. (N. S.) 696; Forsyth v. Oswego, 191 N. Y. 441, 444, 84 N. E. 392, 123 Am. St. Rep. 605.)

This court has not declared that infancy creates or is a condition of mental or physical inability. There are two suggestive judicial utterances. The one of Judge Gray in the Winter case: "The plaintiff was eighteen years of age and, so far as the complaint shows, presumably, was able to cause a claim to be filed, and the statute makes [403] no exception as to persons." The other of Judge Spring in the opinion of the Appellate Division in the Winter case: "If an infant of ten years is injured, with no one capable of presenting a claim to the common council, the strict limitation of the statute should not be raised against him. If twenty years of age and mature, and not disabled unduly by his injuries, then the statutory requirements should be applicable." There are cases holding that a parent is the natural guardian and protector of the rights of his infant child. It cannot, however, be justly held, we think, that rights accorded by the law to infants are forfeited because a parent did not perform for an infant where performance was excused because of the infancy.

We are of the opinion that immature infancy, which includes the age of five years, is, as a matter of law, a condition of physical and mental inability excusing compliance with the requirement of section 341. It is reasonable to conclude that inability is attributable to a final period, as a matter of law, and through a period lying between those two the question of ability is a question of fact to be submitted to and determined by the jury. (See Forsyth v. Oswego, 191 N. Y. 441, 444, 84 N. E. 392, 123 Am. St. Rep. 605; Cogan v. Burnham, 175 Mass. 391, 56 N. E. 585; Barclay v. Boston, 167 Mass. 596, 46 N. E. 113; Barclay v. Boston, 173 Mass. 310, 53 N. E. 822.) It is not necessary now to determine the age at which the first period ends and that at which the final period begins; indeed they might differ with the facts of different cases. Certainly any child only five years old has not reached such maturity and capacity either physical or mental that he would seek to know his rights or could understand them if stated or apprehend the need of searching out or enforcing any legal remedies because of their invasion.

Our conclusion is not in accord with the rule enforced in some jurisdictions that infants are not excepted from the operation of the statutory requirement and that the [404] mere fact that the injured person is an infant is not sufficient to excuse failure to give the statutory notice. (Peoples v. Valparaiso, 178 Ind. 673, 100 N. E. 70; Hoffmann v. Milwaukee Electric R. etc. Co. 127 Wis. 76, 106 N. W. 808; Morgan v. Des Moines, 60 Fed. 208, 19 U. S. App. 593, 8 C. C. A. 569; Davidson v. Muskegon, 111 Mich. 454, 69 N. W. 670.) In certain of these jurisdictions, if not in all, the rule that mental and physical inability excuses non-compliance with the statute does not obtain. The conclusion here reached is, as appears from our prior decisions already cited, within the legislative intention and is just.

The judgment should be affirmed, with costs.

Willard Bartlett, Ch. J., Chase, Cuddeback, Miller and Cardozo, JJ., concur; Hiscock, J., absent.

Judgment affirmed.

NOTE.

Infancy or Other Disability of Claimant as Suspending Limitation of Time for Filing Claim against Municipality.

The reported case conforms to the rule laid down in Winter v. Niagara Falls, 190 N. Y.

198, 13 Ann. Cas. 486, that infancy in and of itself does not suspend the time prescribed by statute for the filing of a claim against a municipality for damages resulting from the happening of an accident, where the filing of such claim is a condition precedent to the right to maintain an action. To substantially the same effect see Morgan v. DesMoines, 60 Fed. 209, 19 U. S. App. 593, 8 C. C. A. 569; Davidson v. Muskegon, 111 Mich. 454, 69 Nev. 670. The reported case, however, holds that an infant of five years of age who has not filed his claim in time is excused because of his extreme minority and distinguishes its decision from the rule laid down in Winter v. Niagara Falls, supra, on the basis that an infant of five is hardly obliged to display the prudence and caution of an infant of eighteen, which was the age of the infant in Winter v. Niagara Falls. The reported case goes so far as to assert that the earlier period of infancy is as a matter of law a condition of mental inability which excuses compliance with a requirement of this nature, while later infancy should as a matter of law be considered a period of ability from which an infant should not be excused for failure to observe the requirement, and that between these periods ability or inability of an infant is a question of fact to be determined by a jury, taking into consideration all the circumstances involved in each case.

It has been held that the statutory requirement regulating the filing of claims, against a municipality does not apply to a statutory action for death by wrongful act brought by the representative of the deceased. Prouty v. Chicago, 250 Ill. 222, 95 N. E. 147, *reversing* 159 Ill. App. 82; Devine v. Chicago, 166 Ill. App. 17, *following* Prouty v. Chicago, supra; Nesbit v. Topeka, 87 Kan. 394, 124 Pac. 166, 40 L.R.A. (N.S.) 749.

As to the effect of the disability of a claimant in some respect other than infancy as suspending the period of time prescribed by statute for the filing of a claim against a municipality, the recent cases have adopted different views. Some courts have held that disability either mental or physical or both is not sufficient to excuse the failure to file a notice of claim within the prescribed time. Peoples v. Valparaiso, 178 Ind. 673, 100 N. E. 70; McCollum v. South Omaha, 84 Neb. 413, 121 N. W. 438 (strong dissenting opinion); Ransom v. South Bend, 76 Wash. 396, 136 Pac. 365; Hall v. Spokane, 79 Wash. 303, 140 Pac. 348. Thus in Peoples v. Valparaiso, supra, wherein it appeared that the plaintiff was under two disabilities, sickness and infancy, the court held that the failure to file a claim against a city within the statutory period was fatal to the plaintiff's cause of action, saying: "Section 8962 [Burns' 1908], supra, does not contravene article 1, section 23, of the Indiana Constitution. Touhey v. Decatur, 175 Ind. 98, 93 N. E. 540, 32 L.R.A. (N.S.) 350. The liability of the city in the first instance was statutory, and section 8962, supra, is simply a limitation on that liability. One seeking the benefit of the statute must show that he is within its provisions, including that requiring the notice; and the fact that such person was unable to give notice, or cause it to be given, affords no excuse for a failure to comply with the terms of the statute. Touhey v. Decatur, supra. No exception as to persons is made in the statute, and none can be engrafted on it by the courts. It imposes on all persons, including minors, the obligation to serve such notice in order to maintain an action. Hoffmann v. Milwaukee Electric R. etc. Co. 127 Wis. 76, 106 N. W. 808; Winter v. Niagara Falls, 190 N. Y. 198, 13 Ann. Cas. 486 and note, 82 N. E. 1101, 123 Am. St. Rep. 540; Davidson v. Muskegon, 111 Mich. 454, 69 N. W. 670; 28 Cyc. 1450. That the ends of justice might be the better subserved by making exceptions in cases such as this, and possibly others, appears scarcely open to controversy; but the making of such exceptions is a duty solely devolving on the legislative department of our government, and courts cannot rightfully modify the terms of a statute, however meritorious such modification may appear." In Hall v. Spokane, 79 Wash. 303, 140 Pac. 348 (*following* Benson v. Seattle, 78 Wash. 541, 139 Pac. 501) it was held that a person who, intending to commence an action against a city, failed to file the requisite notice of claim within the thirty days allowed by statute, during twenty-nine days of which the plaintiff was capable of filing her claim, was not excused by disability, on the thirtieth. The court said: "In the Born case [Born v. Spokane, 27 Wash. 719] the court said: 'We think the general rule is that it must be shown that there is such physical or mental incapacity as to make it impossible for the injured person to procure the notice to be served, and, if there is an actual incapacity, it makes very little difference in reason whether the incapacity is mental or physical.' No claim is made in the instant case that the appellant was unable to present her claim within the first twenty-nine days following the injury. Indeed, her own evidence shows that she frequently visited her physician during this time, that she was able to go about, and that she could have presented her claim in person. It is not contended that the charter provision is either unreasonable or invalid. The contention is that the appellant brought herself within its provisions. Under the authorities cited, the court was right in withdrawing the case from the jury. The statute makes a compliance with the charter provisions mandatory." In Ransom

v. South Bend, 76 Wash. 396, 136 Pac. 365, the court said that incapacity or disability would not excuse the failure to file a notice of claim and, criticizing the holding in Walden v. Jamestown, 178 N. Y. 213, 70 N. E. 466, said: "The New York courts have held that a failure to serve a preliminary notice required by a legislative charter (within forty-eight hours after the happening of the accident) is not a bar to an action where the injured party was unable to transact business during the time fixed in the charter for the service of the notice. Walden v. Jamestown, 178 N. Y. 213, 70 N. E. 466. This holding was rested upon two maxims of the law: (a) 'That a thing which is in the letter of a statute is not within the statute itself unless it is within the intention of the statute makers,' and (b) that the law does not seek 'to compel a man to do that which he cannot possibly perform.' These are sound maxims when soundly applied. There is another maxim, however, which we apprehend is even more potent, viz., that the legislature is presumed to have meant what it said. The notice in that case was served seventy-two hours after the accident occurred. The court said that this 'was a substantial compliance with the statute.' We feel constrained to adopt the view that the legislature thought it best not to except either incapacity or disability." And in reference to the rule laid down in Born v. Spokane, 27 Wash. 719, 68 Pac. 386, the court said: "The appellant invites us to apply this rule of interpretation to the statute. This we cannot do without trenching upon powers vested exclusively in a co-ordinate branch of the state government. When the law-making branch of the government has spoken, the courts may interpret, but cannot add to or take from, the clear and unambiguous meaning of the law. To do so would be legislation rather than interpretation. The policy, expediency, and wisdom of a statute are legislative and not judicial questions."

Other jurisdictions have maintained that physical or mental incapacity is sufficient to excuse a failure to file the prescribed notice of claim. Stoliker v. Boston, 204 Mass. 522, 90 N. E. 927; Terrell v. Washington, 158 N. C. 281, 73 S. E. 888; Hartsell v. Asheville, 166 N. C. 633, 82 S. E. 946 (*reconsidering* 164 N. C. 193, 80 S. E. 226); O'Connor v. Hamilton, 8 Ont. L. Rep. 391, 3 Ont. W. Rep. 918; Morrison v. Toronto, 12 Ont. L. Rep. 393, 7 Ont. W. Rep. 547, 607. Thus in Terrell v. Washington, supra, wherein it appeared that the plaintiff was both mentally and physically incapable of filing a notice within the requisite statutory period the court said: "The defendant alleged that the claim of the plaintiff had not been presented within the time fixed by its charter. But the jury have found, under proper instructions, that by reason of his injuries, which affected him both mentally and physically, the plaintiff was unable, during that period, to transact ordinary business or to present his claim, and that he did so within a reasonable time after he was restored sufficiently to do so. This, we think, excused the delay. The general rule in such cases seems to be that in order to excuse a strict compliance with the provision, it must be shown that there is such physical or mental incapacity as to make it impossible for the injured person, by any ordinary means at his command, to procure service of the notice or a filing of the claim, whichever is required, and if there is an actual incapacity, it can make no practical difference in reason whether it is mental or physical in its nature. Born v. Spokane, 27 Wash. 719; Barclay v. Boston, 167 Mass. 597. It may very properly be said that it would, in truth, shock the sense of justice and right if this provision was construed so as to hold the notice of the plaintiff's claim insufficient under the circumstances. It is an accepted maxim that the law does not seek to compel that to be done which is impossible. It cannot reasonably be presumed that the intention of the legislature in enacting this charter would lead to any such unjust conclusion, and it is a fundamental canon of interpretation that a thing which is within the letter of a statute is not within the statute itself, unless it is within the intention of the makers." And in Hartsell v. Asheville, 166 N. C. 633, 82 S. E. 946 (*considering* 164 N. C. 193, 80 S. E. 226), under a charter requirement providing that a claimant must file a notice of claim within ninety days after the accident it was held that a person who had been practically disabled during that period would not lose his right of action against the city. The court followed Terrell v. Washington, supra. In Egan v. Saltfleet, 29 Ont. L. Rep. 116, 4 Ont. W. N. 1384, incapacity continuing for two weeks, but leaving more than two weeks within which to serve a notice of claim was held not to be a sufficient excuse for a failure to file the prescribed notice. But in Morrison v. Toronto, 12 Ont. L. Rep. 333, 7 Ont. W. Rep. 547, 607, it was held that a person who, being required to file a claim within seven days after being injured, was incapacitated for three weeks, was excused from failure to file a notice of claim.

CHARING CROSS ELECTRICITY SUPPLY COMPANY

v.

HYDRAULIC SUPPLY COMPANY.

England—Court of Appeal—April 3, 1914.

[1914] 3 K. B. 772.

Waterworks and Water Companies — Underground Water Pipes — Liability for Injuries.

A person conveying water in underground pipes, by virtue of a license to use a public street for that purpose, is liable irrespective of negligence for injuries caused by the bursting of a pipe.

[See note at end of this case.]

[773] Appeal from a decision of Scrutton, J.; reported [1913] 3 K. B. 442.

The plaintiffs were a company supplying electricity in the city of London under a provisional order under the authority of which they had placed their cables under certain of the public streets. The defendants were the owners of hydraulic mains containing water at a high pressure used to supply hydraulic power, which mains had been laid under the same streets also under statutory authority. The action was brought to recover damages for injury to the plaintiffs' cables in four different streets, Water Lane, Upper Thames Street, Cannon Street, and St. Swithin's Lane, caused by the bursting of the defendants' mains. Two of the mains which so burst, those in Upper Thames Street and Cannon Street, were laid under a private Act passed in 1671—34 & 35 Vict. c. cxxi.—which did not contain the usual clause, now found in Gasworks Acts and other similar Acts, providing that nothing in the Act should exempt the company from liability for a nuisance. The other two mains were laid under the London Hydraulic Power Act, 1884 (47 & 48 Vict. c. lxxii.), which in s. 17 provided that "Nothing in this Act shall exempt the company from any indictment suit action or other proceeding at law or in equity in respect of any nuisance caused by them." And by s. 1 of that Act, "This Act may be cited for all purposes as the London Hydraulic Power Act, 1884, and this Act and the Act of 1871 as amended and extended by this Act shall be read and construed together as one Act." The plaintiffs alleged that the water had escaped from the mains by reason of the defendants' negligence, or alternatively that the defendants were liable as for a nuisance. The defendants denied the negligence, and contended that in the absence of negligence they were not liable, especially as they contended that the fractures of their mains were caused by subsidence due to the laying of the plaintiffs' cables. The judge found the following facts:—

[774] A. On February 4, 1912, the defendants' main in Water Lane burst and did damage to the plaintiffs' cable, thereby necessitating repairs which cost 583*l.* 10*s.* 10*d.* The defendants' main was laid in 1895, the plaintiffs' cable in 1901–2. The soil in Water Lane was not very sound, and when the plaintiffs laid their cable in 1902, and the excavations were filled up, the settling down of the soil did damage to the defendants' mains for which the plaintiffs paid. This was put right in a manner satisfactory to all parties at the time, and nothing happened from June, 1902, till February, 1912, when the defendants' main was fractured in a way which was due to subsidence or shifting of the soil, leaving the main unsupported in places, when the weight and pressure of the pipes and the water within, probably assisted by the vibration of the heavy traffic and a sharp frost at the time, caused the fracture. The effective cause was the subsidence. This was due to the nature of the soil and the traffic over it. The judge was not satisfied that the plaintiffs' work in 1902 or anything that had happened to it since had anything to do with the subsidence in 1912. The defendants suggested in this and the other cases that the subsidence was caused by the perishing of the wood surrounding the plaintiffs' cables which were laid in bitumen in a wooden mould, which perishing let the soil down. The judge was not satisfied that this was so.

B. On February 5, 1912, during the same sharp frost, the defendants' main burst in Upper Thames Street and did damage amounting to 41*l.* 0*s.* 10*d.* to the plaintiffs' cables. The defendants' main was laid in 1883, the plaintiffs' cables in 1901. There was a large inspection chamber of the plaintiffs built near the point where the burst occurred. Nothing happened from 1901 to 1912, when the defendants' flange broke transversely near the inspection chamber. The fracture was due to subsidence of the soil leaving the pipe unsupported, and to vibration by heavy traffic in a hard frost. The judge was not satisfied that the plaintiffs' works in 1901, or anything that had happened to them since, had anything to do with the burst in 1912.

C. On February 10, 1912, a burst in the defendants' main in Cannon Street caused damage to the plaintiffs' cables amounting to 3*l.* 8*s.* 7*d.* This amount was so small that very little was said [775] about it. The burst was due to subsidence of soil and vibration caused by the underground railway and traffic above, and the cables of the plaintiffs had nothing to do with it.

D. On August 27, 1912, a burst of the defendants' main in St. Swithin's Lane caused damage to the plaintiffs' cables amounting to

89*l.* 3*s.* 10*d.* The defendants' main was laid in 1892, the plaintiffs' cables in 1901. The fracture was due to subsidence of the soil leaving the main unsupported and subject to the vibrations of heavy traffic. The judge was not satisfied that any work of the plaintiffs in 1901 or any changes in its condition since had anything to do with the burst in 1912. He found that the defendants were not guilty of any negligence either in the manner of laying their mains or in respect of the materials of which the mains were constructed, and that they could not by any reasonable care have detected the subsidences before the bursts occurred.

Scrutton, J., held (1.) that the doctrine of Rylands v. Fletcher, L. R. 3 H. L. (Eng.) 330, applied not only to cases in which the dangerous thing had escaped from the defendant's land on to the plaintiff's land and done damage there, but also to cases in which the site of the plaintiff's injury was occupied by him only under a licence and not under any right of property in the soil, and that in the absence of statutory authorization of the nuisance the defendants were liable for the damage caused by the bursts in their mains, notwithstanding that they had been guilty of no negligence; and (2.) that the effect of the two Acts being read together as one Act was to take away the privilege which, down to the passing of the later Act, the defendants had enjoyed, in respect of the two first-mentioned mains, of not being liable for damage done by their bursting in the absence of negligence, and that consequently in the case of all four of the mains the defendants were liable as for a nuisance.

The defendants appealed.

Sankey, K.C., and *F. Gover* for appellants.

McCall, K.C., and *C. B. Marriott* for respondents.

Beale & Co., solicitors for appellants.

Pladgate & Co., solicitors for respondents.

[777] LORD SUMNER.—This is an appeal from the judgment of Scrutton, J., in favour of the plaintiffs' claim for damage done to their underground electric cables by the escape of water from the defendants' underground mains. Both parties carry on undertakings for profit, and have certain statutory permissions and powers under private Acts of Parliament. The damage was actually done in four places in the City, where the mains of the defendants and the cables of the plaintiffs were underneath the surface of the street. In two of them, the mains were put in [778] under the defendants' earlier Act, the other two after they obtained their later Act. In 1912 there were subsidences of the surrounding soil, and the mains were left unsupported in consequence, whereupon the weight and pressure of the pipes and the water within, probably assisted by the vibration of the heavy traffic and a sharp frost at the time, caused the fracture. The effective cause was the subsidence. This was due to the nature of the soil and the traffic over it. The learned judge finds substantially the same events in all the cases.

The defendants by their Acts of Parliament are incorporated for the purpose of supplying power by hydraulic pressure for cranes and similar uses, and are not allowed to supply water for any purposes which would come into competition with the ordinary water supply. Accordingly they keep their mains charged at very high pressure, and, as soon as the breaks occurred, the water escaped under a very high head. No doubt there would be a complete wash-out of the earth, and injury to the cables and penetration of the insulation would follow comparatively soon with serious results. Negligence was alleged, but was negatived by the learned judge.

The first question is whether, under those circumstances, the plaintiffs sustained particular injury by a nuisance or an invasion of their rights in the nature of a nuisance caused by the defendants; and without wishing to treat the argument with any disrespect, I can answer that briefly, if curtly, by quoting Collins, M.R., in Midwood v. Manchester [1905] 2 K. B. (Eng.) 605: "If that was not a nuisance, I do not know what would be one." Indeed I might dispose of this case by saying that, as Midwood v. Manchester [1905] 2 K. B. (Eng.) 597, is a decision of this Court, unless it can be effectively distinguished, nothing more need be said. In that case the plaintiffs had premises and stock in trade adjoining a street in Manchester. The Manchester Corporation—the undertakers of the electricity supply—had their mains in the streets. Negligence was not relied upon. Somehow the insulation of the conductors failed; a short circuit took place, and the heat so generated volatilized the bitumen in which the main was laid, which gave off an inflammable gas. The gas accumulated [779] and presently found its way into the house adjoining the plaintiff's, where it exploded and caused the fire by which the plaintiff's property was damaged, and for this the defendants were held liable.

I think that this present case is also indistinguishable from Rylands v. Fletcher, L. R. 3 H. L. (Eng.) 330. Two grounds of distinction have been suggested. It is said that the doctrine of Rylands v. Fletcher, L. R. 3 H. L. (Eng.) 330, is applicable between the owners of adjacent closes, which are adjacent whether there be any intermediate property or not; and that it is a doctrine depending upon the ownership of land and the rights attaching to the ownership of land, under

which violations of that species of right can be prevented or punished. In the present case, instead of having two adjacent owners of real property, you have only two neighbouring owners, not strictly adjacent, of chattels, whose chattels are there under a permission which might have been obtained by the private licence of the owners of the soil, though in fact obtained under parliamentary powers; hence the two companies are in the position of co-users of a highway, or at any rate of co-users of different rooms in one house, and Rylands v. Fletcher, L. R. 3 H. L. (Eng.) 330, does not apply. The case depends on doctrines applicable to the highways, or to houses let out in tenements. I am unable to agree with any of these distinctions, though they have been pressed upon us by both learned counsel with great resource and command of the authorities. Midwood v. Manchester [1905] 2 K. B. (Eng.) 597, is not decided as a case of a dispute arising between the owners of two adjacent closes. The case is treated as one between a corporation, whose business under the roadway is exactly similar to that of the defendant corporation here, and injured occupiers of the premises. If the distinction drawn between the present case and that of adjacent landowners in Rylands v. Fletcher, L. R. 3 H. L. (Eng.) 330, be a good one, it either was not taken in Midwood v. Manchester [1905] 2 K. B. (Eng.) 597, or was taken and treated as of no importance. Further I am satisfied that Rylands v. Fletcher, L. R. 3 H. L. (Eng.) 330, is not limited to the case of adjacent freeholders. I shall not attempt to shew how far it extends. It extends as far as this case, and that is enough for the present [780] purpose. It is quite true that the parties were adjacent freeholders, of whom one made a reservoir on his land, and the other excavated old mining workings. Hence in the judgments both of the Exchequer Chamber and of the House of Lords attention is drawn to the use of the close and the natural user of the land, and the rule of law is laid down that one who for his own purposes brings on his land and keeps there anything likely to do damage if it escapes must keep it at his peril. Both Courts, however, shew that they have no intention of confining the principle to the case of adjacent freeholders. It is enough if I refer to the report of Fletcher v. Rylands in the Exchequer Chamber (1866) L. R. 1 Exch. (Eng.) 265, in which Blackburn, J., delivered the judgment of the Court. He illustrated by cases upon the liability in trespass of the owner of an animal. Again, Lord Cranworth in the House of Lords, L. R. 3 H. L. (Eng.) 341, speaks of the principle not as confined to the case of landlords, but in very broad terms: "For when one person, in managing his own affairs, causes, however innocently, damage to another, it is obviously only just that he should be the party to suffer." That is not a precise proposition of law, but it is inconsistent with there being any idea in his Lordship's mind that Rylands v. Fletcher, L. R. 3 H. L. (Eng.) 330, was confined to the invasion of a right of property in soil.

Counsel then argued that Rylands v. Fletcher, L. R. 3 H. L. 330, is at most a case of adjacent owners, or occupiers, or licensees, of separate premises. This is a case of joint and successive user by two parties of one highway common to them both. I think the same idea is involved in the other class of cases cited, namely, cases of joint occupiers of one house.

Upon this part of his judgment, and upon this only, I differ from Scrutton, J., because he clearly [1913] 3 K. B. (Eng.) at pp. 449, 450, was disposed to think that this was a case of joint user of highways. These cables and mains were laid under the highway, but the laying and using of them are no part of the use of the highway. How thick a highway is, I do not know. I suppose practically it has a certain thickness, but I should think it quite clear that where you find cables and mains laid, there the highway ceases. At [781] that depth they are not in the highway but underneath it, and it seems to me, therefore, that this is a simple case of two independent persons licensed to pass their apparatus through soil—the ownership of which is not material here—with additional rights of breaking up the superincumbent surface of the highway, but the enjoyment of their licenses is no joint user of the highway at all. If that is so, the analogy of cases on nuisance and on co-occupation of a house fails. It was said by the defendants, "We got there first and the plaintiffs came with their cables afterwards, and they must therefore take the place as they find it; one of the ways in which that place may be dangerous is the presence of our mains, and, unless there is negligence, they cannot recover." Of course there are cases of nuisance where a person is held not to be entitled to complain of what is only the accustomed way of dealing with property on the ground that he has gone to the nuisance instead of the nuisance coming to him. No doubt similar cases can be put in connection with licensees who go upon premises that are in a more or less hazardous condition, but no analogy is made out here. If it had been the normal condition of these mains to squirt out water under high pressure from time to time, there might be some substance in the argument, but, assuming that the mains were sound and contained the water instead of releasing it, as they have done for years, the argument founded upon the sequence of dates is illusory.

Another argument is based upon the language of the defendants' Acts of Parliament. The Act of 1871 incorporated the undertakers

and recited that they proposed to carry on an undertaking that was beneficial to the public. They are not incorporated as waterworks supply companies with an obligation to supply water to the public, but they are given powers of taking water and of laying mains without being under obligation to keep their mains charged with water at high pressure, or at all. This serves at once to distinguish the class of cases of which Green v. Chelsea Waterworks Co. 70 L. T. N. S. (Eng.) 547, was an illustration, where the principle is that if the Legislature has directed and required the undertaker to do that which caused the damage, his liability must rest upon [782] negligence in his way of doing it, and not upon the act itself. In the Act of 1871 there was no clause in pari materia with clause 17 of the Act of 1884, which is: "Nothing in this Act shall exempt the company from any indictment, suit, action, or other proceeding at law or in equity in respect of any nuisance caused by them." It is said that, in so far as that section applies, the plaintiffs have to prove that if there was a nuisance the nuisance was caused by the defendants, and it is suggested that it was not caused by the defendants, but by unknown passers-by on the surface of the highway or what not. I do not agree that "nuisance caused by them" is to be read in any restricted sense which would save the defendants, even although there were other jointly operating causes as well as their own acts which led to the breakdown, but on the facts as found by the learned judge it is plain that this nuisance was caused by the defendants. It is not having water in the pipes that is the legal wrong; it is not even subjecting water in the pipes to the very high pressure necessary for the defendants' undertaking that is the legal wrong; it is letting the water escape: Nichols v. Marsland (1875) L. R. 10 Exch. (Eng.) 255; (1876) 2 Ex. D. 1. The question is: What caused the nuisance which consisted in streams of water suddenly issuing from a fracture in the pipe under a very high head? The fracture was only conduced to by the traffic and the vibrations caused by the traffic. The immediate cause of the fracture of the pipe was its own weight, when charged with water and suspended between two points instead of being continuously supported by the subjacent soil which had subsided; but the thing which actually caused the water to squirt out was the working of the defendants' engines, and if at the time of the fracture the engines had not been working, or it had been possible to cut off the pressure instantly, the damage would have been done in a very different way and to a very different extent, and much of the damage would have been of a very different kind. On any reading of the words "nuisance caused by them," this escape of water constituting a nuisance was caused by the defendants.

There is another point. By s. 1 of the Act of 1884 it is provided: "This Act may be cited for all purposes as the London [783] Hydraulic Power Act, 1884, and this Act and the Act of 1871, as amended and extended by this Act, shall be read and construed together as one Act and may be cited as the London Hydraulic Power Acts, 1871 and 1884." The suggestion is that in the two cases where the mains were laid before 1884, these provisions, including s. 17, do not apply, and that they are governed only by the Act of 1871, which, as it does not keep alive liability for nuisances caused by them, must be deemed to authorize nuisances caused by them. That is an assumption that I should not be prepared to make, but it does not arise because, on the construction of the two Acts, as regards all occurrences after 1884, although happening to a main laid before 1884, the two Acts must be read and construed together as one Act, and therefore, in the language of Lord Coleridge, C.J.—in Read v. Joannon (1890) 25 Q. B. D. (Eng.) 300, s. 17 of the later Act should be read thus: "Nothing in this Act" —meaning thereby nothing in this combined Act of 1871 and 1884—"shall exempt the company from any suit . . . in respect of any nuisance caused by them." If that is so, there is nothing in that defence.

I think the appeal should be dismissed with costs.

KENNEDY, L.J.—I am of the same opinion, and I have very little which I must add, because I entirely agree with the reasoning which has been expressed in the judgment just delivered. I will only, in fact, add this, that in my view this case would be sufficiently decided by saying that it is indistinguishable in any material point from Midwood v. Manchester Corp. [1905] 2 K. B. (Eng.) 597, and the judgment in that case is a judgment which places the right of the plaintiffs to succeed, so far as this Court is concerned, beyond all doubt. It was attempted, as a suggestion merely, to say that in Midwood v. Manchester [1905] 2 K. B. 597, in addition to clause 70, which corresponds with s. 17 of the later of the two Acts in the present case, there was another clause, cl. 67, but on looking through the judgment it is quite clear that the fact that there was also a clause 67 in that case had no effect as materially governing the decision. It was clause 70 of the Order in that case which was relied upon, and the only [784] reference, I think, in all the three judgments to the existence of clause 67 is in the judgment of Mathew, L.J., in which he says, not that clause 70 is to be read by the light of clause 67, but that "clause 70 of the Order seems to me to be decisive. I think

the provisions of clause 67 of the Order in this case must be read by the light of clause 70." Clause 70 is substantially identical as it seems to me, with s. 17 in the 1884 Act, and, as my Lord has said, that Act by its terms is applicable and governs the case, although some portion of the present defendants' mains were brought into being under earlier legislation, which, by the Act of 1884, is incorporated with the Act of 1884, and therefore, in my view, according to the true construction, s. 17 of the later Act applies to all the mains in question. It has been said in the course of the argument, the substance of which has been dealt with by my Lord, that the plaintiffs in the present case came upon the ground, if I may use that expression, after the defendants' mains had been placed there and, so to speak, were obliged to take the position for their works subject to risks which might arise from the earlier works. I think that is fallacious. They did in fact go there, it is true, at later dates. I think the earliest of the works that they put in was somewhere about 1901. They went there, if you look at it, as it appears to me, according to the true light to be got from the facts, with the knowledge that they were persons whose works would be protected from injury arising from the existing works. They went there, in fact, after the Act of 1884 had come into force, and, therefore, apart from any implication from the general law which would give them protection from nuisance, they went there entitled to assume that whatever was there already was there under the condition of its owners having to pay damages if nuisance arose from it. Did nuisance arise? In my opinion it clearly did in this case. As I have said, I am not going to repeat the reasoning which has been already expressed by Lord Sumner. I concur in his opinion that Midwood v. Manchester [1905] 2 K. B. (Eng.) 597, is a case which governs us, and that the principle applicable in Midwood v. Manchester [1905] 2 K. B. 597, and in the present case is the principle of Rylands v. Fletcher, L. R. 3 H. L. (Eng.) 330; and that this cannot be [785] distinguished on any of the grounds that have been suggested by the argument for the defendants. I agree that this judgment should be as my Lord has stated.

BRAY, J.: I am of the same opinion. Treating this case, first of all, without regard to the statutory authority which the defendants have, it seems to me quite clear that it comes within the principles of Rylands v. Fletcher, L. R. 3 H. L. (Eng.) 330. It was said that it was not within those principles because Rylands v. Fletcher, L. R. 3 H. L. (Eng.) 330, is the case of the owners of adjoining closes of land, but, in my opinion, that is not so. The headnote of Rylands v. Fletcher, L. R. 3 H. L. (Eng.) 330, as reported in the House of Lords, is this, and I may say that I have looked through the speeches of the Lord Chancellor and the other learned Lords and it is abundantly justified by what is said there: "Where the owner of land, without wilfulness or negligence, uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbour, he will not be liable in damages. But if he brings upon his land anything which would not naturally come upon it, and which is in itself dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned." "For any mischief thereby occasioned," that is to say, not mischief necessarily occasioned to the owner of the adjoining land, but any mischief thereby occasioned. Now in the earlier part of that, it deals with the case where he brings it upon his land. It seems to me it does not matter whether it is upon his land; if he has a right, as the defendants have here, to occupy this land for a certain purpose, namely, for these pipes, it is equally his for the purpose of testing this principle. Therefore I think that Rylands v. Fletcher, L. R. 3 H. L. (Eng.) 330, applies, and, if it applies, then the defendants undoubtedly have brought upon their land, or land which they are permitted to occupy, something which would not have naturally come upon it and which is in itself dangerous and probably mischievous if not kept under proper control.

Now, if it is within Rylands v. Fletcher, L. R. 3 H. L. (Eng.) 330, the next point [786] is to see whether the statutory power which is given them gives them any protection, and undoubtedly the cases shew that, if statutory power is given without any limitation, that does not protect them, except it be shewn that they have acted negligently. Then comes s. 17, which has been read and which I will not read again. What is the effect of that section? In my opinion the effect of it is, paraphrasing the language somewhat: You may put your pipes on this land, but you are not to be entitled by reason thereof to any protection against claims by other persons who have sustained injuries arising from any actionable nuisance which you may commit, and, therefore, if it be shewn that the plaintiffs have sustained an injury by an actionable nuisance committed by the defendants, then they have no protection.

Then the next point which is taken is that the defendants have not committed any nuisance; the injuries have not been caused by them. In my opinion the findings of the learned judge shew that the injuries were

caused by them. Lord Sumner has explained this, and I need not refer to it further.

The next point is that s. 17 does not apply to injuries caused by the water in the pipes which have been laid before the passing of the Act of 1884. Now the Act of 1884 is to be read with the preceding Act, and it imposes, in my opinion, a limitation upon the exercise of their powers. Now they were exercising their powers at the time they caused this nuisance, which was after the passing of the Act of 1884, and therefore it seems to me that s. 17 imposed that limitation on the exercise of the defendants' powers.

The last point taken was this: We got there first. Now, in order to make that good, it seems to me that it must be shewn that, by virtue of the powers given to the defendants, they were given some right to interfere with the beneficial use of the land by the adjoining owner. In my opinion they were given no such right at all. If this Act did not deprive the owner of the surrounding land of any beneficial use of his land and if he might use his land in this way, he would be entitled to exactly the same remedies as he could otherwise have got; so that there is no protection, in my opinion, to be given because of the [787] defendants coming there first. It does not matter to whom the surrounding land belongs. When the Legislature gave them these authorities, they did not take away from the right of the owner of that surrounding land any of the rights which he otherwise had, and therefore, in my opinion, the judgment must be affirmed.

Appeal dismissed.

NOTE.

Liability for Injuries Caused by Underground Water Pipes.

Water in an underground pipe is not such a dangerous instrumentality as to require a person so conveying it to confine it at his peril, and no recovery can be had for an injury to property caused by the leakage or bursting of an underground water pipe unless negligence in the construction or maintenance of the pipe is shown. Blyth v. Birmingham Waterworks, 11 Exch. (Eng.) 781, 2 Jur. N. S. 333; Green v. Chelsea Waterworks, 70 L. T. N. S. (Eng.) 547; Mann v. Henderson, 154 Ky. 154, 156 S. W. 1063; Littlefield v. Newport Water Co. 110 Me. 129, 85 Atl. 482; McCord Rubber Co. v. St. Joseph Water Co. 181 Mo. 678, 81 S. W. 189; Terry v. New York, 8 Bosw. (N. Y.) 504; Cincinnati v. Renner, 33 Ohio Cir. Ct. Rep. 189; Esberg Cigar Co. v. Portland, 34 Ore. 282, 55 Pac. 961, 75 Am. St. Rep. 651, 43 L.R.A. 435; Morgan v. Duquesne, 29 Pa. Super. Ct. 100; Paris v. Tucker (Tex.) 93 S. W. 233. See also Cattle v. Stockton Waterworks Co. L. R. 10 Q. B. (Eng.) 453; Rice v. St. Louis, 165 Mo. 636, 65 S. W. 1002. *Compare* the reported case. In McCord Rubber Co. v. St. Joseph Water Co. supra, it was said: "The plaintiff contends, however, that the defendants are liable regardless of whether they were guilty of any negligence directly causing the accident. This contention rests in the theory that one who brings into his premises anything that is liable to escape, and liable to inflict injury on his neighbors if it should escape, brings it there at his peril, and is responsible for any injury that it may cause. That contention rests for its authority on the decision in Rylands v. Fletcher, L. R. 3 H. L. (Eng.) 330. . . . There is a wide difference between a great volume of water collected in a reservoir in dangerous proximity to the premises of another and water brought into a house through pipes in the manner usual in all cities, for the ordinary use of the occupants of the house. Whilst water so brought into a house cannot literally be said to have come in in the course of what might be called in the language above quoted of the Lord Chancellor 'natural user' of the premises, yet it is brought in by the method universally in use in cities and is not to be treated as an unnatural gathering of a dangerous agent. The law applicable to the caging of ferocious animals is not applicable to water brought into a house by pipes in the usual manner." So in Terry v. New York, supra, it was said: "The use of the Croton water by pipes was legal. No one is responsible for injury committed by their breaking, unless caused by negligence or design. If all due diligence is used in making or maintaining the pipes, the injury becomes an unavoidable accident, for which no one is responsible. There was no evidence in this case that the pipes were originally defective. On the contrary, as they were in long before the damage in this particular case, they must have been originally strong. If originally sound, there was no proof of want of care in repairing any known defects or discovering them; on the contrary, it took six months of close investigation to discover where the leak was, and then they were repaired. Mere results are not proof of want of care."

If the leakage or bursting of an underground water pipe is due to the negligence of the water company, that company is liable for the resultant damage. Yik Hon v. Spring Valley Water Works, 65 Cal. 619, 4 Pac. 666; Kelly v. Winthrop, 219 Mass. 471, 107 N. E. 414. And see Leonhardt v. New York, 109 N. Y. S. 24; Woodie v. North Wilkesboro, 159 N. C. 353, 74 S. E. 924. Thus in Birmingham Water Works v. Martini, 2 Ala. App. 652, 56 So. 830, a water company was held liable for continuing to furnish water

through leaky mains, whereby pools of water formed creating a nuisance. In Emerson v. General Central Water Co. [1874–1884] Newfoundland L. Rep. 11, it appeared that a public water company failed, after proper notice, to shut off the water from the premises of a patron, by reason of which the freezing of the water burst the pipes. It was held that the company was liable.

A water company failing to repair a break in an underground pipe within a reasonable time after receiving notice thereof is liable for all damage thereafter ensuing. Monomoy Co. v. New York, 132 N. Y. S. 438; Zimmer v. Philadelphia, 57 Pa. Super. Ct. 20; French v. West Seattle Light, etc. Co. 50 Wash. 257, 97 Pac. 60. And see State Journal Printing Co. v. Madison, 148 Wis. 396, 134 N. W. 909.

In most of the cases it is clearly implied that the doctrine of res ipsa loquitur is not applicable to the bursting of an underground water pipe, and in a few cases it is directly held that the doctrine is not applicable. McCord Rubber Co. v. St. Joseph Water Co. 181 Mo. 678, 81 S. W. 189; Morgan v. Duquesne, 29 Pa. Super. Ct. 100. However, in Esberg Cigar Co. v. Portland, 34 Ore. 282, 55 Pac. 961, 75 Am. St. Rep. 651, 43 L.R.A. 435, it was said: "And this brings us to the question as to whether there was sufficient evidence of negligence on the part of the servants or employees of the committee to carry the case to the jury. The evidence on behalf of the plaintiff was to the effect that the pipe in question was laid in 1892, by The Water Committee, and connected with the general water system of the city; that it burst twice, prior to the time of the accident which caused the injury to plaintiff's goods, under an ordinary pressure; that at the time of the accident there was no unusual or extraordinary pressure upon the pipe, or reason why it should have burst at that time. The evidence further shows that a water pipe of its size and dimensions, when properly constructed and laid, will not ordinarily burst under such a pressure; and these circumstances, in our opinion, were sufficient to carry the case to the jury. As a general proposition, a party who alleges negligence as a cause of action must, of course, prove it; but under some circumstances the accident itself and the consequent injury may be of such a nature as to raise a presumption of negligence, and thus cast upon the defendant the duty of showing that he was free from fault. The rule seems to be that whenever a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of an explanation by the defendant that the accident arose from a want of care."

HUNT
v.
HELD.

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90 Ohio St. 280; 107 N. E. 765.

Restrictive Covenants — Construction against Restriction.

Where the right to enforce a restriction contained in the conveyance as to the use of the property conveyed is doubtful, all doubt should be resolved in favor of the free use thereof for lawful purposes by the owner of the fee.

Covenant to Use for Residence Purposes — Double House

A clause in a conveyance restricting the use of the property conveyed "for residence purposes only" does not prohibit the erection of a double or two-family house on the premises.

[See note at end of this case.]

Same.

The word "residence," as used in a covenant restricting the use of property to residence purposes, is equivalent to "residential" in contradistinction to "business," and has reference to the use or mode of occupancy to which the property may be put. A building used as a place of abode, and in which no business is carried on, is used for "residence purposes," whether occupied by one family or a number of families.

[See note at end of this case.]

Error to Court of Appeals, Cuyahoga county.

Action for injunction. Francis Held, plaintiff, and Carrie E. Hunt et al., defendants. Judgment for defendants in court of common pleas. Judgment for plaintiff on appeal to court of appeals. Defendant Hunt brings error. REVERSED.

[280] This was an action for an injunction brought by defendant in error on the 28th day of July, 1913, in the court of common pleas of Cuyahoga county. He sought to enjoin the plaintiff in error, Carrie E. Hunt, and one A. T. Sebek, a contractor, from any and all further work toward the construction of a two-family or double house on the real estate of said Carrie E. Hunt. He based his right of action on a certain clause of restriction contained in the deed of purchase of the real estate owned by said Carrie E. Hunt.

The matter was heard in the court of common pleas on the motion of Carrie E. Hunt to dissolve a restraining order theretofore allowed and was submitted to the court upon the petition, the answer of Carrie E. Hunt, the reply thereto and an agreed statement

of facts. The motion to dissolve was sustained, an injunction denied and the petition dismissed at the costs of defendant in error.

[281] Defendant in error thereupon appealed the case to the court of appeals and it was there heard upon the pleadings, the evidence and agreed statement of facts.

It appears from the agreed statement of facts that the defendant in error, Francis Held, was the owner of the easterly twenty-five feet of sublot 160 and the westerly ten feet of sublot 161 in John W. Taylor & Company's Douglas Park subdivision and that plaintiff in error, Carrie E. Hunt, was the owner of the easterly thirty feet of sublot 161 and the westerly five feet of sublot 162 in said subdivision, that both Francis Held and Carrie E. Hunt received their conveyances directly from the allotment company and in each of the deeds there was the following covenant of restriction: "This property is sold for residence purposes only."

It further appears that said plaintiff in error, Carrie E. Hunt, would construct on her property, unless enjoined, a two-family or double house, and that at the time the restraining order was allowed the excavation for said house had been made and a part of the easterly foundation constructed.

The court of appeals found in favor of the defendant in error, and Carrie E. Hunt was perpetually enjoined from constructing or continuing the erection of any two-family or double house on her property and judgment was rendered against her for costs.

Thompson, Hine & Flory for plaintiff in error.

A. C. Waid for defendant in error.

[282] NEWMAN, J.—In addition to the claim that the erection of a double or two-family house is not in violation of the clause of restriction contained in her deed, plaintiff in error contends that, if the erection of such a house did violate the restriction, the right to enforce it has been lost to defendant in error through his own acts or those of the common grantor. These acts are pleaded in the answer and are referred to at length in the agreed statement of facts. In arriving at a decision of this case, however, we have found it necessary to consider only the meaning of the clause of restriction contained in the deed.

It is the claim of counsel for defendant in error that in the erection of a double or two-family house on her property plaintiff in error would violate the restriction clause in her deed and that when the words "this property is sold for residence purposes only" were inserted in the deeds the sellers of the property clearly intended that single houses only should be built thereon and that the language used excluded the idea of a number of residences under the same roof or in the same house. They concede that the use of a double or two-family house is a use for residence purposes in one sense, but that it is not a use for residence purposes *only*, and say that therein lies the distinction. We are unable to see the distinction they would make. The word "only" in our opinion does not change the meaning of the words "residence purposes."

If there is any doubt as to the meaning of the words employed the doubt should be resolved in favor of the free use of the property by plaintiff [283] in error for any lawful purpose and against restrictions, for it is a well-settled rule that in construing deeds and instruments containing restrictions and prohibitions as to the use of property conveyed all doubts should be resolved in favor of the free use thereof for lawful purposes in the hands of the owners of the fee. Ewertsen v. Gerstenberg, 180 Ill. 344, 57 N. E. 1051, 51 L.R.A. 310. And again defendant in error acquired no greater rights under the restriction clause than his grantor had, and the rule that a deed is to be construed most strongly against the grantor applies here.

But is there any doubt as to the meaning of the words? The word "residence" as we view it, is equivalent to "residential" and was used in contradistinction to "business." If a building is used as a place of abode and no business carried on it would be used for residence purposes only whether occupied by one family or a number of families. Counsel say that the words were intended to describe a type of building. We think not. The word "residence" has reference to the use or mode of occupancy to which the building may be put. If it had been intended that the building was to be for the use of one family only, words indicating such an intention would have been used, as is frequently done, such as "a single residence," "a private residence," "a single dwelling house." And it is to be noted that the common grantor here, in his deed to another lot owner in the subdivision, used the expression: "This property is sold for single residence purposes only."

Counsel have cited a number of cases decided by courts in other jurisdictions, but an examination of [284] them will disclose the fact that in those cases there was under consideration language in restriction clauses materially different from that in the case at bar.

In Round Lake Assoc. v. Kellogg, 141 N. Y. 348, 36 N. E. 328, there was a restriction against the use of the property for business purposes and "residence purposes" does not appear. In Skillman v. Smatheurst, 57 N. J. Eq. 1, 40 Atl. 855, this language was used:

"Any building other than for the use or purpose of a private dwelling." In Schadt v. Brill, 173 Mich. 647, 139 N. W. 878, 45 L.R.A. (N.S.) 726, "other than a dwelling house with the usual appurtenances" was under consideration. But the supreme court of Michigan in Tillotson v. Gregory, 151 Mich. 132, 114 N. W. 1025, had made a distinction between the words "residence purposes" and "dwelling house," and held that while the latter words meant a single dwelling house the words "residence purposes" would not bear such construction.

But it is claimed that the question has been clearly decided in this state. In support of this they cite Rose v. King, 49 Ohio St. 213, 30 N. E. 267, 15 L.R.A. 160, and Linwood Park Co. v. Van Dusen, 63 Ohio St. 183, 58 N. E. 576. In the former case the question was not before the court, and in the latter the court was interpreting a provision in a lease that required the lessee to use the premises "for the purpose of a private dwelling or residence." On page 200, the court say: "The plain provision of the covenant is that the leased premises shall be used for the purposes of a dwelling or residence only, not for a number of dwellings. More than that, they are restricted to the use of it for a *private* dwelling or residence; and that is not a private [285] dwelling or residence which is used in the *business* of renting rooms to lodgers or tenants." The court seems to have laid stress on the use of the words "a" and "private," these words appearing in the report italicized.

The only reported case to which our attention has been called where the language "for residence purposes only" is given the meaning claimed for it by defendant in error is Burton v. Stapely, 4 Ohio N. P. N. S. 65, and the case is discussed at length by counsel here. The common pleas judge, it seems, based his ruling on the language used by this court in Linwood Park Co. v. Van Dusen, quoted above. The language under consideration in the Van Dusen case was entirely different from that before the court in Burton v. Stapely, and the holding of the court in the former case was not, we think, an authority for the position taken by the court in the latter, nor does it sustain the opinion of the court. In the Burton case the common pleas court granted an injunction in favor of the plaintiff and the case was appealed to the circuit court. There the injunction was denied. Error was prosecuted to this court and the judgment of the circuit court was reversed and judgment rendered in favor of plaintiff in error on facts found by the circuit court. Burton v. Stapely, 74 Ohio St. 461, 78 N. E. 1120. In that case plaintiff had asked for an injunction upon the grounds that there had been a violation of two restrictions in the conveyance and this court may have found that plaintiff was entitled to an injunction on account of the violation of the restriction in the conveyance other than the one restricting the use of the [286] property for residence purposes only, for the circuit court found as a fact that there had been a violation of the restriction in reference to the location of the building on the lot. The reversal of the judgment of the circuit court does not signify necessarily that this court approved the holding of the court of common pleas as to the meaning of the clause restricting the use of the property for residence purposes only.

In Brown v. Huber, 80 Ohio St. 183, 88 N. E. 322, 28 L.R.A. (N.S.) 705, in the covenant in the deed it was provided "that the only buildings put upon said lot shall be a residence and the necessary attachments, and that it shall be used for no other purposes than that of a family residence, and shall cost not less than $5,000 for the residence alone." The owner of the lot had constructed two dwelling houses and planned and purposed to construct two more. This the court said was prohibited by the restriction clause in the deed.

That the erection of a double or two-family house is not in violation of a restriction that the property is to be used "for residence purposes only" is the holding in Tillotson v. Gregory, 151 Mich. 132, 114 N. W. 1025; McDonald v. Spang, 55 Misc. 332, 105 N. Y. S. 617; McMurtry v. Phillips Invest. Co. 103 Ky. 308, 45 S. W. 96, 40 L.R.A. 489. In the latter case the language used was: "The property herein conveyed shall be used for residence purposes only, and that, in erecting a residence thereon, it shall be built of brick or stone." The court say: "It is contended that the language of the restriction conveys the idea of a single residence for a single family or at any rate excludes the idea of a number of residences under the same roof [287] or in the same house. We think, however, that to give the language used, this meaning, would be to extend its scope beyond the express intention of the parties. The purposes for which the houses to be erected on the court were to be used were 'residence purposes only.' And as the house in controversy is to be constructed for such purpose only and is not to be used for any other purpose, we do not think its construction is at all prohibited by the restriction clause." See also note by annotator, 45 L.R.A. (N.S.) 726, 728.

If the common grantor in the case before us had in mind the exclusion of a building for the abode of more than one family he should have used language that would have expressed such an intention. The court cannot read it into the covenant.

We do not think the clause under consideration bears the interpretation given it by the court of appeals. Taking the language in

its ordinary and popular sense, we are forced to the conclusion that it was not the intention of the common grantor to prohibit the erection of a double or two-family house on the premises. Defendant in error was therefore not entitled to the relief he sought and his petition should have been dismissed.

Judgment of the court of appeals reversed, and judgment for plaintiff in error.

Nichols, C. J., Shatuck, Johnson, Donahue, Wanamaker and Wilkin, JJ., concur.

NOTE.

The reported case holds that a covenant restricting the use of property to "residence purposes only" is not violated by the erection thereon of a double or two-family house. The cases discussing the construction of a covenant in a deed restricting the building on the granted premises to use as a dwelling house are collated in the note to Sayles v. Hall, Ann. Cas. 1912D 475.

STATE

v.

VON KLEIN.

Oregon Supreme Court—June 16, 1914.

71 Oregon 159; 142 Pac. 549.

Criminal Law — Proof of Other Crimes — As Incident to Relevant Evidence.

In a prosecution for polygamy, where a witness, having referred to the plural wife as Mrs. L., stated that she was known also as E. N., the question whether she was the same E. N. who had complained against the defendant charging him with the larceny of $3,300 worth of diamonds is admissible for the purpose of identification and is not objectionable as tending to show another offense.

[See 105 Am. St. Rep. 977.]

To Show Motive.

In a prosecution for polygamy, where the evidence showed that defendant lived with the plural wife for only a few days, evidence that he stole valuable jewelry from her while living with her is admissible to show motive for the crime charged.

[See 7 Ann. Cas. 66.]

Assignment of Error — Definiteness.

An assignment that the trial court erred in sustaining objections to questions to a witness concerning a certain person is too general to raise any question for review.

Witnesses — Cross-Examination — Irrelevant Matters.

In a prosecution for polygamy, cross-examination of a witness as to whether he had read newspaper accounts of the arrest of defendant is properly excluded.

Criminal Law — Testimony at Former Trial.

L. O. L. § 1533, makes the rules of evidence in criminal cases the same as in civil cases, except as otherwise specially provided. Section 727 authorizes the testimony of a witness deceased or out of the state or unable to testify, given in a former action, suit, or proceeding between the same parties, relating to the same matter, to be received. Const. art. 1, § 11, guarantees the accused the right to meet the witnesses face to face. Held, that testimony of witnesses out of the state given at a former trial in a prosecution for larceny, the witnesses then being face to face with accused, is admissible, so far as relevant, in a subsequent prosecution of the same defendant for polygamy.

[See Ann. Cas. 1913C 464.]

Witnesses — Husband and Wife — Competency of Wife in Bigamy Trial.

Under L. O. L. § 1535, as amended by Laws 1913, p. 351, providing that in criminal actions, where the husband is the party accused, the wife shall be a competent witness but shall not be compelled or allowed to testify unless by consent of both parties, provided that in criminal actions for polygamy the wife shall be a competent witness as to the fact of marriage, an objection to the testimony of the wife of accused in a prosecution for polygamy, before she gave any evidence except her name and place of residence, is properly overruled; her testimony as to the fact of marriage being admissible.

[See note at end of this case.]

Objection to Competency — Objection Insufficient.

In a prosecution for polygamy, after the wife of accused had testified as to their marriage, where the counsel for accused objected to further questions as they were stated only on the ground of incompetency, irrelevancy, immateriality, and no foundation laid, the objection that the witness is incompetent because she is the wife of accused is waived.

Objection to Evidence — Objection Too Broad.

When evidence would be admissible for any purpose or under any circumstances, an objection should point out specifically what the objection is, and an objection that the question is incompetent, irrelevant, and immaterial is insufficient, though it would be sufficient if the evidence were not admissible for any purpose.

Time for Objecting.

Objections to evidence must be made at the right time or they cannot be considered on appeal.

Appeal from Circuit Court, Multnomah county: KAVANAUGH, Judge.

Criminal action. E. E. C. Von Klein convicted of polygamy and appeals. The facts are stated in the opinion. AFFIRMED.

Wilson T. Hume and *Thomas B. McDevitt* for appellant.

Walter H. Evans and *Robert F. Maguire* for appellee.

[161] RAMSEY, J.—On December 13, 1913, the grand jury of Multnomah County returned an indictment against the defendant, charging him with the commission of the crime of polygamy committed as follows:

"The said E. E. C. Von Klein, alias George B. Lewis, on the 12th day of October, A. D. 1911, in the county of Multnomah and State of Oregon, then and there being, did then and there knowingly and feloniously live and cohabit with a woman, to wit, one Ethel Newcomb, as his wife, he (the said defendant) then and there having a wife then living, to wit, Louise Ellstrup Von Klein, contrary to the statute in such cases made and provided and against peace and dignity of the State of Oregon."

The defendant was arraigned upon said indictment, and he pleaded not guilty. He was tried and found guilty by a jury on the 23d day of December, 1913. On December 27, 1913, he was sentenced to imprisonment in the penitentiary for the period of from one to four years. The defendant has brought this case here on appeal, and asks for a reversal of the judgment for several alleged errors.

1. The first point made by the defendant is that the court erred in permitting the witness E. J. Carpenter to testify as to the identity of Ethel Newcomb, as complaining witness against the appellant, charging him with the larceny of about $3,300 worth of property, for the reason that the said evidence, if it tended to prove anything, tended to prove another crime, and did not [162] tend to prove the charge contained in the indictment. The witness Carpenter, having referred to Mrs. Lewis, and having stated that she was known also as Ethel Newcomb, was asked by the state this question:

"Is that the same Ethel Newcomb who complained against the defendant, charging him with larceny of some $3,300 worth of diamonds?"

Counsel for the defendant objected to this question, alleging that it was incompetent and irrelevant and tended to prove another crime. The attorney for the state represented to the court that he was asking said question for the purpose of proving the identity of the woman. The court overruled the objection, and the witness answered that it was the same woman. We think that said evidence was admissible for the purpose of identification. We do not think that to say a person is the same person that accused another of larceny tends to prove that the person so accused was guilty of larceny, especially when the statement was made for the purpose of identification.

2. There was some evidence given in this case that tended to show that the defendant stole some valuable jewelry from Miss Newcomb at the Portland Hotel at the time that he was living and cohabiting with her as his wife, as charged in the indictment. The defendant contends that the admission of said evidence was error. On the other hand, the state contends that such evidence was admissible to show the motive that prompted the defendant to marry Miss Newcomb and take her to the Portland Hotel, and there cohabit with her as his wife. The evidence showed that the defendant had a lawful wife in Minnesota; that, only a few days before he was living with Miss Newcomb as his wife at the Portland Hotel, he illegally married her in San Francisco, and took her to Portland, and went to [163] the Portland Hotel and registered as "Mr. and Mrs. Geo. B. Lewis," and they were assigned to room 637 of that hotel; that the defendant remained there only two or three days, and during that time lived with Miss Newcomb as his wife and called her his wife, and introduced her to persons about the hotel as his wife; that Miss Newcomb had jewelry valued at $3,300 which she wore at the hotel and at a theater; that, after they had been at the hotel about two days, the defendant exhibited a lot of jewelry, wrapped in a lady's handkerchief, to some persons in the hotel barber-shop and told them that it belonged to his wife, and that he was going to have it cleaned; that he went down town ostensibly to have the jewelry cleaned and disappeared, leaving Miss Newcomb and taking her jewelry with him, and leaving the hotel bill unpaid; and that he was arrested in Chicago and brought back to Portland.

The state contends, and the evidence tends strongly to prove, that the defendant planned to steal Miss Newcomb's jewelry, and that, to obtain an opportunity to steal said property, he illegally married her, took her to the Portland Hotel, and lived with her as her husband two or three days, obtained possession of her jewelry on a pretense that he would have it cleaned, and immediately absconded, taking the jewelry with him.

The state contends that the motive for marrying and living with Miss Newcomb was to obtain an opportunity to steal her said property, and the evidence tends to support that contention. The state contends also that the marrying of Miss Newcomb, the living with her at the Portland Hotel, and stealing of her jewelry were so closely connected as to form one transaction.

[164] In State v. Roberts, 15 Ore. 195, 13 Pac. 899, the court says:

"All of the acts of the parties, done in furtherance of the common design, though separated by time, and not continuous, constitute one entire transaction, and may be shown upon the trial."

In State v. O'Donnell, 36 Ore. 225, 61 Pac. 893, the court says:

"If the facts and circumstances tend to show that the prisoner committed an independent dissimilar crime, to enable him to perpetrate or conceal an offense, such evidence is admissible against him upon an indictment charging the auxiliary crime, when the intent to perpetrate or conceal such offense furnished the motive for committing the crime for which he is put upon trial."

In State v. Start, 65 Ore. 185, 132 Pac. 514, 46 L.R.A.(N.S.) 268, the court says:

"Under the third exception, an illustration would be where a burglar stole tools from a foundry with which to break the safe burglarized. Evidence of one crime could in such circumstances be given to support an indictment for the other. On the trial for burglary, the stealing of the tools could be shown as preparation for the crime charged, and, on an indictment for larceny of the tools, the commission of the burglary with them would supply the motive for stealing them."

In 2 Wharton's Criminal Ev. (10 ed.) 1667, the author says:

"But the evidence of other crimes is admissible to show motive, and, where relevant for this purpose, the admissibility is not affected by the fact that such evidence may prove other crimes."

We think that the evidence supports the state's contention that, when the defendant illegally married Miss Newcomb, he did so for the purpose of obtaining an [165] opportunity to steal her jewelry, and that his living with her at the Portland Hotel was a part of the same scheme, and that the state had a right to prove the larceny of her jewelry by him to show the motive for his living and cohabiting with her at the Portland Hotel as his wife. The illegal marriage, the cohabitation at the hotel, and the larceny of the jewelry formed one connected transaction or scheme.

3. The second assignment of error asserts that the trial court erred in sustaining the objections of the state to questions asked J. H. Marble concerning "Jack Lewis." This assignment is too general to raise any question for review.

4. However, we have examined the cross-examination of the witness Marble that is set out in the bill of exceptions, and we find that the questions there set out all asked whether Marble had read accounts supposed to have been published in the "Oregonian" concerning the arrest of the defendant. We cannot see the competency or relevancy of newspaper accounts of the defendant's arrest. The court properly ruled them out.

5. The fourth, fifth, sixth, and ninth assignments of error raise similar questions and can be properly considered together. The defendant was indicted for larceny of the jewelry of Miss Newcomb, and he was tried upon said charge, and the jury failed to agree upon a verdict and were discharged. On the trial of the defendant on said charge of larceny, Miss Newcomb was present and testified. At said trial the Rev. E. R. Dilley was a witness and testified. The evidence of both of these witnesses was taken down in shorthand by J. F. Wood, the official reporter of the court. When said witnesses were examined in said case, the defendant was present in person and by his attorney, W. T. [166] Hume, Esq., and the defendant had an opportunity to cross-examine said witnesses. His attorney, Mr. Hume, did cross-examine each of them at that time, and the defendant "met them face to face." These witnesses were absent from the state when this case was tried, and the evidence given by them in the larceny case, so far as it was relevant to the issues in this case, was admitted in evidence and read to the jury. When the evidence of E. R. Dilley, given in the larceny case, was offered in evidence, counsel for the defendant objected thereto for the following reasons: "Objected to as incompetent, irrelevant, immaterial, and no foundation laid," etc.

When the evidence of Miss Newcomb, given in the larceny case, was offered, counsel for the defendant objected thereto, for the reason that said evidence was "incompetent, irrelevant, and immaterial," etc. These objections were overruled by the court.

The first point urged against the admission of the evidence of these two witnesses is that the state did not show proper diligence to procure the personal attendance of said witnesses at the trial of this case. The evidence shows that the witness Dilley resided in San Francisco, California, and that he was not in this state at the time of the trial. A subpoena issued out of the trial court would have no validity in the state of California. It is not necessary to review the evidence tending to show diligence; but we have examined it and find that a sufficient showing was made to entitle his evidence, given in the larceny case to be read, if it was competent. Miss Newcomb, also, did not reside in the state, and the showing of diligence to procure her personal attendance was sufficient to entitle her evidence in the larceny case to be read in evidence in this case, if it was competent.

[167] The other chief objection is that the evidence of these two witnesses was not admissible in this case, because the witnesses were not personally present, and the defend-

ant had no opportunity to meet them face to face, and the evidence that was offered and read was given in another case where the issues were different, etc.

The evidence of these witnesses was given in a case in which the State of Oregon was the plaintiff, and the defendant herein was the defendant, and in that case the defendant was charged with the crime of larceny of the jewelry of Miss Newcomb that she had at the Portland Hotel during the time that the defendant was cohabiting with her there as his wife, as stated in the indictment. The parties to said larceny case were the same as the parties to this action. The evidence shows that said witnesses were sworn and gave said evidence in the presence of the defendant and his counsel, and that the defendant had an opportunity to cross-examine them, and that he did, by his counsel, cross-examine each of said witnesses in said larceny case. The defendant met said witnesses face to face in the larceny case, and the evidence that was given by them in the larceny case and was admitted in evidence in this case related to the matters in controversy in this case and was relevant to the issues herein.

In this state the rules of evidence in criminal cases are the same as in civil cases, except as otherwise specially provided in the Criminal Code: Section 1533, L. O. L.

Section 727, L. O. L. provides as follows:

"In conformity with the preceding provisions, evidence may be given on the trial, of the following facts: . . . (8) The testimony of a witness, deceased or out of the state, or unable to testify, given in a former action, [168] suit or proceeding, or trial thereof, between the same parties, relating to the same matter."

Construing the foregoing provisions of our statute and the Article I, Section 11, of the Constitution, this court in State v. Meyers, 59 Ore. 541, 117 Pac. 819, says:

"The Constitution of Oregon (Article I, Section 11) provides that in all criminal prosecutions the accused shall have the right to meet the witnesses face to face, and the Constitutions of most of the states, as well as the Constitution of the United States, contain similar provisions. It is held, however, that, where the accused has once enjoyed the right to cross-examine and confront the witnesses at an earlier trial, his constitutional right to meet him face to face is not violated by the admission of the" evidence, "when absent, at a subsequent trial. If the defendant is represented by counsel at a preliminary examination, and has had an opportunity to cross-examine witnesses, he has enjoyed his right to meet his accuser face to face, and no objection exists to receiving the testimony."

In State v. Walton, 53 Ore. 565, 99 Pac. 434, 101 Pac. 389, 102 Pac. 173, the court says:

"The statute was intended to make a general rule, concerning the taking of depositions, inapplicable to criminal trials; but we cannot think it was designed to abrogate a doctrine so firmly established and generally applied as that of permitting the testimony of a witness, given in the manner required by statute, to be used by either the state or defense on a subsequent trial, when he has since died or is absent from the state."

In Mattox v. U. S. 156 U. S. 241, 39 U. S. (L. ed.) 410, 15 S. Ct. 339, the court says:

"Upon the other hand, the authority for the admissibility of such testimony, where the defendant was present either at the examination of the deceased . . . before a . . . magistrate, or upon a former trial of the same case, is overwhelming."

[169] See, also, on this point, Summons v. State, 5 Ohio St. 325; United States v. Macomb, 5 McLean 286, 26 Fed. Cas. No. 15,702; State v. Bowker, 26 Ore. 313, 38 Pac. 124; State v. Wilson, 24 Kan. 189, 36 Am. Rep. 257; McNamara v. State, 60 Ark. 406, 30 S. W. 762.

The admissibility of the evidence of a deceased witness, or of one who is absent from the state, or unable to testify, given in a former action, suit, or proceeding, between the same parties, and relating to the same matter, is settled in this and other states by an overwhelming preponderance of authority, and this rule applies to criminal as well as civil cases; but in criminal cases the defendant must have been present when the evidence was taken and have had an opportunity to cross-examine the witness who gave it.

The defendant in this case was present in person and by his counsel when the evidence under consideration was taken, and his counsel cross-examined the witnesses; the parties were the same as in this case; and the evidence so taken related to the matter in controversy in this cause. Said evidence was admissible, and the court did not err in admitting it.

6. The defendant contends in his seventh assignment that the trial court erred in permitting Mrs. Louise Von Klein, the admitted wife of the defendant, to testify against the defendant, over the defendant's objection as to matters other than the marriage of the defendant to said witness. This assignment is very indefinite, as it does not indicate what particular evidence of the witness is objected to. When this witness was called and sworn, and before she gave any evidence, except to state her name and place of residence, the counsel for defendant asked whether she was the lady charged in the indictment to be the wife of the [170] defendant, and counsel for

the state informed him that she was. Whereupon counsel for the defendant said:

"Then I object to the witness being sworn or testifying in this case, on the ground that she is the wife of defendant."

This objection was overruled.

Section 1535, L. O. L., as amended in 1913 (Laws of 1913, p. 351), is as follows:

"In all criminal actions, where the husband is the party accused, the wife shall be a competent witness, and, when the wife is the party accused, the husband shall be a competent witness; but neither husband nor wife, in such cases, shall be compelled or allowed to testify in such cases unless by consent of both of them: Provided, that in all cases of personal violence upon either by the other, the injured party, husband or wife, shall be allowed to testify against the other: Provided further, that in all criminal actions for polygamy or adultery, the husband or wife of the accused, shall be a competent witness, and shall be allowed to testify against the other, and without the consent of the other, as to the fact of marriage."

This statute makes husband and wife competent witnesses for or against each other in criminal cases; but neither husband or wife shall be compelled or allowed to testify in such cases, unless by the consent of both parties, except that, in cases of personal violence upon either, the injured party may be a witness against the other, and in cases of polygamy or adultery the husband or wife of the accused shall be a competent witness, without the consent of the other, as to the fact of marriage. This statute means that the husband and the wife are competent witnesses for or against each other in criminal cases; but that generally they shall not be either compelled or allowed to testify unless both consent thereto.

[171] In cases of personal violence, by one upon the other, the husband or the wife (not being the party accused) may testify generally against the accused without his or her consent, but in cases of polygamy and adultery the evidence must be confined to the fact of marriage. The trial court properly overruled the defendant's objection to his wife's being sworn and to her testifying. The statute expressly provides that she may, against his objection, testify as to her marriage to the defendant.

7. After the witness had testified to her marriage to the defendant, she was asked several questions relating to his handwriting, etc. Each of those questions was objected to by counsel for the defendant, for the alleged reason that it was "incompetent, irrelevant, and immaterial, and no foundation laid." Counsel, in objecting to these questions, did not object to the witness answering them, for the reason that she was the wife of the defendant, nor did he, by said objections, question her qualifications to answer them. His objections did not go to the competency of the witness. They went only to the questions and the answers sought by them.

In the eighth volume of Enc. Pl. & Pr. page 163, the rule as to objections is stated thus:

"The objection must state the grounds thereof and point out specifically the errors complained of, in order that an opportunity may be given to correct them; if not sufficiently specific, it will not afterward avail the party raising it. In examining a question as to whether the rulings of the court below are correct, the appellate court will not consider any other grounds of objection than those urged in the court below. The appellate court is not a forum in which to discuss new points, but merely a court of review, to determine whether the rulings of the court below, as presented, were correct or not."

[172] The same volume, on page 162, says:

"Objections should be made at the first seasonable opportunity offered, and, in strictness, should be made when action is asked of the court or purposed by it."

In Mechanics' Sav. Bank v. Harding, 65 Kan. 659, 70 Pac. 656, the court says:

"At the trial the plaintiff offered in evidence what purported to be a transcript of the judgment obtained against the bank of Le Roy. The defendant objected to its introduction on the ground that it was 'incompetent, irrelevant, and immaterial.' This objection was overruled, and we think properly so. It is argued that the transcript was not properly authenticated. If that objection had been made, it should have been sustained. Objections to testimony should be sufficiently specific to direct the attention of the trial court to the exact question contended for. This is due the court as well as the opposite party. It was said in Howard v. Howard, 52 Kan. 477, 34 Pac. 1117: 'Objections to testimony should be sufficiently pointed out, in order that the court may rule intelligently upon them, and, unless this is done, they are not entitled to consideration here.' In Johnston v. Clements, 25 Kan. 670, where the objection was based 'on all the grounds ever known or heard of,' it was said: 'The court should not have entertained these objections. Objections made in that form are unfair, both to the court and to the adverse party.' In Kansas Pac. R. Co. v. Cutter, 19 Kan. 83, a transcript of the record of the proceedings of a probate court of Colorado was admitted in evidence over the objection that it was incompetent.' It was held by this court that such objection would not raise the question of the insufficient authentication of the record. If it is admissible for any purpose, or under any circumstances, it is the duty of the party objecting distinctly to call

the attention of the court to such defect. A neglect to do so will deprive such party of having the question reviewed in this court."

[173] In Rice v. Waddil, 168 Mo. 120, 67 S. W. 610, the court says:

"There was no error in overruling the objection to the letters of Columbus T. Rice, as it assigned no ground other than they were 'incompetent, immaterial, and irrelevant,' which we have often held amounts to no more than 'I object.'"

Under the statute of 1913, supra, the wife is a competent witness against the husband generally, if he consents thereto, and the defendant in this case, having objected to the questions asked his wife, on the ground that they were "incompetent, irrelevant, and immaterial," and having failed to object to her competency as a witness, for the reason that she was his wife and not permitted to testify against him, without his consent, thereby waived all objections to his wife's competency to testify against him generally, and he cannot be heard to raise that question in this court. His objections were to the competency of the evidence and not to the competency of the witness.

In 12 Enc. of Ev. page 1046, the rule is stated thus:

"Inasmuch as it is the witness, and not this evidence, which is incompetent, the objection must be directed at the former and not the latter. An objection to testimony raises no question as to the witness' competency. . . ."

The tenth volume of the same work, at page 329, says:

"Persons objecting to questions as calling for privileged communication must specify that ground in his objection, and indicate the portion objected to. It is not sufficient to state that the question is objected to as 'incompetent.'"

In McDonald v. Young, 109 Ia. 705, 81 N. W. 156, the court says:

[174] "Several questions asked of W. W. Young were objected to as being incompetent, immaterial, and irrelevant. It is argued that the questions called for personal transactions with his deceased mother, and the testimony given in response thereto should have been excluded, under Section 3639, Code 1873. The objection, in the form made here, is not sufficient to raise the point presented in argument. The objection of incompetency, without more, goes to the evidence and not to the witness. The testimony given was competent. It is the witness who is made incompetent to speak, under Section 3639, and the objection, to be good, must be made to the witness."

In Burdick v. Raymond, 107 Ia. 228, 77 N. W. 833, the syllabus is as follows:

"An objection that testimony is incompetent, irrelevant, and immaterial, hearsay, and not the best evidence, is insufficient to raise the objection that the witness is disqualified by Code, Section 4604, prohibiting certain persons from testifying to personal transactions with decedents."

In Levering v. Langley, 8 Minn. 111, the court says:

"The defendant Langley was called, and under an objection from the plaintiff's counsel that the testimony was incompetent, irrelevant, and immaterial, which was overruled, testified substantially to such an agreement between the parties at the time of the execution of the assignment of the lease. After this evidence had been thus elicited, the counsel for the plaintiff interposed the further objection to the evidence of this agreement that Randall was now dead. The referee overruled the objection as having been made too late. In this decision we think he was clearly right. The plaintiff's counsel could waive his right to object to the evidence of his adversary on the ground of the decease of the plaintiff's assignor, and we think he did so by delaying to assert it until after the witness had been allowed to testify, and more particularly so as he [175] made objections specifically upon other grounds, which were directed to the admissibility of the testimony offered and not to the competency of the witness by whom it was sought to be proved."

The objection made to the evidence given by the defendant's wife was that it was "incompetent, irrelevant, and immaterial, and that no foundation had been laid." This objection was to the evidence given by the witness, and not to the competency of the witness to testify against the defendant. The evidence that she gave was competent, relevant, and material, and there was no necessity for laying any "foundation" for its introduction.

After the defendant's wife had given her evidence concerning her marriage to the defendant, the defendant should have objected to her giving any further evidence in the case, for the reason that she was his wife, and had no right to testify to any fact except as to her marriage, without his consent.

Had a specific objection of that character been made at the proper time, any evidence by her except as to the marriage would have been inadmissible. But the objections interposed were directed to the evidence and not to her right to give additional evidence against him, and by making said objections and omitting to object to her right to testify to any fact, except the marriage, for the reason that she was his wife, the defendant waived his right to object to her general evidence.

8. When evidence that would be admissible for any purpose, or under any circum-

stances, is offered, an objection thereto should point out specifically what the objection is, so that the trial court and the adverse party will be thereby advised of the real point of the objection. To say that a question is "incompetent, [176] irrelevant, and immaterial" conveys neither to the court nor to counsel any specific information as to the real point of objection. If a question calls for facts that would not be admissible for any purpose or under any circumstances, a general objection thereto is sufficient.

9. Objections to evidence must be made at the right time, or they cannot be considered on appeal.

10. We have examined all the assignments of error, but have found no error in the proceedings of the trial court. We have read all the evidence and the charge of the court, and we are satisfied that the defendant had a fair trial, and that there is abundant evidence to support the verdict and the judgment. It is not necessary to discuss, in this opinion, each of the assignments of error. We have examined them all and find no cause for reversal.

The judgment of the court below is affirmed.

Affirmed.

McBride, C. J., and Moore, J., concur.

Burnett, J., dissents.

NOTE.

Husband or Wife as Competent Witness in Prosecution for Bigamy.

The earlier cases passing on the competency of the husband or wife of the accused as a witness in a prosecution for bigamy, are reviewed in the notes to State v. Kniffen, 12 Ann. Cas. 113; and State v. Burt, 106 Am. St. Rep. 759. This note presents the recent cases on the subject.

Unless it is specifically permitted by statute, in a prosecution for bigamy, the lawful husband or wife of the accused cannot testify against him. Knapp v. State, 54 Tex. Crim. 633, 114 S. W. 836, 130 Am. St. Rep. 903; Bryan v. State, 55 Tex. Crim. 136, 114 S. W. 811. Thus in the case first cited the court said: "In cases of bigamy the first wife cannot be used as a witness against her husband. If the first marriage was void or illegal and was not in fact such a marriage as is contemplated by the statute of bigamy or by our law, or by the law of the marital contract, then a second marriage would not be illegal. There was error, therefore, in permitting the first wife to testify against appellant. This is thoroughly settled in this state. . . . The rule is universal and the statute is emphatic that the wife cannot testify against her husband except where the offense is directly against her person. This is so in bigamy, incest, adultery, fornication and similar offenses and the same rule applies as in bigamy cases." And in Bryan v. State, 55 Tex. Crim. 136, 114 S. W. 811, it was said: "Upon the trial of the case the court permitted the wife of the first marriage to testify for the state. This has been held error by an unbroken line of authorities of this court. Evidently the learned trial judge knowing the outrage that often goes unpunished by reason of this fact, permitted this testimony introduced in order that this court might have an opportunity of again reviewing the authorities on this question. This we have done, and although, as the court evidently did, we recognize the fact that often an appellant goes unwhipped of justice by reason of the inability of the former wife to testify, yet we are constrained to hold and adhere to the former adjudications of this court, believing that they are in consonance with the statute which inhibits the wife testifying against the husband. But we most respectfully call the legislature's attention to the fact that the statute itself should be amended, and especially in bigamy cases the wife should be permitted to testify."

In *Oregon*, the statute with respect to the competency of a husband or wife as a witness against the other in a prosecution for bigamy, is as follows: "In all criminal actions, where the husband is the party accused, the wife shall be a competent witness, and, when the wife is the party accused, the husband shall be a competent witness; but neither husband nor wife, in such cases, shall be compelled or allowed to testify in such cases unless by consent of both of them: Provided, that in all cases of personal violence upon either by the other, the injured party, husband or wife, shall be allowed to testify against the other: Provided further, that in all criminal actions for polygamy or adultery, the husband or wife of the accused, shall be a competent witness, and shall be allowed to testify against the other, and without the consent of the other, as to the fact of marriage." [L. O. L. § 1535, as amended by Laws of Oregon, 1913, p. 351.] Under that statute, it is held in the reported case that, in a prosecution for polygamy the lawful wife of the accused may testify to the fact of marriage and that the admission of other testimony by her will not be reviewed in the absence of a specific objection to her competency. In State v. Locke (Ore.) 151 Pac. 717, it was held that the statute does not limit the testimony of the wife to the bare fact of marriage but that she may testify to the time and place thereof.

In *Maryland*, a husband or wife is a competent witness against the other in a criminal prosecution (Code Pub. Gen. Laws 1904, art 35, § 4). In Richardson v. State, 103 Md.

112, 63 Atl. 317, it was held that a lawful wife, in a prosecution of the husband for bigamy, is a competent witness and may testify to her marriage with the defendant, although under the statute she cannot be compelled to testify.

BOROK

v.

CITY OF BIRMINGHAM.

Alabama Supreme Court—December 17, 1914.

191 Ala. 75; 67 So. 389.

Criminal Law — Appeal from Magistrate — Objections First Made on Appeal.

Objection to the sufficiency of a complaint for violation of an ordinance cannot be made for the first time in the circuit court on appeal.

Harmless Error — Validity of Count Not Considered Below.

Where an affidavit filed in recorder's court for violation of an ordinance was treated on appeal to the criminal court as importing the charge tried, and under it guilt was determined, whether the other count of the affidavit, or the statement filed in the criminal court, both attempting to charge a like offense, were sufficient or not, is immaterial on a further appeal.

Presumption on Appeal — Verdict on Proven Acts.

It will not be assumed that the verdict was rested on any act of which there was no evidence.

Statutes — Implied Repeal.

There being no provision in the Smith and Parks Bills (Gen. Acts 1911, pp. 249–288, 26–31) defining what are unlawful drinking places, the provisions of section 5 of Act August 9, 1909 (Acts Sp. Sess. 1909, pp. 10, 11), defining unlawful drinking places, were not repealed, except in so far as regularly issued licenses to maintain drinking places afford the legal right to maintain such places.

Municipal Corporations — Ordinances — Supplementing Statute.

It is no objection to municipal ordinances, under Pol. Code 1907, § 1261, giving municipalities full power to pass ordinances, that they afford additional regulations complementary to the end state legislation would effect, if they are not in contravention of any state enactment.

[See generally Ann. Cas. 1912D 677.]

Making Facts Prima Facie Evidence.

An ordinance providing that certain circumstances, when established by evidence, should raise a prima facie presumption of guilt, which promulgates the same rule as the Fuller Bill (Acts Sp. Sess. 1909, p. 63), infracts no constitutional provision.

[See note at end of this case.]

Appeal — Persons Entitled to Allege Error — Irresponsive Answer by Witness.

Motion to exclude an answer merely because not responsive can only be availed of by the interrogator.

Intoxicating Liquors — Evidence — Other Offenses.

Where the issue on a prosecution for violation of a municipal ordinance was whether defendant kept at his storehouse prohibited liquors with intent to sell same contrary to law, a question to a witness, whether he bought liquor at that location recently before the offense alleged and after the passage of the ordinance, is an evidential fact bearing on defendant's guilt.

Appeal from Jefferson Criminal Court; GREENE, Judge.

Prosecution for violation of municipal ordinance. R. A. Borok convicted and appeals. Transferred from Court of Appeals. The facts are stated in the opinion, AFFIRMED.

Samuel B. Stern for appellant.
Joseph P. Mudd for appellee.

[76] McCLELLAN, J.—(1–3.) On appeal to the criminal court, the defendant (appellant) was adjudged guilty of the violation of an ordinance of the city of Birmingham. No objection to the sufficiency of the complaint on which defendant was found guilty by the recorder having been made in the recorder's court, objection could not be made thereto in the criminal court on appeal.—Birmingham v. O'Hearn, 149 Ala. 307, 42 So. 836, 13 Ann. Cas. 1131; Aderhold v. Anniston, 99 Ala. 521, 12 So. 472; McKinstry v. Tuscaloosa, 172 Ala. 344, 54 So. 629. The affidavit filed in the recorder's court contained in its first "count" every element with respect to probable cause that could be exacted in a criminal prosecution; and that "count" was treated on the trial in the criminal court of Jefferson county, after appeal, as importing the charge there tried; and under it guilt was determined as of an offense against the municipal ordinance. So, whether the other "count" in the affidavit, or the statement filed in the criminal court—both directed to the purpose of charging a like offense to that set forth in the first "count" in the affidavit—were sufficient or not, is entirely immaterial on this appeal. There was no averment in the mentioned first "count" asserting the manufac-

ture of forbidden liquors by the defendant, and there was no evidence tending in any degree to show [77] that defendant manufactured forbidden liquors; whereas, there was evidence supporting the allegation of infraction of the ordinance by the forbidden traffic in intoxicants. It cannot be assumed that the jury's verdict was rested upon any act of which there was not the slightest intimation or evidence, namely, the manufacture of forbidden liquors, which was not condemned or inhibited in the ordinance 58-C, but which was alleged in the statement filed in the criminal court.

(4) It has been determined here that the Smith and Parks Bills (Gen. Acts 1911, pp. 249–288, 26–31), treating the manufacture, sale, etc., of intoxicants, did not operate the repeal of the Fuller and Carmichael Bills (Acts Sp. Sess. 1909, pp. 8, 63), except in the particulars the former laws are inconsistent with the latter laws.—Western Ry. v. Capitol Brewing, etc. Co. 177 Ala. 149, 153, 59 So. 52; Allen v. State, 181 Ala. 383, 61 So. 912, 913. There being no provision in the Smith and Parks Bills defining what are unlawful drinking places, the provisions of section 5 of the act approved August 9, 1909 (Acts Sp. Sess. 1909, p. 10–11), defining unlawful drinking places were not repealed by the Smith and Parks Bills, except in so far as regularly issued licenses to maintain drinking places afford the legal right to maintain such places. Unless legally licensed under existing laws, every place defined in said section 5 as an unlawful drinking place is such and is subject to the provisions in that respect of the laws enacted at the Special Session of the Legislature held in 1909.

(5) By section 1251 of the Political Code (codifying what is known as the Municipal Code), the amplest authority was conferred on municipal governing bodies to enact ordinances to the ends therein defined. That section is as follows: "Municipal corporations [78] shall have power from time to time to adopt ordinances and resolutions not inconsistent with the laws of the state, to carry into effect or discharge the powers and duties conferred by this chapter, and to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort, and convenience of the inhabitants of the municipality, and to enforce obedience to such ordinances by fine not exceeding one hundred dollars and by imprisonment or hard labor not exceeding six months, one or both."

There is nothing in ordinance No. 58-C which appears to be in conflict with any state law on the subject. It is no objection to municipal ordinances, in which no contravention of a state enactment is undertaken or is effected, that they afford additional regulations complementary to the end state legislation would effect.—Turner v. Lineville, 2 Ala. App. 454, 56 So. 603, 605.

(6) Section 8 of the ordinance provided that certain circumstances, when established by the evidence, should raise a prima facie presumption of guilt of defined unlawful acts. This section was admitted in evidence over defendant's objection. The substance of this section (8) of the ordinance infracts no constitutional provision.—Ex p. Woodward, 181 Ala. 97, 61 So. 295. Section 4 of the Fuller Bill (Acts Sp. Sess. 1909, p. 64), considered in Ex p. Woodward, supra, provides a rule of evidence of general application in state and municipal prosecutions for violation of laws pertaining to the liquor traffic. That rule of evidence was applicable to the appellant's prosecution and effected to make out the prima facie case under features of section 1 of Ordinance No. 58-C. Hence no prejudice could have resulted to the appellant in the admission of section 8 of the mentioned ordinance which but reiterated the [79] substance of the pertinent rule of evidence provided in section 4 of the state statute.

(7) One of the issues on trial was whether defendant kept at his storehouse, in the city of Birmingham, prohibited liquors with the intent to sell the same contrary to law. The witness Flagg was asked whether or not he had bought any liquor from defendant on Fifteenth street near Avenue E in January, 1913. The question was not objectionable. The time referred to in the question was long after the ordinance had become effective. Motion to exclude an answer merely because not responsive can only be availed of by the interrogator.—Pope v. State, 174 Ala. 63, 76, 57 So. 245. Whether defendant had sold liquors at that location, so recently before the particular occasion under investigation, contrary to law, was an evidential circumstance bearing on one of the issues of guilt vel non as stated before.

The sentence imposed upon the defendant was within the penalty prescribed by section 1 of Ordinance No. 58-C.

There is no prejudicial error in the record. The judgment must be affirmed.

Affirmed.

Anderson, C. J., and Mayfield and Gardner, JJ., concur.

NOTE.

Validity of Ordinance Providing that Certain State of Facts Shall Constitute Prima Facie Evidence of Violation Thereof.

In the few cases involving the validity of an ordinance declaring the proof of a certain

state of facts to be prima facie evidence of a violation thereof, the courts have followed the rules governing statutes containing similar provisions and have held the ordinance to be valid, as merely prescribing a rule of evidence. Com. v. Price, 123 Ky. 163, 13 Ann. Cas. 489, 94 S. W. 32; Piqua v. Zimmerlin, 35 Ohio St. 507. See also Paducah v. Ragsdale, 122 Ky. 425, 92 S. W. 13; State v. Vass, 49 La. Ann. 444, 21 So. 596, 62 Am. St. Rep. 653. And see the reported case. In Com. v. Price, supra, it was said of the power of a municipality to pass such an ordinance: "The city council has a large discretion in the enactment of ordinances and an ordinance enacted under the police power will not be declared void unless it is clearly oppressive or unreasonable. It was competent for the legislative body in making the law to provide what should be a prima facie case, and to place upon the defendant, in case a violation of the law was shown, the burden of showing that the case fell within one of the exceptions named in the ordinance. The ordinance makes it an offense for the saloon keeper to suffer an infant or female to drink in his saloon, or to be or remain there over five minutes, and when these facts are shown the prosecution has made out its case, and the burden then shifts to the defendant to show that the case falls within one of the exceptions named in the ordinance." In Rowland v. Greencastle, 157 Ind. 591, 62 N. E. 474, an ordinance prescribing the business section of a city and prohibiting the conduct of the liquor business in any other portion was held to render prima facie unlawful shops kept for the sale of liquor outside the business section as defined. This, the court held the city had power to do. But it was held in In re Wong Hane, 108 Cal. 680, 41 Pac. 493, 49 Am. St. Rep. 138, that an ordinance providing that it should be unlawful to have in one's possession any lottery ticket unless it was shown that such possession was innocent or for a lawful purpose, was invalid because it overthrew the presumption of innocence.

DOMINION FIRE INSURANCE COMPANY

v.

NAKATA.

Canada, Supreme Court—December 29, 1915.

52 Can. Sup. Ct. 294.

Fire Insurance — On Bawdy House — Validity.

A policy of fire insurance on a house of prostitution and the furniture therein is void as against public policy.

[See note at end of this case.]

Appeal from Appellate Division of Supreme Court of Alberta.

Action on fire insurance policy. Minnie Nakata, plaintiff, and Dominion Fire Insurance Company, defendants. Judgment for plaintiff in trial court: BECK, Judge. Judgment affirmed by Supreme Court of Alberta. Defendant appeals. The facts are stated in the opinions. APPEAL ALLOWED.

Hamilton Cassels, K. C., for appellant.
C. T. Jones, K. C., for respondent.
Cassels, Brook, Kelly & Falconbridge, solicitors for appellant.
Jones, Pescod & Adams, solicitors for respondent.

[296] THE CHIEF JUSTICE.—I have come to the conclusion, with some hesitation, that this appeal must be allowed. This is certainly not from any desire to assist the appellants, for I think, as Lord Mansfield says in Holman v. Johnson, 1 Cowp. (Eng.) 341, "the objection that a contract is immoral and illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant."

The objection is allowed on principles of public policy which the defendant has the advantage of contrary [296] to the real justice as between him and the plaintiff.

In the appellants' factum it is said:—

"It must be clearly borne in mind in dealing with this appeal that this is not one of those too frequently occurring cases of an attempt by an insurance company to escape by means of some technicality a liability deliberately assumed by it and for the assumption of which it has received its stipulated recompense."

These are brave words, but unfortunately are not borne out by the facts. The factum proceeds:—

The plaintiff is a foreigner of bad character. I do not think it is particularly creditable for the appellants to allege as one of the grounds for trying to escape liability that the respondent is a foreigner, and, as to the fact that she is of bad character, it appears on the face of the policy, issued under the corporate seal of the company and the signature of its president, that the premises were kept by the insured as a disorderly house.

The law, I think, is stated in Phillips on Insurance (5 ed.) in chapter III. section 2, on the legality of the insurable interest. We read sub-section 210:—

"Insurance upon a subject is void if the interest insured is illegal or if the contract contemplates an unlawful use of it;" and this is carried further in sub-section 211, "though there is no express prohibition in respect to a subject, still if insurance upon it is contrary to the spirit and general principles, or what is called 'the policy' of the law, the owner cannot make a valid insurance upon it."

Again, sub-section 231, after referring to cases partly legal and partly illegal where a valid insurance may be made for the legal part, continues:—

"In the preceding cases no illegality appeared on the face of the contract of insurance. Where such does appear, the whole contract is void, as in the case of an agreement to employ a ship in an illegal trade."

[297] In Pearce v. Brooks L. R. 1 Exch. (Eng.) 213, at page 218, Chief Baron Pollock said:—

"No distinction can be made between an illegal and an immoral purpose; the rule which is applicable to the matter is, *ex turpi causâ non oritur actio*, and whether it is an immoral or an illegal purpose in which the plaintiff has participated it comes equally within the terms of that maxim and the effect is the same; no cause of action can arise out of either the one or the other."

In the notes to the case of Collins v. Blantern (1 Smith Lead. Cas. [12 ed.] 412), in Smith's Leading Cases (ed. 1915) it is said:—

"Contracts made for immoral purposes are simply void. . . . The illegality is equally fatal when created by statute."

Many cases are cited in support of this latter proposition. By section 228 of the Criminal Code the keeping of a disorderly house is an indictable offence and the purpose for which this house is used, being expressly stated in the policy, there can be no doubt of the illegality of the purpose for which it was used.

In Scott v. Brown (1892) 2 Q. B. (Eng.) 724, at page 728, Lindley L. J. said:—

"*Ex turpi causâ non oritur actio.* This old and well known legal maxim is founded in good sense and expresses a clear and well-recognized legal principle which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal. . . . . If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him."

In his judgment in the case in this court of Clark v. Hagar, 22 Can. Sup. Cas. 510, Mr. Justice Gwynne refers to a number of cases as establishing that the true test whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires any aid from the illegal transaction to establish [298] his case. In the present action the plaintiff, now respondent, could not, of course, succeed without proving the policy bearing on its face evidence of illegality. Such proof is offensive to the court and cannot be received.

That we find in the English reports no case exactly in point is not, I think, a matter of surprise. English insurance companies, it is well known, rarely dispute their liabilities, never except in gross cases. Further, I should think it probable that respectable companies would be unwilling to state in their policies an immoral purpose. Few people, one may suppose, are willing to advertise their own turpitude unnecessarily.

There is a case in the Circuit Court of Quebec of Bruneau v. Laliberté, 19 Quebec Super. Ct. 425, in which Mr. Justice Andrews held that "insurance upon the furniture in a house of ill-fame is an illegal and immoral contract and will not be enforced by the courts."

I do not think it is necessary for me to dissent from anything said in the judgment above referred to of Clark v. Hagar, 22 Can. Sup. Ct. 510. It is relied on in the decision of Morin v. Anglo-American F. Ins. Co. 3 Alberta 121, 13 West. L. Rep. 667, in the court of appeal for the Province of Alberta, which the decision now under appeal professes to follow, and also in the later case of Trites Wood Co. v. Western Assur. Co. 15 British Columbia 405, 15 West. L. Rep. 475, in the Court of Appeal for British Columbia. It is, however, unnecessary to examine this judgment particularly, as I am unable to find in it anything to support the decisions in these cases in which, as in the present case, the [299] illegality appears upon the face of the contract sued upon.

For the French law on the subject, see Planiol (6 ed.) vol 2, para. 1009 et seq. and cases there cited. The modern tendency of

the Cour de Cassation would appear to be, however, to maintain the validity of contracts such as the one here in question on the ground that the reciprocal obligations which the parties assume relate exclusively to the payment by the insured of the agreed premium and to the payment by the company of the stipulated indemnity in the event of the destruction of the thing insured. *Vide* Sirey, 1904, 1, page 509; but see S. V. 1896, 1, 289; Appert's note; S. V. 1913, 1, 497, note, and S. & P. 1909, I, 188.

There is no provision in the Code Penal which corresponds with section 228 of the Canadian Criminal Code.

The appeal will be allowed and judgment entered for the defendants, the present appellants, but without costs.

DAVIES, J.—I think this appeal should be allowed upon the grounds submitted by Mr. Cassels.

In the first place, I think Carr was the agent of Nakata for the purpose of procuring the policy of insurance in question.

The insured was the keeper of a "sporting house" which Mr. Jones, for the respondent, candidly admitted was well understood to be a bawdy house or house of ill-fame.

The husband of the plaintiff applied to Carr, an insurance broker, to obtain the insurance and was told by him that he could not take it in the insurance [300] company for which he was agent, but would apply to other companies and was instructed to do so. He applied to the general agent in the province of the appellant company, who agreed to take it. The applicant paid to Carr a part of the insurance premium and shortly afterwards returned to Carr to obtain the policy when he was told it was subject to cancellation at any time. He then paid Carr the balance of the premium and Carr handed over to him the policy.

Carr says that at that time he asked them whether in case of cancellation he would return the money or put the insurance in some other company—and he was told to put it in some other company.

The same afternoon Carr received notice that the head-office had cancelled the policy, whereupon he wrote and sent by registered post a letter to the plaintiff telling her the policy was cancelled. Carr had received the premium from the applicant, and on receiving notice of the cancellation of the policy made, as instructed, efforts to obtain insurance elsewhere, but was unsuccessful and the premium remained in his hands.

The trial judge was of the opinion that the whole thing depended upon the question of the agency of Carr for the insured upon which there is much to be said upon both sides. The learned judge was not satisfied that Carr was an agent to receive notice of cancellation and this view prevailed in the court of appeal.

I am of opinion, however, that Carr was such an agent and that the premium having been left with him in case of cancellation to obtain insurance in some other company, that he was the agent of the insured for receiving notice of such cancellation.

[301] On the other ground also, that the contract was one for facilitating the carrying on of an illegal and immoral object, I think the appeal should be allowed. The trial judge and the court of appeal felt themselves concluded by the case of Morin v. Anglo-American F. Ins. Co. 3 Alberta L. Rep. 121, 13 West. L. Rep. 667. I am not able to accept that authority or the reasoning upon which it was founded. I think the principle upon which the case of Pearce v. Brooks, L. R. 1 Exch. (Eng.) 213, was decided the proper one to apply in this case.

That principle is that one who makes a contract for sale or hire with the knowledge that the other party intended to apply the subject-matter of the contract to an immoral purpose cannot recover on the contract. As Pollack C. B. said in that case if an article was required and furnished "to facilitate the carrying on of the immoral purpose" that is sufficient. The courts would not lend their aid to carry it out. It seems to be that the facts of the case now before us are stronger against the enforcement of the contract than those in the case of Pearce v. Brooks, L. R. 1 Exch. (Eng.) 213, which the Exchequer Court refused their aid to enforce. In that case, the plaintiffs sued for the hire of a brougham by a woman known by them to be a prostitute and who used the brougham to their knowledge for the purpose of making a display favourable to her immoral purposes.

In the case of Johnson v. Union Marine, etc. Ins. Co. 127 Mass. 535, the court followed a previous decision of their own in Kelly v. Home Ins. Co. 97 Mass. 288, and held that if a person engaged in the unlawful business [302] of selling intoxicating liquors without a licence at the time of the making and acceptance of a policy of insurance on his stock in trade and a month afterwards, the policy does not attach, although he made application for a licence immediately after he began such business.

The grounds on which the decision was placed in Kelly v. Home Ins. Co. 97 Mass. 288, above referred to were that the object of the assured in obtaining the policy was to to make their illegal business safe and profitable and that the direct and immediate purpose of the contract of insurance being to protect and encourage an unlawful traffic the contract was illegal and never attached.

The same principle was held by Andrews J. to govern in the case of Bruneau v. Laliberté, 19 Quebec Super. Ct. 425.

I think this principle should apply to this case, the contractual obligation of the company being in case of loss either to pay the same up to the amount insured or to "replace the property damaged or lost." Could it be fairly argued that the replacement of the property would not be an aiding or facilitating of the immoral purpose for the carrying on of which the house and furniture were used? I think the courts of this land should not lend their aid to enforce contracts made to facilitate the keeping of houses of ill-fame, which, in my judgment, this insurance policy was calculated to do.

IDINGTON, J. (*dissenting*).—This is an action upon a policy of insurance against fire on a house in Calgary owned by respondent and used as a bawdy house, [303] in modern slang phrase described, as it was in the said policy, as a "sporting house," and on furniture therein.

The chief ground of defence set up was that, pursuant to a statutory condition indorsed thereon, the policy had been cancelled long before the fire.

It is quite clearly established, indeed not seriously disputed, that the policy was duly issued by the general agents of the appellant and the premium therefor paid.

It was procured by a local broker from the said general agents. A good deal of what was, I respectfully submit, needless discussion, has taken place as to the details of how this payment and its alleged return was dealt with. I assume, upon the facts in evidence, that the general agents received the premium, but failed to return same in any way for more than six weeks after the date of the policy, although the alleged cancellation is claimed to have taken place within ten days after said date.

This alleged re-payment is only material in considering the contention set up by appellant that Mr. Carr, the broker, was the respondent's agent to receive the return of the money.

The power of cancellation relied upon is that contained in the condition, No. 19, of the statutory conditions in force in Alberta.

I think it is necessary for any company seeking to avail itself of the power therein contained to follow the very simple and clear terms of that condition.

I cannot find in what was done anything even resembling what the power requires. Nor can I find that what the respondent's husband said to Carr could [304] entitle him, as her agent, to set aside or waive that condition and all implied therein.

The details of all that have been so fully dealt with by the learned judges in the courts below that I do not think I can serve any good purpose by setting forth an additional elaboration thereof.

The appellant stoutly maintains Carr was not its agent, though appearing on the policy as agent. I accept its contention in that regard.

The doing so relieves me of the necessity for considering the possible effect of his sending her a notice. The only notice alleged to have been given the insured was one mailed to her by Carr, but never received by her, or heard of by any one acting for her as her agent for that purpose.

There never was, unless Carr was appellant's agent, anything done, I repeat, resembling what the statutory condition imposes upon the insuring company to be done by it in such cases, but not by some one else.

Again, it is contended that the policy was illegal upon the ground that the owner of a bawdy house cannot insure himself, or herself, against loss thereof by fire.

We have all heard of leases made of a house to be used for such like purposes being illegal, either because it obviously promotes the illegal purpose had in view, or because the consideration for such a lease may be tainted thereby and, hence, the contract is void.

I am unable to understand how the policy of insurance can, as of course, in itself promote the carrying on of such a traffic, or in law be held to fall within the principles upon which I suggest a lease, for example, may be illegal and be thereby void.

[305] It is urged the house had become vacant and that change of condition so increased the risk as to violate the condition. The learned trial judge upon the facts found against the appellant, and no appeal was made against that finding.

Though neither set up in the pleadings nor urged at the trial, nor presented to the court of appeal, counsel for the appellant seeks now, for the first time, in this court to set up the further defence that there was an undisclosed encumbrance on the property and some false statement of proof of loss in that regard.

The manifest injustice of allowing such an issue of fact to be raised at this stage for the first time has always been held a sufficient answer here to permitting any such course.

The appeal should be dismissed with costs.

DUFF, J. (*dissenting*).—The first question is whether the policy was in force at the time of the fire and that subdivides itself into: (*a*) Did the appellant company receive payment of the insurance premium? and (*b*) Was the power of cancellation with which the insurers were invested by the terms of the policy effectively put into operation?

The answer to the former question must be in the affirmative or the negative according as the appellant company is held or not held to be precluded from disputing both that payment to Carr and that payment to Tavender & Co. would be payment to themselves. As to Carr—for some purposes he no doubt was the agent of the respondent, but it does not necessarily follow that he was not also the agent of the appellant company for the purpose of receiving payment of the premium. [306] The policy was delivered by Carr to the respondent's husband and on the policy there was a declaration to the effect that Tavender & Co. were the general agents of the company and there was also a statement that Carr was the company's agent. In the appellant's factum it is said that the designation of Carr as agent was adopted as a matter of office procedure in recognition of Carr's right to a commission for the introduction. For our present purpose we are not concerned "with the appellant's office procedure." Carr held the policy for delivery to the respondent on payment of the premium and the designation of him as agent correctly describes the character in which he had possession of the policy which he unquestionably held for the company and delivered to the respondent on their behalf; the description of him as agent and his possession of the policy for the company together constituted a representation upon which the respondent was entitled to act on paying the premium. Counsel for the respondent did not, of course, dispute, it would have been hopeless to do so, that if a loss had occurred immediately after the delivery of the policy and before the transmission of the premium by Carr and before any steps had been taken looking to cancellation, that it would have been impossible to deny that the risk had attached. As to Tavender & Co.—the premium was in fact paid by a set off of the accounts between Tavender & Co. and Carr—the repudiation of Tavender & Co.'s action by the company could have no effect upon the rights of the respondent, who, having no notice of any limitation of authority was entitled to assume that Tavender & Co. were acting within the scope of that conferred upon them.

[307] As to cancellation. It is not disputed that notice of cancellation was not received by the respondent. The appellant's contention rests upon the proposition that Carr had been constituted the respondent's agent for the receipt of such notice. The contention breaks down on the facts, there being simply no evidence to support a conclusion that the parties intended that the policy should be subject to cancellation without notice to the respondent personally. The direction alleged to have been given to Carr to retain the premium in the event of cancellation cannot fairly be held to imply authority to receive notice of cancellation. The learned trial judge found against agency in fact and I entirely agree with his view on this point.

We now come to the difficult question: Was the policy invalid as tainted with illegality by reason of the purported contract being a contract entered into for the purpose of assisting the respondent in carrying on an illegal business by securing her indemnity against loss of property by fire while the property was being employed for an illegal purpose?

The facts are that the house and personal effects, the subjects insured, were at the time of the application in the possession of the respondent who carried on in the house and used the furniture for the purpose of carrying on the business (as it is described in the application) of a "sporting house," in other words, a house of ill-fame. This fact, being stated in the application, was, of course, known to the company. At the time the fire occurred the house was not occupied by the respondent, but was in the care of a caretaker who slept there at nights. The usual premium was charged, there being no augmentation because of [308] any special hazard that might be supposed to exist by reason of the character of the occupation, and there is no suggestion that this last mentioned circumstance in itself, according to insurance practice, would be regarded as entailing any special hazard or as affecting the character of the risk from the actuarial point of view. It appears further that the appellant company was unwilling to accept the risk and directed the cancellation of the policy as soon as they became aware of the facts. The point, however, upon which the appellant company based its objection was a rather narrow one. The officials of the company appear to have had no objection to accept a risk of this character if the place was situated within what was described as a "licensed district," in other words, if the place was permitted to flourish by the openly understood sanction of the police. The house in question not being as I have said within a "licensed district" these officials decided to put an end to the risk.

The argument for the appellant is now put in this way. The respondent, it is said, sought insurance to enable her the more safely to carry on a business which is not only a violation of the law itself, but is a public trading in immorality. It is said that the performance of such contracts of indemnity by the insurer has a tendency directly to encourage illegality and immorality and

such contracts are, therefore, in such circumstances, within one of those classes which the courts refuse to enforce, as being in the traditional phrase "tainted with illegality." I have come to the conclusion that this view does not furnish the governing rule for the decision of this appeal; but I am far from suggesting that there is not a great deal of force in the strict legal considerations that may be adduced [309] in support of it, however little one may be disposed to look with anything but impatience upon the posture of this company whose interest in the public morals finds adequate expression in a distinction between bawdy houses protected by the police, according to clearly understood convention, and bawdy houses whose toleration is more irregular and precarious.

This question is, of course, a dry question of law. This contract of insurance is not in itself illegal in the sense that it is a contract directly forbidden by law or in the sense that it is intended to create an obligation to do anything forbidden by law. If the appellant company had paid the respondent's claim, nothing in the making or the performance of the contract could be described as illegal. A contract, however, on the face of it collateral to an unlawful act or to an unlawful course of business or to an unlawful design may be so connected with the illegality as to the vitiated by it; the question as Marshall C. J. said in Armstrong v. Toler, 11 Wheat. 258, at p. 272, 6 U. S. (L. ed.) 468, very often is a question of considerable nicety whether the connection is or is not of such a character as to have that effect.

There is a number of decisions in cases similar to this in which the insurance contract is treated (1) as an agreement to indemnify against the consequences of an illegal course of action or (2) as a mere incident in the carrying on of some transaction or business forbidden by law.

The former is the interpretation which has been given to marine policies insuring a voyage illegal in its inception, such policies being held void as attempts [310] to contract for indemnity against the loss suffered by reason of carrying out an unlawful enterprise. See Wilson v. Rankin, L. R. 1 Q. B. (Eng.) 162; Ocean Ins. Co. v. Polleys, 13 Pet. 157, 10 U. S. (L. ed.) 105. The latter is the interpretation upon which rest certain decisions in the American courts, notably in the courts of Massachusetts in which policies of insurance effected upon stocks of liquor held for sale by unlicensed dealers in violation of the law have been thought void as transactions in reality constituting in part the carrying on of an unlawful business.

These interpretations cannot, I think, be said to fit the case before us. The fact that in accordance with settled practice an applicant for insurance is required to state the business, if any, carried on on the premises proposed for insurance, and the fact that the business named is illegal and the fact that this statement with other statements in the application constitute the basis of the contract do not justify the interpretation of the contract as a contract to indemnify against loss incurred by reason of the carrying on of an illegal business; the policy being in the usual form, the risk insured against being the risk of fire from causes usually insured against in a policy in that form, the premium, as I have already said, being the usual premium. One would not think of describing a policy of insurance upon his office furniture taken out by a promoter whose chief business was to effect mergers obnoxious against the provisions of the Criminal Code as an agreement to indemnify against loss incurred in the course of his illegal business; and yet the parallel if not exact is approximate.

[311] Neither ought the latter of the above mentioned views (which has been given effect to in Massachusetts in the cases referred to) to govern in this case. It would be a quite unreasonable interpretation of the intentions of the parties to this contract to hold that the terms of the bargain in any way turned upon the character of the business carried on. One could better interpret their intentions by saying that the contract was made in spite of the fact rather than because of the fact that the occupation was of the character mentioned.

A distinction suggested by a series of English cases dealing with the enforceability of contracts made with persons of the respondent's class may, I think, well serve as a key to the solution of the question before us. In Lloyd v. Johnson 1 B. & P. 340, Mr. Justice Buller, in Bowry v. Bennet, 1 Campb. 348, Lord Ellenborough, and in Pearce v. Brooks, L. R. 1 Exch. 213, the Court of Exchequer had such contracts before them and the net result, I think, of the authorities of which these are typical examples, is summed up with accuracy in the treaties on contracts by Mr. Manisty, in Halsbury Laws of England, vol. 7, p. 400, in these words:—

"An action lies to recover the price of goods sold or work done even though that the plaintiff knew that the person with whom he was dealing was a prostitute (Lloyd v. Johnson, L. R. 1 Exch. 213); Bowry v. Bennet, 1 Campb. 348), unless it appears that the goods were sold or the work was done for the purpose of enabling her to exercise or assisting her in the exercise of her immoral calling. (Hamilton v. Grainger, 5 H. & N. 40; Pearce v. Brooks, L. R. 1 Exch. 213)."

In Pearce v. Brooks, Baron Bramwell, who had tried the action, says:—

[312] "I told the jury that, in some sense, everything which was supplied to a prostitute is supplied to enable her to carry on her

trade, as, for instance, shoes sold to a street walker; and that the things supplied must not merely be such as would be necessary or useful for ordinary purposes, and might be also applied to an immoral one; but that they must be such as would under the circumstances not be required, except with that view."

This insurance company, no doubt invites us to hold that when they do enter into contracts for the insurance of such places (being, of course, let it be well understood, within a "licensed district") they do so with the object of enabling the proprietors to exercise and to assist them in the exercise of their immoral calling. In fact, of course, it is not so and it would be ridiculous to say that they ever thought of assisting the respondent in the exercise of her trade or of supplying her with anything that had any special reference to her trade or of contracting with her in any other character than that of the proprietor of a furnished dwelling simply.

The above mentioned cases were applied in this court in the case of Clark v. Hagar, 22 Can. Sup. Ct. 510, and the judgment of Mr. Justice Gwynne, who spoke for the majority of the court, contains an exhaustive but luminous exposition of the effect of the decisions and his conclusions are substantially in harmony with the passage quoted above from Mr. Manisty's treatise.

Mr. Justice Gwynne's judgment was applied in a case similar to the present by the British Columbia Court of Appeal, Trites Wood Co. v. Western Assur. Co. 15 British Columbia 405, 15 West. L. Rep. 475.

I must not omit a reference to Bruneau v. Laliberté, 19 Quebec Super. Ct. 425 (Mr. Justice Andrews), in which it was [313] held that a policy of insurance on the furniture of a house of ill-fame was an illegal and immoral contract and non-enforceable. The decision is, in part, based on an interpretation of Pearce v. Brooks, L. R. 1 Exch. (Eng.) 213, which is not, I think, an admissible interpretation; and upon certain French authorities which were supposed to support the conclusion at which the learned trial judge arrived. In France, however, the jurisprudence is by no means uniformly in favor of the learned judge's view as is shewn by the following passages from Carpentier, Rep. Supplément, 2 Assurance contre l'incendie, Nos. 64 and 207 (2), giving the effect of two comparatively recent decisions of the Cour de Cassation:

"64. Le contrat d'assurance contre l'incendie passé par le tenancier d'une maison de tolérance ne peut être annulé comme ayant une cause immorale, alors que, dans ce contrat, les prestations que les parties se sont mutuellement promises consistaient, d'une part, dans le paiement de l'assuré des primes convenues, d'autre part, dans le paiement par la compagnie d'une indemnité pécuniaire, ou, à son choix, dans la reconstruction ou la réparation des batiments incendiés et le replacement en nature des objets détruits; ces prestations licites en elles-mêmes, n'ont pu devenir illicites par cela seul que les risques assurés dépendaient d'une maison de tolérance, et elles ne sauraient être considérées comme ayant eu en vue la création, le maintien ou l'exploitation d'un établissement de cette nature. Cass., 4 mai, 1903.

"207. (2) Y a-t-il fausse déclaration de la part du tenancier d'une maison de tolérance qui se qualifie de loger en garni? La question s'est posée devant la cour de cassation. Le pourvoi soutenant l'affirmative par les motifs suivants: L'exploitation d'une maison de tolérance, disait-il "présente des risques considérables. Le danger d'incendie, en effet, est plus grand que partout ailleurs dans une maison fréquentée la nuit par des gens souvent avinés, où l'orgie est quotidienne, le drame fréquent, et dont le personnel par sa profession même, est une perpétuelle menace d'imprudence, sinon d'actes malveillants. Ces risques considérables entraînent les compagnies, quand elles consentent à assurer les tenanciers de maisons de tolérance, [314] à exiger d'elles le paiement de primes fort chères." Mais les juges du fond avaient refusé d'accueillir le moyen de nullité, par la raison que la compagnie ne pouvait se méprendre sur la sens et la portée des expressions "logeur en garni" dans les circonstances au elles avaient été employées. C'est la solution qu'a fait prévaloir la Cour de cassation. Cass., 4 mai, 1903, Comp. d'assur, terr. Le Monde (S. & P. 1904, D. 1906,5,33)."

The appeal should be dismissed with costs.

BRODEUR, J.—The first question in this case is whether the contract of insurance was valid.

In the application for insuring the premises, it was stated that the plaintiff (respondent) was keeping a "sporting house," which was understood as being a house of ill-fame.

The policy was procured through the appellants' agents in Calgary. They had the power to accept risks, subject to cancellation by the head-office, as is the usual insurance practice. The head-office of the insurance company refused to maintain the policy and a notice of cancellation was given.

The agents of the appellant company in Calgary immediately notified the broker through whom the application had been made. This broker, Carr, on the same day, wrote to the plaintiff telling her the policy was cancelled and asking for its return. He did not enclose the premium because, as in-

structed by the plaintiff, he intended to try and get insurance else where.

This letter was not received by the plaintiff and was subsequently returned to Carr.

A fire having taken place on the premises, the present action has been instituted for the purpose of recovering the amount of the insurance.

[315] The company claims that the contract was illegal because it facilitates immorality.

It has been decided in a case of Bruneau v. Laliberté, 19 Quebec Sup. Ct. 425, by Mr. Justice Andrews that an "insurance upon the furniture in a house of ill-fame is an illegal and immoral contract, and will not be enforced by the courts."

Addison, on Contracts, p. 72, summarises the matter in stating—

"Contracts tending to promote fornication and prostitution are void." And Beach on Contracts, p. 2019, says that "any contract auxiliary to the keeping of a bawdy house is void." Halsbury, Laws of England, vol. 7, No. 829, p. 400, relying on the case of Pearce v. Brooks, L. R. 1 Exch. 213, says that if it appears that a work was done for the purpose of enabling a prostitute to exercise or assisting her in the exercise of her immoral calling, no action would lie.

Pollock on Contracts (7 ed.) p. 370, in speaking of transactions where there is an agreement for a transfer of property for a lawful consideration, but for the purpose of an unlawful use being made of it, says that—

"The later authorities shew that the agreement is void not merely if an unlawful use of the subject-matter is part of the bargain, but if the intention of one party so to use it is known to the other at the time of the agreement.

. . . . . .

"If goods are sold by a vendor who knows that the purchaser means to apply them to an illegal or immoral purpose he cannot recover the price."

I find in Dalloz, Répertoire Pratique, vo. "Contrats et Conventions en général," Nos. 398 and 401, that [316] the contract whose consideration is the maintenance of a house of ill-fame is illicit and the action for the price of the service of a domestic in a house of ill-fame should not be accepted. I must say, however, that this latter decision has been severely criticized by some authors. Baudry-Lacantinerie, vol. 11, No. 313, says:—

"C'est l'obligation sur cause illicite que l'art. 1131 déclare sans effet. Il en est autrement de l'obligation dont le motif séulement est illicite. Ici donc apparaît encore l'utilité de la distinction entre la cause et le motif. Cette distinction est nettement établie dans quelques décisions judiciaries. Mais beaucoup d'autres l'ont perduc de vue et la confusion a engendré des décisions vraiment fantastiques. N'a-t-on-pas vu le tribunal de commerce de la Seine, refuser sur le fondement de la cause illicite, tout effet a l'obligation contractée par le directeur d'une maison de tolérance pour acquisition de vins de champagne destinés à être consommés dans son établissement?"

On that first ground, I would be of opinion that the contract of insurance was illegal and that it should be set aside. The appeal should be allowed with costs.

Appeal allowed without costs.

NOTE.

Validity of Insurance Policy on Property Illegally Kept or Used.

Contrary to the holding in Conithan v. Royal Ins. Co. 91 Miss. 386, 15 Ann. Cas. 539, the reported case holds that a fire insurance policy which covers a house of prostitution and the furnishing therein, is invalid and no recovery may be had thereunder, on the ground that a contract of insurance on such a subject is contrary to the policy of the law.

In two recent Canadian cases, similar in facts to the reported case, a view opposed to the one expressed therein, is taken. Trites-Wood Co. v. Western Assur. Co. 15 British Columbia, 405; Morin v. Anglo-American F. Ins. Co. 3 Alberta L. Rep. 121, 13 West. L. Rep. 667. In the case first cited, wherein a recovery was allowed on a fire insurance policy which expressly stated that it insured a "sporting house" the court said: "The insurance of property is one of the things useful for the ordinary purposes of life. Such protection is no more contributory to the immoral trade carried on by the owner of these premises than are the necessaries of life. A policy of insurance is not one of those things which would appear not to be required except for an immoral purpose. It was not an inducement to the assured to build and furnish a house for immoral purposes. It was to protect her property from those risks of destruction against which those in every walk of life protect themselves. But it appears from the evidence of the insurance agents that a higher rate is charged upon risks of this nature, and it might be said that the contract is tantamount to a division of profits of the immoral business. There might be something to be said on this phase of the case if it appeared by the evidence that the assured was aware that she was being charged a higher rate on account of the character of her house, but nothing of the kind does appear. She may have thought she was making the ordinary contract of insurance, i. e., paying the ordinary rate payable by respectable householders. True the Company knew what

it was about and had a back-room scale of rates for this class of business, though it seems to have lacked the gambler's sense of honour, but whatever could be urged on this point had it been shewn that both parties were bargaining, the one for protection against risks peculiarly incidental to premises frequented by disorderly persons, the other for an increased premium for such protection, cannot be urged against this plaintiff because there is no evidence that the assured was knowingly a part to such transaction."

In Electrova Co. v. Spring Garden Ins. Co. 156 N. C. 232, 72 S. E. 306, 35 L.R.A.(N.S.) 1216, it appeared that the makers of mechanical musical instruments had placed one of their instruments in a bawdy house on trial with the object of later selling it to the proprietress thereof. The makers took out a "floating" fire insurance policy on all of their instruments in two towns which included the one in which the house of ill-fame was located. In an action on the policy to recover for the destruction by fire of the instrument placed in the house of ill-fame it was held that the policy was valid, and that the public interest was too remotely affected, on the facts in the case, to justify a court in refusing to enforce the payment of the policy.

Where the general policy of a state is to forbid the manufacture or sale of intoxicating liquors, but under certain conditions, such liquors may lawfully be kept and stored, and a statute provides that no action shall be maintained for the recovery of possession of any intoxicating liquor, or the value thereof, except in cases where the persons owning or possessing such liquor with lawful intent may have been illegally deprived of the same, it has been held that recovery may be had on a fire insurance policy which covers a quantity of whisky made in the state and stored in a bonded warehouse therein. Mechanics' Ins. Co. v. C. A. Hoover Distilling Co. 105 C. C. A. 128, 31 L.R.A. (N.S.) 873, 182 Fed. 590, wherein the court said: "This whisky was stored in a bonded warehouse, and the insurance of it against fire neither violated nor had any direct tendency to violate the policy of the state which forbade its manufacture and sale. While the whisky remained stored, it could be neither made nor sold. If the whisky burned, it could not be thereafter sold, and neither the payment nor the contract to pay its value in the event that it was burned could make its manufacture, storage, or sale after the burning possible. Even if these contracts of insurance had the effect to make the business of the manufacture and sale of the liquor less hazardous, and in that way to encourage the conduct of that business, nevertheless that encouragement was not the chief purpose or direct effect, but was a mere incident of the indemnity against loss by fire which the policies were made to secure. The laws of Iowa contain no express prohibition of the insurance of intoxicating liquors against fire, its Supreme Court had sustained a contract for such insurance (Erb. v. Fidelity Ins. Co. 99 Ia. 727, 733, 69 N. W. 261), there was no moral turpitude in the making or the performing of this contract, and the mere fact that an agreement, the consideration and performance of which are lawful, incidentally assists one in evading a law or a public policy, is no bar to its enforcement."

BAUMANN
v.
STEINGESTER ET AL.

New York Court of Appeals—January 5, 1915.

213 N. Y. 328; 107 N. E. 573.

Wills — Parol Evidence to Identify Legatee.

Where a testatrix made a bequest to her niece by name, of a certain place, and it appeared that she had a grandniece of that name living at that place and also a niece whose maiden name was similar and who lived near by, there is a latent ambiguity in the will, and parol evidence is admissible to establish the identity of the legatee.

[See Ann. Cas. 1915B 8.]

Witnesses — Confidential Communication to Attorney — Testamentary Matters.

Where a testatrix gives instructions to her attorney relative to her will in the presence of a third person, the communications are not confidential so as to be privileged, and it is error, in an action to construe the will, to exclude the attorney's testimony as to such instructions.

[See note at end of this case.]

Communication in Presence of Third Person.

Code Civ. Proc. §§ 835, 836, providing that an attorney shall not be allowed to disclose communications made by his client to him, apply only to confidential communications, and not to those made in the presence of others.

[See Ann. Cas. 1913A 3; 66 Am. St. Rep. 225.]

Baumann v. Steingester, 159 N. Y. App. Div. 923, reversed.

Appeal from Appellate Division of Supreme Court, Second Judicial Department.

Action to construe will. Lena Baumann, plaintiff, and Henry C. Steingester et al., defendants. Judgment for plaintiff at Special Term of Supreme Court. Judgment affirmed to Appellate Division of Supreme Court. Defendant Magdalena Fuhge appeals. The facts are stated in the opinion. REVERSED.

John M. O'Neill for appellant.
Anthony Darmstadt for respondent.

[330] SEABURY, J.—This action was commenced to obtain a construction of the last will of Maria Schadrack, deceased, and to have it adjudged that the plaintiff is the legatee described in subdivision 1 of paragraph "Third" of said will, and that she is one of the three residuary legatees referred to in paragraph "Sixth" of said will. The appellant, Magdalena Fuhge, answered and asked to have it adjudged that she is the legatee described in the two paragraphs of the will referred to above. The question at issue upon the trial related to the identity of the legatee referred to as "Lena Baumann" in the following paragraphs of the will. Subdivision 1 of paragraph third provides that the testatrix gives "The sum of $1,000 to my niece Lena Baumann of Richmond Hill in the County and Boroughs of Queens" paragraph sixth provides that the testatrix gives "all the rest and residue of my estate to my three nieces, Helene Bang, Katherine Hainer, and Lena Baumann, to be divided among them share and share alike." The plaintiff is a grandniece of the testatrix, and at the time the will was made resided at Richmond Hill. The appellant is a niece of the testatrix, and her maiden name was Magdalena Baumann. There was evidence received upon the trial to show that the testatrix was accustomed to speak of her as "Lena Baumann," and that while she resided at the time the will was made at a place about one mile from Richmond Hill, the testatrix [331] was also accustomed to refer to this place as "Richmond Hill." It thus appears that the language used in these two paragraphs of the will does not accurately designate either the plaintiff or the appellant. It does not accurately designate the plaintiff because the reference in the will is to a niece of the testatrix, and the plaintiff is a grandniece. It does not accurately designate the appellant because while her maiden name was Magdalena Baumann her name at the time the will was made was Magdalena Fuhge and she did not reside at Richmond Hill. These facts appearing by extrinsic evidence there was a latent ambiguity in the will. Parol evidence was properly receivable in the effort to dissolve this ambiguity. (Lefevre v. Lefevre, 59 N. Y. 434; In re Taylor, 34 Ch. D. (Eng.) 255; Henderson v. Henderson, 1 Ir. Rep. (Eng.) [1905] 353.) In view of the unanimous affirmance by the Appellate Division of the judgment appealed from, the single question which survives for consideration in this court relates to the rulings of the Special Term excluding the evidence of the witness Kellar. Mr. Kellar was the attorney for the testatrix and was the draftsman of and a subscribing witness to her will. The testatrix, a woman about seventy years of age, called upon Mr. Kellar and gave him instructions as to the drawing of her will. With her on this occasion and present at the office of Mr. Kellar at the time was Mrs. Stiefhold. Mrs. Stiefhold lived with the testatrix and acted as companion and housekeeper. The instructions as to her will were given to Mr. Kellar in the presence of Mrs. Stiefhold, who, while within hearing, testified that she "did not pay very much attention." When Mr. Kellar was called as a witness he was asked as to the instructions he had received from the testatrix as to the legacies and the provisions for the residuary estate. The question was excluded under objection of the plaintiff and subject to the exception of the appellant. It thus becomes necessary to determine whether Mr. Kellar, the [332] attorney, should have been permitted to testify to communications which took place between himself and his client, the testatrix, in the presence of Mrs. Stiefhold. This evidence should have been received and considered by the court below. (Doheny v. Lacy, 168 N. Y. 213, 223, 61 N. E. 255; People v. Buchanan, 145 N. Y. 1, 26, 39 N. E. 846; People v. Hayes, 140 N. Y. 484, 495, 35 N. E. 951, 37 Am. St. Rep. 572, 23 L.R.A. 830; Brennan v. Hall, 131 N. Y. 160, 165, 29 N. E. 1009; Matter of Eckler, 126 App. Div. 199, 203, 110 N. Y. S. 650; People v. Bloom, 124 App. Div. 767, 109 N. Y. S. 344; Matter of Barnes, 70 App. Div. 523, 527, 75 N. Y. S. 373; Lecour v. Importers,' etc. Nat. Bank, 61 App. Div. 163, 168, 70 N. Y. S. 419; Matter of Smith, 61 Hun 101, 104, 15 N. Y. S. 425; Matter of McCarthy, 55 Hun 7, 11, 8 N. Y. S. 578. See, also, People v. Andre, 153 Mich. 531, 539, 117 N. W. 55; Scott v. Aultman Co. 211 Ill. 612, 615, 71 N. E. 1112, 103 Am. St. Rep. 215; Roper v. State, 58 N. J. L. 420, 33 Atl. 969.) Mrs. Stiefhold was not present and acting in the character of a confidential agent of the testatrix, nor was her presence necessary to enable the parties to communicate with each other. No attempt was made by the testatrix to prevent her hearing the communication which she made to her attorney. The fact that Mrs. Stiefhold did "not pay very much attention" to what was said does not alter the situation. She was within hearing and so far as the testatrix knew heard all that was said. If the testatrix had desired her communication with her attorney to be

confidential she could have asked Mrs. Stiefhold to withdraw from the room or have communicated with her attorney when Mrs. Stiefhold was not present. She did not do either of these things, but on the contrary gave her instructions to her attorney as to the manner in which she wished to have her will drawn, in the presence of Mrs. Stiefhold. The fact that these instructions were given in the presence and in the hearing of Mrs. Stiefhold is a circumstance indicative of the fact that the communication was not made in confidence. A third person even though a mere stranger or bystander in whose hearing communications are made by a client to an attorney may testify to such communications. [333] (Jackson v. French, 3 Wend. (N. Y.) 337, 20 Am. Dec. 699; People v. Buchanan, supra.) To allow a stranger or bystander who overhears such a conversation to testify to what he heard and at the same time preclude the attorney of the client from giving his testimony as to what occurred might often result unfairly to the client for whose protection the privilege is designed. The communication not being confidential the attorney is not privileged from disclosing it. Where there is no confidence reposed, no privilege can be asserted. In such cases the attorney is permitted to testify not because the privilege has been waived, but because the communication, not having been made in confidence, was not privileged. The privilege which exempts one from giving testimony, except in so far as it is embodied in statutory provisions, cannot be extended to cover cases not within the reason upon which the privilege rests. The provisions of section 835 and 836 of the Code of Civil Procedure apply only to those communications which are confidential in their nature, and, therefore, these sections are without application to the facts of this case. In certain cases in other jurisdictions a distinction has been attempted which permits the third person hearing such communications to testify, but holds the attorney bound to secrecy. (Gallagher v. Williamson, 23 Cal. 332, 83 Am. Dec. 114; Blount v. Kimpton, 155 Mass. 378, 29 N. E. 590, 31 Am. St. Rep. 554; Hartness v. Brown, 21 Wash. 655, 59 Pac. 491.) Such a distinction is without support in the reasons underlying the privilege which rests not only upon the professional character of the employment, but also upon the confidential nature of the communication. Nor does the supposed distinction find support in the adjudications made in this state which are referred to above.

The statement made in the opinion in Butler v. Fayerweather, 91 Fed. 458, 461, 63 U. S. App. 120, 33 C. C. A. 625, that "the circumstance that other witnesses were present at the time when the codicil is alleged to have been executed and published, even though they heard all that took place, and were [334] aware of the contents of the instrument, is wholly immaterial," is not an accurate statement of the rule prevailing in this state and is not in accord with the authorities already cited.

The judgment should be reversed and a new trial granted, with costs to abide the event.

Willard Bartlett, Ch. J., Hiscock, Chase, Hogan, Miller and Cardozo, JJ., concur.

Judgment reversed, etc.

NOTE.

Communications between Attorney and Client in Regard to Testamentary Matters as Privileged.

Introductory, 1073.
General Rule, 1073.
Rule in New York, 1074.

Introductory.

It is the purpose of this note to review the recent cases discussing the question whether communications between an attorney and his client in regard to testamentary matters are privileged. The earlier cases on the subject are collated in the notes to In re Young, 14 Ann. Cas. 596; In re Cunnion, Ann. Cas. 1912A 834 and O'Brien v. Spalding, 60 Am. St. Rep. 202, 229.

General Rule.

The weight of authority is to the effect that communications between an attorney and his client in regard to testamentary matters are not privileged. Mahoney v. Healy (Del.) 91 Atl. 208; Black v. Funk, 93 Kan. 60, 143 Pac. 426; Durant v. Whitcher (Kan.) 156 Pac. 739; Holyoke v. Holyoke, 110 Me. 469, 87 Atl. 40; In re Veazey, 80 N. J. Eq. 466, 85 Atl. 176, L.R.A. 1914A 980; In re Beck, 79 Wash. 331, 140 Pac. 340. See also Norton v. Clark, 253 Ill. 557, 97 N. E. 1079; Hopper v. Sellers, 91 Kan. 876, 139 Pac. 365. *Compare* In re Loveland, 162 Cal. 595, 123 Pac. 801; Feltrup v. Schloemer, 33 Ohio Cir. Ct. Rep. 467. "Instructions to an attorney as to drawing a will are not privileged communications in a contest to establish a will." Mahoney v. Healy (Del.) 91 Atl. 208. "The great weight of authority is that statutes like that of this state, rendering an attorney incompetent to testify concerning communications made to him by his client in that relation (Civ. Code, sec. 321), are declaratory of the common law and do not render communications between a testator and his attorney in reference to the preparation of a

will privileged after the death of the testator."

In Black v. Funk, 93 Kan. 60, 143 Pac. 426, it was held "that the attorney may relate the facts and circumstances surrounding the preparation and execution of the will to show that the testator was not under any improper restraint." It was said that the testimony of the attorney who prepared the will for the decedent "indicated that he was a mere scrivener, and the fact that he was an attorney at law did not affect his capacity" to testify "to what occurred in connection with the preparation of the will." In the case of In re Beck, 79 Wash. 331, 140 Pac. 340, evidence of communications between the attorney who drew a will and the principal beneficiaries under the will was held to be admissible. The court said: "If the will was drawn by an attorney who was employed by the principal beneficiaries, the communications made by such attorneys to the beneficiaries, or by the beneficiaries to the attorney, cannot, we think, be reasonably interpreted as privileged, because in drafting the will he was acting for the testatrix." In Norton v. Clark, 253 Ill. 557, 97 N. E. 1079, which was a suit brought by one of the beneficiaries to set aside a will the testimony of an attorney who had transacted business with the testatrix was stricken out. It was held that the ruling was error, the court saying: "There was nothing in his testimony about any matter involved in this suit, and apparently he was merely qualifying to give an opinion as to her mental condition, which would have been proper although he was her attorney. If it was intended to prove by him anything about the testamentary disposition of her property, it would not, if otherwise competent, be excluded as a privileged communication."

In Holyoke v. Holyoke, 110 Me. 469, 87 Atl. 40, it was held that the declarations of a testator as to his domicil made to his counsel were admissible. The court said: "The evidence in this case, of declarations to counsel as to domicil, is not to be regarded as privileged in this proceeding, whether it be that the nature of the communications was such as to raise an implication of waiver, or such that as between personal representatives or legatees, and heirs, there is no privilege. As in all testamentary contests, so in this case, the controversy is not one that affects the estate as such, but rather the manner of its administration and distribution. The real parties ultimately interested are the heirs and widow on one side, and the legatees on the other. It seems to be settled on good authority that in testamentary contest between personal representatives, heirs and legatees, the claim of privilege is unavailing, when the character and reputation of the deceased are not involved." In the case of In re Loveland, 162 Cal. 595, 123 Pac. 801, the statute involved provided that an attorney's stenographer or clerk could not be examined without the consent of his employer, concerning any fact the knowledge of which had been acquired in his capacity as employee. It was held that a stenographer employed by the attorney of a testator could testify that she had met the testator ten or fifteen times at the office of the attorney and from conversations there had with him, had formed an opinion with regard to his condition physically and mentally.

In Feltrup v. Schloemer, 33 Ohio Cir. Ct. Rep. 467, an attorney testified that he was the attorney for the testatrix only in the drawing of her will and it was held that "this, . . . would not foreclose him from being called to testify upon any other subject of conversation between them, but only as to those things and conversation which came to him as attorney by reason of and in connection with the matter for which he was acting as her attorney."

Rule in New York.

In New York by the force of a statute to that effect the rule is that evidence as to communications between a client and his attorney as to testamentary matters are privileged, except in the case of the probate of a will to which the attorney is a subscribing witness. Matter of Francis, 73 Misc. 148, 132 N. Y. S. 695; Matter of Seymour, 76 Misc. 371, 136 N. Y. S. 942; Rintelen v. Schaefer, 152 App. Div. 727, 137 N. Y. S. 527, *reargument denied* 153 App. Div. 916, 138 N. Y. S. 1139; In re Campbell, 136 N. Y. S. 1086; In re Carpenter, 145 N. Y. S. 365; In re Coughlin, 157 N. Y. S. 630, "By the weight of authority it is held in all other states that the principle excluding evidence of confidential communications between lawyer and client has no application after the death of testators to instructions to their lawyers to draw their wills, or to the facts about the execution of such wills, and that it is not in the interest of the testators themselves after their death to exclude evidence of such instructions or the facts about execution of the will within the lawyer's knowledge. Jones, Ev. sec. 755. But by the statute of New York the rule is otherwise, unless the attorney is a subscribing witness." In re Campbell, supra. In Matter of Seymour, 76 Misc. 371, 136 N. Y. S. 942, it was held that the evidence of the attorney who prepared a will and who was not a subscribing witness "should be wholly disregarded in so far as it relates to the matters which he testifies he saw and heard at the time of the execution of the will and as to the mental condition of the deceased and of the influence under which she acted." In

Mead v. Cavanagh, 161 App. Div. 177, 146 N. Y. S. 353, it appeared that an attorney prepared a will and became a subscribing witness to it, but the will was subsequently revoked by another will. The court in discussing the admissibility of the testimony of the attorney as to communications between him and the client with regard to the revoked will said: "There seems to be substantial reason for saying that the witness was incompetent to testify to the execution of the paper or to statements made by the alleged testatrix at the time of its execution. If the testatrix waived the seal of confidence by requesting her attorney to witness her will, she annulled such waiver by revoking the will."

In Rintelen v. Schaefer, 158 App. Div. 477, 143 N. Y. S. 631, it appeared in a proceeding to contest a will that the attorney of the testatrix was called on to testify as to his conversations with her during the year preceding his becoming her attorney. The object of the testimony "was to show the opportunity the witness had, by observation and conversation with testatrix, to qualify him to say whether such conversations and acts impressed him as being rational or irrational." In was held that the testimony was admissible as "the relation of attorney and client did not exist between the witness and the testatrix at the time to which the question was limited, and the question did not call for the disclosure of any communication by the witness."

In Matter of Spooner, 89 Misc. 30, 152 N. Y. S. 537, it appeared that the attorney of the testatrix was a subscribing witness to the will but it was not decided whether he could testify to professional communications had with her while acting as her attorney and which did not relate to the will. The court said: "I think the question is one that is open to discussion because it might very well be that testimony as to professional communications between the attorney and the decedent regarding other matters than the execution of the alleged will itself, which in nowise tends to disgrace her and which throws light upon her relations with one of the contestants, might have an important bearing upon the mental capacity of the alleged testatrix and her state of mind toward the contestant in question, and it might be argued that by making her attorney an attesting witness, the alleged testatrix intended that he should testify to any facts within his knowledge which would sustain her testamentary disposition. As the question, however, is a close one, and as there is so much evidence in this case which in my opinion justifies the conclusions I have reached without considering the testimony of the attorney referred to, I have disregarded his testimony as to all professional communications with the decedent prior to the day on which the alleged will was made."

The statutory prohibition does not apply where the communications between the tetstator and the attorney are had in the presence of a third person. Matter of Hall, 90 Misc. 216, 154 N. Y. S. 317; Matter of Bennett, 166 App. Div. 637, 152 N. Y. S. 46. See also Wallace v. Wallace, 216 N. Y. 28, 109 N. E. 872, *affirming* on other grounds 158 App. Div. 950, 143 N. Y. S. 1148, which *affirmed* 158 App. Div. 273, 137 N. Y. S. 43, and *distinguishing* In re Cunnion, 201 N. Y. 123, 94 N. E. 648, L.R.A.1912A 834. And see the reported case. In Wallace v. Wallace, supra, it appeared that a husband and wife had made mutual wills which were prepared by the same attorney at the same time and place and before the same witnesses and contained reciprocal and identical provisions. It was held that evidence of the instructions to the attorney regarding the wills was admissible although they were not given by the testators in the presence of each other. The court said: "If both were not present when the communications to the attorney were made, it is certain that such communications were intended for the information of both of them. Neither intended what was said to the attorney with regard to the wills was to be kept a secret from the other. The business could not have been done in that way. The disability of an attorney to act as a witness applies only when the communications are intended to be confidential."

CRAGHEAD

v.

McCULLOUGH.

Colorado Supreme Court.—January 4, 1915.

58 Colo. 485; 146 Pac. 235.

Physicians and Surgeons — Malpractice — What Constitutes.

It is not negligence for a physician or surgeon to reduce a fracture by the method generally recognized by surgeons as proper.

[See 1 Ann. Cas. 21, 306; 14 Ann. Cas. 605; 93 Am. St. Rep. 657.]

Same.

In an action against a physician and surgeon, evidence held sufficient to support a jury finding of negligence in connection with the treatment of a fractured collar bone.

Same.

In the absence of a special contract, the law implies that a surgeon employed to treat an injury contracts to exercise reasonable and ordinary care to accomplish the purpose for which he is employed, but he does not warrant a cure and is not responsible for want of success unless it results from a failure to exercise ordinary care or from want of ordinary skill.

Proof of Negligence — Res Ipsa Loquitur.

A surgeon's failure to exercise ordinary care in treating a fracture is not established by proof of the result alone, but must be shown by other evidence.

[See 93 Am. St. Rep. 665.]

Verdict Not Excessive.

Where a surgeon, in treating a fractured collar bone, did not exercise the degree of care which the law requires, resulting in the fragments overlapping and causing a deformity and condition which rendered the plaintiff a cripple and necessitated an operation by another surgeon, who made an incision down to the bone, refractured it by the use of instruments, made a hole in each fragment, and inserted a wire to hold the bones in place and prevent overlapping until a new union was effected, in view of the pain and suffering, expense, and loss of time necessarily entailed, a verdict for $1,000 is not excessive and does not indicate that the jury was influenced by bias or prejudice.

[See note at end of this case.]

Damages — Voluntary Remittitur by Plaintiff — Prejudice to Defendant.

Where a verdict was not excessive and there is nothing to indicate that the jury were influenced by passion or prejudice, defendant is not prejudiced by the voluntary filing by plaintiff of a remittitur of a part of the recovery, and cannot complain thereof on the ground that the error could be cured only by granting a new trial and not by the filing of a remittitur.

Error to District Court, City and County of Denver: TELLER, Judge.

Action for damages. Alonzo McCullough, plaintiff, and W. Spencer Craghead, defendant. Judgment for plaintiff. Defendant brings error. The facts are stated in the opinion. AFFIRMED.

John T. Bottom and *Milnor E. Gleaves* for plaintiff in error.

S. S. Abbott for defendant in error.

[486] GABBERT, J.—Plaintiff in error (defendant below), a physician and surgeon, was employed by defendant in error (plaintiff below) to reduce a fracture of his collar bone. He brought suit to recover damages from defendant which he claimed to have sustained as a result of the negligence of the doctor in treating the fracture. At the conclusion of the testimony, the defendant requested the court to instruct the jury to return a verdict in his favor which was refused. The jury returned a verdict for plaintiff in the sum of one thousand dollars. The defendant filed a motion for a new trial, based upon the grounds, among others, that the verdict was excessive and the result of bias and prejudice; [487] that the court erred in not directing the jury to return a verdict for the defendant; and that the verdict was against the law and the evidence. Pending the determination of this motion the plaintiff filed a remittitur in the sum of $350.00, in which it was stated, "leaving the verdict stand as six hundred fifty dollars." Defendant did not consent to this reduction of the verdict. The court denied the motion for a new trial, and ordered that judgment be entered in favor of plaintiff, and against defendant, in the sum of $650.00, which was accordingly done. The defendant brings the case here for review on error.

The negligence charged in the complaint is, that the defendant failed to use ordinary care in treating the fracture, by carelessly and negligently bandaging and placing the ends of the bone in such position that they overlapped by more than one inch, and causing them to be held in that position until they adhered and solidified. It appears from the testimony that the fracture was oblique; and that defendant is a physician, and surgeon of many years experience in the practice of his profession, and a graduate of a medical college. He testified that when called to treat the fracture he recognized its character and described the steps he took in treating it, which it is not practical to state in detail, as from the record it appears he illustrated the method employed by referring to his arm and otherwise, but briefly, his treatment consisted in putting the ends of the bone in place, and bandaging and holding the arm and shoulder in a position with the aid of a fulcrum, the object of this treatment being to prevent overlapping. All the surgeons called as witnesses who testified on the subject, stated, that the method defendant employed was the usual and proper one to treat an oblique fracture of the clavicle. Employing the method to reduce a fracture generally [488] recognized by surgeons as proper is not negligence.—McGraw v. Kerr, 23 Colo. App. 163, 128 Pac. 870; Williams v. Poppleton, 3 Ore. 139.

The real question involved, however, is whether there is testimony from which it can be fairly inferred that the defendant did not use ordinary care and diligence in treating the fracture. Not in the sense, however, that he did not employ the proper method, but in setting it improperly and causing it to be held in that position until the fragments ad-

hered and became solidified, or in not exercising reasonable care to ascertain whether they remained in proper position. He testified that he placed the fragments in proper position, and from time to time after setting the bone visited his patient, and found it in place, having made examinations for this purpose; that later the plaintiff came to his office, which was about three months after the bone was set, when he found, for the first time, that it was overlapping, and so advised him, and requested him to return in a couple of days when he would have another surgeon make an examination. This examination was made and plaintiff advised that an operation should be performed. Arrangements for this purpose were made but plaintiff did not keep his engagement, and went to another doctor for an operation. This doctor testified that he made an examination of the clavicle, found some deformity from what had evidently been an oblique fracture in which the fragments had slipped past each other and healed in that position, and that bone adhesion was practically complete. Other surgeons testified to the effect that at this time the shoulder of the plaintiff was pressed forward, and in such position that bone interfered with respiration and deprived him of the use of his arm, and that his crippled condition was very apparent. The surgeon who performed the operation to which we will refer later, [489] and also the doctor who assisted him, stated that in their opinion the defendant ought to have discovered earlier than he did that the condition of the fracture was not satisfactory; that the fragments were overlapping and that this condition could have been ascertained by the outline or the position of the shoulder. The plaintiff testified that after the defendant set the broken bone, he examined him from time to time and said he was doing fine, up to the time when he suggested that another surgeon should be consulted and an operation performed. He also stated that about one month after the bone was set he complained to the defendant that it hurt him to breathe, that defendant told him this was caused by the enlargement at the point of union which would bother him for a time, but would come out all right.

Without question, the fragments of the broken bone had not healed in a proper position, which had caused a deformity and condition which rendered the plaintiff a cripple, but counsel for defendant contend that there is not any testimony to establish that this condition was the result of negligence on the part of defendant. In the absence of a special contract, the law implies that a surgeon employed to treat an injury, contracts with his patient that he will exercise reasonable and ordinary care to accomplish the purpose for which he is employed. He does not warrant a cure and is not responsible for want of success, unless it results from a failure to exercise ordinary care, or from want of ordinary skill.—Bonnet v. Foote, 47 Colo. 282, 107 Pac. 252, 28 L.R.A.(N.S.) 136; McGraw v. Kerr, supra; Leighton v. Sargent, 27 N. H. 460, 59 Am. Dec. 388; Paten v. Wiggin, 51 Me. 594, 81 Am. Dec. 593. True, as stated in many well considered cases, the failure to exercise ordinary care in treating a fracture is not established by proof of the result alone, but must be shown by other evidence. Other [490] evidence that the condition of plaintiff, bearing on the question of negligence in treating the fracture was introduced. Surgeons testified that the position of the fragments ought to have been discovered by defendant while treating the plaintiff; that an examination would have disclosed the overlapping, and that the position of the shoulder indicated that the fracture was not healing in the proper position. The plaintiff also testified that he complained to the defendant about one month after the bone was set, that it hurt him to breathe, which from the testimony of the physicians, must have been caused by the clavicle not being in a proper position. So that there is substantial testimony from which to deduce one of two conclusions, either the defendant did not place the fragments in a proper place in the first instance, or, if he did, he failed to exercise ordinary care from time to time to ascertain whether they remained in place and in keeping them in proper position.

It is next urged that the verdict was excessive and the result of bias and prejudice, and, for this reason, it should have been set aside, and a new trial granted. That an operation was necessary in order to relieve plaintiff from the condition he was in as the result of the overlapping of the fracture, must be conceded. The surgeon performing this operation testified that he made an incision down to the bone, and then by the use of instruments re-fractured it where the union had taken place, and made a hole in each fragment and inserted a silver wire, and wired the bones together so that they would remain in place and prevent overlapping until a new union was effected. Considering the pain and suffering, expense and loss of time which this operation necessarily entailed, and also the fact that there was sufficient testimony from which it could be inferred that defendant had not exercised the degree of care the law required [491] in treating the fracture, it cannot be said that the verdict was excessive or in any sense the result of bias or prejudice. Counsel, however, contend that in an action to recover for a tort, the court cannot reduce the verdict of a jury merely because it is excessive, and that the

only remedy in such case is to set the verdict aside and grant a new trial. It is also contended that where the amount awarded is so excessive as to be accounted for only on the ground of passion or prejudice on the part of the jury a remittitur will not cure the error, as such passion or prejudice will be deemed to have influenced the jury in determining the issues of fact. In the circumstances of this case neither proposition is applicable. The trial judge did not find that the award of one thousand dollars was excessive. He did not direct that the verdict would be set aside unless the plaintiff consented to remit the sum of $350.00. The reduction was voluntary on the part of plaintiff. There is ample testimony to sustain the findings of the jury that defendant was guilty of negligence. The testimony is sufficient to sustain the award of the jury. So that the record does not disclose that the jury were influenced by either passion or prejudice in finding the facts in issue in favor of plaintiff, or in making the award they did, consequently, the defendant was not prejudiced by the remittitur, and hence cannot complain.

Error is also assigned in ruling out testimony sought to be introduced on the part of defendant. This testimony was in no sense pertinent to any issue in the case, and was therefore properly excluded.

Complaint is made that by instructions requested and given, the jury were prevented from considering contributory negligence on the part of plaintiff. The testimony did not tend in any manner to establish negligence of the plaintiff. It is also urged that instructions [492] given speak of want of skill of the defendant which was not an issue in the case. The objection is without merit. The method employed to reduce the fracture was proper, but there was testimony tending to prove that defendant, either from want of ordinary skill or through failure to exercise reasonable care, did not properly set the fracture in the first instance, or failed thereafter to discover that the fragments were not in place, and keep them in proper position.

The judgment of the District Court is affirmed.

Judgment affirmed.

Musser, C. J., and Bailey, J., concur.

Rehearing denied February 1, 1915.

NOTE.

What Is Excessive or Inadequate Verdict in Action against Physician for Malpractice.

Generally, 1078.
Excessiveness, 1079.
Inadequacy, 1080.

Generally.

The general rule by which the courts are guided in passing on the question of excessive or inadequate damages is that the jury have a broad discretion in fixing the amount, and their verdict will be upheld unless it is so clearly erroneous as to show the influence of prejudice, corruption, or a misunderstanding of the measure of damages. This rule was applied directly in each of the following cases to an action for malpractice, and is supported generally by the cases cited throughout this note. Kelsey v. Hay, 84 Ind. 189; Chamberlain v. Porter, 9 Minn. 260; Longan v. Weltmer, 180 Mo. 322, 79 S. W. 655, 103 Am. St. Rep. 573, 64 L.R.A. 969; Thompson v. Martin, 127 Mo. App. 24, 106 S. W. 535; Froman v. Ayars, 42 Wash. 385, 85 Pac. 14. Thus, in Chamberlain v. Porter, supra, the court said: "In cases of this kind, for many of the injuries for which damages may be given there is no pecuniary standard by which their compensation can be determined, and there is no rule fixing the amount which may be allowed, except that they may not be excessive. The question of damages for injuries of this character is not one of science or skill, nor is it one requiring peculiar knowledge or experience, but it is a practical question, upon which the jury are presumed to have an equal degree of knowledge and experience with others, and to be able to form a correct conclusion, from their own experience of the common affairs of life. The opinions of witnesses, therefore, upon this point were not admissible, but the damages for these injuries were to be determined by the jury from the facts and circumstances in the case. . . . In actions of this nature the jury are the proper judges of the amount of damages to be allowed, and unless there is something in the case showing that the jury, in their determination, were influenced by passion, prejudice, or some improper motive, the court will not interfere." So in Longan v. Weltmer, 180 Mo. 322, 79 S. W. 655, 103 Am. St. Rep. 573, 64 L.R.A. 969, it was said: "There seems to be no way by which it can be proven that in making a large verdict the jurors were controlled by improper influences, and therefore it can only be inferred when the verdict is so out of line with reason and justice as to shock the conscience and to satisfy the unbiased mind that it is not the result of fair and unprejudiced consideration. To justify such an inference, the fact in evidence ought not to justify any other conclusion."

That a verdict in an action for malpractice is not different from one in an ordinary action for damages for personal injuries in so far as the physician is responsible for the injuries, was pointed out in Froman v. Ayars,

42 Wash. 385, 85 Pac. 14, wherein the court said: "Appellant's counsel make an interesting argument to the effect that this case should be distinguished from one which is brought to recover for ordinary personal injuries where the injury is wholly due to the neglect of the defendant in the case. It is argued that in the case at bar the primary cause of the result which came to respondent was the running away of the team, for which appellant was in no way responsible, and that the degree of appellant's responsible relation to the final outcome cannot be as great as that of one whose negligence laid the first foundation for the injury. The theory of the case, however, is that the final outcome to respondent, by which he was deprived of a foot for the remainder of his life, would not have resulted if appellant had properly applied his learning and skill. It is true, respondent would have suffered pain and distress from the original injury, yet if the bones had properly united and the wound had healed, the suffering would have been but temporary, while as it is he must continue to suffer humiliation, inconvenience and loss of earning power during the remainder of his life. If such a result would not have occurred but for appellant's neglect, we are not impressed that there is force in the logic of counsel's argument. . . . There is seldom a case of this kind, or even one for ordinary personal injuries, when there does not seem to be some element of hardship either way the case may be decided; but such cases are triable by a jury, and when so tried, if there is reasonable evidence to support the verdict, it should not be reduced unless it is manifestly too large, when all the facts and circumstances are considered."

But to a certain extent a sound distinction exists between a case of malpractice and an ordinary case of personal injury. In an action for malpractice the plaintiff cannot recover for the original hurt, which existed before the physician was engaged, and, therefore, where the size of the verdict indicates that the jury have visited the entire loss suffered by the patient on the physician, the verdict will be held to be excessive, since the physician is responsible only for the injury and suffering caused by his own act and is not responsible for the original injury with which he had nothing to do. Taylor v. Kidd, 72 Wash. 18, 129 Pac. 406; Cranford v. O'Shea, reported in full, post, this volume, at page 1081.

Excessiveness.

Verdicts for the following amounts in actions for malpractice have been held not to be excessive;

$7,500.—Longan v. Weltmer, 180 Mo. 322, 79 S. W. 655, 103 Am. St. Rep. 573, 64 L.R.A. 969 (negligent and unskillful treatment of female patient by "magnetic healer," tearing ligaments connecting backbone and hipbone, and permanently injuring back, spine and pelvic organs);

$5,500.—Brooke v. Clark, 57 Tex. 105 (gross negligence in tying ligature around penis, instead of umbilical cord, of newly born infant, causing glans of penis to come entirely off);

$5,200.—Getchell v. Lindley, 24 Minn. 265 (malpractice in setting and treatment of injured arm);

$5,000.—Froman v. Ayars, 42 Wash. 385, 85 Pac. 14 (mistreatment of broken leg, resulting in loss of foot; patient was laborer, forty-four years old);

$4,500.—Kelsey v. Hay, 84 Ind. 189 (negligence in setting broken legs, resulting in loss of use of both legs);

$3,600.—Samuels v. Willis, 133 Ky. 459, 19 Ann. Cas. 188, 118 S. W. 339 (failure to remove sponge after abdominal operation);

$3,000.—Prout v. Martin, 160 Ill. App. 4 (mistreatment by dentist in replacing missing teeth, including fraud and deceit in regard to method); Allen v. Voje, 114 Wis. 1, 89 N. W. 924 (negligent operation upon female patient, resulting in permanent injury);

$2,250.—Krauss v. Ballinger, 171 Ill. App. 534 (the court said: "It is argued by the appellants that passion and prejudice are shown because the court required a remittitur of $750. We cannot agree with this contention. The evidence offered on behalf of the appellee would tend to show that the arm was left in a very bad condition, which might or might not be relieved by a serious operation. If this condition is chargeable to the acts of the appellants, as the jury found, the amount of the judgment cannot, in our opinion, be regarded as excessive.") Wilk v. Black (Mich.) 154 N. W. 561 (negligent treatment of fractured arm; it appeared that plaintiff had life expectancy of forty years, and that his arm would always be crooked);

$2,000.—Lathrope v. Flood (Cal.) 83 Pac. 1007 (abandonment of case of woman in confinement; judgment was reversed in 135 Cal. 458, 87 Pac. 683, 67 L.R.A. 215, for allowance of certain elements of damage unsupported by evidence); Stanford v. Hyde, 87 Conn. 707, 87 Atl. 788 (failure to discover dislocation of shoulder, resulting in permanent impairment of shoulder, affecting patient's pursuit of his trade); Viita v. Dolan (Minn.) 155 N. W. 1077 (negligent treatment of fractured leg); Mosslander v. Armstrong, 90 Neb. 774, 134 N. W. 922 (negligent treatment of injured foot, resulting in necessity for amputation);

$1,741.66.—Hastings v. Stetson, 91 Me. 229, 39 Atl. 580 (delay in reducing dislocation of shoulder, causing paralysis);

$1,500.—Miller v. Mintun, 73 Ark. 183, 83 S. W. 918 (mistreatment of injured ankle, causing patient great pain for many months and resulting in probably permanent lameness); Reeves v. Lutz, 179 Mo. App. 61, 162 S. W. 280 (failure to remove drainage tube in due time after operation on breast of female patient; this action was brought by husband of patient to recover for loss of consortium);

$1,250.—Evans v. Munro (R. I.) 83 Atl. 82 (failure to remove drain in due time after operation, necessitating another operation);

$1,000.—See the reported case.

$500.—Gerken v. Plimpton, 62 App. Div. 35, 70 N. Y. S. 793 (mistreatment of fractured arm, necessitating further operation costing $500); Just v. Littlefield, 87 Wash. 299, 151 Pac. 780 (negligent treatment of case of pregnancy).

Verdicts for the following amounts in actions for malpractice have been held to be excessive:

$9,000.—Brown v. Goffe, 140 App. Div. 353, 125 N. Y. S. 456 (alleged negligence in performing operation; no permanent injury);

$7,385.—Cranford v. O'Shea, reported in full, post, this volume, at page 1081;

$5,500.—Taylor v. Kidd, 72 Wash. 18, 129 Pac. 406 (negligent treatment of strained shoulder, necessitating operation and leaving arm shorter than before; reduced to $3,500);

$5,000.—Reynolds v. McManus, 139 Ia. 242, 117 N. W. 667 (negligent treatment of woman in confinement, causing additional suffering and delayed recovery); Nickerson v. Gerrish (Me.) 96 Atl. 235 (unskilful diagnosis and treatment of fractured leg as sprain only, resulting in impaired motion of ankle joint; reduced to $3,000);

$4,000.—Hensen v. Crocker, 160 Ill. App. 514 (gauze left in body of patient after operation, causing temporary pain and necessitating further operations); Helland v. Bridestine, 55 Wash. 470, 104 Pac. 626 (examination of widow with unsterilized instruments which communicated loathsome disease to her, patient recovered from disease, amount reduced to $2,000); Hoffman v. Watkins (Wash.) 155 Pac. 159 (failure to diagnose injury to shoulder as dislocation; patient was man 54 years old; reduced to $2,400. The court said: "The evidence indicates that the shoulder has entirely recovered and is now giving the respondent no pain. While it is true that some of the effects of the operation are permanent in their nature, the evidence shows that the respondent's earning capacity is not materially diminished. It is true that he cannot perform those tasks which necessitate lifting above the level of his shoulder, and it is true, also, that he has suffered much pain, inconvenience, and considerable expense. The joint, however, so far as the evidence shows, is otherwise unimpaired. In Taylor v. Kidd, 72 Wash. 18, 129 Pac. 406, a case similar to this in many respects, the shoulder joint was permanently impaired, the head of the humerus was partially removed, the arm was permanently shortened, and had permanently lost perhaps 75 per cent of its original power and scope of motion. The results were evidently much more serious than those found here. In that case a verdict for $5,500 was held to evidence passion and prejudice and was reduced in the sum of $2,000. We think a reduction in about the same proportion is essential to meet the ends of justice in this case."

$2,000.—Reynolds v. Smith, 148 Ia. 284, 127 N. W. 192 (failure to remove gauze in proper time after abdominal operation; consequences not serious; reduced to $1,200);

$1,100.—Evans v. Roberts (Ia.) 154 N. W. 923 (cutting of patient's tongue while removing adenoids, causing pain and slight deformity of tongue. The court said: "The injury, though a regrettable one, was not of a very serious character. The wound was soon healed. There is no personal disfigurement, unless the slight scar upon the tongue is to be so regarded. The only suggestion of permanent ill effect is a slight difficulty in vocalizing a single letter of the alphabet. Damages in such cases, where no element of wilfulness or recklessness is shown, ought to be strictly compensatory, and not punitive. Upon the whole record we conclude that a judgment not to exceed $750 is sufficient to answer the ends of justice in this respect."

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Inadequacy.

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In an action against a physician for alleged negligence in the treatment of an injured arm wherein it appeared that the jury cancelled the physician's counterclaim for services rendered and in addition considered the evidence of contributory negligence, it was held that a verdict of one dollar in favor of the plaintiff was not so inadequate as to justify interference. Whitesell v. Hill (Ia.) 66 N. W. 894.

The defendant physician attempted to take advantage of an alleged inadequacy of the verdict in Thompson v. Martin, 127 Mo. App. 24, 106 S. W. 535. In that case it appeared that the plaintiff sought to recover $25,000 for alleged malpractice resulting in total blindness, and was awarded $1,500 by the jury. The defendant claimed that the small amount of the verdict showed that it was based on sympathy for the plaintiff rather than on the law and the evidence. In affirming the judgment the court said "Jurors are liable to make mistakes, but it is an undeniable fact that they are prone to administer equity on suitable occasions. Where nothing is

shown that the jury acted from improper motives, it is the duty of the court to impute to them honesty of purpose at least, although it may be that they have been mistaken in their conclusions. The respondent with propriety might have attacked the verdict on the ground that the sum awarded was inadequate, but as he has seen fit to acquiesce in the result the appellant ought to be satisfied also as he is bound to admit that under the evidence a verdict in respondent's favor is supported by the evidence."

CRANFORD
v.
O'SHEA.

Washington Supreme Court—January 11, 1915.

83 Wash. 508; 145 Pac. 579.

Appeal and Error — Harmless Error — Admission of Evidence as to Damages.

There being other independent evidence of negligence, any error in admission of evidence thereof, which would in all probability go only to the quantum of damages, is not sufficiently prejudicial to require reversal; affirmance being, because of excessive damages, conditional on remission of part of recovery.

Failure to Submit Contention — Harmless Error.

Failure, in submitting the issues, in a malpractice case for not seasonably discovering and setting a fracture of the femur just above the knee, to state defendant's contention that he knew of the fracture, but could not heal it, because of synovitis of the knee joint and fractures just above the ankle, is harmless; every feature of the defense, as well as plaintiff's case, having been prominently and skillfully brought out during a long trial.

Physicians and Surgeons — Malpractice — For What Injuries Liable.

For malpractice in treating an injury, a surgeon is liable only for results from his negligence, and not for those from the original injury.

Verdict Excessive.

A verdict of $7,385 for malpractice in not seasonably setting a fracture of a femur held excessive to the extent of $2,000.

[See note at end of this case.]

Appeal from Superior Court, Spokane county. BLAKE, Judge.

Action for damages. Clara E. Cranford, plaintiff, and John H. O'Shea, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. MODIFIED.

Lloyd E. Gandy and *Graves, Kizer & Graves* for appellant.

Attwood A. Kirby and *H. M. Stephens* for respondent.

[509] CHADWICK, J.—Appellant is a surgeon, engaged in the practice of his profession. He is sued for malpractice. On January 17, 1910, respondent was injured in a coasting accident. Both bones of one of her lower limbs were fractured just above the ankle. The fracture is denominated by the medical witnesses a compound comminuted fracture. The flesh was torn and the bone protruded. There was also a simple fracture or a nearly square break of the femur a short distance above the kneejoint. Appellant was, at the time of the accident, surgeon at the emergency hospital, and gave respondent first aid and thereafter treated her for four or five weeks, when she was passed to the care of the county physician, who cared for her until Dr. Phy, a surgeon of her own choosing, took charge of the case.

So far as we can see, the fracture of the two bones in the lower limb was treated surgically, and but for an infection that appeared two or three days after the accident and for which appellant is not shown to be responsible, respondent would have recovered of that fracture in from six to twelve weeks. The malpractice is alleged to lie in the fact that appellant did not make timely discovery of the fracture of the femur and did not, after discovery, render proper and skilled service. On February 2 or 3, X-ray photographs were taken. [510] Thereafter respondent's limb was set and put in a cast. It so continued until after the case passed to the charge of the succeeding doctors. After several months, Dr. Phy had X-ray pictures made, and it was found that the fractured femur had slipped out of place and, being held by the contracted muscles, had knit or formed a union. This union was broken up by Dr. Phy, who cut the two ends, slightly shortening the length of the two pieces, which he held in place by plates riveted into the bone. The limb is now straight instead of bowed out as it had been and, but for the shortening and a slight probability of future trouble, is what is called a good recovery. Appellant insists, that he knew of the fracture of the femur; that he discovered it at the time he first examined the patient; that he could not have failed to see it as it was "laid out before him." In this he is corroborated by the assisting surgeon and by the surgical nurse who was present. But the jury believed the respondent and her mother, who testified that appellant did not examine or give any attention

to the upper fracture, although respondent continuously complained of the pain and suffering she endured at the place of the fracture.

Appellant's version is, that the lower fracture was the important thing; that the knee became immediately swollen, and that a synovitis of the knee joint developed; that because of the swelling and synovitis he could not set the bone at the time by ordinary methods, nor could he attach a weight to the limb to hold the fractured bones in place because of the fracture and lacerations below the knee. Respondent's present condition is: the upper fracture has made a good recovery; the lower fracture, after an operation in which the bones were cut and reunited, has healed; the limb is shorter than the other from one and one-half to two and one-half inches as variously estimated by the witnesses; she walks with, and bears most of her weight on, a cane which she carries at her hip; she can walk without help, though she can walk better with assistance; she was bedridden for many [511] months, and has suffered, and still suffers, acute pain; her knee is slightly larger than its companion and she cannot bend her ankle up, although she can bend it down, so that when going upstairs she has to carry the injured limb after the other. Respondent asks for damages for pain and suffering. It is not shown that she lost any earning time or wages on account of the injury. The case was here on defendant's appeal, Cranford v. O'Shea, 75 Wash. 33, 134 Pac. 486, and was reversed and remanded for a new trial, with the same result except that the jury substituted the sum of $7,385 for the $5,000 allowed on the former trial.

It is urged that the court erred in allowing evidence to be received tending to show that appellant was negligent in that he did not have X-ray pictures taken at the time or shortly after the case came under his notice; that the court did not properly instruct upon this feature of the case; and that the court erred in submitting the issues to the jury, in that he failed to state appellant's contention that he knew of the fractured femur but could not heal it because of the synovitis of the kneejoint and the condition of the lower fracture. As for the first contention, we think it would have been better if the court had sustained appellant's objections and had given his requested instructions, but as there is independent evidence of negligence and the testimony would in all human probability go only to the quantum of damages, we have decided, in view of the conclusion we have reached, to treat the act and refusal of the court as not sufficiently prejudicial to justify a third trial of the case. As for the last contention, the case went to the jury after a long trial. Every feature of respondent's case as well as the defense was prominently and skillfully brought out. We cannot believe the jury were unmindful of, or failed to consider, appellant's case. In this respect we find no error.

This brings us to the real contention. Are the damages awarded excessive? It is fundamental that a doctor who is called to treat an injured person cannot be held to answer [512] for the suffering caused by the original injury, but only for the suffering caused by his own negligent acts. Taylor v. Kidd, 72 Wash. 18, 129 Pac. 406; Rice v. Puget Sound Traction, etc. Co. 80 Wash. 47, 141 Pac. 191, L.R.A.1915A 797. The theory being evident, the original injury, in so far as the attending surgeon is concerned, is regarded as if it were self-inflicted. All hurts requiring surgical care are presumptively painful and tormenting. It can be judicially noticed that a compound fracture of the lower limb and a fracture of the femur are painful hurts, and will occasion long suffering although treated with the best of surgical skill. In the instant case, appellant is not responsible for the original injury, or the infection which prolonged the healing of the lower fracture indefinitely and which made a surgical operation upon it necessary, or for the six to twelve weeks of confinement during which the bones might have knit under the most skillful treatment had there been no infection. In fact, the negligence of which the jury found appellant guilty cannot be made to extend beyond his treatment, or as it is found, his lack of treatment, of the fractured femur which, barring the slight shortening of the limb made necessary to square the bones, is a fair recovery, and the added pain and suffering. Considering recoveries in cases where the injuries were of like nature and for which the party charged was solely responsible, we are constrained to believe that the jury, in pity for the respondent, visited the whole consequence of her hurts and suffering upon appellant, without appreciating the demand of the law that respondent bear her share of the misfortune which angry chance threw over the unlucky parties to this action. Mueller v. Washington Water Power Co. 56 Wash. 556, 106 Pac. 476, is, in so far as the consequences of the injury are concerned—an injury for which defendant was responsible—most like this case. We there allowed a recovery of $5,000. It has seemed to us that a recovery of more than $5,385 is not justified by the record in this case.

A motion for a new trial was taken under advisement by [513] the trial judge, after saying, "To tell you the truth, Mr. Stephens, the girl is fortunate to be alive with any kind of a leg." After reading the case of Froman v. Ayars, 42 Wash. 385, 85 Pac. 14, in con-

nection with the Mueller case, the court allowed the verdict to stand. The opinion in the Froman case admits that a verdict "manifestly too large" should be reduced. The surgeon was there charged, and the jury found, that but for the malpractice, the plaintiff would not have lost his foot by amputation. A life expectancy and the earning power of a common laborer were proved. The holding of this court was rested on that circumstance. "To pass through twenty-six years of life without a foot is a condition that we may assume no man, however humble his occupation, would be willing to accept for $5,000," said the court.

We have not overlooked the contention that, when the trial judge has refused to reduce the verdict we will not, and the cases cited to sustain it. In the cases relied on, the party charged was primarily responsible, the testimony conflicting, and we could not say, nor would we say if this case were against one responsible for the original hurt, that the verdict is too large; but bearing as she must her own share of the attendant and consequent suffering, we think respondent, who can claim no more than compensation, should remit $2,000 of her recovery or take a new trial. It is our judgment that the jury was moved by the passion of sympathy for respondent and possibly by the passion of prejudice against appellant.

If the respondent will, within thirty days after the remittitur in this case goes down, remit $2,000 of her judgment and consent to the entry of a judgment for $5,385, the judgment will be affirmed. Otherwise a new trial will be awarded.

Crow, C. J., Parker, Gose, and Morris, JJ., concur.

NOTE.

The reported case illustrates the rule that in assessing damages against a physician for malpractice a line must be drawn between the damages caused by the act of the physician and the damages caused by the original injury. The court holds that the verdict rendered for $7,385 is excessive, its size indicating that the jury were influenced by passion or prejudice to charge the physician with damages further than those for which he was responsible. The question what is an excessive or inadequate verdict in an action against a physician for malpractice is exhaustively treated in the note to Craghead v. McCullough, reported ante, this volume, at page 1075.

RIGGLE
v.
LENS.

Oregon Supreme Court—June 9, 1914.

71 Oregon 125; 142 Pac. 346.

Negligence — Unguarded Mill Race — Death of Trespassing Child.

The owner of a mill race is not liable for the death of a child who, trespassing upon premises and playing upon the banks of the mill race, fell in and was drowned, though it was sometimes resorted to by children for amusement and was not protected by fence or guard.

[See note at end of this case.]

Appeal from Circuit Court, Umatilla county: PHELPS, Judge.

Action for death by wrongful act. George W. Riggle, plaintiff, and I. C. Lens, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. AFFIRMED.

Will M. Peterson for appellant.
Raley & Raley for respondent.

[125] EAKIN, J.—Plaintiff brings this action to recover damages for the death of his son Paul, an infant of five years of age by drowning in the Byer's mill-race. The complaint charges that the mill-race was situated in the City of Pendleton and owned by defendant, being located near public streets or highways; that it was from three to eight feet deep; that it was sometimes resorted to by children for amusement, and was not protected [126] by fence or guard. Paul Riggle, while playing upon the banks thereof, fell in and was drowned; and plaintiff seeks to recover for the loss of Paul's services during his minority. A demurrer thereto was sustained, and, from a judgment thereon, plaintiff appeals.

The question is whether defendant was guilty of negligence in leaving the race unprotected against small children; plaintiff contending that the defendant is liable for the death of the infant by drowning therein under the turntable doctrine, the race being an attractive nuisance constituting a lure to children. Although the question is one of first impression in this state, it is not new to the courts of this country. It is discussed in many decisions by nearly all the courts of last resort, and they do not all arrive at the same result, differing principally on account of the difference in the facts involved. The cases holding in regard to the liability of the

owner of the object attractive to children are to some extent collated on the one side by the plaintiff and upon the other by the defendant, as well as in some of the annotated cases on the subject.

The cases of Sioux City, etc. R. Co. v. Stout, 17 Wall. 657, 21 U. S. (L. ed.) 745, and Union Pac. R. Co. v. McDonald, 152 U. S. 262, 38 U. S. (L. ed.) 434, 14 S. Ct. 619, seem to be recognized by subsequent decisions as authoritative and final upon the points decided; at least they are very extensively quoted and followed. Sullivan v. Huidekoper, 27 App. Cas. (D. C.) 154, 5 L.R.A.(N.S.) 263, Duell, J., annotated in 7 Ann. Cas. 196, is a case in which there is a full discussion of the law upon that question and also a review of many cases, in which a child of tender years was drowned in a pool of water upon the property of the defendant, caused by a street grade. The court says:

[127] "We deem it immaterial whether the pond be a natural or an artificial one."

This is not a case where the injury was claimed by reason of negligence in not properly guarding a concealed, dangerous condition, as were the Stout and McDonald cases.

Bjork v. Tacoma, 76 Wash. 225, 135 Pac. 1006, 48 L.R.A.(N.S.) 331, was a case of unguarded, concealed danger, and comes directly within the two former cases, as are also Brinkley Car Co. v. Cooper, 60 Ark. 545, 31 S. W. 154, 46 Am. St. Rep. 216, and Kinchlow v. Midland El. Co. 57 Kan. 374, 46 Pac. 703. It is considered to be the primary duty of the parent to guard or protect the small child against patent and unconcealed dangers: Sullivan v. Huidekoper, 27 App. Cas. (D. C.) 154, 7 Ann. Cas. 196, 5 L.R.A.(N.S.) 263; Wheeling, etc. R. Co. v. Harvey, 77 Ohio St. 235, 83 N. E. 66, 122 Am. St. Rep. 503, 11 Ann. Cas. 981, 19 L.R.A.(N.S.) 1136.

In the case of McCabe v. American Woolen Co. 124 Fed. 283, the court recognizes the principle announced in the Stout and McDonald cases, supra, but distinguishes them from a case of an open, visible ditch or canal, which is similar to a natural stream. In the Sullivan case it is said that:

"The doctrine of the turntable cases is an exception to the rule of nonliability of a land owner for accidents from visible causes to trespassers on his premises."

Stendal v. Boyd, 73 Minn. 53, 75 N. W. 735, 72 Am. St. Rep. 597, 42 L.R.A. 288, adopts the same language, where it is said that, with the exception of Pekin v. McMahon, 154 Ill. 141, 39 N. E. 484, 45 Am. St. Rep. 114, 27 L.R.A. 206, the courts of last resort, including those which recognize the doctrine of the turntable cases, have uniformly denied the liability [128] of the land owner for injuries to trespassing children by reason of open and unguarded ponds or excavations upon his premises. That state had previously adhered to the doctrine of the turntable and attractive nuisance cases, and the court had modified its former position on that question, holding that the turntable doctrine is an exception to the rule of nonliability of a land owner for accidents from visible causes to a trespasser on his premises, which is followed in Mattson v. Minnesota, etc. R. Co. 95 Minn. 477, 104 N. W. 443, 111 Am. St. Rep. 483, 5 Ann. Cas. 498, 70 L.R.A. 503.

In Erickson v. Great Northern R. Co. 82 Minn. 60, 84 N. W. 462, 83 Am. St. Rep. 410, 51 L.R.A. 645, the Chief Justice says the manifest trend of all the decisions of this court is to limit its application to attractive and dangerous machinery and to other similar cases where the danger is latent, and that as a general rule the doctrine must be limited to those cases.

In an able article in 11 Harvard L. Rev. 349, 434, Judge Jeremiah Smith, in a review of the cases, reaches the conclusion that the turntable doctrine is not sound. This article is an able and exhaustive treatment of the subject, the cases *pro* and *con* being collated, at the conclusion of which the author says:

"Our conclusion, therefore, is that the law ought not to impose upon the land owner even qualified liability, so far as the condition of his premises is concerned, to children entering without permission, although 'attracted' by his method of making beneficial use of his premises."

The turntable doctrine is repudiated in Massachusetts in the McCabe case, supra, and in Daniels v. New York, etc. R. Co. 154 Mass. 349, 28 N. E. 283, 26 Am. St. Rep. 253, 13 L.R.A. 248. In the former [129] Justice Putnam says that this doctrine is also repudiated in New Hampshire, and suggests that it is doubtful if it is recognized in any part of New England. He concludes by saying that the rule of the turntable and slackpit cases should not be extended to cases of injuries to children by reason of open and unguarded ponds on the defendants' lands.

In Thompson v. Baltimore, etc. R. Co. 218 Pa. St. 444, 67 Atl. 768, 120 Am. St. Rep. 897, 11 Ann. Cas. 896, 19 L.R.A.(N.S.) 1162, it is said:

"The doctrine of the so-called turntable cases has been disapproved. . . . "

In a note to Wheeling, etc. R. Co. v. Harvey, 77 Ohio St. 235, 83 N. E. 66, 122 Am. St. Rep. 503, 11 Ann. Cas. 981, 19 L.R.A.(N.S.) 1136, annotated in 11 Ann. Cas. 981, the author at page 990 on this subject says:

"While the doctrine of the turntable cases has been approved and followed by many jurisdictions, there has developed in the last few years a tendency to break away from that doctrine. . . . In some jurisdictions . . . the doctrine has been . . . so limit-

ed as to apply only to injuries occurring to trespassing children while playing on a turntable, or to injuries occasioned by alluring, attractive, and dangerous unguarded machinery."

The opinion in that case adopts the well-settled rule that a land owner is under no obligation to safeguard his property so as to prevent injury to trespassers, and that such duty cannot be imposed by the inefficiency of the trespasser, where none would otherwise exist. The opinion is exhaustive and apparently unanswerable upon the point that a land owner is not liable for damages to an infant trespasser for injuries arising from an unguarded, open, and unconcealed [130] danger on his land. Liability in such a case is no different from liability to an adult, and he concludes that the rule that the owner of land may manage it in his own way for his own benefit, owing no duty to those who come upon it for no business purpose, but without license, express or implied, is too well-established to need further comment or to warrant a departure from it.

In Thompson v. Baltimore, etc. R. Co. 218 Pa. St. 444, 67 Atl. 768, 120 Am. St. Rep. 897, 11 Ann. Cas. 894, 19 L.R.A.(N.S.) 1162, the opinion repudiates the turntable doctrine entirely. There is a strong dissenting opinion, and the two opinions set forth the argument on either side of the question involved.

The case of Sullivan v. Huidekoper, 27 App. Cas. (D. C.) 154, 7 Ann. Cas. 196, 5 L.R.A.(N.S.) 263, sets forth the leading arguments of the cases against the liability of a land owner for injuries from an open, unguarded pond on his land, and the case of Bjork v. Tacoma, 76 Wash. 225, 135 Pac. 1006, 48 L.R.A.(N.S.) 331, is a strong opinion to the contrary. In the latter case the city, in connection with its water system, maintained a flume 24 inches square about on the level with the ground to carry water to its reservoir; and, at a point where the land is used as a playground for children, it had an opening 24 inches square and a cover fastened with hinges and used by residents in that vicinity for a time, but it had subsequently fallen into decay, and, the cover being removed, a child three years old fell in and was drowned. The flume was a closed box from which there could be no escape or rescue.

In Haynes v. Seattle, 69 Wash. 419, 125 Pac. 147, it is disclosed that the reason for the court's conclusion was that the danger was exposed on the street of the city in front of and adjacent to the school playground, where there was a swarm of children; that it was not [131] only alluringly attractive, but in the nature of dangerous machinery carelessly left exposed to them.

In a former Washington case Gordon v. Snoqualmie Lumber, etc. Co. 59 Wash. 272, 109 Pac. 1044, 29 L.R.A.(N.S.) 88, it is held that hot water in a substantial barrel, used in connection with a shingle mill, being securely placed and covered, was not a trap or concealed danger. Defendant averred that it was under no duty to trespassers, and that one injured by dipping hot water from it could not recover damages, and was held not liable. The opinion in Bjork v. Tacoma, 76 Wash. 225, 135 Pac. 1006, 48 L.R.A.(N.S.) 331, is a strong argument in favor of such a liability.

In many cases a distinction is made between the case of negligence in not properly guarding dangerous machinery or a concealed dangerous condition, as found in the Stout and McDaniel cases, supra, and cases where there may be on one's land an unguarded pond or waterway, artificial or natural, even though children may be attracted there. As said in the Sullivan case, to hold the land owner liable in the latter cases would be to shift the care of children from their parents to strangers. The private duty to guard a child against unconcealed dangers devolves upon the parent, and not upon the land owner. The great majority of the cases upon this point hold that the landowner is liable only for accidents occurring on his land by reason of dangerous, unguarded machinery, permitted or created by him, or some concealed, dangerous condition thereon that is attractive to children whereby they may be injured; otherwise he is not liable.

The judgment of the Circuit Court is affirmed.

Affirmed.

Moore, J. dissents.

NOTE.

Liability of Landowner for Injury to Trespassing Child on Account of Unguarded Pond, Pool, Well, Etc.

The earlier cases discussing the liability of a landowner for an injury to a trespassing child by reason of an unguarded pond, pool, well or the like are reviewed in the notes to Wheeling, etc. R. Co. v. Harvey, 11 Ann. Cas. 981; Bottum v. Hawks, Ann Cas. 1913A 1025; and Barnes v. Shreveport City R. Co. 49 Am. St. Rep. 400, 423. The present note collects the recent cases. For a discussion of the attractive nuisance doctrine as applied to municipalities, see the note to Doyle v. Chattanooga, Ann. Cas. 1915C 283.

The majority of the recent cases refuse to apply the attractive nuisance doctrine to an unguarded pool or pond, and hold that a landowner on whose premises such a body of water is situated is not liable for the death of a trespassing child who is accidentally drowned therein. Pastorello v. Stone, 89

Conn. 286, 93 Atl. 520; Somerfield v. Land, etc. Co. 93 Kan. 762, 145 Pac. 803; Missouri, etc. R. Co. v. Moore (Tex.) 172 S. W. 568; Thompson v. Illinois Cent. R. Co. 105 Miss. 636, 63 So. 185, 47 L.R.A. (N.S.) 1101; Emond v. Kimberly-Clark Co. 159 Wis. 83, 149 N. W. 760. And see the reported case. Thus in Thompson v. Illinois Cent. R. Co. supra, it was said: "Here we have a generally shallow body of water covering a large area in the woods, a half mile from the inhabited parts of the town, wherein boys waded, and wherein appellant's boy was drowned. We think it must be conceded that this deplorable tragedy could not have been anticipated as probable by the exercise of reasonable forethought, nor could it have been prevented by any reasonable precautions. Of course, one could have anticipated the possibility of this sad event; but we think the danger was comparatively remote. Scattered over the length and breadth of the land are innumerable ponds and lakes, artificial and natural; and occasionally a boy or man loses his life while wading, or bathing, in such body of water. If, as a matter of law, the owners of fish ponds, mill ponds, gin ponds, and other artificial bodies, wherein it is possible that boys may be drowned, can be held guilty of actionable negligence unless they inclose or guard same, few will be able to maintain these utilities, and to our minds an intolerable condition will be created." In Emond v. Kimberly-Clark Co. 159 Wis. 83, 149 N. W. 760, wherein it appeared that a boy, attracted to a pond situated about forty feet from a highway, was drowned therein, it was held that it was not the duty of the proprietor to maintain a fence to guard the pond, it not being situated so close to the highway as to endanger passersby. The court said: "Stripped of verbiage describing the attractiveness of the pond to children, we have a body of water forty feet long and thirty feet wide situated upon defendant's land, with one end adjacent to a highway and the other end remote from the highway containing the dam and overflow gate or spill. There is nothing peculiar either in size, construction, or location of the pond. Hundreds of bodies of water both larger and smaller and equally attractive dot the whole state. And they take their toll of human life, especially of children, both in winter and summer. But it has not yet been deemed to be the duty of the owners thereof to fence or barricade them so as to exclude the public therefrom. Bodies of water like the one in question either natural or constructed by a dam or otherwise are useful and lawful objects whether located wholly within private lands or adjacent to a highway. Their usefulness would often be seriously interfered with if not entirely destroyed by a fence; especially so of ponds located on farms where they furnish water for stock. Generally speaking it is true, as stated in defendant's brief, that every drop of water except that in the washbowl is attractive to children, and it is also true that all bodies of water deep enough to drown a child situated within roving distance of children present a danger from which an injury to some person or death may reasonably be anticipated. But it does not follow from such fact that a duty on the part of the owner to fence or guard springs therefrom. There are many useful, lawful structures and objects of which the same is true. One having a grove of trees, especially be they nut-bearing trees, may reasonably anticipate that a boy may climb one and be injured. Such occurrences are by no means rare. But would any one claim that he must fence or guard his trees lest an injury to a child might result? The difference between an attractive lawful object and an attractive nuisance must not be overlooked. A certain amount of danger apparent to the mature mind inheres in the very existence of many useful objects both natural and artificial that surround our daily life. When the risk resulting from their use or existence is no greater than is reasonably necessary for their proper enjoyment by the owner, it is one we must assume as a condition of living. All efforts to minimize danger are commendable. But in so far as they are compulsory they must remain within the realm of what is fairly reasonable, and that is especially true of duties owing to trespassers. As to them, useful or lawful structures or objects upon one's land may in the absence of active negligence at the time of the injury be maintained and used in the customary manner in which they have been in the past, provided such maintenance and use is not so obviously dangerous as to partake of the nature of gross negligence. Zartner v. George, 156 Wis. 131, 145 N. W. 971. The world cannot be made danger-proof—especially to children. To require all natural or artificial streams or ponds so located as to endanger the safety of children to be fenced or guarded would in the ordinary settled community practically include all streams and ponds—be they in public parks or upon private soil,—for children are self-constituted licensees if not trespassers everywhere. And to construct a boy-proof fence at a reasonable cost would tax the inventive genius of an Edison. Heretofore it has been the judgment of this court that, in the absence of special danger or peculiar circumstances, there is no breach of duty to the public in leaving unfenced a pond of water located on private property."

But in Cochran v. Kankakee Stone, etc. Co. 179 Ill. App. 437, a recovery was permitted for the death of a child drowned while fishing in a pool formed in a stone quarry on the de-

fendant's premises, which was not sufficiently fenced or guarded from entrance by children. The court said: "Where the owner or occupant of land has unguarded dangers thereon, of such a nature as to be attractive to a child and to appeal to his childish curiosity and instincts, such dangerous attractions are regarded as holding out implied invitations to children of tender years to come upon the premises for their own pleasure, and the owner or occupant of the premises must use ordinary care to keep them in safe condition; because such children, being without judgment, are liable to be drawn by childish curiosity into places of danger and to be there injured by reason of such unguarded attractions. In any given case where an injury results to a child from unguarded conditions upon the premises of another, the questions whether the premises are dangerous, whether they are calculated to be attractive to a child of tender years and liable to lead such a child into danger, and whether the child had such a lack of intelligent capacity and experience as to bring him within the protection of said rule, are questions of fact for the jury." To the same effect see Thomas v. Anthony, 179 Ill. App. 463. And in Cœur d'Alene Lumber Co. v. Thompson, 215 Fed. 8, 131 C. C. A. 516, L.R.A.1915A 731, it was held that recovery could be had for the death of a child who while trespassing on the defendant's property was drowned in a well maintained by the defendant, which was not properly protected from children. The court said: "We are aware that in many cases the rule laid down in the cases from which we have cited has not been adhered to. There are numerous authorities of high repute in support of the rule that if a child trespasses upon the premises of another, and is injured in consequence of something that befalls him while so trespassing, he cannot recover damages, unless the injury was wantonly inflicted. Among these is the late case of Shawnee v. Check (Okla.) 137 Pac. 724, to which our attention has been directed by a supplemental brief filed by the defendant. The cases in support of the two rules are hopelessly in conflict. We have only to say that we prefer to follow the more humane rule, rather than the rule that an owner of land cannot be held responsible for injuries to children unless the same were wantonly inflicted. The latter rule is—'A cruel and wicked doctrine, unworthy of a civilized jurisprudence, which puts property above humanity, leaves entirely out of view the tender years and infirmity of understanding of the child, indeed his inability to be a trespasser in sound legal theory, and visits upon him the consequences of his trespass just as though he were an adult, and exonerates the person or corporation upon whose property he is a trespasser from any measure of duty toward him which they would not owe under the same circumstances towards an adult.' Thompson's Commentaries on the Law of Negligence, sec. 1026."

GABRIEL ET AL.

v.

CHURCHILL ET AL.

England—Court of Appeal—July 14, 1914.

[1914] 3 K. B. 1272.

Agency — Del Credere Agent — Liability to Principal.

A del credere agent, though he sells to an undisclosed buyer, is liable to his principal only as a guarantor for the buyer and is not subject to an action by the principal to litigate disputes arising on the contract of sale.

[See note at end of this case.]

[1272] Appeal from a decision of Pickford, J., in an action tried in the Commercial Court without a jury; reported [1914] 1 K. B. 449.

The following statement of facts is taken in substance from the judgment of Pickford, J.:—The claim in this action is against the defendants as del credere brokers. The plaintiffs are timber merchants and the defendants are wood brokers, and the action arises out of a sale of timber made by the defendants as brokers for the plaintiffs. The name of the purchaser was not at the time of the sale disclosed to the plaintiffs, but the purchaser was in fact Millar's Karri and Jarrah Company, Limited, a company of unimpeachable solvency. The defendants gave the plaintiffs a sold note which was in the following terms: "Sold for account of Messrs. Thomas Gabriel & Sons to our principals about 380 loads Blackbutt scantlings as per specification at foot at two shillings and nine pence per foot cube. Cost freight and insurance to London. Delivery as soon as possible and to follow on after delivery of 2000 setts contract 7th February 1907. To be paid for by net cash on arrival of each shipment. Any question arising under this contract which cannot be settled by the brokers hereto shall [1273] then be submitted to arbitration in the usual manner. (Signed) Churchill & Sim, Brokers. The goods to be at buyer's risk in respect of fire directly they leave the ship's deck. Brokerage and guarantee 2½ per cent." The bought note was in these words: "Sold to Messrs. Millar's Karri and Jarrah Company (1902), Limited, for account of our principals:" then followed the same description of

the goods and the same terms as in the sold note, except that the bought note said "Brokerage ½ per cent." The notes did not disclose to the plaintiffs the name of the buyers, nor did they disclose to Millar's Karri and Jarrah Company the name of the sellers. The defendants took the brokerage and guarantee, or what is called a del credere commission, from the plaintiffs in respect of the transaction. The plaintiffs got into default in delivering under the contract, and it was arranged that they should pay a sum of 200*l.* in respect of claims arising out of that delay, and it was also arranged that the plaintiffs would deliver, and the buyers would accept, the balance of the timber under a penalty of 250*l.* to be paid by the plaintiffs if they did not deliver the balance on March 1, 1911, the contract having been made in 1908. The contract was varied to that extent and became a contract by which the plaintiffs agreed to deliver the balance of the goods and agreed to pay a penalty if they were not delivered by March 1, 1911. The timber was not all delivered by March 1, 1911, and the buyers declined to pay to the extent of 250*l.*, because they said they were entitled as against the price that might be due for the goods to set off 250*l.* which was owing by the plaintiffs under the contract as altered. That dispute having arisen and the names of the buyers being by that time known to the plaintiffs, the buyers were willing to have the matter settled either by arbitration or by the submission of a case for the opinion of counsel or of some person of standing in the trade. The plaintiffs declined to agree to that unless the brokers, the defendants, were made parties to the arbitration of the case. The defendants took up the position, which they still adhere to, that they were not personally liable to the plaintiffs in respect of the performance of the contract; thereupon the plaintiffs brought this action against them, alleging that by a custom in the timber trade where a merchant sells timber through a broker to an [1274] unnamed principal, and the broker is paid a del credere commission by the seller, the broker is responsible for the due performance of the contract and for the payment of the bills on their due date, and that the liability of the broker is not limited to guaranteeing the solvency of the undisclosed principal.

Pickford, J., found that the custom had not been proved, and held that a broker who on a sale of goods to an undisclosed buyer receives a del credere commission from the seller is not liable to pay the seller for the goods if the buyer is solvent but has refused to pay for the goods on the ground that the seller has not duly performed the contract, and that the broker is liable to pay the seller only if, owing to the insolvency of the buyer or some other analogous cause, the seller is unable to recover the price from the buyer.

The plaintiffs appealed.

Schiller, K.C., and *Douglas Hogg* for appellants.

George Wallace, K.C., and *A. H. Chaytor* for respondents.

Drake, Son & Parton, solicitors for appellants.

Coward & Hawksley, Sons & Chance, solicitors for respondents.

[1275] BUCKLEY, L.J.—I think that this appeal fails. For the determination of the case it is not necessary to decide what the obligation of a del credere agent is. It is only necessary to decide negatively that this obligation is not so extensive as to constitute him a person with whom a seller may litigate any dispute that arises out of a contract and determine what is the sum which is due in respect of the contract which is the subject of the del credere agency. The appellants' contention on the contrary is based on Grove v. Dubois, 1 T. R. 112, on which I will say a word in a moment.

The facts are simple. The plaintiffs are timber merchants; the defendants are wood brokers. A contract was made on January 23, 1908, by which a sold note was given by the defendants to the plaintiffs, the defendants not disclosing the buyer. The sold note expressed that the defendants had sold for the plaintiffs, [1276] who are principals, certain goods at certain prices, delivery as soon as possible, to follow on after delivery of certain setts under a previous contract, to be paid for by net cash on arrival of each shipment; any question arising under this contract which cannot be settled by the brokers hereto shall then be submitted to arbitration in the usual manner. The contract was performed to a certain extent, deliveries took place under it, the plaintiffs then fell into default in delivering, and certain varied terms were arrived at. An arrangement was made to pay a certain sum of 200*l.* in respect of claims arising out of delay. A date was fixed, March 1, 1911, upon which the plaintiffs were to complete delivery under a penalty of 250*l.* if they failed. Under the contract thus varied default was made; the last delivery was not effected by March 1, 1911; one shipment arrived at a later date. A dispute arose between the parties whether the penalty was payable or not. The buyers were willing to refer to arbitration under the contract, the plaintiffs declined to do so except on certain terms which were not assented to, and thereupon the defendants took up the position that they were not personally liable to the plaintiffs in respect of the performance of the con-

tract. The plaintiffs then brought this action against them, alleging that they were personally liable under the contract.

It will be noticed from what I have said that no ascertained sum has been arrived at as between the vendors and the vendees as to what is the amount due. There is a dispute pending as to what is the sum. The contention before us is that the vendor is entitled to sue the del credere agent and to ascertain for the first time in that proceeding what is due and to settle in that proceeding matters in dispute between the vendors and vendees as to what the amount is. The contention to that effect is raised on what Lord Mansfield, C.J., said in Grove v. Dubois, 1 T. R. 112. His language as to the nature of a del credere contract was this: "It is an absolute engagement to the principal from the broker and makes him liable in the first instance. There is no occasion for the principal to communicate to the underwriter, though the law allows the principal for his [1277] benefit to resort to him as a collateral security. But the broker is liable at all events." That was language that affirmed that the del credere agent was under an absolute engagement in respect of which he was liable in the first instance, that he was liable, I suppose, for the performance of the contract, an expression which is found in some of the later cases, that his liability was not confined to a liability to make good the event of insolvency of the buyer or the impossibility of suing the buyer by reason of his being abroad or anything of that kind, but that he was liable as a principal in the matter. From that it would flow, I suppose, that he would stand in the position of a subseller to the ultimate buyer and would be entitled to retain any profit made upon the sub-sale. That of course is inconsistent with the general idea as regards the engagements subsisting between seller and del credere agent and buyer. Lord Mansfield's language in Grove v. Dubois, 1 T. R. 112, has been criticized in Morris v. Cleasby, 4 M. & S. 566; Hornby v. Lacy, 6 M. & S. 166, and Couturier v. Hastie, 8 Exch. 40. In the first case, Morris v. Cleasby, 4 M. & S. 566, Lord Ellenborough said this, after reading what I have read from Grove v. Dubois, 1 T. R. 112: "With all the respect which is due to Lord Mansfield and those judges, we cannot accede to these propositions thus generally laid down without restriction or qualification. The doctrine contained in them, as so laid down, appears to us to reverse the relative situations of principal and factor and to have a tendency to introduce uncertainty and confusion into the law on this subject." Lord Ellenborough in Hornby v. Lacy, 6 M. & S. 171, says: "I own I cannot think that a commission del credere is to have an effect attributed to it beyond that which regards the benefit of the principal who gives the commission. The commission imports that if the vendee does not pay the factor will; it is a guarantee from the factor to the principal against any mischief to arise from the vendee's insolvency. But it varies not an iota the rights subsisting between vendor and vendee. A somewhat different doctrine seems to have originated with Grove v. Dubois, 1 T. R. 112. A kind of magic effect was there given to a commission del credere [1278] changing the relative position of the owner and buyer; and what is reported to have fallen from Chambre, J., in a later case is referable to the same authority; but this was set right, as I think, in the judgment in Morris v. Cleasby, 4 M. & S. 566, which was given after much consideration, and I may add with the concurrence of two of our learned brethren on this bench now unhappily no more." I need not refer with particularity to the case of Couturier v. Hastie, 8 Exch. 40. The decision in Grove v. Dubois, 1 T. R. 112, is criticized in Story on Agency in a note to s. 33, where the learned author says this: "It was laid down in Grove v. Dubois, 1 T. R. 112, that a commission del credere amounts to an absolute engagement to the principal from the factor and makes him liable in the first instance. But the doctrine of that case on this point seems incorrect. A factor with a del credere commission is liable to the principal, if the buyer fails to pay or is incapable of paying. But he is not primarily the debtor. On the contrary, the principal may sue the buyer in his own name notwithstanding the del credere commission; so that the latter amounts to no more than a guaranty." I do not propose to travel through more of the authorities. They have all been most carefully reviewed by Pickford, J., in the judgment from which this appeal is brought. The proposition which the learned judge affirms at the end of his judgment seems to me absolutely correct. After pointing out that it is not necessary for him to determine whether the obligation of a del credere agent extends beyond the case of insolvency to a case of inability, by reason of a debtor being beyond the seas or something of that kind, to obtain immediate payment, and that it is not necessary to decide what his obligations are as regards making payment in default of payment by the buyer, he goes on to say this: "I think it is quite clear that it" (that is, the obligation of the del credere agent) "does not extend to make him the person with whom the seller is entitled, if he wishes, to litigate any disputes that arise out of the contract and ascertain what is due upon it. I think that, according to the authorities, it cannot extend further than that where there is an ascertained amount [1279] or certain sum due as a debt

from the buyer to the seller, and the buyer fails to pay that amount either through insolvency or something that makes it as impossible to recover as in the case of insolvency, the broker has to answer for that default by reason of his having received a del credere commission." To that I assent. The liability of the del credere agent is a contingent pecuniary liability, not a liability to perform the contract; it is a pecuniary liability to make good in an event the default of the buyer in respect of a pecuniary liability. It does not extend to other obligations of the contract. It does not expose the del credere agent to an action to ascertain the sum due. It is limited to a contingent pecuniary liability in respect of a sum which, as between the seller and the buyer, is an ascertained sum.

On these grounds I think that the judgment under appeal is right, and that this appeal should be dismissed.

KENNEDY, L.J.—I am of the same opinion. I think myself that this is a novel effort, very gallantly made and supported with much care and learning, to put the position of a del credere agent where it has never been before. I think it has always been understood, both by men of commerce and by men of law, to be a liability to be called upon by the principal to pay the ascertained sum when due under a contract from the other contracting party. The case that has been put here is summarized in his judgment by Pickford, J., at p. 454, where he says: "The question which I have to decide is one of principle whether the seller is entitled to call upon the del credere broker to litigate any disputes that may have arisen between the seller and the buyer, and not only to pay an ascertained sum which the buyer has refused to pay, but also to ascertain by setting up the buyer's defences how much is to be paid." That was what he had to decide, and in my judgment he decided it rightly on principle and rightly on authority. I cannot help thinking that it would generally be correct to say that the del credere undertaking or guarantee relates to the solvency of the contracting party, but I am not going any more than Pickford, J., did, so to tie it down, because I can conceive of a case in which it would be impossible [1280] to say that the buyer, though he may be temporarily embarrassed, was not able to pay, and if in fact he did not pay a liquidated sum on the particular day, I think it could quite conceivably be right to say that recourse to the agent is within the intention and meaning of a del credere agency. The seller may say to the agent "You, who have taken the del credere commission, have given me a buyer who does not produce the cash which is unquestionably due to me on a certain day. You say if I can press it on the buyer he can pay, but the process of squeezing is a difficult and a troublesome one; you have agreed that he shall pay me that liquidated sum." I am prepared to hold my mind open as to whether that would not be a proper case in which to call upon the del credere agent to fulfil his duty; and I think that that was what was perhaps in the minds of those judges who have not absolutely confined themselves to solvency as the question to be considered, but have also considered performance of the contract. At the same time, from such inference as I can draw from one's knowledge and experience, I cannot help thinking that the popular view is not far wrong; certainly if you asked nine people out of ten who were in a position to express an opinion they would say that the del credere agent guarantees the solvency of the buyer. Lord Ellenborough in the case of Hornby v. Lacy, 6 M. & S. 166, says this: "I own that I cannot think that a commission del credere is to have an effect attributed to it beyond that which regards the benefit of the principal who gives the commission. The commission imports that, if the vendee does not pay, the factor will." That is putting it in general terms that would include non-payment simply; but what he goes on to say in the same sentence, and what I think is the general idea, is, "It is a guarantee from the factor to the principal against any mischief to arise from the vendee's insolvency." I do not think that so great a judge would have used that phrase, as he did, in the commencement of his judgment, if he had not thought, as I, following him, think, that the central idea is that "I guarantee to give you a client who can pay when the time comes." But I am not prepared to say that the liability of the agent will not go a little further and [1281] be enforceable when there is an ascertained sum so as to be an undertaking "If he will not pay, I am called upon on my guarantee to pay." The question that we have heard argued with so much care is a totally different one; it is this: "Is the agent to be treated as a person who says to his principal 'I turn my face to the smiter when the other side, the contracting party, has a number of disputes with you about what is due; sue me, I take upon myself all the burden of these vexed questions though I may not even know of the correspondence between you and him. I do not know even the rights of the parties; I cannot say whether he has a good answer to your claim by reason of prior contracts and dealings by set-off or counterclaim.'" It is impossible, I think, that a business man ordinarily would take such a view, and I do not think that is the view of the law. I am far from saying that you might not have in any given trade or market

a custom by which a del credere agent may be made to take upon himself a larger liability and that you might not prove a custom under which the person who says "I am going to do business as a del credere agent" may be holding himself out as a person who undertakes a larger liability, but if I am to construe the term "del credere agent" apart from special custom, apart from usage in a particular market, I do not think that it includes anything like that which it must include in order to justify the success of the appellants in this case.

PHILLIMORE, L.J.—I agree. It has been said that this point which the learned judge has decided, on which we have heard a good deal of argument, was not the point really raised on the pleadings. I am not quite sure how far the point was raised by the pleadings, but looking at the course of the trial, looking to the correspondence which was put in without objection, I am sure that it was open to Pickford, J., to decide that which he has now decided, namely, whether on the particular facts of this case—and that is all I am going on—the del credere agent was liable to pay. If the decision in Grove v. Dubois, 1 T. R. 112, really established what the position of a del credere [1282] agent is, the plaintiffs would be right. A great many people have thought that Grove v. Dubois, was right; apparently the current of American decisions is that way. I think, so far as we are concerned in this country, that it is pretty well established that Grove v. Dubois, 1 T. R. 112, went too far. Morris v. Cleasby, 4 M. & S. 566, and Hornby v. Lacy, 6 M. & S. 166, were cited, as Pickford, J., said, without disapproval in Couturier v. Hastie, 8 Exch. 40. No later case in England has been brought to our notice in which any suggestion has been made that the doctrine in Grove v. Dubois, 1 T. R. 112, was the right view. When you come to think of it, if the doctrine of Grove v. Dubois, 1 T. R. 112, was right, the vendor can sue the del credere agent not merely for the price of the goods but for the refusal of the ultimate vendee to accept, and I find no case in which that view has been accepted. If Grove v. Dubois, 1 T. R. 112, were out of the way, then the del credere agent is not responsible as a principal to his vendee; he is responsible only in virtue of the relation which arises between them, namely, that he is an agent for making a contract with some unknown vendor and also that he guarantees something. What exactly he guarantees, I do not propose to say. I think it is quite likely that he does more than guarantee solvency, but what I do think is that he does not guarantee the performance in such a case as this. He does not guarantee performance where, for instance, the vendee refuses to take delivery or accept the goods; he does not guarantee performance where the vendee and the vendor have, no doubt through him (because the correspondence all passed through him and not between the principals direct), made a fresh arrangement. Here the arrangement made was that the vendors were willing to pay a sum of money and that they should enter into a contract with regard to the promptitude of future delivery. The question of construction of that contract may be wrongly raised by the vendee, but from that moment forward the only thing the vendors could possibly look to the del credere agent for was the assurance that the vendee, when the contract was ultimately fought out with him and these points on the subsequent contract had been raised [1283] and determined, would prove solvent. On these grounds I think this appeal fails.

Appeal dismissed.

NOTE.

Nature and Extent of Liability of Del Credere Agent to Principal.

Nature of Liability.

The reported case holds that a del credere agent is liable to his principal for goods sold only in case the purchaser of the goods fails to pay for them. Although there is authority for a different doctrine this view that the undertaking of a del credere agent is in the nature of a guaranty is upheld in a number of cases both in the United States and in England. Morris v. Cleasby, 4 M. & S. 566; Hornby v. Lacy, 6 M. & S. 166; Peele v. Northcote, 7 Taunt. 478, 2 E. C. L. 477, 1 Moo. C. Pl. 178; Ex p. Bright, 10 Ch. D. (Eng.) 566; Thompson v. Perkins, 3 Mason 232, 23 Fed. Cas. No. 13,972; Bradley v. Richardson, 2 Blatchf. 343, 23 Vt. 720, 3 Fed. Cas. No. 1,780; Muller v. Bohlens, 2 Wash. 378, 17 Fed. Cas. No. 9,914; Dunnell v. Mason, 1 Story 543, 8 Fed. Cas. No. 4,179. See also Baker v. Langhorn, 6 Taunt. 519, 1 E. C. L. 470, 2 Marsh 215, 4 Campb. 396; Corbett v. Foote [1884–1896] Newfoundland L. Rep. 276; Ex p. Flannagans, 2 Hughes 264, 12 Nat. Bankr. Reg. 230, 9 Fed. Cas. No. 4,855; Wittkowski v. Harris, 64 Fed. 712; Titcomb v. Seaver, 4 Me. 542; Wasey v. Whitcomb, 167 Mich. 58, 132 N. W. 572; Commercial Credit Co. v. Girard Nat. Bank, 246 Pa. St. 88, 92 Atl. 44. In Bradley v. Richardson, supra, the court said: "It is established, that the undertaking of the factor is merely to answer for the solvency of the buyers of the goods, or, rather, to guaranty to the principal the payment of the debts due from the buyers. He becomes liable to pay to the principal the amount of the purchase-money,

if the buyers fail to pay it when it becomes due. This is the effect and whole extent of his engagement. The doctrine is so laid down in all the adjudged cases, with few exceptions, and is recognized as the true doctrine by Chancellor Kent in his Commentaries, and by Judge Story in his Treatise on Agency. And I think it necessarily must be so, if the factor has authority to sell on credit, as he indisputably has, and if the principal may maintain an action against the buyers of the goods, which has been often adjudged and is nowhere denied." And in the same case on the question whether such a guaranty by a factor was within the clause of the statute of frauds requiring a contract to pay the debt of another to be in writing, it was said by the court: "Some confusion has arisen on this subject from the decisions on the question whether the undertaking of a factor is a contract within the Statute of Frauds, and so must be in writing. The better opinion is, that it need not be in writing; that, though a guarantee, it is not a collateral engagement, but an original and absolute one, that the prices for which the goods are sold, or the debts created by the sales of the goods, shall be paid to the principal when the credit given on the sales shall have expired."

It was held in a few early English decisions that the liability of a del credere agent to his principal was not merely that of a guarantor but that he was absolutely liable in the first instance for the proceeds of goods sold by him for his principal. Grove v. Dubois, 1 T. R. 112; Bize v. Dickason, 1 T. R. (Eng.) 285; Houghton v. Matthews, 3 B. & P. (Eng.) 485. The foregoing cases may be regarded as overruled by the reported case and the English cases cited in the opening paragraph of this note.

The doctrine, however, that a del credere agent is liable to his principal in the first instance finds support in several American decisions. Lewis v. Brehme, 33 Md. 412, 3 Am. Rep. 190; Swan v. Nesmith, 7 Pick. (Mass.) 220, 19 Am. Dec. 282; Balderston v. National Rubber Co. 18 R. I. 338, 27 Atl. 507, 49 Am. St. Rep. 772. See also Pugh v. Porter Bros. Co. 118 Cal. 628, 50 Pac. 772; Cushman v. Snow, 186 Mass. 169, 71 N. E. 529.

In *New York* although there is some authority for a contrary view (see Heubach v. Rother, 2 Duer (N. Y.) 227; Wallace v. Castle, 14 Hun (N. Y.) 106; Gindre v. Kean, 7 Misc. 582, 31 Abb. N. Cas. 100, 28 N. Y. S. 4), the larger number of decisions take the position that a del credere agent is liable to his principal in the first instance for goods sold in his capacity as agent. Leverick v. Meigs, 1 Cow. (N. Y.) 645: Wolff v. Koppel, 5 Hill (N. Y.) 458, *affirmed* 2 Denio 368, 43 Am. Dec. 751; Cartwright v. Greene, 47 Barb. (N. Y.) 9; Blakely v. Jacobson, 9 Bosw. (N. Y.) 140; Sherwood v. Stone, 14 N. Y. 267. See also Milliken v. Byerly, 6 How. Pr. (N. Y.) 214. In Wolff v. Koppel, supra, the court said: "This is a class of contracts that have existed in this country as long as commerce has flourished, and under which business is daily transacting to a large amount. The understanding of the mercantile community has, I apprehend, been general and uniform, that the agreement between the principal and factor was original and absolute to pay the price of the sale, deducting the commission, at the time the credit expired. Doubtless the factor expected the fund would be received from the purchaser: but whether received or not, he charges himself with the amount in his account with his principal. A contrary rule would require the principal to exhaust his remedy against the purchaser, in order to determine his insolvency, before he could charge the factor as surety." In Cartwright v. Greene, 47 Barb. (N. Y.) 9, it was held that it is not necessary for a principal in order to hold his agent liable for the purchase price of goods sold to show that he has tried to collect from the person who bought from the agent.

Extent of Liability.

It has been held that a del credere agent does not guarantee the bills of exchange sent by him to his principal in payment for goods sold where the bills are forwarded under instructions from the principal or that method of remittance is the ordinary course of business between them. Heubach v. Rother, 2 Duer (N. Y.) 227; Leverick v. Meigs, 1 Cow. (N. Y.) 645; Sharp v. Emmet, 5 Whart. (Pa.) 288, 34 Am. Dec. 554. See also Cartwright v. Greene, 47 Barb. (N. Y.) 9. It is otherwise however where it appears that the understanding of the parties is that the agent shall guarantee the remittances. Heubach v. Rother, 2 Duer (N. Y.) 227, wherein it was held that a del credere agent who remitted to his principal in advance the funds due for a sale made on credit was liable as for a personal debt and should make good in case the remittance proved worthless.

In Muller v. Bohlens, 2 Wash. 378, 17 Fed. Cas. No. 9,914, it was held that an agent who sold goods for a del credere commission was liable to his principal on a protested bill of exchange which he took from a purchaser in payment for goods sold, but was not liable on another protested bill which he purchased from a solvent person for a remittance to his principal in accordance with the latter's directions.

If the agent is guilty of negligence and deviates from the instructions of his principal in making a remittance, as by drawing a bill

of exchange on a person of poor credit, he is liable for the payment of the bill in case of its dishonor. Leverick v. Meigs, 1 Cow. (N. Y.) 645. See also Lucas v. Groning, 7 Taunt. 164, 2 E. C. L. 164, 2 Marsh. 460.

In Lewis v. Brehme, 33 Md. 412, 3 Am. Rep. 190, it was held that a del credere agent was bound to see that the proceeds from a sale of his principal's goods were safely transmitted to him in the absence of special instructions from the principal regarding the manner of remitting.

A del credere agent need not account to his principal for the proceeds of a sale of goods until the period of credit extended to the purchaser has expired. Lewis v. Brehme, 33 Md. 412, 3 Am. Rep. 190; Upham v. Lefavour, 11 Metc. (Mass.) 174; Leverick v. Meigs, 1 Cow. (N. Y.) 645; Swan v. Nesmith, 7 Pick. (Mass.) 220, 19 Am. Dec. 282.

It has been held that an agent who makes a contract with his principal to be liable for the proceeds of all goods sold by the agent, is not discharged from responsibility where notes taken in payment for goods sold by the agent are renewed by the principal after suit has been instituted for an accounting between the parties. Buelterman v. Meyer, 132 Mo. 474, 34 S. W. 67. And where a del credere agent who has sold goods at a par price takes payment in depreciated bank notes he cannot set off this loss in accounting to his principal but must account for the purchase price at par. Dunnell v. Mason, 1 Story 543, 8 Fed. Cas. No. 4,179.

A local agent who had agreed with his principal to indorse all the notes which he took in payment for his principal's goods has been held not to be liable for goods sold by a general agent of the principal where it appeared that the local agent protested against the sale on the ground that the proposed vendee was insolvent and refused to indorse his note for that reason. Springfield Fertilizer Co. v. Tompkins, 16 Ind. App. 403. And a factor who guarantees sales for his principal is not chargeable by the principal for goods sold but subsequently recovered from the purchaser because of his fraud, or for goods which have been rejected by the purchaser as not being up to sample. Talcott v. Canton Mills Co. 31 Abb. N. Cas. 97, 30 N. Y. S. 421 (Arbitration).

It has been held that where, under the terms of an agreement, an agent becomes a guarantor of all sales made for his principal and the agent has a right to sell on credit, he cannot be held liable as for a conversion of goods sold on credit even though he has failed to collect for the sales. Standard Fertilizer Co. v. Van Valkenburgh, 21 Misc. 559, 47 N. Y. S. 703.

Where a contract of sale was made by a del credere agent of goods which had been sold to another at the time the contract was entered into, this fact being unknown to either of the parties, it was held that the agent was not liable to his principal for the price of the goods as there was nothing capable of a transfer at the time of the making of the contract. Couturier v. Hastie, 5 H. L. Cas. (Eng.) 673, 2 Jur. N. S. 1241, 25 L. J. Exch. 253.

Where a del credere agent has received goods from his principal under an express contract which does not oblige the agent to insure the goods, he is not liable for the loss of the goods by fire even though the invoice of the goods bears a stipulation in very small type that the stock is "to be kept covered by insurance for the benefit of the consignor." Sturtevant Co. v. Cumberland, 106 Md. 587, 14 Ann. Cas. 675, 68 Atl. 351.

In a jurisdiction where the doctrine of the absolute liability of a del credere agent prevails it has been held that the agent is liable to his principal for interest on the amount due from the date on which the credit extended to a purchaser expires. Blakely v. Jacobson, 9 Bosw. (N. Y.) 140.

BURNS
v.
CITY OF NEW YORK.

New York Court of Appeals—January 12, 1915.

213 N. Y. 516; 108 N. E. 77.

Landlord and Tenant — Covenant for Perpetual Renewal of Lease.

Covenants in a lease for continual renewals, while not favored, because tending to create a perpetuity, are valid and enforceable if explicit and clear.

[See note at end of this case.]

Same.

A covenant in a lease by a city for 21 years "to renew it at its expiration for 21 years, "with a like covenant for future renewals of the lease as is contained in this indenture," is one for future renewals in perpetuity.

[See note at end of this case.]

Same.

Four renewals of a lease for 21 years are a practical construction of a covenant of the original lease, to be given great weight by a court, as one for future renewals in perpetuity.

[See note at end of this case.]

Municipal Corporations — Power to Lease — Limitation Not Retroactive.

Ordinances and statutes limiting the period for which the city may lease property, not being retroactive, do not affect renewals

under a prior valid lease by the city of New York for 21 years, with covenant for renewals in perpetuity.

Burns v. *New York*, 158 N. Y. App. Div. 729, reversed.

Appeal from Appellate Division of Supreme Court, First Judicial Department.

Submission of controversy. John N. Burns, administrator, plaintiff, and City of New York, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. REVERSED.

James A. Donnelly for appellant.
Frank L. Polk, *Charles J. Nehrbas* and *Terence Farley* for respondent.

[519] CHASE, J.—The mayor, aldermen and commonalty of the city of New York, in 1811, leased to John Dixey a small piece of real property in the city of New York now known as No. 103 Park Row. The lease was for the term of twenty-one years, beginning May 1, 1806. It contained a covenant by the lessor that "They, the said Mayor, Aldermen and Commonalty of the City of New York, their successors and assigns shall and will, at the expiration of the terms hereby demised, again demise and to farm let the above premises in pursuance of this present lease unto the said John Dixey, his executors, administrators or assigns for and during the term of twenty-one years thereafter, *with a like covenant for future renewals of the lease as is contained in this present indenture*, and upon such rents and other terms and conditions as shall be agreed upon between the parties, or as shall be determined by two sworn appraisers, one of whom to be chosen by each of the said parties: unless the said premises or some part thereof shall at the expiration of the said term hereby demised be required for public purposes; in which case the said term shall not be renewed, but the said Mayor, Aldermen and Commonalty of the City of New York, their successors and assigns shall and will pay to the said John Dixey, his executors, administrators or assigns, the value of such buildings as shall be erected in pursuance of this lease. . . ."

[520] On May 1, 1827, May 1, 1848, May 1, 1869, and on May 1, 1890, and on each of said dates, said lease was renewed for a further term of twenty-one years to the successor in interest of said Dixey. Each of said renewals contained a provision similar to the provision quoted from the first lease providing for future renewals. Prior to May 1, 1911, at the expiration of the lease dated May 1, 1890, the successor in interest of said Dixey duly applied for a renewal of said lease for a further period of twenty-one years, which application was refused. The plaintiff's testatrix and her predecessors in title fully performed all the conditions and covenants required of the lessee by the terms of said leases. The premises are not required for public purposes. The respondent claims that if the original lease did not provide for perpetual renewals the leases executed on and subsequent to May 1, 1869, were made without authority of law and are void, because of the ordinances passed by the common council of the city of New York in 1844 and subsequent acts of the legislature. (Ordinances of the City of New York, sections 9 and 10, title 4, as ratified and confirmed by chapter 225, Laws of 1845; chapter 217, Laws of 1853, section 7; chapter 446, Laws of 1857, section 41; chapter 876, Laws of 1869, section 8; chapter 410, Laws of 1882, section 170; present Charter of the City of New York, section 205.)

But one question of law is presented on this appeal and that is involved in the construction of that part of the lease quoted relating to the renewals thereof. Was it the intention of the parties to the lease to provide for perpetual renewals?

Covenants by a landlord for continual renewals are not favored for they tend to create a perpetuity. When they are explicit the more established weight of authority is in favor of their validity. (Kent's Comm. vol. 4, 109.) The rule stated by Kent was the law in England and has been frequently stated by writers and in opinions by the courts both in England and in this country. (Platt on [521] Leases, 709; Taylor's Landlord and Tenant, section 335; 3 Washburn's Real Property, 469; McAdam on Landlord and Tenant, section 123; Jones on Landlord and Tenant, section 343; Tritton v. Foote, 2 Bro. C. C. (Eng.) 636, 639 and note; Hare v. Burges, 4 Kay & J. (Eng.) 45; Rutgers v. Hunter, 6 Johns. Ch. (N. Y.) 215; Carr v. Ellison, 20 Wend. 178; Hoff v. Royal Metal Furniture Co. 117 App. Div. 884, 103 N. Y. S. 371, *affirmed*, 189 N. Y. 555, 82 N. E. 1128; Drake v. Board of Education, 208 Mo. 540, 13 Ann. Cas. 1002, 106 S. W. 650, 123 Ann. St. Rep. 448, 14 L.R.A.(N.S.) 829.)

Reading the provisions of the leases in question in the light of the settled law upon the subject of the construction of covenants for renewal, it is difficult to avoid the conclusion that the parties to the original lease in preparing the same had the established rule of law in mind and intended to bind the city to grant future renewals in perpetuity. Such intention is not left to conjecture or to be implied. It is clearly and specifically provided by the lease that it shall run for a term of twenty-one years and that at the expiration of the term it will be renewed "*with a like*

covenant for future renewals of the lease as is contained in this present indenture." As the language in regard to future renewals is clear, it should be enforced.

The respondent relies upon the case of Syms v. New York, 105 N. Y. 153, 11 N. E. 369. The plaintiff in the Syms case brought the action to reform two leases. The city of New York had executed a lease for the term of thirty years which ended on the first day of May, 1840. In it the city agreed that at the expiration of the term it would give a new lease "for and during the term of twenty-one years thereafter with a like covenant for future renewals of the lease as is contained in this present indenture." A new lease was given at the end of the first term for a term of twenty-one years, and it was therein covenanted that at the end of such renewed term another lease would be given "in pursuance of this present lease . . . for and during the term of twenty-one years thereafter upon [522] such rents as shall be agreed upon." At the end of the second lease a third lease was given to an assignee of the first lessee, and in such third lease there was no covenant for a renewal, but the lessee expressly covenanted that at the end of the term he would peaceably and quietly leave, surrender and yield up to the city or its successors or assigns all the demised premises. Near the end of the term of the last lease the city sold the property to a stranger to the lease. Thereafter the successor of the lessee brought the action to reform the leases given in renewal of the original lease so as to insert in each a covenant for a further renewal of twenty-one years from the date of the expiration of such renewals. The court in the opinion say (page 158): "This action was brought mainly for the purpose of reforming the last two leases. But there was no proof of any mistake or fraud in their execution, or in the terms inserted in them, and, therefore, even if the statute of limitations did not furnish a bar to the action to reform the leases, there was no basis or ground for their reformation. The plaintiff's action, therefore, utterly failed and a verdict was properly directed for the defendants." It was not necessary for the court to discuss the construction of the original lease, as the renewals had been given and accepted without fraud or mistake, and by the terms of the last renewal neither the lessee nor any person claiming under him could assert any right to the premises after the termination of such lease. The court, however, did in the course of the opinion use language as follows: "The lease executed in 1810 should not be so construed as to create a perpetuity. (Rutgers v. Hunter, 6 Johns. Ch. (N. Y.) 215; Carr v. Ellison, 20 Wend. (N.Y.) 178; Piggot v. Mason, 1 Paige (N. Y.) 412; Banker v. Braker, 9 Abb. N. Cas. 411.) Its language is satisfied by holding that it gave the lessee the right to two renewals and those renewals were subsequently given and it must be assumed that the parties so understood the first lease. The two renewals signed by poth parties gave that lease [523] a practical construction which should have great weight with any court called upon to ascertain its meaning and effect."

Notwithstanding the statement of the court regarding the covenant for renewal in the Syms case, we think that if the intention of the parties in that lease had not been shown by their acts amounting to a practical construction, and if the renewals had not been accepted and fully agreed to by the parties in the form stated, the language of the original lease would not have been satisfied by granting two renewals thereof.

The intention of the parties in this case is shown by the four renewals covering a period of nearly one hundred years to have been in accordance with the construction of the appellant. As said by the court in the Syms case, these renewals are a practical construction of the original lease which should have great weight with any court called upon to ascertain the meaning and effect of the lease itself.

In Storms v. Manhattan R. Co. 178 N. Y. 493, 71 N. E. 3, 6 L.R.A. 625, the court construed a lease having a covenant in the exact words of the covenant in the lease now under consideration. The court there referred to the lease as one entitling the lessee to perpetual renewals and say: "The covenant for renewal must be considered as perpetual, absolutely binding the city until some portion of the land upon which the plaintiff's building stands shall be actually required for public purposes by the City of New York." The decision in the Storms case was subsequent to the decision in the Syms case, and it supports the claim of the appellant that the court is not bound by language used in the opinion in the Syms case which was not only not necessary to the decision of the case but was used in connection with its reference to the practical construction placed upon the lease by the parties to it. It is conceded that if it was not the intention of the parties to the lease under consideration to provide for perpetual [524] renewals the judgment appealed from is right and should be affirmed.

The intention to grant renewals in perpetuity is not shown by a general covenant to renew upon the same covenants, conditions and agreements as contained in the original lease. There must be some language in the covenant which shows an intention to include in the renewal leases a particular covenant in regard to future renewals. (Muhlenbrinck v. Pooler, 40 Hun 526, 1 N. Y. St. Rep. 223;

Carr v. Ellison, 20 Wend. (N. Y.) 178; Winslow v. Baltimore, etc. R. Co. 188 U. S. 646, 23 St. Ct. 443, 47 U. S. (L. ed.) 635.) The lease under consideration expressly provides that the renewal leases shall contain a covenant *in regard to renewals* the same as in the original lease. This agreement the parties are entitled to have carried out.

In Hare v. Burges (supra) a clause in a lease providing for a renewal lease at the same rents and subject to the same covenants *including this present covenant* was held to give to the lessee the right to perpetual renewals.

In Hodges v. Blagrave, 18 Beav. (Eng.) 404, the lease contained a covenant on the part of the lessors to renew for twenty-one years "and that in every future lease should also be inserted the *like covenant for renewals* at the expiration of the first ten years of every such lease." The court held that the lessee was entitled "to a perpetual renewal from time to time forever upon the terms stated in the original lease." In Hoff v. Royal Metal Furniture Co. (supra) the lease contained a covenant that "Said party of the second part, its successors or assigns, to have the privilege of renewing this lease from year to year upon notice to that effect in writing, given on or before the day of the date of the expiration of *each and every year* by written notice addressed to the party of the first part at her last known address." The court held that the covenant entitled the lessee to perpetual yearly renewals.

It is not denied that the mayor, alderman and commonalty [525] of the city of New York had the power to make the lease in 1811, and therein provide for perpetual renewals. Neither is it claimed that the ordinances and the acts of the legislature prevented the renewal of said lease from time to time if it was so agreed in the original lease. The ordinances and acts of the legislature were not intended to affect outstanding valid contracts.

The judgment should be reversed and judgment directed in favor of the plaintiff in accordance with this opinion, with costs.

Willard Bartlett, Ch. J., Hiscock, Collin, Cuddeback, Miller and Cardozo, JJ., concur.

Judgment reversed, etc.

NOTE.

Construction of Covenant in Lease for Renewal as Covenant for Perpetual Renewal.

It is the purpose of this note to review the recent cases discussing the question whether a covenant in a lease for a renewal should be construed as a covenant for perpetual renewal. The earlier cases are considered in the notes to Drake v. Board of Education, as reported in 13 Ann. Cas. 1002, and 123 Am. St. Rep. 448, 462.

The courts lean against a construction of a renewal clause in a lease that will make the lease one in perpetuity. Therefore it is generally held that a lease containing a covenant to renew at its expiration, with covenants, terms, and conditions similar to those contained in the original lease, is fully carried out by one renewal without the insertion of another covenant to renew. U. S. Brewing Co. v. Wolf, 181 Ill. App. 509; Feigenspan v. Popowska, 75 N. J. Eq. 342, 72 Atl. 1003; Fergen v. Lyons (Wis.) 155 N. W. 935; Rex v. St. Catharines Hydraulic Co. 43 Can. Sup. Ct. 595; Wilson v. Kerner, 21 Ont. W. Rep. 477, 3 Dominion L. Rep. 11, 3 Ont. W. N. 769; Hoadley v. Bayntun, 31 West L. Rep. (British Columbia) 751. See also Leavitt v. Maykel, 203 Mass. 506, 89 N. E. 1056, 133 Am. St. Rep. 323; Greenville Bank v. Gornto, 161 N. C. 341, 77 S. E. 222. *Compare* Swan v. Colclough, Hayes & J. (Eng.) 807. Thus in Fergen v. Lyons, supra, the court said: "An unqualified covenant to renew a lease calls for a new lease for the same period and upon the same terms as the original lease, except the agreement to renew." And in Feigenspan v. Popowska, 75 N. J. Eq. 342, 72 Atl. 1003, the court said: "It is conceded that an agreement to renew a lease implies a renewal for a like term on like conditions. . . . This general covenant to renew, while calling for a lease of similar tenor to the original lease, does not require that the renewal lease shall contain a similar covenant to renew. The authorities all agree upon this exception, and the reason for it is obvious." So in U. S. Brewing Co. v. Wolf, 181 Ill. App. 509, wherein the court said: "That the plaintiff was not entitled, under the optional clause of its lease with Schreiber, to a new lease including the optional clause, thereby making the lease perpetual, is too well settled to require the citation of authorities." In Hoadley v. Bayntum, 31 West L. Rep. (British Columbia) 751, it appeared that a lease contained the following covenant as to renewal: "And at the option of the lessee the term hereby demised shall be renewed for a further term of one year and so on from year to year at a like rental and on similar terms." The court said: "I think the tenancy under which the defendant in the case at bar had been holding . . . was a tenancy from year to year. The words in the renewal covenant contain these very words: 'for a further term of one year and so on from year to year, etc., etc." *Compare* Van Beuren, etc. Bill Post Co. v. Kenney, 60 Misc. 338, 113 N. Y. S. 450. The courts look with disfavor upon a lease that is perpetually renewable, and from

the ordinary covenant to renew, a perpetuity will not be regarded as created. There must be some peculiar and plain language before it will be assumed that the parties intended to create a perpetual renewal. Rex v. St. Catharines Hydraulic Co. 43 Can. Sup. Ct. 595. See also Sadlier v. Biggs, 4 H. L. Cas. (Eng.) 435, 457; Wilson v. Kerner, 21 Ont. W. Rep. 477, 3 Dominion L. Rep. 11, 3 Ont. W. N. 769; Alexander v. Herman, 21 Ont. W. Rep. 461, 2 Dominion L. Rep. 239, 3 O. W. N. 755. See also Thomas Hinds Lodge, etc. v. Fayette Presbyterian Church, 103 Miss. 130, 60 So. 66. Thus in Rex v. St. Catharines Hydraulic Co. supra, the court said that it has been held "almost uniformly against the insertion in the renewal lease of such a covenant unless the language used in the contract expressly or by very clear implication showed such was the intention of the parties." And in Sadlier v. Biggs, 4 H. L. Cas. (Eng.) 435, the court said that the intention to renew perpetually must be clear from the language of the lease and that the fact that several renewals had been granted was not admissible to explain the intention. But though the courts may dislike perpetual renewals, yet such renewals are not void, and the law is now settled that if the parties clearly express in the covenant their intention to renew perpetually, it will be so construed and enforced. Bridges v. Hitchcock, 5 Bro. P. C. (Eng.) 6; Furnival v. Crew, 3 Atk. (Eng.) 83; Sadlier v. Biggs, 4 H. L. Cas. (Eng.) 435; Wynn v. Conway Corp. [1914] 2 Ch. (Eng.) 705 [1914] W. N. 332, 78 J. P. 380, 30 Times L. Rep. 666, 59 Sol. J. 43. And see the reported case. See also Atkinson v. Pillsworth, 1 Ridg. P. C. (Eng.) 440; Palmer v. Hamilton, 2 Ridg. P. C. (Eng.) 550; Sheppard v. Doolan, 3 Dr. & War. (Eng.) 1, 5 Ir. Eq. 6; Chambers v. Gaussen, 2 Jo. & La. T. (Eng.) 99, 7 Ir. Eq. 575; Hughes v. Public Works Com'rs [1912] 1 Ir. R. 156. Thus in Furnival v. Crew, 3 Atk. (Eng.) 83, it was held that a covenant to renew "from time to time" was a covenant for perpetual renewal, the language meaning "to renew and continue renewing." And in Sheppard v. Doolan, 3 Dr. & War. (Eng.) 1, 5 Ir. Eq. Rep. 6, the court said that while the lease did not contain any technical covenant for renewal, the habendum amounted to a covenant for perpetual renewal.

BARFIELD

v.

SOUTH HIGHLANDS INFIRMARY ET AL.

Alabama Supreme Court—January 14, 1915.

191 Ala. 553; 68 So. 30.

Hospitals — Liability for Malpractice by Surgeon.

Where the medical and surgical treatment of a patient in an infirmary and an operation were prescribed and performed by a surgeon under an independent employment by the patient, the infirmary corporation is not liable for his negligence, unskillfulness, or other wrong, though he was a shareholder and officer of the corporation.

[See Ann. Cas. 1915B 1229.]

Depositions — Practice — Notice to Parties of Taking.

Under Code 1907, § 4032, as amended by Acts 1911, p. 487, providing, relative to depositions, that when the testimony is desired under section 4030, subd. 3, authorizing the taking of depositions when the witness resides more than 100 miles from the place of trial or is absent from the state, the testimony may, unless the opposite party makes the affidavit therein prescribed, be taken by interrogatories, that the moving party may file interrogatories, of which and of the residence of the witness and of the commissioner to be appointed he must give the opposite party notice, and that, if thereupon such opposite party shall make affidavit that in his belief it is material that the testimony of such witness be taken orally, the clerk shall issue a commission to take such testimony by oral examination, provided, however, that in all cases in which testimony is to be taken by interrogatories the party against whom the testimony is proposed to be taken shall, within the time allowed to file cross-interrogatories, have the right to demand reasonable notice of the time and place of taking the testimony and to attend such examination and cross-examine the witnesses orally in all cases where depositions are taken on commissions from the law courts, the party against whom it is proposed to take the testimony within the time for filing cross-interrogatories has a right to demand reasonable notice of the time and place of taking the testimony, and to attend and cross-examine the witnesses orally, though the meaning of the statute is somewhat obscure.

Appeal and Error — Error Not Shown by Record.

Error must be affirmatively shown, and is not shown with respect to the suppression of a deposition on a motion on the ground, among others, that notice of the time and place of taking the deposition was not given, where the evidence on the motion, if any was taken, is not before the Supreme Court and it did not appear that the deposition was not

suppressed for lack of compliance with the statute.

Physicians and Surgeons — Malpractice — Evidence — Amount of Charge.

In an action against a surgeon for malpractice, a question asked a witness as to the surgeon's charge for his treatment was properly excluded, the amount of the charge not being in issue, defendant being morally and legally bound to exercise the same degree of care, diligence, and skill whether his charge was large or small, and no inference of wrong or negligence arising from the fact that the charge was unreasonable, especially as his charge was shown by other evidence.

Evidence — Medical Books.

Relevant extracts from medical treatises recognized and approved by the medical profession as standard may be read to the jury in evidence.

[See 19 Ann. Cas. 1002.]

Expert Witness — Cross-Examination — Statements in Medical Books.

In an action for malpractice, it is proper to permit an expert medical witness to be asked on cross-examination whether it is true, as stated in a medical treatise of high authority, that it is not uncommon even in closed fractures of the femur to find gangrene developing because of laceration or pressure, and that early amputation of the thigh above the fracture is necessary in those cases, and should be done early in order to save life, as this is a statement of surgical theory and practice, and the gist of the question is whether the witness' expert opinion concurs with that of the author.

Trial — Leading Questions.

It is within the court's discretion ordinarily to allow leading questions, especially as a question, asked over plaintiff's objection in an action for malpractice, as to whether it is not a fact that "this sort of human disaster" is preventable, led away from, and not to, the desired answer.

Hypothetical Questions — Basis — Facts Subsequently Supplied.

While it is better to defer hypothetical questions asked expert witnesses until evidence of all the facts hypothesized has been offered, where evidence of such facts is subsequently offered and the error is substantially cured, it does not require a reversal.

Appeal — Harmless Error — Admission of Trivial Evidence.

In an action against a surgeon for amputating plaintiff's leg without her consent, where plaintiff intimated that from the time she went to the hospital where she was operated on and was put in defendant's charge she was kept in ignorance of the danger of her condition and deceived as to the measures that would be resorted to for her cure, the admission of testimony for defendant, apparently in answer to this contention, that on the morning she was removed to the hospital defendant told plaintiff's mother, who was making the arrangement for plaintiff, that he "would not guarantee her," but that he would do all he could for plaintiff, relates to a matter of so little significance as not to require a reversal, especially as it is probably competent to rebut the contention that defendant made an agreement or promise to restore plaintiff to health or to save her leg.

Evidence — Hospital Charts.

In an action for malpractice on the part of a surgeon in treating a patient in a hospital, it is not error to permit defendant, while testifying as an expert and giving his opinion on the whole course of treatment administered to plaintiff, to read temperature charts kept by the nurses in the hospital, the authenticity and accuracy of which was fully established and undisputed, this being nothing more than a statement of some of the considerations that influenced his professional judgment respecting the proper treatment to be followed.

[See Ann. Cas. 1916C 78.]

Harmless Error — Proper Answer to Improper Question.

In an action against a surgeon for amputating plaintiff's leg without her consent, where she testified that she was ignorant that it had been amputated for several days after the operation, if a question asked a nurse as to whether plaintiff knew her leg had been amputated is improper as calling for the witness' cognition of the state or operation of plaintiff's mind, it is rendered harmless by her answer that plaintiff would lie there and watch the leg being dressed every time it was dressed, as she stated only cognizable facts.

Admissions and Declarations — Self-Serving Declarations.

In an action against a surgeon for amputating plaintiff's leg without her consent, evidence as to declarations by plaintiff to another doctor about the amputation, and what was said between them relative thereto, and whether the witness knew that defendant sent such doctor to tell plaintiff about her condition is properly excluded, as statements made or things done in the absence of defendant and not brought to his knowledge can have no bearing on his exercise of due care and skill.

Physicians and Surgeons — Malpractice — Admissibility of Evidence.

In an action for amputating plaintiff's leg without her consent and for so negligently and unskillfully treating it as to make its amputation necessary, where there was no suggestion in the declaration or the evidence that defendant was guilty of any negligence or lack of skill in treating plaintiff after the amputation, evidence as to matters occurring after the amputation is properly excluded.

Hospital Charts.

In an action against a surgeon for malpractice in his treatment of a patient in a hospital, charts or records kept by the nurses for the information of the attending physician or surgeon are properly admitted in evidence, though they doubtless signified little to the jury.

[See Ann. Cas. 1916C 78.]

Opinion Evidence — Testimony That Person Appeared Sick.

A graduate and experienced nurse may properly testify that a person appeared to be

very sick, and it would seem that any witness of ordinary intelligence might be allowed to so testify.

Expert Evidence — Possibility of Cure.

In an action for malpractice, it is not error to permit experts to answer questions as to whether there was any way known to the medical profession by which a blood clot, "in cases of this sort," could be prevented, on the theory that such testimony transcended the limits of all possible human attainment.

Physicians and Surgeons — Necessity of Consent to Operation.

If a patient was incapacitated to consent to the amputation of a leg, and if the necessity therefore was extremely urgent to save her life, a surgeon treating her had a right to consult with her mother and to act upon her mother's consent as the implied consent of the patient; and hence, where there was evidence of these facts, it was not error to admit evidence, in an action for malpractice, that the mother consented and stated that the patient had consented.

[See note at end of this case.]

Same.

In an action against a surgeon for amputating plaintiff's leg without her consent, evidence that plaintiff's mother and a nurse told defendant that plaintiff was willing to have the leg amputated, though falling in the general class of hearsay, is admissible as bearing upon defendant's good faith.

[See note at end of this case.]

Trial — Restriction of Testimony — Discretion.

It is within the court's power and discretion, for the purpose of keeping the examination of witnesses on collateral issues within the bonds of reason and convenience, to exclude questions asked expert witnesses, based on a state of facts finding no support in the evidence, though such questions are asked on cross-examination.

Physicians and Surgeons — Malpractice — Evidence as to Experience.

Where a surgeon sued for malpractice testified as an expert, evidence as to his age, the extent of his practice, and his place of residence and other similar matters is admissible, as the jury were entitled to be informed of his opportunities for observation and experience in his line, and to know what manner of man he was, and it was immaterial that testimony as to these matters was given by another witness rather than by defendant.

Evidence — Medical Books.

Objections to extracts from scientific medical works introduced in evidence were properly overruled, though there was no proof that they were works of authority and standing with the medical profession, where the objections did not point out this lack of proof, as the deficiency might have been supplied or the extracts excluded had the point been raised.

[See 19 Ann. Cas. 1002.]

Physicians and Surgeons — Necessity of Consent to Operation.

Where a patient voluntarily submits to an operation by making no objection, though she knows it is about to be performed, her consent thereto will be presumed, unless it is made reasonably clear that she was the victim of a false and fraudulent representation.

[See note at end of this case.]

Same.

In an action against a surgeon for amputating plaintiff's leg without her consent, an instruction, justifying the amputation without plaintiff's affirmative consent if an emergency demanding the operation, and "not produced by defendant," existed, sufficiently excludes an emergency superinduced by defendant's own negligence or lack of skill, or voluntarily brought on by him, where plaintiff did not consider the matter of sufficient importance to call the court's attention directly to the supposed deficiency.

[See note at end of this case.]

Same.

In an action against a surgeon for amputating plaintiff's leg without her consent, where it was admitted that plaintiff refused for a long time to consent, but defendant's testimony tended to show that she freely consented shortly before the operation, an instruction that, if she was in imminent danger of losing her life, and was advised to have her leg amputated to save her life, it was her right and privilege to refuse to consent, and if she did refuse, and defendant cut off the leg without her consent, it was wrongful, is misleading, and properly refused.

[See note at end of this case.]

Same.

Such instruction is also properly refused because it ignored evidence tending to show that she was wholly incapacitated to consent, justifying defendant in acting upon a consent to be implied on considerations of custom, humanity, and reason.

[See note at end of this case.]

Physicians and Surgeons — Malpractice — Evidence — Failure of Another to Cure.

In an action against a surgeon for amputating plaintiff's leg without her consent, and for so negligently and unskilfully treating it as to make its amputation necessary, the fact that another physician or surgeon had failed in an attempt to treat the leg is proper for the consideration of the jury on the question of defendant's alleged negligence and the alleged wrongful amputation, and an instruction that such fact, if it was a fact, should not be considered is properly refused.

Degree of Responsibility.

Unless so provided by an express contract, a physician or surgeon does not warrant that he will effect a cure, or that he will restore the patient to the same condition as before the necessity for treatment arose, or that the result of the treatment will be successful.

[See 1 Ann. Cas. 21,306; 14 Ann. Cas. 605; 93 Am. St. Rep. 657.]

Same.

A physician or surgeon, possessing the requisite qualifications and applying his skill and judgment with ordinary care and diligence to the diagnosis and treatment of the patient, is not liable for an honest mistake or error of judgment in making a diagnosis or prescribing a mode of treatment, where there is ground for reasonable doubt as to the practice to be pursued.

[See note at end of this case.]

Appeal from City Court of Birmingham: FERGUSON, Judge.

Action for damages. Josephine Barfield, plaintiff, and South Highlands Infirmary et al., defendants. Judgment for defendants. Plaintiff appeals. AFFIRMED.

[557] The fifth assignment of error is as follows: "The court erred in overruling plaintiff's objection to the question, 'Is it not a fact that this sort of human disaster is preventable, in your opinion and judgment as a physician?'"

Assignment 7 is to overruling plaintiff's objections to the following questions: "Is it true that in case of a fracture of the femur, if a vein has been compressed by a displaced fragment of the bone, causing thrombosis, the resulting gangrene of the wound occurs?"

"Doctor, taking into consideration your knowledge of the history of this case, the kind of injury that was caused, fracture, its proximity to the blood vessel, or the probability of it impinging or resting upon a blood vessel, resting upon the fracture, and taking into consideration all that you know about the case of your own knowledge, as testified to by you, and the fact that several weeks afterward, while she was still in the infirmary under the treatment of Dr. Prince, mortification began to set in in the leg; suppose the foot became cold; no pulsation in the vessel; green spots began to appear on different parts of the limbs—what, in your opinion, was the cause of that condition?"

Assignment 8 refers to the answer to the question: "I should say she lost her limb from a gangrene or death of the limb; that would be my answer."

Assignments of error 17 to 29, inclusive, have reference, first, to declarations made by plaintiff to Dr. Jordan about the amputation, and what he said, and what she said relative thereto, and whether or not witness [558] knew that Dr. Prince sent Dr. Jordan in to tell her about her condition.

Assignments 43 and 44 are the same, as follows: Is there any way known to the medical profession by which a blood clot in cases of this sort can be prevented?

Assignment 75 sets forth: "Miss Gossett came down and said, 'Miss Josephine says she is willing to have her leg cut off.' (Objection by plaintiff.)"

Assignment 47: "The court erred in overruling plaintiff's objection to the question, 'Did she know that her leg had been amputated?'"

The charge made the basis of assignment 101 is as follows: "If you find from the evidence in this case that plaintiff was in imminent danger of losing her life by reason of an infected or dislocated leg, and was advised by Dr. Prince to have her leg amputated to save her life, I charge you that it was her right and privilege to refuse to give her consent to the amputation, and if she did refuse to give her consent, it was wrongful."

The court gave the following charges for defendant: "(1) If a patient voluntarily submits to an operation, her consent thereto will be presumed.

"(2) Unless it is so provided by an express contract, a physician or surgeon does not warrant that he will effect a cure, or that he will restore the patient to the same condition as before the necessity for treatment arose, or that the result of the treatment will be successful.

"(3) A physician or surgeon possessing the requisite qualifications and applying his skill and judgment with ordinary care and diligence to the diagnosis and treatment of the patient is not liable for an honest mistake or error of judgment in making a diagnosis or prescribing [559] a mode of treatment, where there is ground for reasonable doubt as to the practice to be pursued."

Allen & Bell for appellant.
Cabaniss & Bowie for appellees.

SAYRE, J.—Plaintiff (appellant) brought her action against defendants, a surgeon and an incorporated infirmary where the surgeon operated, alleging: (1) That defendants, wrongfully, intentionally, and without her consent amputated one of her legs; and (2) that they so negligently and unskillfully treated one of her legs, which had been accidentally broken and injured, as to make its amputation necessary. From a verdict and judgment for defendants, plaintiff has appealed.

(1) On the undisputed evidence the defendant corporation was entitled to the general charge which it requested and received. The medical and surgical treatment and operation were prescribed and performed by the defendant Prince under an independent employment by plaintiff, and Prince, though he was a shareholder and officer of defendant corporation, in treating and operating upon plaintiff acted not at all as the agent of the said corporation nor within the line and

scope of his authority as an officer. Beyond question or doubt any negligence, unskillfulness, or other wrong, if any there was, was his wrong, and for it he alone was responsible.—Robinson v. Crotwell, 175 Ala. 194, 57 So. 23. Such being the case, other assignments of error bearing alone upon the alleged liability of defendant corporation need not be considered.

(2,3) On defendant's motion the deposition of Frances J. Barfield was suppressed, and this ruling is assigned for error. We do not feel sure that we are in [560] a position to pass upon this assignment intelligently. We have before us the deposition in narrative form, the grounds of the motion, one of which was that notice of the time and place of taking the deposition was not given to defendants, the court's ruling, and an exception reserved in due form. If any evidence was taken on the motion, we have it not before us. We are left to infer the ground upon which the court acted, though it is proper to assume that the court acted upon some one of the grounds assigned for the motion. The statute on this subject has by amendments (Acts Sp. Sess. 1909, p. 168; Acts 1911, p. 487) been reduced to a state of obscurity and confusion in some respects. Our judgment is that the last proviso to section 4032 of the Code, as amended by the act of 1911, intends that in all cases where depositions are taken on commissions from the law courts, that is, in all cases provided for by section 4030, the party against whom it is proposed to take such testimony shall, within the time allowed for the filing of cross-interrogatories, have the right to demand reasonable notice of the time and place of taking the testimony and to attend the examination when and where had, and cross-examine the witness or witnesses orally. For aught appearing the deposition was suppressed for lack of compliance with the requirement of this statute as to notice. Error must be affirmatively shown. Appellant has failed to show error in the ruling under examination.

(4) There was no error in refusing to allow plaintiff, on the examination of her witness Dr. Whelan, to have an answer to the question: "Did you know how much Dr. Prince charged for what he did for this girl?"—referring to plaintiff. Prima facie this question was inadmissible. The amount of the charge was not in issue. Defendant was morally and legally bound to exercise [561] the same degree of care, diligence, and skill whether his charge was large or small. The fact that the charge was unreasonable—assuming that plaintiff may have been able to prove it so—afforded no inference of wrong or negligence. It may be stated further, though we are entirely satisfied with the ground of the ruling already announced, that later in the progress of the trial plaintiff had a statement of the charge that appears to have been accepted without challenge.

(5, 6) Some courts hold differently, but this court has long entertained the opinion that relevant extracts from medical treatises, recognized and approved by the medical profession as standard, may be read to the jury in evidence.—Stoudenmeier v. Williamson, 29 Ala. 558; Bales v. State, 63 Ala. 30. Appellant's real complaint at this point seems to be that defendant was allowed, on cross-examination, to ask Dr. Whelan, an expert medical witness, whether it was true, as stated in Scudder's Treatment of Fractures, a work shown to be of high authority, that "It is not very uncommon, even in closed fractures of the femur, to find gangrene of the leg developing because of laceration or pressure upon the great vessels of the limb. Early amputation of the thigh just above the fracture will be necessary in these cases. It should be done early in order to save life."

This was a statement of surgical theory and practice, made in the abstract, but strictly relevant to the concrete case sought to be shown by plaintiff. The gist of the question was whether the witness' expert opinion concurred with that of the author. Defendant was entitled to the answer.—Stoudenmeier v. Williamson, supra. This ruling in principle disposes of several of the assignments of error.

[562] (7) It seems scarcely necessary to linger over appellant's fifth assignment of error. If the question was put in exactly the form shown in the bill of exceptions, it was leading. But it led away from, not to, the answer desired, and, anyhow, it was within the court's discretion ordinarily to allow a leading question. The witness was competent, the expert opinion called for was relevant, and there was no error.

(8) Assignments 7 and 8 cannot be sustained. Some of the facts hypothesized in these questions, seeking to elicit an expert opinion, had not been proved. It would have been better practice to defer the questions until evidence of all the hypothesized facts had been offered, as it was at a later stage of the case; but errors of this sort cannot be allowed to work a reversal where, as here, they have been substantially cured.

(9) Plaintiff testified that her limb had been removed without her knowledge or consent, over her protest indeed. She seems to intend to convey the idea, though it is hinted rather than asserted, that from the time she went to the infirmary where defendant Prince operated and was put in his charge she was kept in ignorance of the danger of her condition and deceived as to the measures that would be resorted to for her cure. To answer this, probably, defendant was permitted to

show by the nurse that on the morning of plaintiff's removal to the infirmary defendant had said to plaintiff's mother, who was making the arrangement for plaintiff, that "he would not guarantee her, but he would do all he could for Miss Josephine," the plaintiff. If this testimony tended to prove anything at all, it was, in view of the intimations of plaintiff's evidence to which we have referred, probably competent for the purpose for which it was admitted in the trial court, viz., to rebut the contention that defendant made any agreement [563] or promise that he would restore the plaintiff to health or save her leg. Otherwise, taken at its worst, it was nothing more than a commonplace of so little significance that it would be a travesty to set aside the result of the trial in this case on this ground.

(10) Defendant, testifying in his own behalf, after consulting the fever charts that had been kept by the nurses, was allowed to state what those charts showed at various places in respect of the patient's temperature. It was, however, made perfectly clear—this witness made it clear—that he was not testifying to the historical accuracy of the figures, or, for that matter, testifying at all; he was merely reading the undisputed record prepared by the nurses and already before the jury. This was not the violation of any rule of evidence; it was merely a matter of practice which in the case of an ordinary witness would be pronounced bad, and, if it appeared probable that it led to results of any account, might induce a reversal. But the witness was not an ordinary witness; he was an expert, entitled to state his opinions on the technical questions involved, was in effect giving his opinion on the whole course of treatment administered to plaintiff, and his reference to the temperature charts here in question—the authenticity and historical accuracy of which, we may add, was fully established and undisputed—read in connection with the rest of his examination, appear to have amounted to nothing more than statements of some of the considerations that influenced his professional judgment from time to time in respect of the proper treatment to be followed. We find no grounds for reversal in this.

(11) Plaintiff had testified that she was ignorant of the amputation of her leg for several days after it had [564] been done, this in support of her claim that the operation had been performed without her knowledge or the consent she at one time refused to give. Defendant was allowed to ask the nurse in charge whether plaintiff knew her leg had been amputated. If, according to the narrow rule that has been sometimes here enforced, the question asking for the witness' cognition of the state or operation of plaintiff's mind was improper, its consequence as error was relieved by the answer which stated only cognizable facts. The witness answered: The patient would lay there and watch her limb being dressed every time it was dressed.

(12, 13) Appellant's assignments of error numbered 17 to 29, both inclusive, are treated together under one head in the briefs. It seems enough to say that statements made or things done in the absence of defendant should not have been allowed to affect a finding as to his exercise of due care and skill unless brought to his knowledge. Another reason, applicable to several of the matters plaintiff here sought to get before the jury, and conducing to the same result, is that they are shown by the proposed questions to have occurred after the amputation, and we are unable to find in the declaration or evidence any intimation that defendant was guilty of any negligence or lack of skill in treating plaintiff after the amputation. As for plaintiff's declaration, before the operation, that she would rather die than have her leg cut off, it may be said, further, that there was no denial, but that plaintiff long persisted in her refusal to have the operation performed. Defendant himself testified to that. The only question at issue in this connection was whether within an hour or two before amputation plaintiff did consent after being informed that she would forfeit her life by a refusal. [565] Some of these exceptions may be answered on other legal grounds. We find no reversible error here.

(14) The charts or records kept by the nurses were kept for the information of the attending physician or surgeon. Everything in them was proper for his information. They were duly proved. Defendant had a right to consider them in determining his treatment, and the jury were properly allowed to have these charts before them as part of the evidence in the case, though doubtless they signified little to any but the skilled professional mind.

(15) We think any witness of ordinary intelligence may be allowed to testify that a person appeared to be very sick; certainly a graduate and experienced nurse, as Miss Gossett was, may so testify.

(16) For the reason that much space and a wealth of illustration, drawn from sacred and profane sources other than law books, have been devoted to a discussion of the forty-third and forty-fourth assignments of error, we linger over these assignments long enough to say that we are unwilling to conclude, as matter of law or fact, that Dr. Moore, shown to be an expert, transcended the limits of all possible human attainment when he testified that there was no way known to medical science to prevent thrombosis in a case of the sort. It is safe to say the doctor

knew more of that subject than we do. He was entitled to give his opinion, and the objection went only to its credibility.

(17) Conversation between defendant and plaintiff's mother in which the latter is said to have stated that her daughter had consented, and that it was all right to go ahead and cut off her limb, this immediately after she had been told that her daughter had consented and had consulted with her daughter for the purpose, as the jury were well authorized to infer, of confirming that [566] report as to her daughter's state of mind. If the mother's deposition had not been excluded, this evidence would have been admissible for impeachment. It was competent anyhow. It scarcely need be debated that plaintiff, if capable of intelligent consideration of the question involved, had the absolute moral and legal right to determine the issue for herself, as defendant contends on the strength of his evidence she in fact did, and an operation of this capital character, performed without regard to her wishes in such case, could not be justified in any forum of law or conscience. But considering plaintiff's contention as to her condition at the time of her alleged consent, the evidence as to which on the part of plaintiff she seems to overlook in her argument for a reversal on this point, considering the incapacity she claims to have labored under at the time, and the extreme urgency of the case as shown by the expert evidence, if believed, it was proper for defendant to consult with the mother—and not conceivably improper in any event—and to act upon her consent as the implied consent of plaintiff.—Mohr v. Williams, 95 Minn. 261, 104 N. W. 12, 1 L.R.A.(N.S.) 439, 111 Am. St. Rep. 462, 5 Ann. Cas. 303; Bakker v. Welsh, 144 Mich. 632, 108 N. W. 94, 7 L.R.A. (N.S.) 612, 8 Ann. Cas. 195; Luka v. Lowrie, 171 Mich. 122, 136 N. W. 1106, 41 L.R.A. (N.S.) 290.

(18) There is an even more obviously sufficient response to the exception last above noted and to the seventy-fifth assignment of error in which appellant complains that the court admitted the testimony of defendant that "Miss Gossett came down and said 'Miss Josephine says she is willing to have her leg cut off.'" Under the circumstances which have appeared, no negligence could be charged to defendant in accepting this statement and that of plaintiff's mother as expressing [567] the true state of plaintiff's mind; at least these statements, though falling in the general class of hearsay, went a part of the way towards demonstrating defendant's good faith in performing the operation which plaintiff charged, inter alia, was performed without her knowledge or consent.

If it be conceded that there was technical error in allowing the question made the subject of the forty-seventh assignment of error, its capacity for harm to plaintiff's case was cured by the witness' statement of the facts on which he based his knowledge of plaintiff's cognition, so that the jury were fully informed of the worth of the testimony, and must be presumed to have given it proper weight.

(19) We have not had our attention called to any authorities sustaining appellant's contention that it was error, even on cross-examination, to deny parties the privilege of asking for an expert opinion on a state of facts finding no support in the evidence. Such questions may, at times, serve a proper purpose, but our opinion is that there is no reversible error in refusing such a test of an expert opinion, for the process involved must, of necessity, depend upon the court's power and discretion to keep the examination of witnesses on collateral issues within the bounds of reason and convenience. This, we think, will answer several of the assignments of error.

(20) Defendant was also a witness, qualified as an expert on the questions involved. The jury were entitled, in a general way, to be informed of his opportunities for observation and experience in his line, and in general to know what manner of man he was. Within this rule, without prejudice to plaintiff's case, and without conveying any intimation that such conditions affected the rule of due care, the jury might be given to [568] understand whether defendant was young or old, did a large practice or none at all, resided in Birmingham or Toad Vine, and other like things, and we do not see that it makes any difference in principles that inquiries to this end were directed to another witness rather than to the defendant himself. It is common practice to introduce a witness with inquiries of this character, though they be of slight or no importance as decisive factors in the case.

(21) As to some of the objections taken to scientific medical works, extracts from which were introduced in evidence by defendant, notably Transactions of the Medical Association of Alabama, it appears that there was no proof that they were works of authority and standing with the medical profession. The objections were of the utmost generality and did not point to this deficiency. No doubt the deficiency would have been supplied, or the extracts excluded, had the objections taken the point.

(22) Defendant could not, of course, compel plaintiff to submit to an operation; but if she voluntarily submitted to the operation, that is, knew it was about to be performed and made no objection, her consent was to be presumed, unless she was the victim of a false and fraudulent representation; this last

a fact to be made reasonably clear in the evidence. The trial court in effect so charged the jury, and in this there was no error.—State v. Housekeeper, 70 Md. 162, 16 Atl. 382, 2 L.R.A. 587, 14 Am. St. Rep. 340.

(23) It is urged that in one part of the oral charge the court allowed the jury to justify defendant's amputation of plaintiff's limb without her consent, if she did not affirmatively consent, on the ground that there may have existed an emergency demanding the operation, although such emergency may have been superinduced by [569] his own negligence or lack or skill, or may have been voluntarily brought on by him. The charge, its parts relating to this question construed together, is not fairly open to this criticism. When the court finally came to a statement of the effect of the emergency doctrine on the conclusion to be reached, it postulated an emergency "not produced by the defendant." This might have been amplified into verbiage meeting specifically the criticism visited upon the charge in appellant's brief, but unless appellant considered the matter of importance enough to call the court's attention directly to the supposed deficiency, the court's general statement must be held to have sufficed.

(24, 25) The charge made the subject of assignment 101 was refused without error. It was misleading. It did not adequately state the case. Plaintiff did refuse for a long time to submit to the loss of her limb. The charge was so framed as that the jury may have been led to believe that this fact was conclusive against defendant's right to amputate. But defendant's testimony was that at the last moment she did freely consent, and the situation at that time determined defendant's right and duty in the premises. A fair statement of the applicable law would have taken some account of this consideration. Besides, this and other instructions refused to plaintiff postulated defendant's liability upon the hypothesis that plaintiff did not consent. The argument for error in the matter of these rulings overlooks plaintiff's contention that she was wholly incapacitated to consent. If that were the case, defendant may have been justified in acting upon a consent, not actually given, but to be implied on considerations of custom, humanity, and reason, as the authorities to which we have heretofore referred and many others amply demonstrate. These charges were properly refused because they omitted [570] any statement of the law of this aspect of the case.

(26) There was no error in the court's refusal to instruct the jury that in determining defendant's liability they should not consider the fact, if it was a fact, that another surgeon or physician had made a failure in an attempt to treat plaintiff's leg, and had made it probable that plaintiff would lose her life if the leg was not amputated. The charge was manifestly wrong. It occurs to us that the facts hypothesized were necessary to be considered in passing upon the question of defendant's alleged negligence in the treatment of the case and his alleged wrong in amputating the leg. Plaintiff had been under treatment for her injury for two months before she came under defendant's care. She had been in the care of an expert physician and surgeon as plaintiff was at pains to prove. And yet there was in the evidence room for the inference that the medical man first called was discharged, and defendant retained, because no relief had been afforded. These facts and the probability hypothesized in defendant's statement of the case it was necessary to consider in determining whether the result of which plaintiff complained may not have been brought about by a course of treatment over which defendant had no control and the effects of which no skill or care on his part could have obviated. Of course, we speak not of our view of the facts, but only of the case made by tendencies of the evidence and the concessions of plaintiff's requested charge.

Several charges refused to defendant proceed upon the idea that the amputation was wrongful, and that therefore plaintiff was entitled to damages, if it was done without her consent, and seem to pretermit the emergency theory of consent. These charges, in view of tendencies of the evidence, should have given a definition of consent as containing the consent, in a proper [571] case of emergency, of plaintiff's family, her mother, for example, in this case, and without this they had a misleading tendency. Some of them were misleading also as apparently basing plaintiff's right to recover on her dissent expressed before the emergency arose, or before the assent she finally gave when confronted with the alternative of amputation or death.

(27, 28) Charges given on defendant's request, defining the degree of care required of physicians and surgeons in the treatment of their patients, were evidently based on our cases. They state the law of our cases as it may be read in McDonald v. Harris, 131 Ala. 359, 31 So. 548; Shelton v. Hacelip, 167 Ala. 217, 51 So. 937; Hamrick v. Shipp, 169 Ala. 171, 52 So. 932; Carpenter v. Walker, 170 Ala. 659, 54 So. 60, Ann. Cas. 1912D 863; Robinson v. Crotwell, 175 Ala. 194, 57 So. 23.

We believe proper and careful attention has been given to all of the 118 assignments of errors found in the record, though not all of them have been made the subject of specific statement. Thus working our way through the record from first to last, making occasionally, perhaps, statements of our con-

sideration reaching beyond the limits of necessity or profit, we have found no error for which we can think the judgment in this case should be reversed.

Affirmed.

Anderson, C. J., and McClellan and Gardner, JJ., concur.

Rehearing denied February 4, 1915.

NOTE.

Consent as Affecting Right to Perform Surgical Operation.

Introductory, 1105.
Consent of Patient, 1105.
Consent of Parent to Operation on Child, 1107.

Introductory.

The earlier cases discussing the necessity of a surgeon's obtaining the consent of his patient before performing an operation, are collated in the notes to Mohr v. Williams, 5 Ann. Cas. 303, and Gillette v. Tucker, 93 Am. St. Rep. 639. This note reviews the recent cases.

Consent of Patient.

Where a person is in full possession of all his mental faculties and in such physical health as to be able to enter into a consultation with respect to the necessity of an operation, and where no emergency exists making it impracticable to confer with him, his consent is a prerequisite to the performance of a surgical operation on him. Pratt v. Davis, 224 Ill. 300, 8 Ann. Cas. 197, 79 N. W. 562, 7 L.R.A.(N.S.) 609.

Consent to an operation does not ordinarily authorize any other or different operation than that consented to. Rolater v. Strain, 39 Okla. 572, 137 Pac. 96, 50 L.R.A.(N.S.) 880. In that case it appeared that the patient consented to an operation consisting of an incision in her toe for the purpose of drawing an inflamed joint. In performing the operation a sesamoid bone was removed. The court said: "It is not denied that this bone was removed, and it is not contended that the defendant in error consented to its removal. The plaintiff in error denies that he undertook the operation with the understanding that no bones were to be removed, but the defendant in error testifies that such was the agreement, and in this she is supported by the testimony of her mother and a sister. This evidence was sufficient to take this question to the jury. It is argued by the plaintiff in error that, even if the contract was made as contended, the sesamoid bone was not within the contemplation of the parties, and that its removal, under the circumstances disclosed by the evidence, was not a violation of the terms of the agreement, and that the jury should have been instructed to bring in a verdict for the plaintiff in error. . . . An attempt is made in the brief to distinguish Mohr v. Williams, 95 Minn. 261, 104 N. W. 12, 1 L.R.A.(N.S.) 439, 111 Am. St. Rep. 462, 5 Ann. Cas. 303, from the case at bar, inasmuch as in that case the patient consented to an operation on the left ear, and it was performed on the right ear, while in this, the consent was to the operation upon the right foot, where it was performed. However, the operation was not performed in the manner agreed upon and in the manner consented to by the patient, and, as a matter of fact, the actual operation performed was without her consent. There can be no real distinction between the cases in principle. The same rule of law is applicable to each. It follows from this authority and upon reason and principle that if the contract was made between the patient and surgeon, that the patient had the right to insist upon a strict performance of it, that the removal of the sesamoid bone by the surgeon was without the consent of the patient, and was therefore unlawful and wrongful, and constituted a trespass upon her person." Referring to a contention that the operation was justified by an emergency the court continued: "The operation itself was not designated by any of the expert witnesses as a major operation. It was represented by the plaintiff in error that it was of slight consequence, and that it would not be necessary for the patient to remain in his hospital over 24 or 48 hours at the outside, and he testified, as to the time taken to perform the operation, that 'I suppose the time I occupied in doing that was possibly 15 or 20 minutes, the actual work that completed the operation.' We would not hold under this evidence, as a matter of law, that there was such an emergency existing as authorized the surgeon to proceed in this operation, after the discovery of this bone in an unusual and unexpected place, as to authorize him to remove it without the consent of the patient. As to whether or not such an emergency existed was a question of fact under the evidence for the jury. If the jury found that the necessity which authorized the surgeon to proceed to remove this bone without the consent did not exist, then his doing so was wrongful and unlawful, and he is liable for whatever injury resulted to the patient from such unauthorized act."

In Robinson v. Crotwell, 175 Ala. 194, 57 So. 23, in holding that the evidence did not support the contention of the plaintiff that a dangerous operation had been performed on him without his consent, instead of a minor operation to which he had consented, the court said: "In one aspect of his case, plain-

tiff claimed that defendant caused a dangerous operation to be performed upon him, after assuring him that the operation to be performed would be a mere trifle, as operations go, and would involve no serious consequences. As has been stated, the operation not only failed to relieve plaintiff's ailment, but left behind injurious consequences of its own. If plaintiff's contention in this regard be true, and it had support in his testimony, defendant's conduct would seem to be indefensible. The cases so hold."

While the patient's consent is a necessary prerequisite to the performance of a surgical operation, in the absence of an emergency which renders it impracticable to confer with the patient, it seems that a surgeon is justified in performing an operation to which the consent of the patient may be inferred or implied from the evidence and circumstances of the case. Van Meter v. Crews, 149 Ky. 335, 148 S. W. 40; Zoterell v. Repp (Mich.) 153 N. W. 692; Mosslander v. Armstrong, 90 Neb. 774, 134 N. W. 922. And see the reported case. In the case first cited it appeared that a physician told a patient (the plaintiff) that he was not satisfied with the examination he had made at his office and would like her to go to the hospital where he could make the examination more satisfactorily. She went to the hospital and there, after the usual preparations had been made and several of her relatives had been summoned, she was placed under an anaesthetic and an operation performed which consisted in his taking out one of the ovaries and making an adjustment of the other, which operation she claimed was performed without her consent. The court said: "The evidence heard on the trial tends very strongly to show that though the plaintiff was averse to the operation it was understood by her, and her relatives who were summoned to the hospital and consulted, that if upon the examination by the doctor it was found that an operation was necessary, he would perform it while she was under the anaesthetic. Both her uncle and her brother were sent for and the matter was discussed carefully, not only with them but with her; and while there is some conflict in the testimony there was evidence warranting the jury to conclude that the doctor understood, and had the right to understand, from all that passed between him and the plaintiff, that he was to perform the operation while she was under the anaesthetic if upon the examination he found this necessary. . . . The court should have told the jury that if the defendant understood and had reasonable grounds to understand, from the words or conduct of the plaintiff, that she was willing for the operation to be performed while she was under the anaesthetic if upon his examination he found the operation to be necessary and he so performed it, then he had the right to perform the operation as by her consent." In Bennan v. Parsonnet, 83 N. J. L. 20, 83 Atl. 948, it appeared that a surgeon had his patient's consent to an operation for a rupture in the left groin. After the anaesthetic was administered the physician discovered a more serious rupture of the right groin, which he and the assisting surgeons agreed was a serious menace to the patient's life. The more serious rupture was operated on, instead of that for which the patient's consent had been obtained. Holding that no recovery could be had against the surgeon, the court said: "The condition for the cure of which the plaintiff applied to the defendant was rupture; he is therefore presumed to have contemplated all of the risks incident to an operation for such a condition. Now, rupture is simply a protrusion of the intestine. Whether it occurs on the right side or on the left the intestine is the same, the muscular wall is the same, the operation is the same, and its dangers and the risks are the same. In the present case it is not conceivable that if the plaintiff had known that at the same risk and with the same absence of expense he could by the contemplated operation be relieved of a condition that seriously threatened his life and health he would not have assented to it or that he would not have relied upon the judgment and have acted upon the advice of the surgeon who was so kindly disposed towards him. Under these circumstances the operation that was performed was not in any true sense against the will of the patient or in any legal sense an operation of a different sort from that which the plaintiff had consented to undergo. The trial judge was therefore right in admitting the evidence and in sending the case to the jury, the fact that the proper question was not left to them being amply explained by his having followed the reputable authority to which reference has been made. The question, however, is one to be settled not by authority but by reason, and its importance is such that it touches at a vital point the interests of the entire public, any member of which may at any time suffer in life or health by the establishment of a rule that will paralyze the judgment of the surgeon and require him to withhold his skill and wisdom at the very juncture when they are most needed, and when, could the patient have been consulted, he would manifestly have insisted upon their being exercised in his behalf. This concluding suggestion may perhaps be ethical rather than legal, but it does seem that in good morals a patient ought not, in his efforts to obtain a money verdict, be permitted to repudiate the sound judgment exercised in his behalf by the surgeon of his choice in whose judgment, had he been capable of being

consulted, he would unquestionably have concurred."

In Edwards v. Roberts, 12 Ga. App. 140, 76 S. E. 1054, under a statute (Civ. Code 1910, sec. 4427) declaring that "a person professing to practice surgery . . . must bring to the exercise of his profession a reasonable degree of care and skill;" and that "any injury resulting from a want of such care and skill will be a tort for which a recovery may be had," it was held that a petition in the suit of a woman against a physician and surgeon, to recover damages for alleged malpractice, was not subject to general demurrer, the petition alleging, in substance, that the defendant had made an unskillful and improper diagnosis of her physical condition; that following this incorrect diagnosis he removed her left ovary, although it was not diseased, and its removal, in whole or in part, was unnecessary and against her expressed desire; that this removal of the ovary was due to his want of knowledge and skill as a surgeon, and to his reckless disregard of her health.

Consent of Parent to Operation on Child.

In the absence of an emergency, it has been held that a physician must obtain the consent of the parents of a child before performing an operation on it. Rishworth v. Moss (Tex.) 159 S. W. 122. In that case a physician was held to be liable to the parents of a child who died as the result of an operation for adenoids. It appeared that the child, who was eleven years of age, was taken to the physician by an adult sister, and that the operation was undertaken without notice to the parents who never consented thereto. The court said: "A child of tender years being incapable of legally consenting to the administration of an anaesthetic and a surgical operation, consent must be obtained from the person clothed with authority to consent by the law, which would be the parent or guardian, in case there be such person. Under the circumstances of this case, the sister, whether adult or otherwise, would have no more authority by virtue of such relationship than would any other person, and it was fundamental error upon the part of the court to instruct the jury that the presence of the elder sister, as a matter of law, justified the physicians in performing the operation. The parents were easily accessible by telephone or telegraph, and there was no emergency."

But where an emergency exists, it has been held that a surgeon may operate without first obtaining the consent of the child or of its parents. Luka v. Lowrie, 171 Mich. 122, 136 N. W. 1106, 41 L.R.A.(N.S.) 290, wherein the following facts appeared: "The plaintiff, a boy 15 years of age, while crossing the Michigan Central Railroad track, was knocked down by an engine and in some manner, not clearly shown, was thrown under the wheels of a car. His left foot was mangled and crushed. There was a compound disarticulation of the bones of the foot, and one of the principal bones of the arch, the 'scaphoid' bone, was torn away entirely, the flesh was crushed and torn from the top of the foot, leaving the muscles, ligaments, and bones exposed. The plaintiff testified: 'I could see the bones sticking out. I could see they weren't broken. Don't know how many bones were sticking out; around four or five, something like that.' Shortly after his injury, plaintiff was removed to Harper Hospital in an ambulance. He was partially conscious upon his arrival and was able to communicate his name and the name of the street upon which he lived to the attending surgeons. Within 10 or 15 minutes after his arrival, he lapsed into a comatose condition, and later into complete unconsciousness. Efforts to revive him by injections of strychnine and infusion of a saline solution were made, but he remained unconscious until after the operation. Soon after his arrival at the hospital, at 10:15 A. M., plaintiff's foot was examined by four house physicians connected with the hospital. They concluded that prompt surgical treatment was necessary and telephoned to defendant, who is assistant surgeon of the Michigan Central Railroad. Defendant arrived at the hospital at 10:45 A. M. Upon examining the plaintiff, he found him unconscious, with a weak pulse and dilated pupils. The foot was found to be cold and dead, the circulation having been interrupted. Defendant testified that he learned from the house surgeon the boy's name and residence street. With reference to the residence, he knew the distance from Harper Hospital and the time it would take to get from there to the hospital: that he inquired of the house surgeon if any one, any relatives, were present, and was informed that no person was present whatever. After consultation with the four house physicians, it was agreed by all that an immediate amputation was necessary to save the plaintiff's life. The foot was amputated, and the plaintiff recovered." The plaintiff claimed that his foot should not have been amputated at all, and particularly that it should not have been amputated without first obtaining his consent or the consent of his parents, who went to the hospital as soon as possible after learning of the accident. The court said: "There is nothing in this record to indicate that, had the parents of plaintiff been present at the operating table, they would have refused their consent to the operation. Indeed, it is inconceivable that such consent would have been withheld in the

face of the determination of five duly qualified physicians and surgeons that it was necessary to save the plaintiff's life. But defendant testifies, and in this he is not contradicted, that he made inquiry for relatives of the plaintiff and was told that none was in the hospital. Suppose that his informant was in error (which is not certain), the defendant had a right to rely upon the information and to act in the emergency upon the theory that to obtain consent was impracticable. . . . The fact that surgeons are called upon daily, in all our large cities, to operate instantly in emergency cases in order that life may be preserved, should be considered. Many small children are injured upon the streets in large cities. To hold that a surgeon must wait until perhaps he may be able to secure the consent of the parents before giving to the injured one the benefit of his skill and learning, to the end that life may be preserved, would, we believe, result in the loss of many lives which might otherwise be saved. It is not to be presumed that competent surgeons will wantonly operate, nor that they will fail to obtain the consent of parents to operations where such consent may be reasonably obtained in view of the exigency. Their work, however, is highly humane and very largely charitable in character, and no rule should be announced which would tend in the slightest degree to deprive sufferers of the benefit of their services."

In Bakker v. Welsh, 144 Mich. 632, 8 Ann. Cas. 195, 108 N. W. 94, 7 L.R.A.(N.S.) 612, it was held that, under the circumstances disclosed by the record, a surgeon performing an operation on an infant with the infant's consent, was not liable, though he had not obtained the father's consent.

LANE

v.

AU SABLE ELECTRIC COMPANY.

Michigan Supreme Court—June 1, 1914.

181 Mich. 26; 147 N. W. 546.

Landlord and Tenant — Forcible Eviction — Evidence Insufficient.

In a striking employee's action for damages sustained from his eviction from a house occupied by him as part compensation for his services, where there is no evidence as to the use of excessive force, plaintiff is not entitled to go to the jury on that issue.

Damages — Humiliation from Eviction — Evidence Insufficient.

A striking employee, evicted from a house occupied by him as part compensation for his services, is not entitled to damages for the mortification, humiliation, and injured feelings caused by having his household effects put into the street in the presence of onlookers, where it appears that most of the onlookers were strikers or sympathizers with the strikers and with plaintiff.

Master and Servant — Occupant of House as Servant or Tenant.

The relation of landlord and tenant does not exist between an employer and an employee who is furnished a house as part compensation for his services, and, where he voluntarily leaves the employment, his right to the use of the house immediately ends.

[See note at end of this case.]

Error to Circuit Court, Muskegon county: SULLIVAN, Judge.

Action for damages. William Lane, plaintiff, and Au Sable Electric Company, defendant. Judgment for plaintiff for less than amount claimed. Plaintiff brings error. The facts are stated in the opinion. AFFIRMED.

Jerome E. Turner for plaintiff in error.

Cross, Vanderveer, Foote & Ross and *W. S. Westerman* for defendant in error.

[27] MOORE, J.—This suit is brought by William Lane to recover damages which he alleges he sustained by reason of an unlawful eviction of himself and family from certain premises located in the city of Muskegon Heights, owned by defendant.

The plaintiff was chief operator of the substation of the defendant at Muskegon Heights, when a strike came on. His testimony as to the occurrences which gave rise to this litigation is, in substance, as follows:

"I lived there and operated the station, used the house as a dwelling house. The time of this strike was the 27th day of May, 7 o'clock in the evening. I don't just remember how long I remained in the employ of the company—after the strike, after the boys walked out. I think it was until about 9 o'clock in the morning of the 28th, the next day. I did not have any talk at that time with any of the officers of this defendant; I don't know that I did. On the 3d day of June, in the forenoon, we were still on the place and in possession of the dwelling house. On that day we were eating dinner. . . . We wasn't up from the table, but we were through, and in come Mr. Stewart and Mr. Burton and asked me if I had received notice to vacate, and I told them that I had, and he asked me if I was going to move, I think. No, he said, 'You have received your notice and you have not vacated yet.' I said, 'No.'

He said, 'We will have to set your furniture out on the street.' And he then asked me if I had any place to go, and I told him no, that I didn't. . . . He said that he would take my wife and children to the hotel, but he didn't say what hotel, or who was to pay the bill, and I told him, 'No;' that I could look after my wife; that it wasn't necessary. And he and Mr. Stewart went out of the house. I don't think they were out over 20 minutes before in came these men and began to tear up and set things out. I can't say that I counted them, but I would say that there was eight or nine men came in. They were strangers to me. It took them about an hour and a half to set our goods in the street. I was there myself all the time while this was being done; also my wife and children. . . ."

[28] On cross-examination:

"There is a passageway between the dwelling house and the substation, as shown there; it is sort of an alleyway, so that you can pass right from the dwelling house into the substation, or from the station into the dwelling house. It was used for convenience, or had been so used, in performing my duties there as chief operator. . . . Shortly before I came here the chief operator there at the substation died, and the position was offered to me. I was receiving $60 a month in Grand Rapids and provided my own place of living; the company didn't furnish me a place to live in in Grand Rapids; so when I came over here my compensation was $55 a month and the use of this house, which Mr. Gilbert thought was worth $5 or $10 a month, and the company also furnished the lights and water, and there was a telephone in the house, which rental wasn't paid by me. It was furnished for my use. There was also a telephone in the substation—the Citizens' and Bell was extended from the house to the substation, and the private, the power company's private, phone was extended from the substation to the house, . . . I performed the last of my duties there as chief operator on the 27th day of May, about 7 o'clock in the evening; then quit and went on a strike; in other words, I walked out with the other strikers. Did not send any notice to the company. There were others at the station capable of performing my duties. One of the strikers, the operator that had been there with me, he walked out, too. I and my helper, or whoever operated there at the substation, walked out at night at 7 o'clock, without any notice to the company whatever. I continued to live in the dwelling house. That substation is supposed to be opened all night, a man on duty there all night; I locked up the station. We had the keys and returned them afterwards to the operator, Mr. Essex. I didn't deliver the keys to anybody that night. When we walked out in that way it left the city and everything in darkness. I know that Mr. Stewart, the local manager here, and Douglas Erwin came out there and got in and turned on the lights; at the time I was down the street. I claimed that the company discharged me afterwards, not until after I had gone on [29] a strike and quit of my own accord, and after I had gone out in this way, locked up the substation, nobody there to turn on the lights, and refused to vacate the house used in connection with the substation. I did not quit my employment there because I had any complaint myself against the company. I was in the Union and was in sympathy with the striking linemen. If you are a mind to call it so, it was sort of a compulsory matter with me. Had no personal grievance against the defendant at that time. Mr. Burton of the defendant company gave me no verbal notice to vacate that dwelling house. I was not asked to vacate on the 28th, the next day after we went out, but I did get a written notice; it was served upon my wife on the 29th, when I got home she delivered it to me. That is the notice that was served:

"'To William Lane:

"'Sir;

"'You are hereby notified to quit and surrender up the dwelling house and premises which you have occupied incident to your employment by this company. Said dwelling house and premises being the dwelling house and premises situated on block thirty-seven (37) plat B, village (now city) of Muskegon Heights, Michigan, the same adjoining the substation of this company on Peck street in said city of Muskegon Heights.

"'Dated this 29th day of May, 1913.

"'Au Sable Electric Company,
"By S. Stewart.' . . .

"The Au Sable Electric Company did not have any local manager here that I know of. I did not get a verbal notice before this written notice was served on me to get out of that house. Mr. Gilbert called me on the telephone, I remember, and he asked me when I was going to move; that was all the notice that I got. He didn't tell me to vacate it. I think it was the morning of the 29th or 28th. I told him that I didn't have any place to go, and that I would see what I could do. I had the intention of moving at the time. I did not consult a lawyer and conclude that I would stay, nor take any legal advice, before this notice was served upon me, or before my goods were taken out. I was told not to move, but not by a lawyer. It came from the Union. . . . I swear I didn't hear any messages over the telephone. I heard messages, but [30] not over the telephone—heard one side of the conversation, the man who was

talking. I could hear through the corridor; the telephone switchboard is at one end of the corridor, and I could hear through the corridor. I have listened on purpose to hear what was going on and would report to the Union. . . . Notwithstanding whatever investigation I had made in regard to procuring a dwelling house elsewhere, I had made up my mind to stay right there in this little house, and I was doing that on the theory that I had a right to stay there. It was four days after I got this notice before I was set out. The goods were not actually set out until after dinner of June 3d. In the house at the time we took dinner was my wife and children and myself, that was all. . . .'

"Mr. Burton said to me he wanted to know if I had had notice to vacate. I told him I had. Well, he said that I hadn't moved, and that they would be compelled to set my goods out on the street. He did not tell me that it would be a good deal better if I went on and moved out myself. I didn't tell him anything. Mr. Burton turned to my wife and informed her that they had an automobile outside. We were not told that they would take my wife and children to the Occidental Hotel. He said to the hotel. I did not know what hotel he meant. My wife said 'No;' that she wouldn't go. At all events both she and I declined the offer, and then the men came in and moved out the stuff. It took them about an hour and a half. They didn't handle the furniture very carefully, I don't think, the way it was scratched up. They damaged it to the extent of $14.50. They carried things out separately and set them down on the ground. I cautioned them myself to use care and not to do any damage. . . .

"I do not remember that Mr. Burton on the morning of the 29th of May, the day this written notice was served, or on the preceding day, May 28th, of Mr. Burton coming where I was at the rear of the substation, or at the rear of the building that I occupied, and having a talk with me about the situation. I remember Mr. Burton being there, but it wasn't that day; it was after that, after the notice was served; it was while I was still occupying the house. He did not offer me another job. He told me I could come back [31] if I wanted to; that he was sorry that I had gone out. In that conversation I probably told him, 'We have got just as good lawyers on our side as you have,' but I can't recall it. At that time I had probably consulted lawyers. I personally hadn't; somebody consulted a lawyer for me in regard to my rights to remain on those premises."

At the close of all the testimony counsel for defendant conceded the plaintiff was entitled to a verdict for $14.50, and moved for a directed verdict in that amount. Under the direction of the court the jury rendered a verdict in favor of plaintiff for that amount. The plaintiff brings the case here by writ of error.

Counsel claim they had a right to go to the jury upon the question of whether excessive force was used, and also upon the question of damages because of mortification, humiliation, and injured feeling, caused by having his household effects put into the street in the presence of onlookers. The record is barren of proof of forcible entry or of the exercise of excessive force. It also shows that most of the onlookers were strikers or sympathizers with the strikers and the plaintiff.

The relation of landlord and tenant between the parties did not exist. It was the relation of employer and employed; the plaintiff being in possession of property belonging to the employer by virtue of his employment. When the plaintiff voluntarily severed the relationship which entitled him to the use of the property, that moment he ended his right to its use. Suppose a maid servant was employed at a monthly wage of $20 and the use of a furnished room in the house of her employer, and should then go on a strike and refuse to do any work, could she still insist upon the right to use the furnished room? A statement of the proposition shows its unreasonableness, and yet it is like the instant case in principle.

[32] The language used in Bowman v. Bradley, 151 Pa. St. 351, 24 Atl. 1062, 17 L.R.A. 213, is pertinent here:

"If the possession of the house be regarded as an incident of the hiring, the incident must fall with the principal. If it be regarded as part of the compensation for labor stipulated for, then the right to the compensation ceased when the labor was discontinued.

"Bowman had the same right to insist on the payment of the cash part of his wages as on that part which provided his family a place to live. His right under the contract of hiring was like that of the porter to the possession of the porter's lodge; like that of the coachman to his apartments over the stable; like that of the teacher to the rooms he or she may have occupied in the school buildings; like that of the domestic servants to the rooms in which they lodge in the house of their employers. In all these cases and others that might be enumerated the occupancy of the room or house is incidental to the employment. The employee has no distinct right of possession, for his possession is that of the employer, and it cannot survive the hiring to which it is incidental, or under which it is part of the contract price for the services performed. . . . When his contract ended, his rights in the premises were extinguished, and it was his duty to

give way to his successor. . . . The case seems to have been begun, and tried, by the plaintiff on the theory that his right to the possession of the house was superior to his right to remain in the defendant's service. . . . When the labor ceased on the 19th of July, the plaintiff ceased to pay for his occupancy. By ceasing to labor without remonstrance or objection he must be held to acquiesce in the defendant's right to terminate the contract for labor. If that contract was rightfully terminated, then the plaintiff's right to the house was at an end, and he could be lawfully put out of possession. . . . It is not necessary that occupation of a house, or apartments, should be a necessary incident to the service to be performed in order that the right to continue in possession should end with the service. It is enough if such occupation is convenient for the purposes of the service and was obtained by reason of the contract of hiring."

[33] To the same effect is Heffelfinger v. Fulton, 25 Ind. App. 33, 56 N. E. 688, and East Norway Lake Church v. Froislie, 37 Minn. 447, 35 N. W. 260.

Judgment is affirmed.

McAlvay, C. J., and Brooke, Kuhn, Stone, Ostrander, Bird, and Steere, JJ., concurred.

NOTE.

Person Occupying Premises of Employer as Part of Compensation as Tenant of Owner.

Introductory, 1111.
General Rule, 1111.
Application of Rule, 1112.
Qualification of Rule, 1115.

Introductory.

It is the purpose of the present note to discuss only those cases which deal with the relation of a person occupying the premises of his employer as a part of his compensation, as affecting the civil rights and liabilities of the owner of the property. There are decisions which deal with the effect of occupation of that kind with relation to other matters, such as the right of the servant to claim a settlement, or his liability to be rated under the various poor laws, and his right to a franchise under particular statutes, but as stated by the court in Bowman v. Bradley, 151 Pa. St. 351, 24 Atl. 1062, 17 L.R.A. 213, which action was brought to recover damages for the alleged wrongful ejection of a farm hand from premises, owned by his employer, of which he claimed to be in possession as a tenant and not as a servant, "analogies furnished by cases arising under the poor laws in England or in this country, while they may be helpful in some respects, ought not to be controlling."

For a discussion of the cases dealing with the relation between the owner of premises and a person working the land for a share of the crops see the notes to Mead v. Owen, 13 Ann. Cas. 231; Wagner v. Buttles, Ann. Cas. 1914B 144.

General Rule.

As a general rule it is held that a person, who occupies the premises of his employer as part of his compensation, is in possession as a servant and not as a tenant where the occupancy is connected with or is required for the necessary and better performance of his service.

England.—White v. Bayley, 10 C. B. N. S. 227, 7 Jur. N. S. 948, 30 L. J. C. Pl. 253, 100 E. C. L. 227; Rex v. Cheshunt, 1 B. & Ald. 473; Rex v. Stock, 2 Taunt. 339, 2 Leach C. C. 1015, R. & R. C. C. 185, 11 Rev. Rep. 605. See also Bertie v. Beaumont, 16 East 33; Lake v. Campbell, 5 L. T. N. S. 582.

Canada.—Hart v. O'Brien, 15 L. C. Jur 42. See also Williams v. Herrick, 5 U. C. Q. B. 613.

California.—Todhunter v. Armstrong, 53 Pac. 446.

Georgia.—Mackenzie v. Minis, 132 Ga. 323, 16 Ann. Cas. 723, 63 S. E. 900, 23 L.R.A. (N.S.) 1003.

Illinois.—Eichengreen v. Appel, 44 Ill. App. 19; Mead v. Pollock, 99 Ill. App. 151; Crain v. Burnett, 190 Ill. App. 407.

Indiana.—Heffelfinger v. Fulton, 25 Ind. App. 33, 56 N. E. 688.

Kentucky.—See Waller v. Morgan, 18 B. Mon. 136.

Michigan.—School Dist. v. Batsche, 106 Mich. 330, 64 N. W. 196, 29 L.R.A. 576; Vincent v. Crane, 134 Mich. 700, 97 N. W. 34. And see the reported case. See also Tucker v. Burt, 152 Mich. 68, 115 N. W. 722, 17 L.R.A.(N.S.) 510, 15 Detroit Leg. N. 83.

Minnesota.—Lightbody v. Truelsen, 39 Minn. 310, 40 N. W. 67.

Nebraska.—Homan v. Redick, 97 Neb. 290, 149 N. W. 782, L.R.A. 1915C 601.

New Jersey.—Mitchell v. Morris Canal, etc. Co. 31 N. J. L. 99; McQuade v. Emmons, 38 N. J. L. 397.

New York.—Haywood v. Miller, 3 Hill 90; People v. Annis, 45 Barb. 304; Kerrains v. People, 60 N. Y. 221, 19 Am. Rep. 158; Weisberg v. Cohen, 129 App. Div. 496, 114 N. Y. S. 138. See also Doyle v. Gibbs, 6 Lans. 180.

North Carolina.—See State v. Curtis, 20 N. C. 363; Watson v. McEachin, 47 N. C. 207.

Pennsylvania.—Huggins v. Bridges, 29 Pa. Super. Ct. 82; Bowman v. Bradley, 151 Pa. St. 351, 24 Atl. 1062, 17 L.R.A. 213, 31 W. N.

C. 142. See also Zinnel v. Bergdoll, 9 Pa. Super. Ct. 522, 44 W. N. C. 54, 7 Del. Co. Rep. 369.

In White v. Bayley, 10 C. B. N. S. 227, 7 Jur. N. S. 948, 30 L. J. C. Pl. 253, 100 E. C. L. 227, Erle, C. J., said: "The distinction is extremely important between granting an estate to a person and the case where an owner allows a person in his employ, for the purpose of better complying with his duties as a servant, to have the use of premises. He has no estate in the latter case, and the owner of the premises, as far as that goes, is able to remove him at any time."

On the termination of the employment the right to occupy the premises ceases. Lake v. Compbell, 5 L. T. N. S. (Eng.) 582; Hart v. O'Brien, 15 L. C. Jur. (Eng.) 42; Williams v. Herrick, 5 U. C. Q. B. 613; De Briar v. Minturn, 1 Cal. 456; Homan v. Redick, 97 Neb. 299, 149 N. W. 782, L.R.A.1915C 601; Mitchell v. Morris Canal, etc. Co. 31 N. J. L. 99; McQuade v. Emmons, 38 N. J. L. 397; People v. Annis, 45 Barb. (N. Y.) 304; Bowman v. Bradley, 151 Pa. St. 351, 24 Atl. 1062, 17 L.R.A. 213, 31 W. N. C. 142. Thus in De Briar v. Minturn, 1 Cal. 450, the court said: "The defendant was an innkeeper. He employed the plaintiff as a barkeeper, and was to give him three hundred dollars per month for his services, and allow him the privilege of occupying a room so long as he remained in the defendant's employ. The plaintiff was not hired for any definite period, and he was discharged by the defendant. After such discharge, the defendant notified the plaintiff to leave the room which he occupied, at the end of the month. The plaintiff did not comply with the notice, and the defendant put him out of the house by force: and this action is brought to recover damages for being thus ejected. The jury rendered a verdict in favor of the plaintiff for six hundred dollars. We do not see how any action can be maintained upon the facts presented. The plaintiff had no right to remain in the defendant's house after being notified to leave, and the defendant had a right to eject him. It does not appear that any more force was used than was necessary, or that the facts would warrant anything more than nominal damages, even if an action could be sustained at all. We think a new trial should be granted." In Crain v. Burnett, 190 Ill. App. 407, it was said: "Where an employee occupies a house incidental to his employment and he is discharged, whether the discharge be rightful or wrongful, he must vacate the premises occupied by him as such employee. If he fails to leave peaceably, or after doing so returns, he becomes a trespasser and may be ejected by the master although his wages have not been paid."

Application of Rule.

In Mackenzie v. Minis, 132 Ga. 323, 18 Ann. Cas. 723, 63 S. E. 900, 23 L.R.A.(N.S.) 1003, it appeared that the defendant had entered into a written agreement with the plaintiff whereby the former agreed to work for the plaintiff as gardner on the latter's summer place for a period of three years. The engagement was dependent on the defendant proving himself competent and satisfactory to the plaintiff. As an employee, he was to have the use of a house on the land of the plaintiff. Before the expiration of three years the plaintiff discharged him and gave him written notice to quit the premises. The defendant refused to go and the plaintiff sought to enjoin him from continuing to enter the premises. In granting the injunctive relief the court said: "Where a servant occupies a dwelling house belonging to the master, free of rent, as incidental to and connected with the performance of his duties as such servant, if he quits the service of the master before the expiration of the term, or is discharged by the master, his right to the possession of the dwelling house ceases, and he must surrender it. In such cases, in the eye of the law, the master has never parted with possession of the premises, the servant's possession being regarded as that of the master. Hence the master may enter and use such reasonable force as may be necessary to expel the servant. It has been said, that, 'when a servant has been discharged, the master's right in this respect does not depend upon the question whether the servant is rightfully or wrongfully discharged, but exists in the one case as well as in the other, the master incurring the peril of paying damages for a breach of the contract if the discharge is wrongful; but the right to expel a servant from the house exists, whether he had good cause therefor or not.' . . . It is evident from the reading of the contract that the furnishing of the house upon the place to the manager and head gardener was an incident to the service, and for the purpose of aiding in its discharge, and was not a letting of any part of the property to him as a tenant of the owner. The occupancy of the house was directly connected with the service to be rendered, and for the better performance thereof. In law, therefore, the employer did not resign possession to the employee as to a tenant, but the possession of the employee was in effect that of the master. When the employee was discharged, it was his duty to resign possession and to leave the premises. He had no right to persist in remaining on the place, walking over it, and using it as if he had not been discharged. Nor could he do this because he insisted that he could not legally be discharged for three

years from the date of the contract." So in Mitchell v. Morris Canal, etc. Co. 31 N. J. L. 99, it appeared that the defendant was employed by the plaintiff canal company as a lock tender and as part of his compensation he was permitted to occupy one of their dwelling houses. One of the rules of the company which had been in force for a number of years and of which the defendant had notice provided that "in case any plane or lock tender shall be discharged while occupying the house belonging to the company, he shall thereupon immediately leave said house." The defendant was served with a written notice of his discharge and a notice and demand in writing for the surrender of the premises within thirteen days. The defendant refused to surrender, claiming that he was a tenant at will and entitled to three months' notice to quit. The court said: "The defendant was to occupy 'as long as he was in the employment of the company; and when he ceased to be so employed he was immediately to leave the house.' He held under the company and so was their tenant, not at a rent reserved, but as part compensation for his services and only during the time those services were being performed. The company reserved to themselves the right to terminate his employment and his occupancy at their pleasure. Such an arrangement is not only reasonable, but in most cases of large manufacturing companies and public works, almost indispensable. Dwellings are provided for the employees convenient to the places of their labor, to further the objects of the enterprise and facilitate the business of themselves and the public. These dwellings are not leased; nor is a rent reserved or term fixed beyond the period of labor, for that would frustrate the design of the owners and tend to defeat the enterprise—since while the time of a notice to quit was running, their works might be suspended. The notice to quit, which by the common law was six months, by our statute three months, was not required in this case." Similarly in McGee v. Gibson, 1 B. Mon. (Ky.) 105, it appeared that the plaintiff contracted to labor on the farm of the defendant, for which the defendant was to pay him, monthly, till the end of the year certain sums stipulated, and the defendant was to furnish a house to the plaintiff and to keep his cow, for which he was to pay two dollars a month for the house and one dollar a month for the cow, both payable monthly. The court said: "Upon this contract, we are of opinion that there was no independent lease of the house for a year, or any other period, but that the right of occupancy was incident to the contract of hire, and ceased whenever, by mutual consent, or by the fault of the plaintiff, the services themselves ceased. Furnishing of the house at two dollars per month, was obviously a mode of paying a part of the wages of the plaintiff; and after such a cessation of his services as is above described, he could no more cleam the right to occupy the house, or to feed his cow on the defendant's pasture, than he could claim any other portion of his hire. From that time he would be in no better condition than a strict tenant at will, who has, by his own act, terminated the tenancy, and would, at most, be entitled only to a reasonable time for removing from the house."

In Presby v. Benjamin, 169 N. Y. 377, 62 N. E. 430, 57 L.R.A. 317, an action instituted to recover the rent reserved in the lease of an apartment, the defense was eviction. The claim of the defendant was that on leaving his apartment before the expiration of the demised term he placed the porter of his store with his wife in the apartment as his servant to take care of the apartment on his behalf during his absence; that the plaintiff refused to allow the defendant's servant to enter or occupy the apartment and that thereupon he surrendered and abandoned the premises to the landlord. The lease contained a covenant that the lessee would not assign or sublet the premises and it was the claim of the plaintiff that the action of the lessee in attempting to place his employee in possession of the premises was a breach of the covenant against subletting. The court said: "It is clear that even under a liberal construction of the covenant, to constitute a violation of this lease the defendant must have attempted to put in possession of the premises a new tenant, not merely a new occupant. To be a tenant a person must have some estate, be it ever so little, such as that of a tenant at will or on sufferance. A person may be in occupation of real property simply as a servant or licensee of his master. In that case the possession is not changed; it is always in the master. . . . Therefore, if the defendant sought to place his porter in occupation of the premises as caretaker or as servant he was entirely within his rights. His testimony to this effect was not conclusive. There were circumstances from which the jury might have inferred that the suggestion of a caretaker was a subterfuge, and that the real intent was to make the porter a tenant of the premises. But in this respect the evidence presented a question of fact for the jury to pass upon." In Vincent v. Crane, 134 Mich. 700, 97 N. W. 34, it appeared that an employer was the lessee of a farm. His lease contained a covenant against subletting. The court held that the act of the employer in placing one of his laborers in possession of a house situated on the premises, for the better performance of his service was not such a subletting as would avoid his lease.

In Huggins v. Bridges, 29 Pa. Super. Ct. 82, it was held that while the relation of landlord and tenant did not exist as between an employer and his employee who occupied rooms on the premises, as a part of his compensation and although at the termination of his employment the employer had the right to set out his goods, he was liable for injuries sustained by the employee's wife as a result of his stopping up the chimney thus causing smoke and gas to enter the rooms so occupied in an effort to make him vacate after the termination of his employment.

In Waller v. Morgan, 18 B. Mon. (Ky.) 136, it was held that a college professor who occupied a portion of the house of his employer on the premises as a part of his compensation could not be considered a tenant of his employer and therefore was not liable as a subtenant or assignee for the rent due the owner from his employer.

Where a pastor occupies as a residence property owned by a church, for the better performance of his duties, the relation of landlord and tenant does not exist and his right to the possession of the property ceases with the termination of his employment. Chatard v. O'Donovan, 80 Ind. 20, 41 Am. Rep. 782; East Norway Lake Church v. Froislie, 37 Minn. 447, 35 N. W. 260. See also Bigelow v. Norton, 3 Nova Scotia 283. *Compare* Bristor v. Burr, 120 N. Y. 427, 24 N. E. 937, 8 L.R.A. 710. Thus in Chatard v. O'Donovan, supra, it appeared that the action was instituted to oust the defendant, a priest, from the possession of certain church property. He had been removed from the office of pastor but had refused to surrender his possesion of the property. The court said: "While it may not be said . . . that the defendant was the hired servant of his Bishop, it does appear that he was appointed to his position by and held it at the discretion of the Bishop, and that his possession of the property was only an incident to his appointment, the better to enable him to discharge the duties of his office, and when, in the exercise of that discretion, which by the rules and customs of the church he had the right to employ, the Bishop removed the defendant from his charge or pastorate over the congregation, his right to possession of the property at once necessarily ceased. If, under the circumstances, the parties should be deemed to have come under a contract relation to each other, the plain meaning of the contract was that when the defendant should cease to be pastor, which might be at the will of his Bishop, he should cease forthwith to occupy the property, there being, from the nature of the case, no right of occupancy except as an incident to the performance of the duties of pastor. And if this be regarded as a tenancy, it was a tenancy at will, and determinable 'by one month's notice, in writing, delivered to the tenant,' which notice the complaint shows to have been given. We are, however, of the opinion that the relation of the parties was more like that of master and servant—the possession of the priest being, in fact, the possession of his superior, the Bishop, who had power, at any time and upon his own judgment or discretion, to remove one and install another in the office of pastor, and in the possession of the property of the office." In Doe v. M'Kaeg, 10 B. & C. 721, 21 E. C. L. 154, it was held that a minister placed in possession of a chapel and dwelling house was a mere tenant at will of his employers whose estate was determined by a demand of possession. See to the same effect Doe v. Jones, 10 B. & C. 718, 21 E. C. L. 153, 8 L. J. K. B. 310.

Likewise, it has been held that where a person occupies the premises of his employer as a caretaker or while looking after the interests or business of the owner the relation of landlord is not created. Mayhew v. Suttle, 4 El. & Bl. 347, 82 E. C. L. 347, 1 Jur. N. S. 303, 24 L. J. Q. B. 54, 3 W. R. 108, 3 C. L. R. 59; Doe v. Derry, 9 C. & P. 494, 38 E. C. L. 194; Davis v. Williams, 130 Ala. 530, 30 So. 488, 89 Am. St. Rep. 55, 54 L.R.A. 749; Cook v. Klenk, 142 Cal. 416, 76 Pac. 57; Davis v. Clancy, 3 McCord L. (S. C.) 422. See also Allen v. England, 3 F. & F. (Eng.) 49; Mitchell v. Davis, 20 Cal. 45; McCutchen v. Crenshaw, 40 S. C. 511, 19 S. E. 140; Letang v. Donohue, 6 Quebec Q. B. 160; Reynolds v. Metcalf, 13 U. C. C. P. 382. *Compare* Colcord v. Hall, 3 Head (Tenn.) 625. In Cook v. Klenk, supra, the court said: "The mere possession of property does not necessarily imply that the relation of landlord and tenant exists. The servant when given the possession of a cottage in which to live while in the employ of the master is not necessarily a tenant. If this were so, servants and agents would have novel and embarrassing powers in regard to property placed in their charge. The relation of landlord and tenant is created by contract express or implied. The evidence here does not show that any such contract was made, or that any facts exist from which it can be inferred. To allow defendant to remain in possession under an arrangement by which he was to collect the rents from third parties and turn them over to plaintiff, after he has refused to turn over such rents, on the theory that he is a tenant, would be to allow him to reap an undue advantage from the acts of kindness shown him by plaintiff. He would be a tenant for the purpose of holding possession, but not for the purpose of collecting or paying rents."

However, in Shaw v. Hill, 79 Mich. 86, 44 N. W. 422, it was held that where one is put in possession of premises under an agree-

ment to improve the same and to keep off trespassers he becomes a tenant at will.

Qualification of Rule.

A person may occupy premises as a tenant and yet be a servant of the owner and where the occupation of the employer's premises is not a mere incident to the service the principle of landlord and tenant applies even though the rental is satisfied by service. Reg. v. Lynn, 8 Ad. & El. 379, 35 E. C. L. 409, 3 N. & P. 411; Snedaker v. Powell, 32 Kan. 396, 4 Pac. 869; Ofschlager v. Surbeck, 22 Misc. 595, 50 N. Y. S. 862; Anderson v. Steinreich, 36 Misc. 845, 74 N. Y. S. 920. See also Hughes v. Chatham, Bar. & Arn. El. Cas. 61, 7 Jur. 1136, 13 L. J. C. Pl. 44, 5 M. & G. 54, 44 E. C. L. 39, 7 Scott. N. R. 581; Hunt v. Colson, 3 Moo & S. 790, 30 E. C. L. 319. In Womach v. Jenkins, 128 Mo. App. 408, 107 S. W. 423, the court said: "Where the occupation of the master's house by the servant is directly connected with the service or if it is required expressly or impliedly by the employer for the necessary or better performance of the service, the relation of the parties with respect to the property is not that of landlord and tenant, but of master and servant, and the latter will be required by law to surrender possession of the premises at the end of the employment. . . . But there is no inconsistency between the relation of landlord and tenant and that of master and servant, and where, as in the case in hand, it appears that the occupation of the master's premises was not treated by the parties themselves as a mere incident of the service, it should be regarded in law as the occupation by a tenant, and the rights of the parties should be determined according to the laws and principles applicable to the relation of landlord and tenant." In Anderson v. Steinreich, 36 Misc. 845, 74 N. Y. S. 920, it was held that where a janitress occupies an apartment owned by her employer under an agreement to pay rent therefor and her salary as janitress is deducted from the rent, her occupancy is that of a tenant although the relation of master and servant exists while she is performing the service of janitress. In Ofschlager v. Surbeck, 22 Misc. 595, 50 N. Y. S. 862, it appeared that a hired man who occupied a house on the premises of his employer was in possession under an agreement that he should keep the house in good order and that the rent was to be ten dollars per month, which was deducted from his wages each month. It further appeared that the employer had several times sworn that the occupancy of the hired man was that of a tenant. Under those circumstances the court held that the question whether the employer held as a tenant had been properly left to the jury. In Snedaker v. Powell, 32 Kan. 396, 4 Pac. 869, it appeared that the plaintiff had agreed with one B. to work on his farm for eight months. In return B. agreed that he would pay the plaintiff fifty dollars a month and would furnish him with a house on the premises for a period of one year. With the consent of B. the plaintiff permitted the defendant to occupy part of the house. After the completion of the term of his service the plaintiff moved out and subsequently instituted an action to collect four months' rent from the defendant. The defendant claimed that he was in possession under B and that the plaintiff merely held as the servant of B. and had no right of action for rent. The court said: "Under the contract [plaintiff] had paid by his labor and services for the use of the house . . .; and even if the occupancy of the dwelling during his eight months' service was that of a servant and not as a tenant, yet after he had performed that service, the relation existing between B. and [the plaintiff] was that of landlord and tenant. In order for a person to occupy as a servant, the occupancy must in some way be in aid of or necessary to the performance of service." In Reg. v. Lynn, 8 Ad. & El. 379, 35 E. C. L. 409, 3 N. & P. 411, it appeared that an employee who formerly occupied a house on the premises of his employer by agreement moved out and made arrangements with a third person for the renting of another house. While the arrangements were made with the employee, the owner of the house considered the employer as his tenant and the rents and charges were paid by the employer under the terms of the contract of employment. The court held that the employer occupied the house as a tenant and not as a servant and as such tenant was liable to be assessed for the poor rate. In State v. Smith, 100 N. C. 466, 6 S. E. 84, it appeared that the prosecutor occupied with his family a separate and distinct dwelling, several hundred yards from that of the defendant, and under a special contract by which, for his services as a laborer, he was to have furnished him a dwelling place and a monthly allowance of meal and meat as well as the privilege of cultivating a small strip of land for his own benefit. While in possession under the agreement he was driven out, by threats and a demonstration of deadly weapons and an array of numbers, against which resistance would have been useless. The court said: "There were created, in our opinion, the legal relations of lessor and lessee between the parties, which did not warrant this invasion of the prosecutor's possession of the premises, no more than if the house had been on other lands of [defendant] instead of the plantation whereon he lived."

If the person occupying the premises of his employer as a part of his compensation remains in possession after the termination of

his employment he may become a tenant by sufferance or at will. Rex v. Collett, R. & R. C. C. 498; Eichengreen v. Appel, 44 Ill. App. 19; Grosvenor v. Henry, 27 Ia. 269; School Dist. v. Batsche, 106 Mich. 330, 64 N. W. 196, 29 L.R.A. 576; People v. Annis, 45 Barb. (N. Y.) 304; Jennings v. McCarthy, 16 N. Y. S. 161, 40 N. Y. St. Rep. 678. Thus in Jennings v. McCarthy, supra, the court said: "With the termination, however, of the employment, whether by the servant's abandonment thereof or by his discharge therefrom, the servant's right to occupy his master's premises is also determined, and the master then has a present right to repossess himself thereof, and to use all necessary force to eject the servant therefrom. . . . If the servant continues in possession without molestation, it is presumptively with the master's consent; and if such possession endures beyond the limit of a period of time sufficient to enable the former servant conveniently to remove, such possession is converted into a tenancy at will." In Kerrins v. People, 60 N. Y. 221, 19 Am. Rep. 158, it was held that a tenancy at will would not immediately result on the termination of the service of an employee occupying a house as a part of his compensation but that his holding over must be for a sufficient period to warrant an inference of consent to a different holding. However, in Doyle v. Gibbs, 6 Lans. (N. Y.) 180, it appeared that the plaintiff, while in the employ of the defendant, occupied certain premises as a part of his compensation. He was subsequently discharged and requested to move, but owing to the sickness of his wife he was permitted to remain until she was well enough to move. Subsequently the plaintiff and his wife left the premises for a day's visit with her father and while they were absent the defendant entered and removed their property. The court said: "It is necessary to ascertain the exact relation the parties occupied toward each other at the termination of the contract of hiring. That contract and the occupancy of the dwelling house under it did not create the relation of landlord and tenant, but that of master and servant only. . . . If the relation of landlord and tenant did not exist, the plaintiff was not in possession as a tenant holding over, after the expiration of his term, but he was in as a servant dismissed from service, but incapable by reason of the condition of his wife from removing. It was in this condition of things that the plaintiff asked permission to remain until his wife could get ready to leave, and that the plaintiff said he should look to him for rent. If an agreement is to be implied from the facts stated by the plaintiff, it must be an agreement that plaintiff remain, paying rent, until his wife was well enough to remove. No other time was talked of or desired by the plaintiff, and it is obvious that defendant only consented to plaintiff's occupancy until that event occurred. The plaintiff was not a tenant at will nor at sufferance, but until the happening of a future contingent event. It was shown that in December the wife was well enough to leave on a visit to her father, and that the plaintiff removed a part of his property to her father's. In the absence of all evidence to the contrary, these facts established the wife's ability to remove, and, if so, the time for which plaintiff had permission to occupy had expired, and the defendant had the right to enter and put out the plaintiff's goods."

STEWART ET AL.

v.

TALBOTT ET AL.

Colorado Supreme Court—January 4, 1915.

58 Colo. 563; 146 Pac. 771.

Mechanics' Liens — Contract by Agent — Scope of Lien.

Rev. St. 1908, § 4025, giving mechanics, materialmen, etc., and persons performing labor or furnishing materials for the construction of any building, etc., a lien upon the property upon which they have rendered service or bestowed labor, or for which they have furnished materials or other fixtures, for the value of such services, labor, or material rendered or furnished at the instance of the owner or any person acting by his authority or under him as agent, contractor, or otherwise, for the work, labor, services, or materials done, furnished, or rendered at the instance of the owner of the building or other improvement, or his agent, gives a lien only upon the structure or improvement built or placed upon the land.

Same.

Rev. St. 1908, § 4025, which, after giving a lien to persons furnishing labor, etc., to be used in the construction, etc., of any building at the instance of the owner or his agent, provides that every contractor, architect, etc., or other person having charge of the construction, alteration, addition to, or repair of any building or improvement shall be held to be the agent of the owner for the purposes of that act, merely makes such person the statutory agent of the owner of the building or improvement, and does not make him the agent of the owner of the land upon which the improvement is placed.

Same.

Under Rev. St. 1908, § 4027, providing, relative to mechanics' liens, that such liens

shall extend to and cover so much of the lands whereon the building or improvement shall be made as may be necessary for the convenient use and occupation of the building or improvement, and that the lien for work or materials done or furnished for any entire structure shall attach to the building for or upon which the work is done or materials furnished in preference to any prior lien, incumbrance, or mortgage, that any person enforcing such lien may have the building sold, and that the lien shall extend to and embrace any additional or greater interest in any of the property acquired by the owner at any time subsequent to the making of the contract or the commencement of the work, and before the establishment of the lien by process of law, the land upon which a building or improvement is erected or placed cannot be subjected to a lien unless the owner of the land has some ownership in the building and acts affirmatively relative to its construction.

Improvements by Tenant — Right to Lien.

Under Rev. St. 1908, § 4029, providing that any building, etc., constructed, altered, etc., upon any land with the knowledge of the owner or reputed owner shall be held to have been erected, constructed, etc., at the instance and request of such owner, so as to subject his interest to a lien unless he shall within five days after obtaining notice of the erection, construction, etc., give notice that his interests shall not be subject to any lien personally, or by posting and keeping posted a written and printed notice to such effect in some conspicuous place upon the land, building, or improvement, provided that this shall not apply to any owner or person who shall have contracted for any erection, structure, or improvement, a lessor under a long-term lease which bound the lessee to erect a building upon the demised premises at his own expense, to become a part of the realty upon completion, is not required to post the statutory notice, as he had entered into a contract with reference to the construction of the improvement, and was by the very letter of the proviso exempted from the terms of that section.

[See note at end of this case.]

Same.

A long-term lease requiring the lessee to erect a building at his own expense to become a part of the realty upon completion was not a contract with a contractor for the construction of such building within Rev. St. 1908, § 4025, providing, relative to mechanics' liens, that in case of a contract for the work between the reputed owner and a contractor the lien shall extend to the entire contract price, as a "contractor" is one who, as an independent business, undertakes to do specific jobs of work without submitting himself to control as to the petty details, especially as the contracts with the parties claiming the liens designated the lessee as owner and the lessors were not therefore the "reputed owners."

[See note at end of this case.]

Same.

Under Rev. St. 1908, §§ 4025, 4027, 4029, a long-term lease binding the lessee to erect a building on the demised premises to become a part of the realty upon completion does not make the lessee the lessor's agent so as to invest him with authority to create a lien upon the lessor's interest in the fee, and persons doing work and furnishing materials under contracts with the lessee acquired no lien on the fee where the lessors neither participated in the erection or construction of the improvement nor approved the plans, and it does not appear that the rents reserved were greater than the reasonable worth of the vacant lots; since, if the improvements increased the value of the freehold estate, it was only as a future incident, and the lessor was not the owner of the building or structure, but would become such only upon the expiration of the lease or upon the completion of the building.

[See note at end of this case.]

Same.

If, under a long-term lease binding the lessee to erect a building on the demised premises at his own expense, to become a part of the realty, the lessee is presumptively the agent of the lessors within the mechanic's lien laws, the presumption is nullified and destroyed by a provision in the lease, which was duly recorded, that nothing therein should authorize the lessee or any person dealing with him to charge the lands or any interest of the lessors therein with any mechanic's lien or lien of any kind, notwithstanding a covenant by the lessee that it would not permit or suffer any bill of any mechanic, laborer, or materialman, or for furnishings or equipment, to remain unpaid, and that before commencing the erection and construction of the building it would furnish a bond guaranteeing due observance of the provisions of the lease relative to mechanics' liens, in view of Rev. St. 1908, § 694, providing that all deeds or agreements in writing affecting the title to real estate or any interest therein may be recorded, and that from and after the filing thereof for record they shall take effect as to subsequent bona fide purchasers and incumbrancers, and section 707, defining "deed," as used in that chapter, as including mortgages, leases, etc., as the lease was constructive notice to those subsequently acquiring an interest in the premises, and whatever agency it might be presumed was created thereby was necessarily subject to the conditions of the instrument creating the agency.

[See note at end of this case.]

Error to District Court, City and County of Denver: ALLEN, Judge.

Action by A. M. Stewart et al., plaintiffs, against John O. Talbott et al., defendants. Judgment for defendants. Plaintiffs bring error. On rehearing. The facts are stated in the opinion. AFFIRMED.

Robinson & Robinson, Dines, Dines & Holme, Benedict & Phelps, Bartels, Blood & Bancroft, Raymond J. McPhee, L. Ward Ban-

nister and *L. McWhinney* for plaintiffs in error.

C. H. Redmond, Goudy & Twitchell and *J. H. Burkhardt* for defendants in error.

[565] WHITE, J.—Talbott and Mugivan, defendants in error, owners of four lots on Champa street between Fourteenth and Fifteenth streets in the City of Denver, entered into a written contract by which they leased them to The American Music Hall Company, a corporation, for the term of ninety-nine years. The lease contract provided, *inter alia*. "That on or before the first day of July, A. D. 1910, the lessee will proceed to improve said premises by the erection, construction and maintenance of a building covering said premises, said building to cost, when completed, not less than one hundred fifty thousand dollars ($150,000.00); . . . and to be fully completed on or before the first day of January, A. D. 1911. . . . All buildings and improvements of every nature soever erected or placed upon said premises, when commenced and completed, shall at once become a part of the realty of the lessors, without right or authority of any person or corporation to remove the same, "provided, the lessee may alter, remodel, improve, repair or reconstruct the same at its pleasure, but not so as to [566] impair the value thereof; that at all times throughout the term of the lease the lessee shall maintain upon the said premises a building of the aforesaid character." The rental reserved to January 31, 1911, was $3,000 paid simultaneously with the execution of the lease, and $500 per month thereafter payable on the first day of each month, and the payment of taxes, assessments and governmental charges imposed upon the premises. The lessee was required to keep the improvements and fixtures insured, with the loss payable to the lessors, with the right reserved in the lessee in case of loss by fire to rebuild or repair, with reasonable diligence, the building so destroyed, and to use such insurance money therein. The contract obligates the lessee to bear all expense of the erection, construction, maintenance and operation of the building to the end that the rentals reserved to the lessors shall be met. Paragraph 6 thereof is as follows:

"It is expressly understood and agreed (and notice is hereby given), that nothing herein shall authorize the lessee or any person dealing through, with or under it, to charge said lands, or any interest of the lessors therein, or this lease, with any mechanic's lien, or lien or incumbrance of any kind whatever. On the contrary, (and notice is hereby given), the right and power to charge any lien or incumbrance of any kind against the lessors, or their estate, is hereby expressly denied, and the lessee covenants that it will not permit or suffer any bill of any mechanic, labor or material man, or for any furnishings or equipments of said premises, to be or remain unpaid. The lessee shall, before commencing the erection and construction of a building on said premises, furnish or cause to be furnished a bond in a bonding company satisfactory to lessors, guaranteeing the due observance of this clause 6."

April 15, 1910, the lease was filed for record and [567] duly recorded in the office of the county clerk and recorder of the county in which the lots are located, and thereupon possession of the premises delivered to the lessee. April 20, 1910, the lessee entered into a written agreement with James Stewart & Company, one of the plaintiffs in error, whereby the latter, acting as the agents of the former, who were therein designated as the owner, agreed "to build for the said owner a building to be used chiefly for theatrical productions on the premises leased by the owner from" Talbott and Mugivan, the defendants in error, describing the particular lease here in question, designating the book and page where it is recorded. The building was to be erected according to plans and specifications prepared by a designated architect representing "The American Music Hall Company as the owner of the premises." It authorized Stewart & Company to obtain prices and estimates for building materials and work that might be required in the erection of the building, and to submit to the architect a complete list of bids received, together with their recommendation thereon, and to "prepare proper and satisfactory contracts covering the same for execution by the owner or its authorized agent," containing a proviso that Stewart & Company might do and perform each particular portion of the work as might be determined by themselves, the architect and the owner, as most expedient. The American Music Hall Company was to furnish the necessary funds to carry on the work and pay Stewart & Company, for superintending the same, a percentage compensation depending upon the cost of the building. Bids were thereupon received for various portions of the work, and The American Music Hall Company, as owner, entered into written contracts therefor as follows: with F. H. Cowell for the brick work; with the Colorado Portland Cement Company for the cement: with Hugh Murphy for rock. A like contract [568] was prepared by Stewart & Company for execution by The American Music Hall Company, as owner, and the John Eichleay, Jr., Company, as contractor, for the structural steel, but, though approved by the architect, was never signed by either of the contracting parties. McPhee and McGinnity Company, a corporation, without any written contract, but upon orders from Stewart & Company,

furnished certain lumber which was used for concrete forms, piling for shoring up adjacent ground and supporting the foundations of buildings jeopardized by the excavation. Work upon the structure proceeded for a while but certain bills became due and payable, and, default having been made therein, the work ceased early in August. Stewart & Company superintended that which was done by others, did a portion of the excavating, put in the concrete footings, placed some structural steel in the foundation, etc., paid certain bills; and herein claim a lien on the premises for $14,059.30 less $4,129.02 paid to them by the American Music Hall Company. The John Eichleay, Jr., Company fabricated and shipped to Denver from its works in Pittsburg, Pennsylvania, consigned to The American Music Hall Company, ten cars of structural steel. Of these, five cars were delivered on the premises and incorporated into the foundation and basement portion of the intended building; the other five cars were tendered by the railroad company at Denver but were never received by Stewart & Company or The American Music Hall Company or delivered upon the premises, but remained in the possession of the railroad. The Eichleay Company also prepared, or partially prepared, other structural products ready for shipment for use in this building. It filed four separate lien statements. The first statement is for structural steel delivered to and incorporated into the structure, and is in the sum of $6,812.83. The second is for structural steel fabricated and shipped to Denver [569] for use in the structure, but never delivered to, nor incorporated therein because of a cessation of work thereon, and is in the sum of $7,316.10. The third statement is for certain steel either fabricated or partially so at Pittsburg, but not shipped because of cessation of work on the structure, and is in the sum of $7,840.69. The fourth statement is for steel designed for the structure but never cut, and for details made and bills of materials written for the work, and is in the sum of $1,088.86. F. H. Cowell claims a lien for $2,332.65 for brick, cement and sand furnished and placed in the basement walls. The Colorado Portland Cement Company furnished cement which was used in the foundation work of the building and claims a lien for a balance in the sum of $665. Hugh Murphy furnished crushed stone which was mixed with the cement and used in the foundation, and claims a lien therefor in the sum of $246.90. McPhee and McGinnity Company claims a lien for the material hereinbefore designated as furnished by them in the sum of $495.80. At the time work ceased the excavation for the basement had been partially completed and a large portion of the foundation of the building constructed. Subsequent to the filing of the liens, but prior to the institution of the foreclosure proceedings, the lessors, after notice to the lien claimants of their intention so to do, forfeited the lease under the terms thereof and took possession of the premises; and the sole question here involved is the right of plaintiffs in error to fasten their respective liens upon the title of the lessors in and to the lots. The right claimed was denied by the trial court and the purpose of this action is to reverse that judgment.

Plaintiffs in error claim that they are entitled to, and may maintain their respective liens either under the provisions of § 4025 or those of § 4029, R. S. 1908.

§ 4025 gives, to the persons therein designated, "a lien upon the property upon which they have rendered [570] service or bestowed labor on for which they have furnished materials . . . for the value of such services rendered or labor done or material furnished," upon the condition, however, that they acted in that regard "at the instance of the owner" or of some person acting by his authority. Clearly here the word "owner" has reference to the word "property," and the latter signifies the character of the structure or improvement designated in the first part of the section, that is, building, mill, bridge, ditch, flume, aqueduct, reservoir, tunnel, fence, railroad, wagonroad, tramway or other structure or improvement upon land to which a lien attaches solely by virtue of this section. In other words, by this section the lien is given upon the structure or improvement built or placed upon the land. That this is the meaning of the section is made certain by its other provisions and that of the act. Further in the section the right to the lien is restated upon the same condition as above specified, except the word "owner" is followed immediately by the words "of the building or other improvement;" that is, the lien is given when, and only when, the work is done or services rendered or materials furnished "at the instance of the owner of the building or other improvement, or his agent." Moreover, the section contains the declaration that every "person having charge of the construction, alteration, addition to, or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purposes of this act," clearly meaning that the person having charge of the construction of the building or improvement, etc., is the statutory agent of the owner of the building or other improvement, but he is not thereby made such agent of the owner of the land upon which the improvement is placed. It is only by § 4027 that the land whereon such building, structure or improvement may be made, is subjected to the liens provided by

the act. Therefore, ownership of the building, [571] structure or improvement, and the doing of the work thereon or the rendering services or furnishing material therefor at the instance of such owner or his agent, plus ownership in the same person of the land upon which such structure or improvement is erected or placed, are essential, under §§ 4025 and 4027, to the validity of a lien upon such land. This meaning is further evidenced by subsequent provisions of the latter section. It constitutes the lien, where it is for work done or material furnished for an entire structure, erection or improvement, superior thereon to prior liens or incumbrances of the land upon which the same is erected or placed, and authorizes in the enforcement of such lien the sale of such improvement and the removal of the same from the land upon which it stands. It further provides that the lien given by the act shall extend to any "conveyable interest of such owner or reputed owner in the land upon which such building, structure or improvement shall be erected or placed," or that he may thereafter acquire subsequent to the making of the *contract* or the commencement of the work upon such structure and before the establishment of such lien by process of law. It, therefore, follows that under § 4025, coupled with § 4027, it is a condition precedent to the validity of the lien that the person, whose interest in the real estate it is proposed to bind or affect thereby, must have acted affirmatively relative to the structure or improvement placed upon the land, and must have some ownership therein.

In Cornell v. Barney, 94 N. Y. 394, 398, under a statute in substantial effect the same as our §§ 4025 and 4027, materials were furnished by plaintiffs to a lessee (Salem), for an improvement in process of construction by the latter in pursuance of provisions in his lease by which he covenanted to erect a permanent building on the demised premises of, at least, a specified value, within a designated time, and in which the lessor (Barney), covenanted to loan a specified sum as [572] the building advanced, to be secured by mortgage on the lessee's interest in the premises, and the building, upon the termination of the lease, to revert to and become the property of the lessor. The right to the lien was denied on the interest of the lessor for the reason that the material for which the lien was claimed was not furnished under any contract with him or at his instance, and that he did not cause the building to be constructed. Upon this point the court, at page 398, said:

"Section 1 of the Lien Act, applicable to the city of New York (Chap. 379 of the Laws of 1875), provides that 'every person performing labor upon, or furnishing materials to be used in the construction, etc., of any building, etc., shall have a lien on the same for the work or labor done, or materials furnished by each, respectively, whether done or furnished at the instance of the owner of the building improvement, or his agent.' To give a lien under this section, the work must have been done or materials furnished at the instance of the owner of the building or the improvement, or at the instance of his agent, and the lien is upon the building or other improvement. Such is the plain language, and there is no room for construction. Here the iron was not furnished at the instance of Barney. His contract with Salem did not even require any iron to be used in the erection of the building, and it does not appear that he had anything whatever to do with Salem's contract with the plaintiffs, or with the procurement of the iron from them, or that he knew anything about it. It is true that Salem covenanted with Barney to erect the building, and that Barney agreed to advance money to be applied toward the erection of the same, and that he was to have a mortgage on the same; yet the building was not erected for Barney, and was not, before the termination of the lease, to belong to him, and in no proper sense could the material furnished for the same be said to be furnished at his instance. In harmony with this view is section 2 [573] of the act which provides that 'any person, who at the request of the owner of any lot, etc., grades, fills in, or otherwise improves the same, or the sidewalk or street in front of or adjoining the same, shall have a lien upon such lot for his work done and materials furnished.' Here the word 'request' is used in substantially the same sense as the word 'instance' in the prior section, and was intended to have the same scope.

"Section 1 having provided for a lien upon the building, section 3 provides for a lien upon the lot upon which the building stands, as follows: 'The land upon which any building, etc., is constructed, etc., shall be subject to the liens if at the time the work was commenced or materials for the same had commenced to be furnished, the land belonged to the person who caused said building, etc., to be constructed, etc.; but, if such person owned less than a fee-simple estate in such land, then only his interest therein shall be subject to such lien.' The plaintiffs can have no lien under this section upon Barney's interest in the land, because he did not in any proper sense cause the building to be constructed. Within the meaning of this section the building must be constructed for and at the expense of the owner of the land or under contract with him. Salem caused this building to be constructed, and the plaintiffs could have a lien upon his interest in the land under his lease."

This is not the case, however, under § 4029, coupled with § 4027. Thereunder a lien may attach to the lands of a person or his interest therein by his non-action, coupled with his knowledge that the building or structure was erected upon or removed to his land, or, being thereon, was altered, added to or repaired. Indeed, it does so attach under such circumstances, unless he is excluded from the application of the mechanic's lien law by reason of the provisos in the section, or within five days after he shall have obtained knowledge of the work or the intention to do the same he gives notice as required [574] therein that his interest shall not be subject to any lien for such work. The controlling distinction in this respect between §§ 4025 and 4027, on the one hand, and §§ 4029 and 4027 on the other, is, as hereinbefore stated, that in order to fasten a lien upon a person's interest in real estate under the provisions of the former sections, such person must have some ownership in the improvement constructed, etc., and must have, as such owner, contracted to have the same erected, either directly or through an agent thereunto authorized; while under the provisions of the latter sections, such contractual relation cannot exist; and the ownership in the structure or improvement essential to the validity of the lien is invested in the owner of the land by operation of law. In other words, the inception of the right to a lien under § 4025, coupled with § 4027, grows out of contract; while under § 4029, coupled with § 4027, it arises from estoppel. Nor is this distinction affected by the declaration in § 4025, that in default of filing the contract for the work, or a memorandum thereof, as therein required, the labor done and materials furnished by the parties named, prior to the filing of the same, shall be deemed to have been done and furnished at the personal instance of the owner, and the person furnishing the same shall have a lien for the value thereof. It is still the affirmative contractual relation of the owner of the property to the improvement made or work performed upon which the claimant's right to the lien is based, and the effect of the default of the owner as to filing the contract or a memorandum thereof only removes the statutory restriction that the lien can extend only to the contract price and enlarges the right in that regard under the principle of estoppel so as to cover the value of the work performed or material furnished. Indeed, in Grimm v. Yates, 58 Colo. 268, 145 Pac. 696, decided at this term, we expressly declared that the purpose of § 4029 "is to require an owner, where another in possession of his property [575] is making improvements, which by the terms of the agreement between the owner and the party in possession, the latter is without authority to make, to give notice to those performing labor or furnishing materials for such improvements, within five days after he shall have obtained knowledge that they are being constructed, that his interest in the property, upon which such improvements are being placed, shall not be subject to any lien therefor, and that his failure to do so renders his interest subject to a lien for such improvements."

Applying the law to the facts of this case it follows that the liens sought to be established and enforced herein cannot be sustained under § 4029 as affected by § 4027. The defendants in error were under no obligation by virtue of those sections to give or post the notice therein required. They were in no wise engaged in constructing the improvement but had entered into a contract with reference thereto; and were, therefore, by the very letter of a proviso of the section not of the class to whom the section applies but of a class expressly exempted from its terms. Moreover, the lessee was the party in sole possession of the premises and was making no improvement thereon which the terms of its lease and contract with the defendants in error did not authorize it to make. The contract here involved possesses no element of that described in § 4025, supra, as a contract between the "owner" and a "contractor." By its terms nothing was to be paid by defendants in error but the work was to be done by the lessee at its own expense; and the acts of plaintiffs in error relative to the improvement were caused by the lessee and not by the lessors. Moreover, defendants in error were not the reputed owners of the structure or improvement, but, on the contrary, the lessee, in the contracts with plaintiffs in error, was designated as such owner. It cannot be seriously claimed that under the agreement the lessee contracted with the lessors to furnish materials or perform any of the labor or services [576] named in the foregoing section of the statute, by the doing of which it would, by that section, be known as a "contractor." A contractor is "one who as an independent business undertakes to do specific jobs of work without submitting himself to control as to the petty details."

Plaintiffs in error, however, contend that the well recognized rule declared in Shapleigh v. Hull, 21 Colo. 419, 425, 41 Pac. 1108, is applicable to the facts of this case, and that their liens attach to the fee of defendants in error in the premises by virtue of the provisions of § 4025. We held in that case that where a contract of sale of real estate expressly requires the vendee to make improvements thereon, the interest of the vendor in the land is subject to the Mechanic's Lien Law for the improvements so made. Whether the rule should apply and subject the title of the lessor to a lien where the

lease requires the lessee to make permanent improvements upon the leased premises of not less than a stated value, without other conditions or limitations, has never been determined in this state. In Antlers Park Regent Min. Co. v. Cunningham, 29 Colo. 284, 286, 68 Pac. 226, counsel contended for the application of the rule but it was found unnecessary to decide the point therein. Williams v. Eldora-Enterprise Gold Min. Co. 35 Colo. 127, 130, 83 Pac. 780. That there is a clear distinction between the principles involved in the two classes of contracts is obvious. In the former the estate dealt with is one entity, and the contract of sale, containing the building requirements, can and does relate to no other thing. The vendor having required the vendee to erect the structure on the only estate that existed, and of which he was still the owner, the improvement likewise is his within the meaning of the law, and such owner's interest in the premises, by the terms of the statute, is, therefore, subject to the lien. There being but one estate in the land and both the vendee and vendor having an interest therein, the ownership of the permanent improvement placed thereon is likewise in both and the vendee in making the [577] improvement is necessarily the agent of the vendor. Under a lease, however, the estate is divided into term and reversion, and so is the ownership of the thing. In fact, there are two entities: the leasehold estate and the reversionary estate, with either of which, it would seem, parties should be permitted to deal independently of the estate of the other, and when they do so their rights and obligations in the premises, except as affected by statute based upon the doctrine of estoppel, should be measured accordingly. However, could it be said that this distinction does not logically exist, it is, nevertheless, certain that the mere fact, that the terms of a lease obligate the lessee to place permanent improvements upon the premises at his own expense, does not, of itself, constitute him the agent of the lessor in the erection of such improvements. The rule is clearly stated in Atlas Portland Cement Co. v. Main Line Realty Co. 112 Va. 7, 70 S. E. 536, 537, as follows:

"It is insisted that the appellants' claims are liens upon the lessor corporation's interest in the lot, because the lessee corporation was in effect the agent of the lessor in causing the building to be erected on the lot. The evidence fails to sustain this contention, unless in a contract of lease, where the lessee is by its terms required to erect a building upon the leased premises, the latter becomes the agent of the lessor. It is well settled that such relation does not make the tenant the agent of the landlord, and that it does not give him the implied authority to create a lien upon the landlord's interest therein for improvements made thereon, unless the law-making power expressly or by necessary implication enacts otherwise."

Citing, Phillips on Mechanics' Liens, §§ 89, 90; Boisot on Mechanics' Liens, §§ 289, 291; Jones on Liens, §§ 1273, 1276; Mills v. Matthews, 7 Md. 315; Rothe v. Bellingrath, 71 Ala. 55; Harman v. Allen, 11 Ga. 45.

In Winslow Bros. Co. v. McCully Stone Mason Co. 169 Mo. 236, 69 S. W. 304, while the freehold interest was held subject to the mechanic's [578] lien for improvements erected upon the premises by the lessee under a covenant in the lease obligating him to do the same, the holding was not based upon the covenant alone, for the court on page 244, says: that the mere fact "that the tenant has contracted with the owner to make certain improvements on the leased premises, does not make the land, or the landlord's interest in the land subject to a mechanic's lien. For in such cases the tenant acts for himself and not as agent of the owner."

And in Dierks, etc. Lumber Co. v. Morris, 170 Mo. App. 212, 156 S. W. 75, based upon a statute requiring, as the ultimate foundation of the lien, a contract made with the owner of the land sought to be charged with the lien or with that owner's agent, it was held that the statute, together with the mere covenant in a ninety-nine year lease to make permanent improvements upon the leased premises, would neither constitute the lessee the statutory nor the contractual agent of the lessor in making such improvements. The court therein, on page 216, upon the latter point, used the following language:

"Now, can it be said that merely by reason of the fact that a lessee covenants with a lessor to make certain repairs and improvements which will become the property of the lessor at the end of the term, this necessarily makes the lessee the agent of the lessor so as to bind the latter's freehold interest with the lien for the materials used in the improvement? If so, then no matter what is the character and extent of the improvements, nor how strong the language of the lease denying to the lessee the authority to bind the lessor's interest with a lien, the latter will nevertheless be bound, because the lien is a creature of the statute; and whenever the lessee, in contracting for improvements, acts as the 'agent' of the lessor, within the meaning of that word as used in the statute, the freehold is bound by the lien regardless of the inhibitory terms of the lease."

The opinion cites with approval, Albaugh v. Litho-Marble [579] Decorating Co. 14 App. Cas. (D. C.) 113, and quotes therefrom the following:

The covenant "involves no theory of agency, but quite the reverse. The parties to the lease dealt with each other, not as principal

and agent, but practically as adverse parties. To hold that a lessor covenanting with the lessee for the security of his interest under the lease, the payment of rent probably, should construct a building upon the land in the place of one to be demolished, would thereby and by virtue of such covenant make the lessee his agent and bind himself personally, as well as his property, for the contract of the lessee in the performance of his covenants, seems to us to be wholly without warrant either in law or in reason; we greatly question whether even the most positive legislation could impose liability upon one person for the obligation of another in such a contingency. Certainly no such liability is sought to be imposed by our mechanic's lien law. The covenant in question is itself evidence of the intention of all the parties that the lessor should not be bound."

Under this view of the matter it becomes necessary to ascertain: (1), whether the statute here under consideration has expressly or by necessary implication constituted the lessee the agent of the lessor and invested him with the authority to create a lien upon the lessor's interest in the fee for improvements made upon the leased premises; or, (2) of the covenants in the lease, coupled with the other facts of the case, constitute the lessee the agent of the lessor in making the improvements for which the liens are claimed?

Mechanic's lien statutes of our several states give but little aid in construing our own. They differ greatly in their terms and are subject to frequent amendment, and different provisions of the same statute often seem inconsistent and a lien may be sustained under one provision when other provisions would seem to negative the right thereto. Moreover, courts have too frequently applied, [580] as controlling precedents, the broad reasoning and declarations of a decision made under one statute to the facts of a case arising under an entirely dissimilar statute. By reason of these things the decisions and reasoning of the courts cannot always be accepted at their *prima facie* value, and should be cautiously considered and applied. However, much of the contradiction and confusion would disappear if the distinction between a contractual agent and a statutory agent, together with the particular facts of the case and statute under which such decisions were severally rendered, are kept clearly in mind in the consideration of each. Statutes giving liens for improvements made upon land "with the consent" or "with the permission" or "with knowledge" of the owner of such land, or where the owner of the land "knowingly permits improvements to be made" thereon, and statutes of like character, differ fundamentally from those where the lien must be founded on contract with the owner of the land. Under the former statutes the lien fastens upon the land through knowingly submitting or permitting it to be improved, plus the actual improvement thereof. These statutes, it would seem, discard the requirement of an actual contract and adopt the theory of estoppel. In other words, where by the statute the lien must be founded upon contract with the owner of the land, or his agent thereunto authorized by such owner, the true rule is that the lien claimant of a valid lien must establish, by proper proof, the fact that he is the contractual agent, either directly or indirectly, of such owner relative to the making of the improvement, or furnishing the material, for which the lien is claimed, while under statutes which fasten the lien by virtue of the fact that the improvements were placed upon the land "with the consent," "permission" or "knowledge of the owner" thereof, the person doing the work or furnishing the material therefor is essentially the statutory agent of the owner of the land who submitted or permitted it to be [581] improved. Section 4029, supra, with the provisos thereof eliminated, is of the latter class, while sec. 4025, supra, is of the former class. The fact that the latter section declares that any person having charge of the construction of the improvement is thereby constituted the agent of the owner, in no sense nullifies the previous requirement, as affected by Sec. 4027, supra, that the construction of the improvement by the owner of the land or by his contractual agent is essential to the inception of a lien thereunder. This is true because by that section there can be no statutory agent until the owner, either directly or through some contractual agent thereunto authorized, has moved forward in the construction of the improvement. In other words, there can be no statutory agent thereunder until subsequent to the creation of a contractual agent, and how far the lawmaking power could go in transforming the latter into the former would present a difficult question, for "there is no constitutional way for divesting a man's title except by his own act or default." Spry Lumber Co. v. Sault Sav. Bank Loan, etc. Trust Co. 77 Mich. 199, 43 N. W. 778, 6 L.R.A. 204, 18 Am. St. Rep. 396. We, therefore, decline to accept as sound the construction placed upon a statute of apparent similar import to our § 4025, by the Supreme Court of Oregon, that a lessee, obligated by the terms of the lease to build on the land and the building to revert to the lessor, thereby becomes a "contractor" and the statutory agent of the lessor in the construction of such improvements. Oregon Lumber, etc. Co. v. Nolan, 75 Ore. 69, 143 Pac. 935, 146 Pac. 474. The provisos in § 4029 and this construction of § 4025 harmonize and render

the two sections consistent with each other and without which they would seem contradictory. Thus it is provided in the former that the contractor's lien extends only to the contract price, which also limits the lien rights of subcontractors, laborers, material men, etc., unless the owner [582] fails or neglects to file the building contract or a memorandum thereof for record, in which event the rights of the latter extend to the value of the services rendered or materials furnished, to the same effect as if the materials were furnished or the work done at the personal instance of the owner; while under § 4029 the owner, with knowledge that his property is being improved without his having contracted in relation thereto, can act affirmatively and avoid liability therefor.

The distinction between the two classes of statutes and the principles involved are clearly recognized and applied in the New York decisions, in which state the different classes of statutes have been in force and their effect considered and determined. In Cornell v. Barney, supra, the two classes are considered and the effect of each clearly stated and announced, and our conclusions are in conformity therewith. That case was under a contract statute of that state, being § 1 of Chap. 379, Laws of 1875, while Burkitt v. Harper, 79 N. Y. 273, and Otis v. Dodd, 90 N. Y. 336, were under statutes of the other class, as was that of Jones v. Menke, 168 N. Y. 61, 60 N. E. 1053, relied upon by plaintiffs in error herein. Indeed, in Schmalz v. Mead, 125 N. Y. 188, 191, 26 N. E. 251, 252, which was under a permission or knowledge statute, and which involved permanent improvements made by the lessee under a covenant in the lease, it is said: "Under the statute which formerly regulated mechanic's liens in the city of New York, it is no doubt true that parties, situate as the respondents in this case are, could not have acquired any lien, as it was then necessary to show that the labor was performed or the materials furnished by the party claiming a lien under, or by virtue of, some agreement or contract between him and the owner of the land, and hence the numerous cases decided under the statute, as it then stood, have no application to this case."

[583] The Illinois cases are also under the "consent," "permission" or "knowledge" class of statutes, though the court in Carey-Lombard Lumber Co. v. Jones, 187 Ill. 203, 58 N. E. 347, and Crandall v. Sorg, 198 Ill. 48, 61, 62, 64 N. E. 769, stated, substantially, that it would regard the law the same if the statute was only of the contract class. The cases, however, did not call for the remark and it is, therefore, of no force and effect. We think, however, that what the court meant was that the facts brought the respective cases within either class of statutes, because the facts and circumstances disclose that the improvements in each case were the joint undertaking of both the lessor and lessee. Moreover, an examination of the cases cited by the Illinois court in support of the statement shows that Burkitt v. Harper, 79 N. Y. 273, Schmalz v. Mead, 125 N. Y. 188, as we have hereinbefore seen, and Miller v. Mead, 127 N. Y. 544, 26 N. E. 251, were based upon either "consent," "permission" or "knowledge" statutes, and the last two named cases were likewise upon contracts of sale, as was O'Leary v. Roe, 45 Mo. App. 567, Hill v. Gill, 40 Minn. 441, 42 N. W. 294, Henderson v. Connelly, 123 Ill. 98, 14 N. E. 1, 5 Am. St. Rep. 490, and McCue v. Whitwell, 156 Mass. 205, 30 N. E. 1134. The other cases, Philip Gruner, etc. Lumber Co. v. Nelson, 71 Mo. App. 110, Hall v. Parker, 94 Pa. St. 109, and Barclay v. Wainwright, 86 Pa. St. 191, cited in support of the point or likewise irrelevant thereto, as will hereinafter appear. While there is a diversity of opinion under the contract statutes as to the proof essential to establish the contractual agency, and under the other class of statutes, on the question of what constitutes "consent," "permission" or "knowledge," it would seem that the courts have generally recognized and applied what we believe to be the true rule in such cases, that is, that where the facts and circumstances disclose that the improvement is the joint undertaking of both the lessor and lessee, the interest in the land of both may [584] be held under the mechanic's lien law for the improvements so made, but in the absence of such proof only the interest of the lessee is liable. Thus in Barclay v. Wainwright, supra, it is pointed out that the presence of an express covenant by the lessee to build at his own expense is not the criterion by which it must be determined whether the lessor's estate can be held for such improvements so made under contract with the lessee, but the determining factor in that regard is the *special character of each contract*. And in Dierks, etc. Lumber Co. v. Morris, supra, p. 212, it is said:

"So that in order to make such covenant (to build by the lessee) constitute an agency between the lessor and lessee we are necessarily bound to look at the facts to determine whether there was an agency or not. If on account of the shortness of the lease, the extent, cost and character of the improvements, or other facts in evidence, such as the participation by the lessor in the erection or construction thereof, it can be seen that the improvement is really for the benefit of the lessor and that he is having the work done through his lessee, then it can be said with justice that the lessee in such case is acting for the lessor. But, if the facts do not show this, it

would seem to be untenable to say that the mere inclusion in a lease of a covenant to improve and repair on the part of the lessee will create the relation of agency between the tenant and the landlord, especially where the tenant is to do the work at his own expense and is expressly denied any authority to bind the landlord."

Philip Gruner, etc. Lumber Co. v. Nelson, supra, holds that the fee of the lessor is bound by the lien based upon an improvement made by the lessee pursuant to a covenant in the lease. This case, together with the other Missouri cases and certain Illinois cases, in which very broad language was likewise used, are reviewed and explained in Dierks, etc. Lumber Co. v. Morris, supra, pp. 219–222, as follows:

"Passing to our decision, we find that every one of [585] them, which hold that the fee is bound by the lien, do so only after examining the facts to see whether or not the lessee is in fact doing the work for the lessor, or whether the improvement is for the present or immediate benefit of the reversionary or freehold interest.

"In the cases of Dougherty-Moss Lumber Co. v. Churchill, 114 Mo. App. 578, 90 S. W. 405, and Curtin-Clark Hardware Co. v. Churchill, 126 Mo. App. 462, 104 S. W. 476, the lessee was bound to change a hotel into a theater at an expense of $20,000 and the property became the lessor's at the end of ten years. Besides, the lessor obligated the lessee to build and placed no restriction on his authority to bind with a lien. And the court held that presumptively the lessor made the lessee his agent to bind the whole property for the improvements. But in the case now before us the clause saying the lessee shall have no such authority takes away any such presumption.

"In the case of Winslow Bros. Co. v. McCully Stone Mason Co. 169 Mo. 236, 69 S. W. 304, the court bound the freehold interest because the evidence showed that the owner of the fee was really having the work done by the lessee as a mere straw man. On page 248 the court says the lessee was in reality the *alter ego of the lessor*, the Van Raalte Investment Company. And on page 244 the court says the mere fact 'that the tenant has contracted with the owners to make certain improvements on the leased premises, does not make the land or the landlord's interest in the land subject to a mechanic's lien. For in such cases the tenant acts for himself and is not the agent of the owner.' In this case also the court held that it was proper to instruct the jury that if it was the intention, purpose and understanding between the fee owner and the lessee that the latter should complete the building for the immediate use, enjoyment and benefit of the lessor, and it was completed in pursuance to that understanding, then plaintiff was entitled to a lien against the fee.

"In Crandall v. Sorg, 198 Ill. 48, 64 N. E. 769, the [586] lessor was jointly interested with the lessee in erecting the improvements which were to cost $300,000 while the price of the lot on which they were erected was a much smaller sum. The court held that the defendant Sorg was not an ordinary lessor but was actively engaged in erecting the building, and did not provide that the lessee should have no authority to bind his interest with a lien, but merely contented himself with a stipulation that if any liens were created the lessee would pay them and hold him harmless.

"The case of Carey-Lombard Lumber Co. v. Jones, 187 Ill. 203, 58 N. E. 347, was decided under a statute of that State which authorized a lien against a lessor's freehold if the latter 'authorized or knowingly permitted' the lessee to improve the premises, a statute vastly different from ours. In addition to the statute in that case the court held that by the terms of the lease the right of the lessee to create a lien was recognized and a provision for forfeiture was made in case any were created. Furthermore, the improvements consisted of a building to cost not less than $6000 and the lease was for only five years with privilege of the lessor to terminate sooner and the lessor had in fact terminated the lease and the lessor was insolvent.

"We have carefully gone through all of the cases cited by appellant and find that in all of them there is either a statute which by its peculiar terms authorizes a lien against the freehold without reference to the question of agency, or the facts were such as to make the owner of the freehold directly responsible for the improvements.

"On the other hand the principle is laid down that a provision in a lease expressly requiring the lessee to make specified improvements or repairs does not make the lessee, in so doing, the agent of the lessor so as to bind the reversion of the lessor with a mechanic's lien therefor. 20 Am. & Eng. Enc. of Law (2d ed.) 319; Cornell v. Barney, 94 N. Y. 394; Rothe v. Bellingrath, 71 [587] Ala. 55; Morrow v. Merritt, 16 Utah 412, 52 Pac. 667. It is true the text says there are decisions to the contrary, but those contrary decisions without exception, in the facts stated, show either a participation by the lessor in the building in addition to the mere covenant in the lease, thus making the lessee actually the agent of the owner to erect the building, or that the case was decided under statutes which so defined the word agent as to bring the persons ordering the improvements within the meaning of that term."

Measuring the facts of this case by the law so ascertained, it is manifest that the judgment of the trial court is right, as the liens

claimed may not be sustained under the provisions of § 4025 as affected by § 4027. The lessors neither participated in the erection or construction of the improvement nor approved the plans therefor. They had nothing to say as to the size and architecture of the building or the material of which it should be built. While it was to cost not less than a substantial, designated sum, there is no allegation nor showing that the rents reserved were greater than the reasonable worth of the vacant lots upon which the improvements were to be constructed. If the improvements increased the value of the freehold interest, it was not primarily so but only as a future incident thereto, and the owner of the fee was not the owner of the building or structure within the meaning of the mechanic's lien law. He would become such owner only by operation of law through the expiration or termination of the lease, or at least only when the building was "commenced and completed," when, by the language of the lease, and not until then, it would become a part of the realty of the lessors.

However, should we assume that presumptively the lessors made the lessee their agent by reason of the covenant to build and certain other conditions in the lease, the clause therein expressly denying to the lessee the right and power to charge any lien or incumbrance of [588] any kind against the lessors or their estate, nullifies and renders noneffective such presumption. When a lease provides that the lessee shall erect a building on the premises and is silent as to the authority or want of authority of the lessee to subject the lessor's interest to a mechanic's lien, it is only by implication that it can be held that such authority exists. No such implication can arise in this case for the lease expressly denies to the lessee the authority to do anything with the premises that would bind the interest of the lessors therein with a mechanic's lien. The laws of this state do not prohibit or render non-effective a contract so limiting the power of a lessee, and it is unnecessary to inquire into the constitutionality of a law that should attempt to prohibit such contracts when the public health, safety, morals and welfare are in no wise involved. The power to contract with reference to one's property is a valuable right and courts should and will construe statutes as not abridging that right, when possible, in order to preserve the constitutionality of the law. Moreover, as a lease of real property is an instrument which, under the law may be recorded and thereupon constitutes constructive notice to those subsequently acquiring an interest in the premises, the rights and authority of the parties thereto and whatever agency it might be presumed was created thereby to deal with the estate, or the interest of either of such parties therein, is necessarily subject to the conditions and limitations expressed in the instrument creating the agency, unless otherwise provided by law. §§ 694, 707, Rev. Stat. 1908; Perkins v. Adams, 16 Colo. App. 96, 100, 63 Pac. 792: Delta County Land, etc. Co. v. Talcott, 17 Colo. App. 316, 321, 68 Pac. 985; Loser v. Plainfield Savings Bank, 149 Ia. 672, 126 N. W. 1101, 31 L.R.A.(N.S.) 1112.

Thus, in Cornell v. Barney, supra, it was held that when the lease was recorded and permanent improvements constructed on the leased premises by the lessee [589] under a covenant in the lease obligating him to do so, lien claimants for such work were chargeable with notice of all the terms contained in the lease. And in Atlas Portland Cement Co. v. Main Line Realty Co. supra, upon the effect of the record of a lease, it is said: "It is true, as argued, that the contract of lease required the building to be erected; but it was to be erected by the lessee and the lessee alone and at its cost. The lease was of record and the appellants must be charged with notice of its contents."

Plaintiffs in error, however, contend that as the clause withholding from, and denying to, the lessee the power to charge the interest of the lessors with any mechanic's lien or incumbrances of any kind, contains a covenant upon the part of the lessee that "it will not permit or suffer any bill of any mechanic, labor or material man to be or remain unpaid," and requires the lessee, before commencing the erection and construction of the building, to furnish a bond satisfactory to the lessors guaranteeing the due observance of the clause, that thereby the contract recognizes that such liens might accrue, be filed, and be binding against the interest of the lessors. We do not concur in this view. On the contrary, we do not think it changes in any manner the meaning of that part of the clause which limits the authority of the lessee in the premises. The lessors were certainly interested in having all bills paid to the end that the lessee's interest in the premises be not subjected to a mechanic's lien and a new tenancy created by operation of law through the enforced assignment of the lease. And this is clearly the purpose of the requirement in that respect.

It is not conceivable that the legislature made provision, as it did by § 4029, supra, whereby an owner could protect his interest in land against mechanics' liens for improvements made thereon with his knowledge but in relation to which he had not contracted, and made like provision by § 4025, supra, whereby he could, when [590] entering into a certain class of contracts, that is, with a contractor or builder, limit to such contract price the lien liability of his land, and in-

tended, as to all other contracts relative to improvements upon land, that an owner's rights in the premises and the liabilities that might be impressed thereon as a lien, could in no wise be protected and limited. Such a legislative enactment, if not unconstitutional, would be, at least, unjust and inequitable. We cannot sanction a rule of law, unless by legislative enactment we are so required to do, whereby one man's property may be taken for the debts of another and such person be without power to prevent it. We, therefore, withdraw the former opinion filed herein and affirm the judgment of the trial court.

Judgment affirmed.

Decision *en banc*.

Hill and Scott, JJ., dissent.

MUSSER, C. J. (*specially concurring*).—I agree that the judgment should be affirmed, but I rest my conclusion solely upon clause six of the lease, which is as follows:

"It is expressly understood and agreed (and notice is hereby given), that nothing herein shall authorize the lessee or any person dealing through, with or under it to charge said lands, or any interest of the lessors therein, or this lease, with any mechanic's lien, or lien or incumbrance of any kind whatever. On the contrary (and notice is hereby given), the right and power to charge any lien or incumbrance of any kind against the lessors, or their estate, is hereby expressly denied, and the lessee covenants that it will not permit or suffer any bill of any mechanic, labor or material man, or for any furnishings or equipments of said premises, to be or remain unpaid. The lessee shall, before commencing the erection and construction of a building on said premises, furnish [591] or cause to be furnished a bond in a bonding company satisfactory to lessors, guaranteeing the due observance of this clause 6."

If a mechanic's lien can be fastened upon the reversionary interest of the lessors it must be that the lease made the lessee the agent of the lessors with authority to so contract with reference to the erection of the contemplated building as to bind the interest of the lessors. The agency, if any, that existed between the lessors and lessees was created by the lease. Plainly that agency did not arise from that part of Sec. 4025 Rev. St. '08, which says that "every contractor, architect, engineer, subcontractor, builder, agent or other person having charge of the construction, alteration, addition to or repair, either in whole or in part, of any building or other improvement as aforesaid, shall be held to be the agent of the owner for the purposes of this act." The lessee was not one of those enumerated in the statute who was to be deemed the agent of the owner for the purposes of the act unless the lease created such agency. If the lessee was at all the agent it was by virtue of the lease and not of the statute. It is elementary that the authority of an agent is limited and controlled by the instrument creating the agency and that any person dealing with an agent, and having knowledge of the limitations upon the latter's authority, must at his peril contract with the agent within the known limits of that authority. When a lease provides that the lessee shall erect a building on the real estate and is silent as to the authority or want of authority of the lessee to bind the lessor's interest with a mechanic's lien, it is only by implication, if at all, that it can be said that such authority exists. No such implication can be made in this case, for clause six of the lease, expressly and plainly, in words that need no other construction than their obvious meaning denotes, withholds from and denies to the lessee the authority to bind the interest of [592] the lessors with a mechanic's lien. There is no escape from this. The part of the clause which provides that the lessee would "not permit or suffer any bill of any mechanic, labor or material man, or for any furnishings or equipments of said premises, to be or remain unpaid;" is only a personal covenant; that is, one that extends only to the lessors and lessees. Under the lease, a lien would attach to the leasehold interest of the lessee in the premises, and the lessors were interested in seeing that the bills for labor and material were paid. The part of the clause before that withholds from the lessee any and all authority to encumber the lessor's interest with a lien. Nor does the sentence of the clause which provides that the lessee shall furnish a bond guaranteeing the due observance of the provisions of the clause in any manner change the meaning of that part of the clause which limits the authority of the lessee. The lessors were certainly interested in having the provisions of the lease carried out and they had the right to exact a bond guaranteeing such consummation. Any contractor, subcontractor, material man or laborer who would read this clause of the lease could obtain therefrom no other idea than that it was the intention of the contracting parties, the lessors and the lessee, that the interest of the lessors should not be subject to mechanics' liens in consequence of the erection of the building contemplated in the lease.

When the intention of the parties to a contract is found in a contract then it is known what the contract is. What the parties intended by clause six is obvious and plain. If the contract that the interest of the lessors should not be subject to a mechanic's lien is valid then these plaintiffs in error were not entitled to a lien against the inter-

est of the lessors and the judgment of the lower court should be affirmed. In order that it may be said that the plaintiffs in error had a right to mechanics' liens on the interest of the lessors it must be held that that part of the lease forbidding such a lien is void and without [593] effect; and then it must be implied (for there are no express provisions in the lease to that effect) that the lessee was the agent of the lessors with authority to encumber the interest of the latter with a lien. In order to reach that holding and implication it must be held first, that the mechanics' lien laws of this state prohibit such a contract between the lessor and lessee, and second, that it was within the constitutional authority of the legislature to prohibit such a contract when the public health, safety, morals and welfare were in no way involved. The lien laws of this state do not prohibit or render ineffective such a contract between a lessor and lessee, hence it is not at all necessary to inquire into the constitutionality of a law that should attempt to do so. The power to contract with reference to one's property when such a contract does not affect the public health, safety, morals or welfare (which matters are under the recognized cognizance of the legislature) is a very important right, and if it can be done, courts will construe statutes as not abridging that right so as to preserve the constitutionality of the law. In Illinois, it has been held that the right to so contract is clearly a property right and if the legislature should pass a statute prohibiting or restraining an owner and contractor from agreeing that the building should be relieved of liens, that such a statute would be unconstitutional.—Kelly v. Johnson, 251 Ill. 135, 95 N. E. 1068, 36 L.R.A.(N.S.) 573; Cameron-Schroth-Cameron Co. v. Geseke, 251 Ill. 402, 96 N. E. 222.

While I do not express any opinion as to the constitutionality of such a statute, it seems to me that the Illinois cases, and all other authorities are to the effect that the right to contract with reference to one's property is a property right. To say that a person cannot lease his property upon such terms and conditions as he may choose, is to restrain him of full dominion over his property, and certainly any law which so restrains him beyond matters which effect the public health, safety, [594] morals or welfare, must do so expressly or by necessary implication, even if it may be constitutional. If such a law is constitutional at all it must come from the legislature and not from the courts. Our Mechanics' Lien Act provides that its provisions shall be liberally construed in order that its purposes may be achieved, but this refers to a liberal construction of what is in the act. It does not mean that the courts, in order that a person may have a mechanic's lien, have authority to drag into the act that which is not there, nor to disregard elementary principles of law, nor by unnecessary implication or doubtful construction lessen that dominion over his property to which an owner is entitled. Sec. 4033 provides that "no agreement to waive, abandon or refrain from enforcing any lien provided for by this act shall be binding except as between the parties to such contract." That section cannot be applied here, for an agreement to waive, abandon or refrain from enforcing a lien must be made by a party entitled to a lien; that is, by a contractor, subcontractor, material man or laborer. There is no such a contract in this case. Sec. 4029 provides that any building, etc., constructed upon any land, with the knowledge of the owner, shall be held to have been erected at the instance and request of such owner, so far as to subject his interest to a lien, unless the owner shall, within five days after he shall have obtained notice of the construction, give notice in a certain manner that his interest shall not be subject to a lien, provided that the provisions of the section shall not apply to any owner who shall have contracted for such erection. Plaintiffs in error contend that because the notice prescribed was not given, the liens attached to the lessors' interest. Assume, for the sake of the argument, that the section would apply in the absence of any notice. That section must contemplate an owner who has not already, in some effectual way, given notice that his interest will not be subject to a lien. Certainly the legislature did not have [595] in mind that a person who had already given notice should give additional notice in a certain manner. Nor does the section say expressly, or by necessary or any implication, that a lessor who has already contracted with a lessee, in a manner of which the world must take notice, that the interest of the lessor shall not be subject to a lien, must nevertheless give further notice, as prescribed by the statute, in order that his property shall be free from a lien. Nor can it be reasonably said that the legislature intended that one who already has ample notice from a lessor that the latter's interest shall not be subject to a lien, shall nevertheless be given further notice of that fact in the particular manner prescribed in the section before he can be deprived of a lien. Such additional notice would be needless to one already notified and to say that, because it was not given in the particular manner prescribed in the statute, one who already knows of the fact to be imparted shall nevertheless have a lien, would be somewhat arbitrary to say the least.

Mechanics' lien laws can be sustained only upon the theory that the lien is engrafted upon the interest of the owner because he has

consented to the improvement in such a way as to permit a lien. In order that a lien may attach, the circumstances must be such as to show consent of the owner or to justify an inference of it. Wheaton v. Berg, 50 Minn. 525, 52 N. W. 926. In order to sustain a lien for the plaintiffs in error in this case, under that section it must be taken that the consent of the lessors is conclusively presumed to have been given in such a manner as would cause their interest in the property to be subject to a lien, because they failed to give the prescribed notice. In the case last cited, the Minnesota court had under consideration a section of the lien laws of that state almost identical with Sec. 4029 of our statutes, and that court struggled manfully to reach the conclusion that the section was constitutional, [596] and in order to do so it held that the presumption that the owner had consented that a lien might attach to his interest in the premises, by failure to give the required notice was *prima facie* evidence that he had consented rather than conclusive, and that section prescribed a rule of evidence. The court said:

"Those who may be engaged in contributing labor or material which go to the improvement of the land may often have reason to suppose that the work is being carried on at the instance or with the consent of the landowner. It is important to such persons that, if possible, it be made known then if the owner's consent be wanting, and that, therefore, they cannot subject the property to liability for the labor or material supplied by them for its improvement. Hence the statute, in effect, makes it the duty of the owner, who knows of the improvement being made, to give the prescribed notice if he would avoid the inference that is done with his consent. From the neglect of the duty created by statute the inference follows. But it would seem to be impossible to construe this provision as making the mere neglect to give the specified notice *conclusive* upon the landowner in all cases. The circumstances must be such that he can comply with the statutory requirement, or he cannot be thus concluded."

It can be added with the same degree of force that the circumstances must be such that the persons interested in having a lien attach have not already received notice that the owner's interest shall not be subjected to a lien. The court further said that an owner who has knowledge of the erection of the building upon his premises may nevertheless show that he could not give the required notices and thus excuse his failure for giving them. Equally it can be said under this statute that the owner, in order to relieve his property of a lien may show that he has already given notice to that effect and that all interested did know that he had not consented [597] that his interest should be subject to liens, and that, therefore, it would be a needless thing to give the notice specified in the statute. It cannot be conclusively presumed that the lessors in this case consented that their interest might be subjected to a lien when they expressly contracted with the lessee that it should not be and gave full notice to the world of such contract before anything was done toward the erection of the building. It is to be observed that Sec. 4029 provides for actual or constructive notice at the option of the owner. It does not expressly or impliedly exclude other actual notice, which may be given, nor does it in any manner assume that other constructive notice provided by general statute or law would not be sufficient.

The Minnesota court, after showing that construing the section as conclusive against the landowner, would make it unconstitutional or of doubtful constitutionality, said:

"But some reasonable effect should be given to the statute if it be possible; and this may be done by construing the statutory presumption, which springs from the failure to give notice, as being of a *prima facie* nature rather than conclusive, and as imposing upon the landowner who, knowing the fact of the improvement, has failed to give the prescribed notice, the burden of relieving himself from the statutory imputation of having consented to what was being done, by proof of his inability to give the prescribed notice of his dissent, and that in fact the improvement was made without his authority or consent. As the statute was obviously intended to establish a *rule of evidence*, and as it cannot be sustained if the statutory presumption is to be construed as conclusive, but may be if it has the qualified effect which we have suggested, we conclude that it must be so construed. The language of the law does not forbid this construction, and there are apparent reasons which may have led the legislature to impose the burden of [598] proof on the party who has peculiar knowledge concerning the matters to which evidence is to be directed."

From what has been said, it follows that the section furnishes a rule of evidence, by which, in the first instance, the failure of an owner with knowledge to give the notice therein specified raises the presumption that the owner consented that his property be subjected to a lien, and to overcome this presumption that the owner consented that his property be subject to a lien, he must go forward with evidence to show that he could not reasonably give the notice, or that he had already effectually given actual notice, or such constructive notice as would be given by recording a lease with a provision similar to that in clause six of the present lease.

the act. Therefore, ownership of the building, [571] structure or improvement, and the doing of the work thereon or the rendering services or furnishing material therefor at the instance of such owner or his agent, plus ownership in the same person of the land upon which such structure or improvement is erected or placed, are essential, under §§ 4025 and 4027, to the validity of a lien upon such land. This meaning is further evidenced by subsequent provisions of the latter section. It constitutes the lien, where it is for work done or material furnished for an entire structure, erection or improvement, superior thereon to prior liens or incumbrances of the land upon which the same is erected or placed, and authorizes in the enforcement of such lien the sale of such improvement and the removal of the same from the land upon which it stands. It further provides that the lien given by the act shall extend to any "conveyable interest of such owner or reputed owner in the land upon which such building, structure or improvement shall be erected or placed," or that he may thereafter acquire subsequent to the making of the *contract* or the commencement of the work upon such structure and before the establishment of such lien by process of law. It, therefore, follows that under § 4025, coupled with § 4027, it is a condition precedent to the validity of the lien that the person, whose interest in the real estate it is proposed to bind or affect thereby, must have acted affirmatively relative to the structure or improvement placed upon the land, and must have some ownership therein.

In Cornell v. Barney, 94 N. Y. 394, 398, under a statute in substantial effect the same as our §§ 4025 and 4027, materials were furnished by plaintiffs to a lessee (Salem), for an improvement in process of construction by the latter in pursuance of provisions in his lease by which he covenanted to erect a permanent building on the demised premises of, at least, a specified value, within a designated time, and in which the lessor (Barney), covenanted to loan a specified sum as [572] the building advanced, to be secured by mortgage on the lessee's interest in the premises, and the building, upon the termination of the lease, to revert to and become the property of the lessor. The right to the lien was denied on the interest of the lessor for the reason that the material for which the lien was claimed was not furnished under any contract with him or at his instance, and that he did not cause the building to be constructed. Upon this point the court, at page 398, said:

"Section 1 of the Lien Act, applicable to the city of New York (Chap. 378 of the Laws of 1875), provides that 'every person performing labor upon, or furnishing materials to be used in the construction, etc., of any building, etc., shall have a lien on the same for the work or labor done, or materials furnished by each, respectively, whether done or furnished at the instance of the owner of the building improvement, or his agent.' To give a lien under this section, the work must have been done or materials furnished at the instance of the owner of the building or the improvement, or at the instance of his agent, and the lien is upon the building or other improvement. Such is the plain language, and there is no room for construction. Here the iron was not furnished at the instance of Barney. His contract with Salem did not even require any iron to be used in the erection of the building, and it does not appear that he had anything whatever to do with Salem's contract with the plaintiffs, or with the procurement of the iron from them, or that he knew anything about it. It is true that Salem covenanted with Barney to erect the building, and that Barney agreed to advance money to be applied toward the erection of the same, and that he was to have a mortgage on the same; yet the building was not erected for Barney, and was not, before the termination of the lease, to belong to him, and in no proper sense could the material furnished for the same be said to be furnished at his instance. In harmony with this view is section 2 [573] of the act which provides that 'any person, who at the request of the owner of any lot, etc., grades, fills in, or otherwise improves the same, or the sidewalk or street in front of or adjoining the same, shall have a lien upon such lot for his work done and materials furnished.' Here the word 'request' is used in substantially the same sense as the word 'instance' in the prior section, and was intended to have the same scope.

"Section 1 having provided for a lien upon the building, section 3 provides for a lien upon the lot upon which the building stands, as follows: 'The land upon which any building, etc., is constructed, etc., shall be subject to the liens if at the time the work was commenced or materials for the same had commenced to be furnished, the land belonged to the person who caused said building, etc., to be constructed, etc.; but, if such person owned less than a fee-simple estate in such land, then only his interest therein shall be subject to such lien.' The plaintiffs can have no lien under this section upon Barney's interest in the land, because he did not in any proper sense cause the building to be constructed. Within the meaning of this section the building must be constructed for and at the expense of the owner of the land or under contract with him. Salem caused this building to be constructed, and the plaintiffs could have a lien upon his interest in the land under his lease."

This is not the case, however, under § 4029, coupled with § 4027. Thereunder a lien may attach to the lands of a person or his interest therein by his non-action, coupled with his knowledge that the building or structure was erected upon or removed to his land, or, being thereon, was altered, added to or repaired. Indeed, it does so attach under such circumstances, unless he is excluded from the application of the mechanic's lien law by reason of the provisos in the section, or within five days after he shall have obtained knowledge of the work or the intention to do the same he gives notice as required [574] therein that his interest shall not be subject to any lien for such work. The controlling distinction in this respect between §§ 4025 and 4027, on the one hand, and §§ 4029 and 4027 on the other, is, as hereinbefore stated, that in order to fasten a lien upon a person's interest in real estate under the provisions of the former sections, such person must have some ownership in the improvement constructed, etc., and must have, as such owner, contracted to have the same erected, either directly or through an agent thereunto authorized; while under the provisions of the latter sections, such contractual relation cannot exist; and the ownership in the structure or improvement essential to the validity of the lien is invested in the owner of the land by operation of law. In other words, the inception of the right to a lien under § 4025, coupled with § 4027, grows out of contract; while under § 4029, coupled with § 4027, it arises from estoppel. Nor is this distinction affected by the declaration in § 4025, that in default of filing the contract for the work, or a memorandum thereof, as therein required, the labor done and materials furnished by the parties named, prior to the filing of the same, shall be deemed to have been done and furnished at the personal instance of the owner, and the person furnishing the same shall have a lien for the value thereof. It is still the affirmative contractual relation of the owner of the property to the improvement made or work performed upon which the claimant's right to the lien is based, and the effect of the default of the owner as to filing the contract or a memorandum thereof only removes the statutory restriction that the lien can extend only to the contract price and enlarges the right in that regard under the principle of estoppel so as to cover the value of the work performed or material furnished. Indeed, in Grimm v. Yates, 58 Colo. 268, 145 Pac. 696, decided at this term, we expressly declared that the purpose of § 4029 "is to require an owner, where another in possession of his property [575] is making improvements, which by the terms of the agreement between the owner and the party in possession, the latter is without authority to make, to give notice to those performing labor or furnishing materials for such improvements, within five days after he shall have obtained knowledge that they are being constructed, that his interest in the property, upon which such improvements are being placed, shall not be subject to any lien therefor, and that his failure to do so renders his interest subject to a lien for such improvements."

Applying the law to the facts of this case it follows that the liens sought to be established and enforced herein cannot be sustained under § 4029 as affected by § 4027. The defendants in error were under no obligation by virtue of those sections to give or post the notice therein required. They were in no wise engaged in constructing the improvement but had entered into a contract with reference thereto; and were, therefore, by the very letter of a proviso of the section not of the class to whom the section applies but of a class expressly exempted from its terms. Moreover, the lessee was the party in sole possession of the premises and was making no improvement thereon which the terms of its lease and contract with the defendants in error did not authorize it to make. The contract here involved possesses no element of that described in § 4025, supra, as a contract between the "owner" and a "contractor." By its terms nothing was to be paid by defendants in error but the work was to be done by the lessee at its own expense; and the acts of plaintiffs in error relative to the improvement were caused by the lessee and not by the lessors. Moreover, defendants in error were not the reputed owners of the structure or improvement, but, on the contrary, the lessee, in the contracts with plaintiffs in error, was designated as such owner. It cannot be seriously claimed that under the agreement the lessee contracted with the lessors to furnish materials or perform any of the labor or services [576] named in the foregoing section of the statute, by the doing of which it would, by that section, be known as a "contractor." A contractor is "one who as an independent business undertakes to do specific jobs of work without submitting himself to control as to the petty details."

Plaintiffs in error, however, contend that the well recognized rule declared in Shapleigh v. Hull, 21 Colo. 419, 425, 41 Pac. 1108, is applicable to the facts of this case, and that their liens attach to the fee of defendants in error in the premises by virtue of the provisions of § 4025. We held in that case that where a contract of sale of real estate expressly requires the vendee to make improvements thereon, the interest of the vendor in the land is subject to the Mechanic's Lien Law for the improvements so made. Whether the rule should apply and subject the title of the lessor to a lien where the

lease requires the lessee to make permanent improvements upon the leased premises of not less than a stated value, without other conditions or limitations, has never been determined in this state. In Antlers Park Regent Min. Co. v. Cunningham, 29 Colo. 284, 286, 68 Pac. 226, counsel contended for the application of the rule but it was found unnecessary to decide the point therein. Williams v. Eldora-Enterprise Gold Min. Co. 35 Colo. 127, 130, 83 Pac. 780. That there is a clear distinction between the principles involved in the two classes of contracts is obvious. In the former the estate dealt with is one entity, and the contract of sale, containing the building requirements, can and does relate to no other thing. The vendor having required the vendee to erect the structure on the only estate that existed, and of which he was still the owner, the improvement likewise is his within the meaning of the law, and such owner's interest in the premises, by the terms of the statute, is, therefore, subject to the lien. There being but one estate in the land and both the vendee and vendor having an interest therein, the ownership of the permanent improvement placed thereon is likewise in both and the vendee in making the [577] improvement is necessarily the agent of the vendor. Under a lease, however, the estate is divided into term and reversion, and so is the ownership of the thing. In fact, there are two entities: the leasehold estate and the reversionary estate, with either of which, it would seem, parties should be permitted to deal independently of the estate of the other, and when they do so their rights and obligations in the premises, except as affected by statute based upon the doctrine of estoppel, should be measured accordingly. However, could it be said that this distinction does not logically exist, it is, nevertheless, certain that the mere fact, that the terms of a lease obligate the lessee to place permanent improvements upon the premises at his own expense, does not, of itself, constitute him the agent of the lessor in the erection of such improvements. The rule is clearly stated in Atlas Portland Cement Co. v. Main Line Realty Co. 112 Va. 7, 70 S. E. 536, 537, as follows:

"It is insisted that the appellants' claims are liens upon the lessor corporation's interest in the lot, because the lessee corporation was in effect the agent of the lessor in causing the building to be erected on the lot. The evidence fails to sustain this contention, unless in a contract of lease, where the lessee is by its terms required to erect a building upon the leased premises, the latter becomes the agent of the lessor. It is well settled that such relation does not make the tenant the agent of the landlord, and that it does not give him the implied authority to create a lien upon the landlord's interest therein for improvements made thereon, unless the law-making power expressly or by necessary implication enacts otherwise."

Citing, Phillips on Mechanics' Liens, §§ 89, 90; Boisot on Mechanics' Liens, §§ 289, 291; Jones on Liens, §§ 1273, 1276; Mills v. Matthews, 7 Md. 315; Rothe v. Bellingrath, 71 Ala. 55; Harman v. Allen, 11 Ga. 45.

In Winslow Bros. Co. v. McCully Stone Mason Co. 169 Mo. 236, 69 S. W. 304, while the freehold interest was held subject to the mechanic's [578] lien for improvements erected upon the premises by the lessee under a covenant in the lease obligating him to do the same, the holding was not based upon the covenant alone, for the court on page 244, says: that the mere fact "that the tenant has contracted with the owner to make certain improvements on the leased premises, does not make the land, or the landlord's interest in the land subject to a mechanic's lien. For in such cases the tenant acts for himself and not as agent of the owner."

And in Dierks, etc. Lumber Co. v. Morris, 170 Mo. App. 212, 156 S. W. 75, based upon a statute requiring, as the ultimate foundation of the lien, a contract made with the owner of the land sought to be charged with the lien or with that owner's agent, it was held that the statute, together with the mere covenant in a ninety-nine year lease to make permanent improvements upon the leased premises, would neither constitute the lessee the statutory nor the contractual agent of the lessor in making such improvements. The court therein, on page 216, upon the latter point, used the following language:

"Now, can it be said that merely by reason of the fact that a lessee covenants with a lessor to make certain repairs and improvements which will become the property of the lessor at the end of the term, this necessarily makes the lessee the agent of the lessor so as to bind the latter's freehold interest with the lien for the materials used in the improvement? If so, then no matter what is the character and extent of the improvements, nor how strong the language of the lease denying to the lessee the authority to bind the lessor's interest with a lien, the latter will nevertheless be bound, because the lien is a creature of the statute; and whenever the lessee, in contracting for improvements, acts as the 'agent' of the lessor, within the meaning of that word as used in the statute, the freehold is bound by the lien regardless of the inhibitory terms of the lease."

The opinion cites with approval, Albaugh v. Litho-Marble [579] Decorating Co. 14 App. Cas. (D. C.) 113, and quotes therefrom the following:

The covenant "involves no theory of agency, but quite the reverse. The parties to the lease dealt with each other, not as principal

and agent, but practically as adverse parties. To hold that a lessor covenanting with the lessee for the security of his interest under the lease, the payment of rent probably, should construct a building upon the land in the place of one to be demolished, would thereby and by virtue of such covenant make the lessee his agent and bind himself personally, as well as his property, for the contract of the lessee in the performance of his covenants, seems to us to be wholly without warrant either in law or in reason; we greatly question whether even the most positive legislation could impose liability upon one person for the obligation of another in such a contingency. Certainly no such liability is sought to be imposed by our mechanic's lien law. The covenant in question is itself evidence of the intention of all the parties that the lessor should not be bound."

Under this view of the matter it becomes necessary to ascertain: (1), whether the statute here under consideration has expressly or by necessary implication constituted the lessee the agent of the lessor and invested him with the authority to create a lien upon the lessor's interest in the fee for improvements made upon the leased premises; or, (2) of the covenants in the lease, coupled with the other facts of the case, constitute the lessee the agent of the lessor in making the improvements for which the liens are claimed?

Mechanic's lien statutes of our several states give but little aid in construing our own. They differ greatly in their terms and are subject to frequent amendment, and different provisions of the same statute often seem inconsistent and a lien may be sustained under one provision when other provisions would seem to negative the right thereto. Moreover, courts have too frequently applied, [580] as controlling precedents, the broad reasoning and declarations of a decision made under one statute to the facts of a case arising under an entirely dissimilar statute. By reason of these things the decisions and reasoning of the courts cannot always be accepted at their *prima facie* value, and should be cautiously considered and applied. However, much of the contradiction and confusion would disappear if the distinction between a contractual agent and a statutory agent, together with the particular facts of the case and statute under which such decisions were severally rendered, are kept clearly in mind in the consideration of each. Statutes giving liens for improvements made upon land "with the consent" or "with the permission" or "with knowledge" of the owner of such land, or where the owner of the land "knowingly permits improvements to be made" thereon, and statutes of like character, differ fundamentally from those where the lien must be founded on contract with the owner of the land. Under the former statutes the lien fastens upon the land through knowingly submitting or permitting it to be improved, plus the actual improvement thereof. These statutes, it would seem, discard the requirement of an actual contract and adopt the theory of estoppel. In other words, where by the statute the lien must be founded upon contract with the owner of the land, or his agent thereunto authorized by such owner, the true rule is that the lien claimant of a valid lien must establish, by proper proof, the fact that he is the contractual agent, either directly or indirectly, of such owner relative to the making of the improvement, or furnishing the material, for which the lien is claimed, while under statutes which fasten the lien by virtue of the fact that the improvements were placed upon the land "with the consent," "permission" or "knowledge of the owner" thereof, the person doing the work or furnishing the material therefor is essentially the statutory agent of the owner of the land who submitted or permitted it to be [581] improved. Section 4029, supra, with the provisos thereof eliminated, is of the latter class, while sec. 4025, supra, is of the former class. The fact that the latter section declares that any person having charge of the construction of the improvement is thereby constituted the agent of the owner, in no sense nullifies the previous requirement, as affected by Sec. 4027, supra, that the construction of the improvement by the owner of the land or by his contractual agent is essential to the inception of a lien thereunder. This is true because by that section there can be no statutory agent until the owner, either directly or through some contractual agent thereunto authorized, has moved forward in the construction of the improvement. In other words, there can be no statutory agent thereunder until subsequent to the creation of a contractual agent, and how far the lawmaking power could go in transforming the latter into the former would present a difficult question, for "there is no constitutional way for divesting a man's title except by his own act or default." Spry Lumber Co. v. Sault Sav. Bank Loan, etc. Trust Co. 77 Mich. 199, 43 N. W. 778, 6 L.R.A. 204, 18 Am. St. Rep. 396. We, therefore, decline to accept as sound the construction placed upon a statute of apparent similar import to our § 4025, by the Supreme Court of Oregon, that a lessee, obligated by the terms of the lease to build on the land and the building to revert to the lessor, thereby becomes a "contractor" and the statutory agent of the lessor in the construction of such improvements. Oregon Lumber, etc. Co. v. Nolan, 75 Ore. 69, 143 Pac. 935, 146 Pac. 474. The provisos in § 4029 and this construction of § 4025 harmonize and render

the two sections consistent with each other and without which they would seem contradictory. Thus it is provided in the former that the contractor's lien extends only to the contract price, which also limits the lien rights of subcontractors, laborers, material men, etc., unless the owner [582] fails or neglects to file the building contract or a memorandum thereof for record, in which event the rights of the latter extend to the value of the services rendered or materials furnished, to the same effect as if the materials were furnished or the work done at the personal instance of the owner; while under § 4029 the owner, with knowledge that his property is being improved without his having contracted in relation thereto, can act affirmatively and avoid liability therefor.

The distinction between the two classes of statutes and the principles involved are clearly recognized and applied in the New York decisions, in which state the different classes of statutes have been in force and their effect considered and determined. In Cornell v. Barney, supra, the two classes are considered and the effect of each clearly stated and announced, and our conclusions are in conformity therewith. That case was under a contract statute of that state, being § 1 of Chap. 379, Laws of 1875, while Burkitt v. Harper, 79 N. Y. 273, and Otis v. Dodd, 90 N. Y. 336, were under statutes of the other class, as was that of Jones v. Menke, 168 N. Y. 61, 60 N. E. 1053, relied upon by plaintiffs in error herein. Indeed, in Schmalz v. Mead, 125 N. Y. 188, 191, 26 N. E. 251, 252, which was under a permission or knowledge statute, and which involved permanent improvements made by the lessee under a covenant in the lease, it is said: "Under the statute which formerly regulated mechanic's liens in the city of New York, it is no doubt true that parties, situate as the respondents in this case are, could not have acquired any lien, as it was then necessary to show that the labor was performed or the materials furnished by the party claiming a lien under, or by virtue of, some agreement or contract between him and the owner of the land, and hence the numerous cases decided under the statute, as it then stood, have no application to this case."

[583] The Illinois cases are also under the "consent," "permission" or "knowledge" class of statutes, though the court in Carey-Lombard Lumber Co. v. Jones, 187 Ill. 203, 58 N. E. 347, and Crandall v. Sorg, 198 Ill. 48, 61, 62, 64 N. E. 769, stated, substantially, that it would regard the law the same if the statute was only of the contract class. The cases, however, did not call for the remark and it is, therefore, of no force and effect. We think, however, that what the court meant was that the facts brought the respective cases within either class of statutes, because the facts and circumstances disclose that the improvements in each case were the joint undertaking of both the lessor and lessee. Moreover, an examination of the cases cited by the Illinois court in support of the statement shows that Burkitt v. Harper, 79 N. Y. 273, Schmalz v. Mead, 125 N. Y. 188, as we have hereinbefore seen, and Miller v. Mead, 127 N. Y. 544, 26 N. E. 251, were based upon either "consent," "permission" or "knowledge" statutes, and the last two named cases were likewise upon contracts of sale, as was O'Leary v. Roe, 45 Mo. App. 567, Hill v. Gill, 40 Minn. 441, 42 N. W. 294, Henderson v. Connelly, 123 Ill. 98, 14 N. E. 1, 5 Am. St. Rep. 490, and McCue v. Whitwell, 156 Mass. 205, 30 N. E. 1134. The other cases, Philip Gruner, etc. Lumber Co. v. Nelson, 71 Mo. App. 110, Hall v. Parker, 94 Pa. St. 109, and Barclay v. Wainwright, 86 Pa. St. 191, cited in support of the point or likewise irrelevant thereto, as will hereinafter appear. While there is a diversity of opinion under the contract statutes as to the proof essential to establish the contractual agency, and under the other class of statutes, on the question of what constitutes "consent," "permission" or "knowledge," it would seem that the courts have generally recognized and applied what we believe to be the true rule in such cases, that is, that where the facts and circumstances disclose that the improvement is the joint undertaking of both the lessor and lessee, the interest in the land of both may [584] be held under the mechanic's lien law for the improvements so made, but in the absence of such proof only the interest of the lessee is liable. Thus in Barclay v. Wainwright, supra, it is pointed out that the presence of an express covenant by the lessee to build at his own expense is not the criterion by which it must be determined whether the lessor's estate can be held for such improvements so made under contract with the lessee, but the determining factor in that regard is the *special character of each contract*. And in Dierks, etc. Lumber Co. v. Morris, supra, p. 212, it is said:

"So that in order to make such covenant (to build by the lessee) constitute an agency between the lessor and lessee we are necessarily bound to look at the facts to determine whether there was an agency or not. If on account of the shortness of the lease, the extent, cost and character of the improvements, or other facts in evidence, such as the participation by the lessor in the erection or construction thereof, it can be seen that the improvement is really for the benefit of the lessor and that he is having the work done through his lessee, then it can be said with justice that the lessee in such case is acting for the lessor. But, if the facts do not show this, it

would seem to be untenable to say that the mere inclusion in a lease of a covenant to improve and repair on the part of the lessee will create the relation of agency between the tenant and the landlord, especially where the tenant is to do the work at his own expense and is expressly denied any authority to bind the landlord."

Philip Gruner, etc. Lumber Co. v. Nelson, supra, holds that the fee of the lessor is bound by the lien based upon an improvement made by the lessee pursuant to a covenant in the lease. This case, together with the other Missouri cases and certain Illinois cases, in which very broad language was likewise used, are reviewed and explained in Dierks, etc. Lumber Co. v. Morris, supra, pp. 219–222, as follows:

"Passing to our decision, we find that every one of [585] them, which hold that the fee is bound by the lien, do so only after examining the facts to see whether or not the lessee is in fact doing the work for the lessor, or whether the improvement is for the present or immediate benefit of the reversionary or freehold interest.

"In the cases of Dougherty-Moss Lumber Co. v. Churchill, 114 Mo. App. 578, 90 S. W. 405, and Curtin-Clark Hardware Co. v. Churchill, 126 Mo. App. 462, 104 S. W. 476, the lessee was bound to change a hotel into a theater at an expense of $20,000 and the property became the lessor's at the end of ten years. Besides, the lessor obligated the lessee to build and placed no restriction on his authority to bind with a lien. And the court held that presumptively the lessor made the lessee his agent to bind the whole property for the improvements. But in the case now before us the clause saying the lessee shall have no such authority takes away any such presumption.

"In the case of Winslow Bros. Co. v. McCully Stone Mason Co. 169 Mo. 236, 69 S. W. 304, the court bound the freehold interest because the evidence showed that the owner of the fee was really having the work done by the lessee as a mere straw man. On page 248 the court says the lessee was in reality the *alter ego of the lessor*, the Van Raalte Investment Company. And on page 244 the court says the mere fact 'that the tenant has contracted with the owners to make certain improvements on the leased premises, does not make the land or the landlord's interest in the land subject to a mechanic's lien. For in such cases the tenant acts for himself and is not the agent of the owner.' In this case also the court held that it was proper to instruct the jury that if it was the intention, purpose and understanding between the fee owner and the lessee that the latter should complete the building for the immediate use, enjoyment and benefit of the lessor, and it was completed in pursuance to that understanding, then plaintiff was entitled to a lien against the fee.

"In Crandall v. Sorg, 198 Ill. 48, 64 N. E. 769, the [586] lessor was jointly interested with the lessee in erecting the improvements which were to cost $300,000 while the price of the lot on which they were erected was a much smaller sum. The court held that the defendant Sorg was not an ordinary lessor but was actively engaged in erecting the building, and did not provide that the lessee should have no authority to bind his interest with a lien, but merely contented himself with a stipulation that if any liens were created the lessee would pay them and hold him harmless.

"The case of Carey-Lombard Lumber Co. v. Jones, 187 Ill. 203, 58 N. E. 347, was decided under a statute of that State which authorized a lien against a lessor's freehold if the latter 'authorized or knowingly permitted' the lessee to improve the premises, a statute vastly different from ours. In addition to the statute in that case the court held that by the terms of the lease the right of the lessee to create a lien was recognized and a provision for forfeiture was made in case any were created. Furthermore, the improvements consisted of a building to cost not less than $6000 and the lease was for only five years with privilege of the lessor to terminate sooner and the lessor had in fact terminated the lease and the lessor was insolvent.

"We have carefully gone through all of the cases cited by appellant and find that in all of them there is either a statute which by its peculiar terms authorizes a lien against the freehold without reference to the question of agency, or the facts were such as to make the owner of the freehold directly responsible for the improvements.

"On the other hand the principle is laid down that a provision in a lease expressly requiring the lessee to make specified improvements or repairs does not make the lessee, in so doing, the agent of the lessor so as to bind the reversion of the lessor with a mechanic's lien therefor. 20 Am. & Eng. Enc. of Law (2d ed.) 319; Cornell v. Barney, 94 N. Y. 394; Rothe v. Bellingrath, 71 [587] Ala. 55; Morrow v. Merritt, 16 Utah 412, 52 Pac. 667. It is true the text says there are decisions to the contrary, but those contrary decisions without exception, in the facts stated, show either a participation by the lessor in the building in addition to the mere covenant in the lease, thus making the lessee actually the agent of the owner to erect the building, or that the case was decided under statutes which so defined the word agent as to bring the persons ordering the improvements within the meaning of that term."

Measuring the facts of this case by the law so ascertained, it is manifest that the judgment of the trial court is right, as the liens

claimed may not be sustained under the provisions of § 4025 as affected by § 4027. The lessors neither participated in the erection or construction of the improvement nor approved the plans therefor. They had nothing to say as to the size and architecture of the building or the material of which it should be built. While it was to cost not less than a substantial, designated sum, there is no allegation nor showing that the rents reserved were greater than the reasonable worth of the vacant lots upon which the improvements were to be constructed. If the improvements increased the value of the freehold interest, it was not primarily so but only as a future incident thereto, and the owner of the fee was not the owner of the building or structure within the meaning of the mechanic's lien law. He would become such owner only by operation of law through the expiration or termination of the lease, or at least only when the building was "commenced and completed," when, by the language of the lease, and not until then, it would become a part of the realty of the lessors.

However, should we assume that presumptively the lessors made the lessee their agent by reason of the covenant to build and certain other conditions in the lease, the clause therein expressly denying to the lessee the right and power to charge any lien or incumbrance of [588] any kind against the lessors or their estate, nullifies and renders noneffective such presumption. When a lease provides that the lessee shall erect a building on the premises and is silent as to the authority or want of authority of the lessee to subject the lessor's interest to a mechanic's lien, it is only by implication that it can be held that such authority exists. No such implication can arise in this case for the lease expressly denies to the lessee the authority to do anything with the premises that would bind the interest of the lessors therein with a mechanic's lien. The laws of this state do not prohibit or render non-effective a contract so limiting the power of a lessee, and it is unnecessary to inquire into the constitutionality of a law that should attempt to prohibit such contracts when the public health, safety, morals and welfare are in no wise involved. The power to contract with reference to one's property is a valuable right and courts should and will construe statutes as not abridging that right, when possible, in order to preserve the constitutionality of the law. Moreover, as a lease of real property is an instrument which, under the law may be recorded and thereupon constitutes constructive notice to those subsequently acquiring an interest in the premises, the rights and authority of the parties thereto and whatever agency it might be presumed was created thereby to deal with the estate, or the interest of either of such parties therein, is necessarily subject to the conditions and limitations expressed in the instrument creating the agency, unless otherwise provided by law. §§ 694, 707, Rev. Stat. 1908; Perkins v. Adams, 16 Colo. App. 96, 100, 63 Pac. 792; Delta County Land, etc. Co. v. Talcott, 17 Colo. App. 316, 321, 68 Pac. 985; Loser v. Plainfield Savings Bank, 149 Ia. 672, 128 N. W. 1101, 31 L.R.A.(N.S.) 1112.

Thus, in Cornell v. Barney, supra, it was held that when the lease was recorded and permanent improvements constructed on the leased premises by the lessee [589] under a covenant in the lease obligating him to do so, lien claimants for such work were chargeable with notice of all the terms contained in the lease. And in Atlas Portland Cement Co. v. Main Line Realty Co. supra, upon the effect of the record of a lease, it is said: "It is true, as argued, that the contract of lease required the building to be erected; but it was to be erected by the lessee and the lessee alone and at its cost. The lease was of record and the appellants must be charged with notice of its contents."

Plaintiffs in error, however, contend that as the clause withholding from, and denying to, the lessee the power to charge the interest of the lessors with any mechanic's lien or incumbrances of any kind, contains a covenant upon the part of the lessee that "it will not permit or suffer any bill of any mechanic, labor or material man to be or remain unpaid," and requires the lessee, before commencing the erection and construction of the building, to furnish a bond satisfactory to the lessors guaranteeing the due observance of the clause, that thereby the contract recognizes that such liens might accrue, be filed, and be binding against the interest of the lessors. We do not concur in this view. On the contrary, we do not think it changes in any manner the meaning of that part of the clause which limits the authority of the lessee in the premises. The lessors were certainly interested in having all bills paid to the end that the lessee's interest in the premises be not subjected to a mechanic's lien and a new tenancy created by operation of law through the enforced assignment of the lease. And this is clearly the purpose of the requirement in that respect.

It is not conceivable that the legislature made provision, as it did by § 4029, supra, whereby an owner could protect his interest in land against mechanics' liens for improvements made thereon with his knowledge but in relation to which he had not contracted, and made like provision by § 4025, supra, whereby he could, when [590] entering into a certain class of contracts, that is, with a contractor or builder, limit to such contract price the lien liability of his land, and in-

tended, as to all other contracts relative to improvements upon land, that an owner's rights in the premises and the liabilities that might be impressed thereon as a lien, could in no wise be protected and limited. Such a legislative enactment, if not unconstitutional, would be, at least, unjust and inequitable. We cannot sanction a rule of law, unless by legislative enactment we are so required to do, whereby one man's property may be taken for the debts of another and such person be without power to prevent it. We, therefore, withdraw the former opinion filed herein and affirm the judgment of the trial court.

Judgment affirmed.

Decision *en banc*.

Hill and Scott, JJ., dissent.

MUSSER, C. J. (*specially concurring*).—I agree that the judgment should be affirmed, but I rest my conclusion solely upon clause six of the lease, which is as follows:

"It is expressly understood and agreed (and notice is hereby given), that nothing herein shall authorize the lessee or any person dealing through, with or under it to charge said lands, or any interest of the lessors therein, or this lease, with any mechanic's lien, or lien or incumbrance of any kind whatever. On the contrary (and notice is hereby given), the right and power to charge any lien or incumbrance of any kind against the lessors, or their estate, is hereby expressly denied, and the lessee covenants that it will not permit or suffer any bill of any mechanic, labor or material man, or for any furnishings or equipments of said premises, to be or remain unpaid. The lessee shall, before commencing the erection and construction of a building on said premises, furnish [591] or cause to be furnished a bond in a bonding company satisfactory to lessors, guaranteeing the due observance of this clause 6."

If a mechanic's lien can be fastened upon the reversionary interest of the lessors it must be that the lease made the lessee the agent of the lessors with authority to so contract with reference to the erection of the contemplated building as to bind the interest of the lessors. The agency, if any, that existed between the lessors and lessees was created by the lease. Plainly that agency did not arise from that part of Sec. 4025 Rev. St. '08, which says that "every contractor, architect, engineer, subcontractor, builder, agent or other person having charge of the construction, alteration, addition to or repair, either in whole or in part, of any building or other improvement as aforesaid, shall be held to be the agent of the owner for the purposes of this act." The lessee was not one of those enumerated in the statute who was to be deemed the agent of the owner for the purposes of the act unless the lease created such agency. If the lessee was at all the agent it was by virtue of the lease and not of the statute. It is elementary that the authority of an agent is limited and controlled by the instrument creating the agency and that any person dealing with an agent, and having knowledge of the limitations upon the latter's authority, must at his peril contract with the agent within the known limits of that authority. When a lease provides that the lessee shall erect a building on the real estate and is silent as to the authority or want of authority of the lessee to bind the lessor's interest with a mechanic's lien, it is only by implication, if at all, that it can be said that such authority exists. No such implication can be made in this case, for clause six of the lease, expressly and plainly, in words that need no other construction than their obvious meaning denotes, withholds from and denies to the lessee the authority to bind the interest of [592] the lessors with a mechanic's lien. There is no escape from this. The part of the clause which provides that the lessee would "not permit or suffer any bill of any mehcanic, labor or material man, or for any furnishings or equipments of said premises, to be or remain unpaid," is only a personal covenant; that is, one that extends only to the lessors and lessees. Under the lease, a lien would attach to the leasehold interest of the lessee in the premises, and the lessors were interested in seeing that the bills for labor and material were paid. The part of the clause before that withholds from the lessee any and all authority to encumber the lessor's interest with a lien. Nor does the sentence of the clause which provides that the lessee shall furnish a bond guaranteeing the due observance of the provisions of the clause in any manner change the meaning of that part of the clause which limits the authority of the lessee. The lessors were certainly interested in having the provisions of the lease carried out and they had the right to exact a bond guaranteeing such consummation. Any contractor, subcontractor, material man or laborer who would read this clause of the lease could obtain therefrom no other idea than that it was the intention of the contracting parties, the lessors and the lessee, that the interest of the lessors should not be subject to mechanics' liens in consequence of the erection of the building contemplated in the lease.

When the intention of the parties to a contract is found in a contract then it is known what the contract is. What the parties intended by clause six is obvious and plain. If the contract that the interest of the lessors should not be subject to a mechanic's lien is valid then these plaintiffs in error were not entitled to a lien against the inter-

est of the lessors and the judgment of the lower court should be affirmed. In order that it may be said that the plaintiffs in error had a right to mechanics' liens on the interest of the lessors it must be held that that part of the lease forbidding such a lien is void and without [593] effect; and then it must be implied (for there are no express provisions in the lease to that effect) that the lessee was the agent of the lessors with authority to encumber the interest of the latter with a lien. In order to reach that holding and implication it must be held first, that the mechanics' lien laws of this state prohibit such a contract between the lessor and lessee, and second, that it was within the constitutional authority of the legislature to prohibit such a contract when the public health, safety, morals and welfare were in no way involved. The lien laws of this state do not prohibit or render ineffective such a contract between a lessor and lessee, hence it is not at all necessary to inquire into the constitutionality of a law that should attempt to do so. The power to contract with reference to one's property when such a contract does not affect the public health, safety, morals or welfare (which matters are under the recognized cognizance of the legislature) is a very important right, and if it can be done, courts will construe statutes as not abridging that right so as to preserve the constitutionality of the law. In Illinois, it has been held that the right to so contract is clearly a property right and if the legislature should pass a statute prohibiting or restraining an owner and contractor from agreeing that the building should be relieved of liens, that such a statute would be unconstitutional.—Kelly v. Johnson, 251 Ill. 135, 95 N. E. 1068, 36 L.R.A.(N.S.) 573; Cameron-Schroth-Cameron Co. v. Geseke, 251 Ill. 402, 96 N. E. 222.

While I do not express any opinion as to the constitutionality of such a statute, it seems to me that the Illinois cases, and all other authorities are to the effect that the right to contract with reference to one's property is a property right. To say that a person cannot lease his property upon such terms and conditions as he may choose, is to restrain him of full dominion over his property, and certainly any law which so restrains him beyond matters which effect the public health, safety, [594] morals or welfare, must do so expressly or by necessary implication, even if it may be constitutional. If such a law is constitutional at all it must come from the legislature and not from the courts. Our Mechanics' Lien Act provides that its provisions shall be liberally construed in order that its purposes may be achieved, but this refers to a liberal construction of what is in the act. It does not mean that the courts, in order that a person may have a mechanic's lien, have authority to drag into the act that which is not there, nor to disregard elementary principles of law, nor by unnecessary implication or doubtful construction lessen that dominion over his property to which an owner is entitled. Sec. 4033 provides that "no agreement to waive, abandon or refrain from enforcing any lien provided for by this act shall be binding except as between the parties to such contract." That section cannot be applied here, for an agreement to waive, abandon or refrain from enforcing a lien must be made by a party entitled to a lien; that is, by a contractor, subcontractor, material man or laborer. There is no such a contract in this case. Sec. 4029 provides that any building, etc., constructed upon any land, with the knowledge of the owner, shall be held to have been erected at the instance and request of such owner, so far as to subject his interest to a lien, unless the owner shall, within five days after he shall have obtained notice of the construction, give notice in a certain manner that his interest shall not be subject to a lien, provided that the provisions of the section shall not apply to any owner who shall have contracted for such erection. Plaintiffs in error contend that because the notice prescribed was not given, the liens attached to the lessors' interest. Assume, for the sake of the argument, that the section would apply in the absence of any notice. That section must contemplate an owner who has not already, in some effectual way, given notice that his interest will not be subject to a lien. Certainly the legislature did not have [595] in mind that a person who had already given notice should give additional notice in a certain manner. Nor does the section say expressly, or by necessary or any implication, that a lessor who has already contracted with a lessee, in a manner of which the world must take notice, that the interest of the lessor shall not be subject to a lien, must nevertheless give further notice, as prescribed by the statute, in order that his property shall be free from a lien. Nor can it be reasonably said that the legislature intended that one who already has ample notice from a lessor that the latter's interest shall not be subject to a lien, shall nevertheless be given further notice of that fact in the particular manner prescribed in the section before he can be deprived of a lien. Such additional notice would be needless to one already notified and to say that, because it was not given in the particular manner prescribed in the statute, one who already knows of the fact to be imparted shall nevertheless have a lien, would be somewhat arbitrary to say the least.

Mechanics' lien laws can be sustained only upon the theory that the lien is engrafted upon the interest of the owner because he has

consented to the improvement in such a way as to permit a lien. In order that a lien may attach, the circumstances must be such as to show consent of the owner or to justify an inference of it. Wheaton v. Berg, 50 Minn. 525, 52 N. W. 926. In order to sustain a lien for the plaintiffs in error in this case, under that section it must be taken that the consent of the lessors is conclusively presumed to have been given in such a manner as would cause their interest in the property to be subject to a lien, because they failed to give the prescribed notice. In the case last cited, the Minnesota court had under consideration a section of the lien laws of that state almost identical with Sec. 4029 of our statutes, and that court struggled manfully to reach the conclusion that the section was constitutional, [596] and in order to do so it held that the presumption that the owner had consented that a lien might attach to his interest in the premises, by failure to give the required notice was *prima facie* evidence that he had consented rather than conclusive, and that section prescribed a rule of evidence. The court said:

"Those who may be engaged in contributing labor or material which go to the improvement of the land may often have reason to suppose that the work is being carried on at the instance or with the consent of the landowner. It is important to such persons that, if possible, it be made known then if the owner's consent be wanting, and that, therefore, they cannot subject the property to liability for the labor or material supplied by them for its improvement. Hence the statute, in effect, makes it the duty of the owner, who knows of the improvement being made, to give the prescribed notice if he would avoid the inference that is done with his consent. From the neglect of the duty created by statute the inference follows. But it would seem to be impossible to construe this provision as making the mere neglect to give the specified notice *conclusive* upon the landowner in all cases. The circumstances must be such that he can comply with the statutory requirement, or he cannot be thus concluded."

It can be added with the same degree of force that the circumstances must be such that the persons interested in having a lien attach have not already received notice that the owner's interest shall not be subjected to a lien. The court further said that an owner who has knowledge of the erection of the building upon his premises may nevertheless show that he could not give the required notices and thus excuse his failure for giving them. Equally it can be said under this statute that the owner, in order to relieve his property of a lien may show that he has already given notice to that effect and that all interested did know that he had not consented [597] that his interest should be subject to liens, and that, therefore, it would be a needless thing to give the notice specified in the statute. It cannot be conclusively presumed that the lessors in this case consented that their interest might be subjected to a lien when they expressly contracted with the lessee that it should not be and gave full notice to the world of such contract before anything was done toward the erection of the building. It is to be observed that Sec. 4029 provides for actual or constructive notice at the option of the owner. It does not expressly or impliedly exclude other actual notice, which may be given, nor does it in any manner assume that other constructive notice provided by general statute or law would not be sufficient.

The Minnesota court, after showing that construing the section as conclusive against the landowner, would make it unconstitutional or of doubtful constitutionality, said:

"But some reasonable effect should be given to the statute if it be possible; and this may be done by construing the statutory presumption, which springs from the failure to give notice, as being of a *prima facie* nature rather than conclusive, and as imposing upon the landowner who, knowing the fact of the improvement, has failed to give the prescribed notice, the burden of relieving himself from the statutory imputation of having consented to what was being done, by proof of his inability to give the prescribed notice of his dissent, and that in fact the improvement was made without his authority or consent. As the statute was obviously intended to establish a *rule of evidence*, and as it cannot be sustained if the statutory presumption is to be construed as conclusive, but may be if it has the qualified effect which we have suggested, we conclude that it must be so construed. The language of the law does not forbid this construction, and there are apparent reasons which may have led the legislature to impose the burden of [598] proof on the party who has peculiar knowledge concerning the matters to which evidence is to be directed."

From what has been said, it follows that the section furnishes a rule of evidence, by which, in the first instance, the failure of an owner with knowledge to give the notice therein specified raises the presumption that the owner consented that his property be subjected to a lien, and to overcome this presumption that the owner consented that his property be subject to a lien, he must go forward with evidence to show that he could not reasonably give the notice, or that he had already effectually given actual notice, or such constructive notice as would be given by recording a lease with a provision similar to that in clause six of the present lease.

It is held in some authorities that when contracts of sale or of lease require the vendee or lessee to make improvements that the interest of the vendor or lessor will be subject to a lien when there is no stipulation to the contrary. In Carey-Lombard Lumber Co. v. Jones, 187 Ill. 209, 58 N. E. 349, it is said:

"Similar contracts have been before the courts in proceedings to enforce mechanics' liens, and have, without exception, so far as we are advised, been held to amount to authority or consent from the owner to a vendee or lessee to make the improvements, and, *in the absence of some stipulation in the agreement to the contrary*, to give a lien upon the interest of the owner for materials furnished or labor performed under contracts with the vendee or lessee."

This opinion implies that in instances where the agreement contains a stipulation that the interest of the vendor or lessor shall not be subject to a lien such stipulation controls. The cases cited by plaintiffs in error as sustaining their claims to liens where all cases in which there was an absence of such stipulation in the agreement, or as in Illinois, in the case of a so-called lease, the court found that the relation between the parties [599] was in fact not that of lessor or lessee, but as joint venturers in the construction of a building. In Shapleigh v. Hull, 21 Colo. 419, 41 Pac. 1108, the owner agreed to sell land to a named vendee and the vendee agreed to erect houses on two of the lots. The contract was silent as to the right of the vendee to charge the interest of the vendor with a lien, so that there was an entire absence of any stipulation that the interest of the vendor should not be subject to a lien. It was under these circumstances that our court held that a lien would attach to the interest of a vendor. This court has not decided what the law is in the case of the presence of such a stipulation. Since, the decision in Shapleigh v. Hull, supra, sec. 4029, was passed. It was said in the Minnesota case, supra, that such a statute would permit a vendor who had made a contract similar to the one in Shapleigh v. Hull, supra, to free his property from a lien by giving the prescribed notice. If that is true, then the legislature has modified the rule of law as laid down in Shapleigh v. Hull.

On the other hand, in Wilkins v. Abell, 26 Colo. 462, 58 Pac. 612, there was a mining lease. The court said that by the demise the lessee acquired a qualified interest in the property which entitles him to work the same for his own benefit. In fact it may be said that a mining lease presupposes that the lessee will work the mine, else it would be of no use to him. In that case this court held that, "the lessee is in no sense the agent or superintendent of the lessor, nor is he a contractor in the contemplation of the statute." (Mechanics' Lien Stats.)

In Antlers Park Regent Min. Co. v. Cunningham, 29 Colo. 284, 68 Pac. 226, this court refused to decide whether or not the principle upon which Shapleigh v. Hull, supra, was decided would be applicable between a lessor and a lessee.

[600] In Williams v. Eldora-Enterprise Gold Min. Co. 35 Colo. 127, 83 Pac. 780, there was an option to purchase a mining property and a lease thereof. The lessee was required to perform a certain amount of work on the property. After showing that the possession of the claim of the lessee and the doing of the work under the lease was as lessee and not as vendee in the option this court refused to apply the doctrine announced in Shapleigh v. Hull, supra, but applied the doctrine announced in Wilkins v. Abell, supra, and said:

"Nor can a lien be asserted as against the lessor owner on the ground that the lessee here occupied some relation to the mine with respect to the working of it other than that of lessee. The contract of leasing did not call for the erection of any permanent improvements. Its only requirement of the lessee in respect to work was that it should begin development work within a certain time and continuously employ two shifts of five men each. In the nature of things, a lease of a mine contemplates that the lessee must do at least ordinary development work. A mine is valuable principally if not wholly on account of the ore it contains, and to extract the same necessarily requires work to be done upon it. The work required here was merely ordinary development work, which brings the case within the holding in Wilkins v. Abell, supra. In other words, the labor performed and materials furnished by the claimants for which a lien is sought were done for and furnished to one who was in possession and developing the same whose only relation to the property, so far as concerns any requirement of work thereon, was that of a mere lessee."

In Colorado Iron Works v. Taylor, 12 Colo. App. 451, 55 Pac. 942; Dougherty-Moss Lumber Co. v. Churchill, 114 Mo. App. 578, 90 S. W. 405, and Jones v. Menke, 168 N. Y. 61, 60 N. E. 1053, there was no stipulation that the interest of the lessor should not be subject to a lien, and [601] hence those cases are not in point here. In the case of Western Lumber, etc. Co. v. Merchants' Amusement Co. 13 Cal. App. 4, 108 Pac. 891, there was a lease, but it did not contain a stipulation forbidding a mechanic's lien on the interest of the lessor. It appeared in that case, and the court found, that the building was really erected by the lessor and that he was using the corporation lessee as an instrument to

carry out his own venture. Certainly an owner cannot thus free his property from mechanics' liens. And it was for that reason that the California Court held that the lien would attach. In Crandall v. Sorg, 198 Ill. 48, 64 N. E. 769, there was a contract wherein it was agreed that Hullinger would sell and convey the land to Sorg; that the latter would then execute a lease for ninety-nine years to the former and that a building should be erected on the premises. Later on the lease was executed, and provided also for the erection of a building, and had in it a provision that no mechanics' liens should affect the claims of the lessor in the building and his rights in the premises. The court held that the contract and lease were executed as part of the same transaction; that they constituted one writing and should be construed together, and that when so read together it was manifest that Sorg was "not to be regarded as but an ordinary lessor of the premises." But on the contrary, it was held that the instruments disclosed that Sorg and Hullinger "jointly engaged in an enterprise which had for its purpose the construction of a building for rental purposes on the premises in question." Each put up money for that purpose. Under these circumstances, it was held that the clause in the lease concerning mechanics' liens was of no avail because Sorg was in the position of an owner engaged in erecting a building and not as a lessor.

In Provost v. Shirk, 223 Ill. 468, 79 N. E. 178, there was a contract of sale and lease the same as in the former case, so that the socalled lessor and lessee were jointly [602] engaged in the enterprise and were in the position of owners of the property. These Illinois cases placed the lessors and lessees in the position of two tenants in common, who contract with each other concerning the erection of a building upon their joint premises. In such a case, of course, they could not contract with one another so as to free the property of either from mechanics' liens. The question of abridging the right to make a contract concerning one's property with a lessee or vendee, which would be otherwise lawful, is not involved in any of the cases cited, and has never been passed upon by this court. That question is the one that is now presented. It appears to me that a reasonable view of our mechanics' lien laws is that they do not, expressly or by any implication, say that such a contract made between a *bona fide* vendor and vendee, or a *bona fide* lessor and lessee, would have no effect, when due notice has been given thereof. The contract between the lessee and the principal contractors expressly mentioned the lease and it was known that no contract was entered into with the owners of the fee. Owners of property have rights which courts and the legislature must respect. If a contractor has notice that he is to erect a building for a lessee it is reasonable that he should be required to ascertain the contents of the lease if he desires to proceed on the credit of the interest of the lessor. Had the subcontractors and material men investigated the nature of the principal contract they would have known of the lease, could have ascertained all of its provisions, and thus learned that they could not contract or sell on the credit of the lessor's interest. To have done so would have been the exercise of ordinary business diligence. There is nothing in our statutes, that I can find, that permits contractors and others who may have lien claims to proceed without any diligence to ascertain facts that are easily before them. Ordinary diligence [603] may be required of owners who construct or permit to be constructed improvements upon their property which become not only a source of profit to them, but of benefit to an entire community, but ordinary diligence should also be required from those who perform upon the credit of the property. To free lien claimants from ordinary and reasonable diligence is to place an embargo upon improvement and progress. The lease in this case was recorded the day after its execution, and before any right to a lien could have attached. A lease of real property is such an instrument as is entitled to record under sec. 694 Rev. St., and, therefore, its recordation is constructive notice to the world of its contents. While that section does not specifically use the word "lease" it does use the words "agreements in writing of, or effecting title to real estate or any interest therein," and a written lease of land is such an agreement. Besides, sec. 707 says that the term "deed" includes leases, and the term "deed" is used in sec. 694. An instrument that is recorded according to law, and which the statute says shall be notice when recorded, is notice to the world of all the facts and matters therein expressed, and not only of such facts, but of all facts suggested therein and which reasonable inquiry would elicit.—Perkins v. Adams, 16 Colo. App. 96, 63 Pac. 792; Delta County Land, etc. Co. v. Talcott, 17 Colo. App. 316, 68 Pac. 985; Loser v. Plainfield Savings Bank, 149 Ia. 672, 128 N. W. 1101, 31 L.R.A.(N.S.) 1112.

In Armstrong Cork Co. v. Merchants' Refrigerating Co. 184 Fed. 199, 107 C. C. A. 93, there was a lease which provided that the improvements made by the lessee should remain his property, and the court held that the recording of the lease was notice of this stipulation. The court said:

"The record of the lease was notice to the complainant that the improvements he was placing in this warehouse remained the personal property of the lessee, [604] that they

did not become a part of the realty and that Lyon's reversion in the warehouse and the land upon which it stood were not chargeable with a mechanic's lien for the purchase price of the work and the material it was furnishing, Faxon v. Ridge, 87 Mo. App. 299, 307, and the conclusion is that the amended bill did not state facts sufficient to show that the complainant was entitled to a lien upon the interest of the lessor in the land and warehouse."

In Cornell v. Barney, 26 Hun 134, there was a lease from the owner in which the lessee agreed to build or cause to be built on the land a building. The lease was recorded. Suit was commenced to foreclose a mechanic's lien against the interest of the lessor, and it was held that when the lease was recorded, the lien claimants were chargeable with notice of all the terms contained in the lease. In Atlas Portland Cement Co. v. Main Line Realty Co. 112 Va. 7, 70 S. E. 536, while it was held that under the Virginia statute the right to a lien would not be implied where a lessee provided that the lessor should erect a building, yet on the question of the effect of the record of the lease the court said:

"It is true, as argued, that the contract of lease required the building to be erected; but it was to be erected by the lessee, and the lessee alone, and at its cost. The lease was of record and the appellants must be charged with notice of its contents."

Undoubtedly the record of the lease was notice to the world that the interest of the lessor was not subject to a mechanic's lien unless it is held that the mechanics' lien statute repealed *pro tanto* the recording statute. Repeals by implication are not favored. —Haldeman v. Colorado City, 52 Colo. 234, 120 Pac. 1041.

In Dunton v. People, 36 Colo. 128, 87 Pac. 540, it is said:

"If the provisions of the two statutes can be so construed [605] as to stand together, that construction must be given them, and the former is not repealed because they are consistent, and the repealing clause only purports to repeal the inconsistent parts of the act."

In Black on Interpretation of Laws, p. 112, it is said:

"Every new statute should be construed in connection with those already existing in relation to the same subject-matter, and all should be made to harmonize and stand together, if that can be done by any fair and reasonable interpretation, and if the new act does not expressly declare the repeal of an earlier statute, it will not be construed as effecting such repeal unless there is such a repugnancy or conflict between the provisions of the two acts as to show that they could not have been designed to remain equally in force."

The provision in the mechanics' lien laws, that an owner may, in a certain way, give notice that his interest is not to be subjected to a lien, is not at all inconsistent with the recording statute, under whose provisions the same notice may be given in another way. The two statutes can and should be read together and both permitted to stand.

In Boyer v. Keller, 258 Ill. 106, 101 N. E. 237, there was a lease which provided that the premises were to be used only as a theater, and that the lessee would make no alteration to the building on the premises without the written consent of the lessor. The privilege to make alterations was given to the lessee and he was to pay for all made. The lessee made alterations which were permanent in character and increased the value of the premises. The question was presented whether sec. 1 of the Illinois Act, so far as it subjected to a lien the property of one who knowingly permitted another to contract for improvements thereon, violated the constitution of the state. The court said the section did not restrict [606] the right of the owner to freely contract with reference to improvements which should be made upon it. It said that the lessor had the undoubted right to contract with the lessee that any improvements made should be made at the cost and expense of the latter and that the section did not prevent the enforcement of that contract. The court said:

"So long, however, as that contract remained a secret agreement between the lessors and the lessee, said section 1 made the lessor owners liable in case they authorized or knowingly permitted the lessee to contract for the improvement of the property without advising the contractors or material men of the provisions of the lease and notifying them that they must deal with the lessee under its terms."

And it was found that none of the lien claimants knew anything about the provisions of the lease. There was no claim that the lease was recorded. This case simply holds that the provision in a lease against liens that is kept secret and no notice of which is given will not save the interest of a lessor from the lien.

In Pacific Sash, etc. Co. v. Bumiller, 162 Cal. 664, 124 Pac. 230, 41 L.R.A.(N.S.) 296, the lease between the owners and the lessee provided that the owners should not be liable or responsible for any alteration or repair made in the building, by the lessee and that no alteration should be made without the written consent of the owners. It does not appear that any notice whatever was given of the lease and its provisions, by record or

otherwise, and that case was determined as though no such notice had been given.

In Curtin-Clark Hardware Co. v. Churchill, 126 Mo. App. 462, 104 S. W. 476, there was a lease which provided that the lessee should have the right to make alterations in the leased premises and that all improvements made by him should be at his own expense and on his own account. [607] The lease was recorded shortly after it was executed. The court held in that case that the recording of the lease gave the lien claimant constructive notice of its terms, but held that the lien would attach, notwithstanding the agreement that the lessee should do the work at his own cost. This case comes more nearly in point in favor of the claimants than any they have cited. It is to be noticed, however, that the agreement in the lease was not that no right of lien should attach to the interest of the lessor, but that the lessor should construct the improvement at his own expense and on his own account. What is said in Dierks, etc. Lumber Co. v. Morris, 170 Mo. App. 212, 156 S. W. 75, at the top of page 220, kills the decision in the 126 Mo. App. as an authority in this case.

Rehearing denied to plaintiff in error, March 1, 1915.

NOTE.

Mechanic's Lien on Realty for Improvements Made with Consent but Not at Expense of Owner.

Introductory, 1133.
Improvements by Lessee, 1133.
Improvements by Vendee under Contract of Sale, 1135.
Improvements by Mortgagor, 1135.
Notice of Nonresponsibility, 1136.

Introductory.

The purpose of this note is to review the recent cases which consider the right to a mechanic's lien on realty for improvements made thereon with the consent, but not at the expense of the owner. The earlier cases are collected in the notes to Limoges v. Scratch, 19 Ann. Cas. 732; Clark v. North, 11 Ann. Cas. 1080.

Improvements by Lessee.

Under the Code of *Alaska* Civ. Code C. 28, § 262), which gives a mechanic's lien for work done "at the instance of the owner" it has been held that the work is done "at the instance of the owner" where the lease contains a provision authorizing the lessee to make improvements. Arctic Lumber Co. v. Borden, 211 Fed. 50, 127 C. C. A. 486.

In *Arkansas*, where the statute (Kirby's Digest, § 4970) gives a mechanic's lien for work performed or materials furnished by virtue of a contract with the owner or his "agent," it has been held that a lessee is not the agent of the owner within the mechanic's lien law, where under the terms of the lease it is optional whether the lessee shall make repairs at his own expense, even though the owner has knowledge that the lessee is making repairs, and makes a reduction in the rent after the repairs are made. Langston v. Matthews, 117 Ark. 626, 173 S. W. 397 (*distinguishing* Whitcomb v. Gans, 90 Ark. 469, 119 S. W. 676).

In the reported case (*Colorado*), it is held that provisions in a lease for improvements at the expense of the lessee do not alone make the lessee the "agent" of the owner, under the Colorado statute (R. S. 1908, § 4025), which provides in substance that the owner's interest may be subjected to a mechanic's lien for material or labor supplied at the instance of the owner or his agent. It is further held that the recording of a lease which provides that the owner's interest shall not be subjected to mechanics' liens for improvements, is constructive notice of its contents and destroys any presumption that the lessee is the owner's agent.

The *Georgia* statute gives to one furnishing material for the improvement of real estate on the employment of a contractor, or some other person than the owner, a lien on the real estate improved for the material used in the improvement. This has been construed to mean that the material must be furnished under contract with a contractor or with some person occupying a similar relation to the owner as that of contractor. Consolidated Lumber Co. v. Ocean Steamship Co. 142 Ga. 186, 82 S. E. 532. Hence it has been held that a material man is not entitled to a mechanic's lien against an owner, where the material is furnished to a lessee, even though the owner consents to the improvement and has knowledge of the contract between the tenant and the contractor. Carr v. Witt, 137 Ga. 373, 73 S. E. 668; Consolidated Lumber Co. v. Ocean Steamship Co. 142 Ga. 186, 82 S. E. 532.

Under the *Illinois* statute the owner's interest is subject to a mechanic's lien when he "knowingly" permits the lessee to make alterations and repairs at his own expense. Boyer v. Keller, 258 Ill. 106, 101 N. E. 237; Friebele v. Schwartz, 164 Ill. App. 504; Sullivan, etc. Co. v. Richardson, 169 Ill. App. 578. That provision has been declared to be constitutional and under it a provision in a lease that the owner's interest shall not be subject to a mechanic's lien is void. Boyer v. Keller, supra. It has been held that "knowingly" to permit property to be improved is

to know that material is being procured for that purpose and that the work is being done and not to object to it. Bermingham v. Gill, 164 Ill. App. 536 (citing Wertz v. Mulloy, 144 Ill. App. 329). Hence where a contract between the owner of the fee and the lessee provides for certain improvements, the interest of the lessor cannot be subjected to a mechanic's lien for other improvements in the absence of any showing that he authorized or consented to the additional work. Bermingham v. Gill, 164 Ill. App. 536.

Under the *Kansas* statute where a short term lease authorizes the lessee to make improvements at his own expense, and the improvements are to become the property of the owner, the lessee becomes the agent of the owner within the mechanic's lien statute. Long-Bell Lumber Co. v. McCray Band Co. 89 Kan. 788, 132 Pac. 992.

Under the *Michigan* statute (C. L. 10710), it has been held that the owner's interest cannot be subjected to a mechanic's lien in the absence of a contract express or implied, and that mere consent to improvements by a lessee at the lessee's expense, with a reduction in rent, does not constitute such a contract. Merrill v. Brant, 175 Mich. 182, 141 N. W. 550.

Under the *Missouri* statute giving a mechanic's lien where the work is done or materials are furnished by virtue of any contract with the owner or his "agent," it has been held that where under the terms of the lease the lessee is required to make improvements at his own expense, he becomes the "agent" of the owner within the statute. Ward v. Nolde, 259 Mo. 285, 168 S. W. 596; Phillip Carey Co. v. Kellerman, Const. Co. 185 Mo. App. 346, 170 S. W. 449. However, the lease must obligate the lessee to make improvements and mere consent from the owner to the lessee to make repairs at the lessee's expense does not constitute the lessee the owner's agent with the statute. Dierks, etc. Lumber Co. v. Morris, 170 Mo. App. 212, 156 S. W. 75; Marty v. Hippodrome Amusement Co. 173 Mo. App. 707, 160 S. W. 26: Ward v. Nolde, 259 Mo. 285, 168 S. W. 596; Ford v. Dixon, 171 Mo. App. 275, 157 S. W. 99; Phillip Carey Co. v. Kellerman Const. Co. 185 Mo. App. 346, 170 S. W. 449. Hence it has been held that the owner's interest is not subject to a mechanic's lien where the tenant has repairs made under a general covenant to keep the premises in repair. McGuinn v. Federated Mines, etc. Co. 160 Mo. App. 28, 141 S. W. 467. See also Ford v. Dixon, 171 Mo. App. 275, 157 S. W. 99. And it has been held that a general covenant to make improvements will not ordinarily constitute the tenant the owner's agent, so as to subject the owner's interest to a mechanic's lien. Dierks, etc. Lumber Co. v. Morris, 170 Mo. App. 212, 156 S. W. 75, wherein the court said: "In order to make such covenant constitute an agency between the lessor and lessee we are necessarily bound to look at the facts to determine whether there was an agency or not. If on account of the shortness of the lease, the extent, cost and character of the improvements, or other facts in evidence, such as the participation by the lessor in the erection or construction thereof, it can be seen that the improvement is really for the benefit of the lessor and that he is having the work done through his lessee, then it can be said with justice that the lessee in such case is acting for the lessor. But, if the facts do not show this, it would seem to be untenable to say that the mere inclusion in a lease of a covenant to improve and repair on the part of the lessee will create the relation of agency between the tenant and the landlord, especially where the tenant is to do the work at his own expense and is expressly denied any authority to bind the landlord."

In *New York*, where the lease provides for specified improvements at the lessee's expense, the owner gives his consent to such specified improvements within section 3 of the Lien Law (Gen Laws, chap. 49 [Laws of 1897, chap. 418] Consol. Laws, chap. 33 [Laws of 1910, chap. 38] sec. 3.). McNulty v. Offerman, 152 App. Div. 181, 137 N. Y. S. 27: Wahle, Phillips Co. v. Fifty-Ninth St.-Madison Ave. Co. 153 App. Div. 17, 138 N. Y. S. 13; Wahle-Phillips Co. v. Fitzgerald, 183 Misc. 636, 146 N. Y. S. 562; McNulty v. Offerman. 164 App. Div. 949, 149 N. Y. S. 375. But he does not give his consent, within the above act, to improvements in addition to those provided for in the lease. McNulty v. Offerman, 152 App. Div. 181, 137 N. Y. S. 27; McNulty v. Offerman, 164 App. Div. 949, 149 N. Y. S. 375. Thus it has been held that where a lease provided that the tenant should install a steam heating plant at his own expense, but deductions were made in the rent to cover same, and the owner directed the installation, the owner gave his "consent" within the meaning of the statute. Meistrell v. Baldwin, 144 App. Div. 660, 129 N. Y. S. 670. And where certain improvements cost $60,000, and the lease required the owner to pay the lessee $15,000 as a part thereof and the improvements were to belong to the owner of the building, it was held that the owner "consented" to the improvements. McNulty v. Offerman, 152 App. Div. 181, 137 N. Y. S. 27. Likewise it has been held that the owner gave his "consent" within the statute, where the lessee had without authority removed ceilings, and the owner, after notification from the board of fire underwriters, called on the lessee to change the wiring to meet the requirements of the underwriters, ac-

cording to the covenants in the lease. McNulty v. Offerman, 152 App. Div. 181, 137 N. Y. S. 27. It is not necessary that the owner of the fee shall be personally liable for the indebtedness to give validity to the lien or any action for the foreclosure thereof. It is sufficient if the labor is performed and the material is furnished with the knowledge and consent of the owner of the fee. Pearce v. Kenney, 152 App. Div. 638, 137 N. Y. S. 475 (*reversing judgment* 75 Misc. 328, 135 N. Y. S. 537).

Under the *North Carolina* statute (Revisal § 2016) in order that a mechanic's lien may attach, there must exist the relation of debtor and creditor, and hence it has been held that the owner's interest is not liable to a mechanic's lien by the mere fact that the lessee is given permission to make improvements at his own expense. Weathers v. Cox, 159 N. C. 575, 76 S. E. 7.

Under the *Oregon* statute giving a mechanic's lien where the work is done or the materials are furnished by virtue of any contract with the owner or his "agent" it has been held that where a lease requires the lessee to make improvements at his own expense he becomes the "agent" of the owner. Oregon Lbr. etc. Co. v. Nolan, 75 Ore. 69, 143 Pac. 935, *affirmed* on rehearing 75 Ore. 81, 146 Pac. 474.

Under the *Texas* statute it has been held that the mere fact that the owner acquiesces in or consents to improvements by another on his property does not fix a lien against the owner's interest. Cleburne St. R. Co. v. Barber (Tex.) 180 S. W. 1176; Eardley v. Burt (Tex.) 182 S. W. 721. Thus it has been held that a requirement in a lease that the lessee shall put improvements on the property, which will become the property of the owner on the expiration of the lease, will not of itself be sufficient to subject the owner's interest to a mechanic's lien in the absence of consent from the owner to fix such lien. Cleburne St. R. Co. v. Barber (Tex.) 180 S. W. 1176 (*citing* Faber v. Muir, 27 Tex. Civ. App. 27, 64 S. W. 940, writ of error denied 65 S. W. XVI.).

In *Utah* the mere fact that the owner of premises consents to the making of improvements by the tenant gives no right to a mechanic's lien against the premises. Gorman v. Birrell, 41 Utah 274, 125 Pac. 685.

Under the *Ontario* Mechanics' and Wage Earners' Lien Act (R. S. O. 1914, Ch. 140.) the taking of an agreement from a tenant to make improvements is a "request" within the act, making the interest of the owner liable to a mechanic's lien. Orr v. Robertson, 34 Ont. L. Rep. 147, 8 Ont. W. N. 47.

Improvements by Vendee under Contract of Sale.

Under the *Colorado* statute it has been held under a written contract of purchase and sale, whereby the vendee is not only permitted but is required to erect buildings on the premises, that the interest of the vendor is subject to a mechanic's lien under the statute (Rev. St. 1908, § 4029), which provides, in substance that the owner's interest shall be subjected to mechanics' liens when the improvements are made with the "knowledge" of the owner and such owner fails to give notice of nonliability as required by the statute. Miller v. Davis, 26 Colo. 483, 145 Pac. 714.

In *Illinois*, where a vendor under a contract of sale authorizes and knowingly permits the vendee to make improvements, the interest of the vendor is subject to a mechanic's lien. Granite City Lime, etc. Co. v. Pitzman, 161 Ill. App. 228.

Under the *Indiana* statute it has been held that where the vendee is in possession under a contract of sale, mere inactive consent by the owner to improvements will not subject his interest to a mechanic's lien, but where the vendee is required to make improvements under his contract and the owner advises laborers to do the work, the vendor's interest is subject to a mechanic's lien. Rader v. A. J. Barrett Co. 108 N. E. 883.

Under the *Kansas* statute it has been held that where the vendor authorizes and consents to have the vendee make certain improvements, the interest of the vendor is subject to a mechanic's lien for such improvements. White v. Kincade, 95 Kan. 466, 148 Pac. 607.

In *Missouri* it has been held that where a contract for the sale of land obligates the vendee to erect improvements at his own expense, such a contract constitutes the vendee the "agent" of the owner, within the statute, so as to subject the owner's interest to a mechanic's lien Ford v. Dixon, 171 Mo. App. 275, 157 S. W. 99, wherein the court said: "In instances where the owner of the fee enters into a contract of sale or lease, which invests the vendee or lessee with the right to enter into the possession of the premises, and compels him to erect a building thereon or make improvements for the enhancement of the freehold estate, the agency of the vendee or lessee to subject the freehold to mechanics' liens will be implied. O'Leary v. Roe, 45 Mo. App. 567; Dougherty-Moss Lumber Co. v. Churchill, 114 Mo. App. 578, 90 S. W 405; Curtin-Clark Hardware Co. v. Churchill, 126 Mo. App. 462, 104 S. W. 476."

Improvements by Mortgagor.

Under the *Georgia* statute in a case wherein it appeared that the holder of a deed to real estate made to secure a debt had knowledge of a contract made by the vendor to improve the real estate, and expressly agreed to such contract, it was held that the lien of the contractors bound the interest of the holder of the deed to the real estate. Williams v.

claimed may not be sustained under the provisions of § 4025 as affected by § 4027. The lessors neither participated in the erection or construction of the improvement nor approved the plans therefor. They had nothing to say as to the size and architecture of the building or the material of which it should be built. While it was to cost not less than a substantial, designated sum, there is no allegation nor showing that the rents reserved were greater than the reasonable worth of the vacant lots upon which the improvements were to be constructed. If the improvements increased the value of the freehold interest, it was not primarily so but only as a future incident thereto, and the owner of the fee was not the owner of the building or structure within the meaning of the mechanic's lien law. He would become such owner only by operation of law through the expiration or termination of the lease, or at least only when the building was "commenced and completed," when, by the language of the lease, and not until then, it would become a part of the realty of the lessors.

However, should we assume that presumptively the lessors made the lessee their agent by reason of the covenant to build and certain other conditions in the lease, the clause therein expressly denying to the lessee the right and power to charge any lien or incumbrance of [588] any kind against the lessors or their estate, nullifies and renders noneffective such presumption. When a lease provides that the lessee shall erect a building on the premises and is silent as to the authority or want of authority of the lessee to subject the lessor's interest to a mechanic's lien, it is only by implication that it can be held that such authority exists. No such implication can arise in this case for the lease expressly denies to the lessee the authority to do anything with the premises that would bind the interest of the lessors therein with a mechanic's lien. The laws of this state do not prohibit or render non-effective a contract so limiting the power of a lessee, and it is unnecessary to inquire into the constitutionality of a law that should attempt to prohibit such contracts when the public health, safety, morals and welfare are in no wise involved. The power to contract with reference to one's property is a valuable right and courts should and will construe statutes as not abridging that right, when possible, in order to preserve the constitutionality of the law. Moreover, as a lease of real property is an instrument which, under the law may be recorded and thereupon constitutes constructive notice to those subsequently acquiring an interest in the premises, the rights and authority of the parties thereto and whatever agency it might be presumed was created thereby to deal with the estate, or the interest of either of such parties therein, is necessarily subject to the conditions and limitations expressed in the instrument creating the agency, unless otherwise provided by law. §§ 694, 707, Rev. Stat. 1908; Perkins v. Adams, 16 Colo. App. 96, 100, 63 Pac. 792: Delta County Land, etc. Co. v. Talcott, 17 Colo. App. 316, 321, 68 Pac. 985; Loser v. Plainfield Savings Bank, 149 Ia. 672, 128 N. W. 1101, 31 L.R.A.(N.S.) 1112.

Thus, in Cornell v. Barney, supra, it was held that when the lease was recorded and permanent improvements constructed on the leased premises by the lessee [589] under a covenant in the lease obligating him to do so, lien claimants for such work were chargeable with notice of all the terms contained in the lease. And in Atlas Portland Cement Co. v. Main Line Realty Co. supra, upon the effect of the record of a lease, it is said: "It is true, as argued, that the contract of lease required the building to be erected; but it was to be erected by the lessee and the lessee alone and at its cost. The lease was of record and the appellants must be charged with notice of its contents."

Plaintiffs in error, however, contend that as the clause withholding from, and denying to, the lessee the power to charge the interest of the lessors with any mechanic's lien or incumbrances of any kind, contains a covenant upon the part of the lessee that "it will not permit or suffer any bill of any mechanic, labor or material man to be or remain unpaid," and requires the lessee, before commencing the erection and construction of the building, to furnish a bond satisfactory to the lessors guaranteeing the due observance of the clause, that thereby the contract recognizes that such liens might accrue, be filed, and be binding against the interest of the lessors. We do not concur in this view. On the contrary, we do not think it changes in any manner the meaning of that part of the clause which limits the authority of the lessee in the premises. The lessors were certainly interested in having all bills paid to the end that the lessee's interest in the premises be not subjected to a mechanic's lien and a new tenancy created by operation of law through the enforced assignment of the lease. And this is clearly the purpose of the requirement in that respect.

It is not conceivable that the legislature made provision, as it did by § 4029, supra, whereby an owner could protect his interest in land against mechanics' liens for improvements made thereon with his knowledge but in relation to which he had not contracted, and made like provision by § 4025, supra, whereby he could, when [590] entering into a certain class of contracts, that is, with a contractor or builder, limit to such contract price the lien liability of his land, and in-

tended, as to all other contracts relative to improvements upon land, that an owner's rights in the premises and the liabilities that might be impressed thereon as a lien, could in no wise be protected and limited. Such a legislative enactment, if not unconstitutional, would be, at least, unjust and inequitable. We cannot sanction a rule of law, unless by legislative enactment we are so required to do, whereby one man's property may be taken for the debts of another and such person be without power to prevent it. We, therefore, withdraw the former opinion filed herein and affirm the judgment of the trial court.

Judgment affirmed.

Decision *en banc*.

Hill and Scott, JJ., dissent.

MUSSER, C. J. (*specially concurring*).—I agree that the judgment should be affirmed, but I rest my conclusion solely upon clause six of the lease, which is as follows:

"It is expressly understood and agreed (and notice is hereby given), that nothing herein shall authorize the lessee or any person dealing through, with or under it to charge said lands, or any interest of the lessors therein, or this lease, with any mechanic's lien, or lien or incumbrance of any kind whatever. On the contrary (and notice is hereby given), the right and power to charge any lien or incumbrance of any kind against the lessors, or their estate, is hereby expressly denied, and the lessee covenants that it will not permit or suffer any bill of any mechanic, labor or material man, or for any furnishings or equipments of said premises, to be or remain unpaid. The lessee shall, before commencing the erection and construction of a building on said premises, furnish [591] or cause to be furnished a bond in a bonding company satisfactory to lessors, guaranteeing the due observance of this clause 6."

If a mechanic's lien can be fastened upon the reversionary interest of the lessors it must be that the lease made the lessee the agent of the lessors with authority to so contract with reference to the erection of the contemplated building as to bind the interest of the lessors. The agency, if any, that existed between the lessors and lessees was created by the lease. Plainly that agency did not arise from that part of Sec. 4025 Rev. St. '08, which says that "every contractor, architect, engineer, subcontractor, builder, agent or other person having charge of the construction, alteration, addition to or repair, either in whole or in part, of any building or other improvement as aforesaid, shall be held to be the agent of the owner for the purposes of this act." The lessee was not one of those enumerated in the statute who was to be deemed the agent of the owner for the purposes of the act unless the lease created such agency. If the lessee was at all the agent it was by virtue of the lease and not of the statute. It is elementary that the authority of an agent is limited and controlled by the instrument creating the agency and that any person dealing with an agent, and having knowledge of the limitations upon the latter's authority, must at his peril contract with the agent within the known limits of that authority. When a lease provides that the lessee shall erect a building on the real estate and is silent as to the authority or want of authority of the lessee to bind the lessor's interest with a mechanic's lien, it is only by implication, if at all, that it can be said that such authority exists. No such implication can be made in this case, for clause six of the lease, expressly and plainly, in words that need no other construction than their obvious meaning denotes, withholds from and denies to the lessee the authority to bind the interest of [592] the lessors with a mechanic's lien. There is no escape from this. The part of the clause which provides that the lessee would "not permit or suffer any bill of any mehcanic, labor or material man, or for any furnishings or equipments of said premises, to be or remain unpaid," is only a personal covenant; that is, one that extends only to the lessors and lessees. Under the lease, a lien would attach to the leasehold interest of the lessee in the premises, and the lessors were interested in seeing that the bills for labor and material were paid. The part of the clause before that withholds from the lessee any and all authority to encumber the lessor's interest with a lien. Nor does the sentence of the clause which provides that the lessee shall furnish a bond guaranteeing the due observance of the provisions of the clause in any manner change the meaning of that part of the clause which limits the authority of the lessee. The lessors were certainly interested in having the provisions of the lease carried out and they had the right to exact a bond guaranteeing such consummation. Any contractor, subcontractor, material man or laborer who would read this clause of the lease could obtain therefrom no other idea than that it was the intention of the contracting parties, the lessors and the lessee, that the interest of the lessors should not be subject to mechanics' liens in consequence of the erection of the building contemplated in the lease.

When the intention of the parties to a contract is found in a contract then it is known what the contract is. What the parties intended by clause six is obvious and plain. If the contract that the interest of the lessors should not be subject to a mechanic's lien is valid then these plaintiffs in error were not entitled to a lien against the inter-

estate of the approximate value of $4,000, and chattel property, exclusive of the money in dispute, of a value less than $50.

The executor maintains that, viewing the will as a whole, it cannot be said that the testatrix intended to bequeath the $320 found in the bureau to the defendant in error, while the legatee mentioned in item 2 just as strongly contends that the plain and unambiguous meaning of the term "contents" is of such a character as to carry all the bureau might contain, whether it be wearing apparel, notes, credits, moneys, or what not.

No direct authority can be found in Ohio which will aid the court in its interpretation of the dispute in question, although in other jurisdictions, both in England and the United States, cases are not few which construe substantially similar expressions. [164] In volume 51 of the Connecticut Reports, at page 569, in the case of Webster v. Wiers, the court holds: "A testatrix made the following bequest:—'I give to M. all my household effects, books and papers of value, and *everything the house contains.*' . . . Held: Not to include a promissory note of $100, and a savings bank book with deposits of $2,500 represented by it, which belonged to the testatrix and were found among her papers in her dwelling house immediately after her death."

Park, C. J., in his opinion in this case, at page 575 says: "It seems clear to us that the articles intended were clearly household effects, such articles as were kept for household and family use. It is true that she uses, at the close of the bequest, the sweeping expression, 'and everything the house contains.' . . . It would be a very unnatural thing that a testator should describe such property, and of such value, merely as household effects and as a part of all the house contained. . . . It is hardly credible that a particular allusion to them should not have been made if she had intended to embrace them in the bequest."

In the case of Gibbs v. Lawrence, 7 Jur. N. S. (Eng.) 137, Vice Chancellor Woods, a jurist of great learning and high repute, held that a bequest of "all and singular my household furniture, plate, linen, china, pictures, and other the goods, chattels, and effects which shall be in, upon or about my dwelling-house and premises at the time of my decease," would not include a sum of money (in that case 400 pounds) found in the house.

Consulting some of the leading text-writers on [165] will construction, we find it to be an established course of interpretation that it is a rule of presumption, especially in *clauses not residuary*, that where a more general description is coupled with an enumeration of things, the description shall cover only things of the same kind; and doubtless words of a general description may, by due regard to the context, be considered as limited by an attempt at particular description.

But let us disregard for the moment all case law on the subject, and also the general rules of construction excepting the most important rule, "that all the words of the will are to be taken into view and not a part of them only; as every word is employed to develop the intention of the testator and all of them taken in connection exhibit a transcript of his mind," and so invoking this cardinal rule, we are irresistibly forced to the conclusion that this aged colored woman did not have the remotest idea of bequeathing to Sadie Harris the money found in the bureau.

A reading of the instrument, a consideration of the circumstances surrounding the testatrix at the time of the execution of the instrument, together with the exercise of a knowledge of human nature, forbid the conclusion that the testatrix wished to bequeath this money in this manner.

The very great detail to which the testatrix resorts in the matter of enumeration of the various articles she specifically bequeaths demonstrates that she in common with the older people of her race and condition held little things, even old trumpery, in high esteem.

[166] Is it not unreasonable to believe that she would bequeath and specifically mention "window blinds, washtub and board, baskets, crocks and jars," and leave unmentioned, except under the general head of "the contents of a bureau," the sum of $320 in money, which exceeded by nearly sevenfold the total value of all her other chattels? And is it not equally incredible that she would employ five of the nine items of her will to dispose of her chattels, of a less value than $50, and not regard the bequest of $320 in money of sufficient moment to justify a line at least for its disposal?

The will speaks eloquently in its wealth of detail in proof of the fact that the aged woman felt that the littlest article which she owned was of sufficient importance to have a place in her will.

Under all these circumstances we feel that it would be doing violence to the intention of the testatrix to pass title to this money under the poor and meager description of "the contents of a bureau," and it must be held as passing to the next of kin, the residuary legatees mentioned in item 9 of the will.

Judgment reversed.

Shauck, Johnson, Newman and Wilkin, JJ., concur.

consented to the improvement in such a way as to permit a lien. In order that a lien may attach, the circumstances must be such as to show consent of the owner or to justify an inference of it. Wheaton v. Berg, 50 Minn. 525, 52 N. W. 926. In order to sustain a lien for the plaintiffs in error in this case, under that section it must be taken that the consent of the lessors is conclusively presumed to have been given in such a manner as would cause their interest in the property to be subject to a lien, because they failed to give the prescribed notice. In the case last cited, the Minnesota court had under consideration a section of the lien laws of that state almost identical with Sec. 4029 of our statutes, and that court struggled manfully to reach the conclusion that the section was constitutional, [596] and in order to do so it held that the presumption that the owner had consented that a lien might attach to his interest in the premises, by failure to give the required notice was *prima facie* evidence that he had consented rather than conclusive, and that section prescribed a rule of evidence. The court said:

"Those who may be engaged in contributing labor or material which go to the improvement of the land may often have reason to suppose that the work is being carried on at the instance or with the consent of the landowner. It is important to such persons that, if possible, it be made known then if the owner's consent be wanting, and that, therefore, they cannot subject the property to liability for the labor or material supplied by them for its improvement. Hence the statute, in effect, makes it the duty of the owner, who knows of the improvement being made, to give the prescribed notice if he would avoid the inference that is done with his consent. From the neglect of the duty created by statute the inference follows. But it would seem to be impossible to construe this provision as making the mere neglect to give the specified notice *conclusive* upon the landowner in all cases. The circumstances must be such that he can comply with the statutory requirement, or he cannot be thus concluded."

It can be added with the same degree of force that the circumstances must be such that the persons interested in having a lien attach have not already received notice that the owner's interest shall not be subjected to a lien. The court further said that an owner who has knowledge of the erection of the building upon his premises may nevertheless show that he could not give the required notices and thus excuse his failure for giving them. Equally it can be said under this statute that the owner, in order to relieve his property of a lien may show that he has already given notice to that effect and that all interested did know that he had not consented [597] that his interest should be subject to liens, and that, therefore, it would be a needless thing to give the notice specified in the statute. It cannot be conclusively presumed that the lessors in this case consented that their interest might be subjected to a lien when they expressly contracted with the lessee that it should not be and gave full notice to the world of such contract before anything was done toward the erection of the building. It is to be observed that Sec. 4029 provides for actual or constructive notice at the option of the owner. It does not expressly or impliedly exclude other actual notice, which may be given, nor does it in any manner assume that other constructive notice provided by general statute or law would not be sufficient.

The Minnesota court, after showing that construing the section as conclusive against the landowner, would make it unconstitutional or of doubtful constitutionality, said:

"But some reasonable effect should be given to the statute if it be possible; and this may be done by construing the statutory presumption, which springs from the failure to give notice, as being of a *prima facie* nature rather than conclusive, and as imposing upon the landowner who, knowing the fact of the improvement, has failed to give the prescribed notice, the burden of relieving himself from the statutory imputation of having consented to what was being done, by proof of his inability to give the prescribed notice of his dissent, and that in fact the improvement was made without his authority or consent. As the statute was obviously intended to establish a *rule of evidence*, and as it cannot be sustained if the statutory presumption is to be construed as conclusive, but may be if it has the qualified effect which we have suggested, we conclude that it must be so construed. The language of the law does not forbid this construction, and there are apparent reasons which may have led the legislature to impose the burden of [598] proof on the party who has peculiar knowledge concerning the matters to which evidence is to be directed."

From what has been said, it follows that the section furnishes a rule of evidence, by which, in the first instance, the failure of an owner with knowledge to give the notice therein specified raises the presumption that the owner consented that his property be subjected to a lien, and to overcome this presumption that the owner consented that his property be subject to a lien, he must go forward with evidence to show that he could not reasonably give the notice, or that he had already effectually given actual notice, or such constructive notice as would be given by recording a lease with a provision similar to that in clause six of the present lease.

It is held in some authorities that when contracts of sale or of lease require the vendee or lessee to make improvements that the interest of the vendor or lessor will be subject to a lien when there is no stipulation to the contrary. In Carey-Lombard Lumber Co. v. Jones, 187 Ill. 209, 58 N. E. 349, it is said:

"Similar contracts have been before the courts in proceedings to enforce mechanics' liens, and have, without exception, so far as we are advised, been held to amount to authority or consent from the owner to a vendee or lessee to make the improvements, and, *in the absence of some stipulation in the agreement to the contrary*, to give a lien upon the interest of the owner for materials furnished or labor performed under contracts with the vendee or lessee."

This opinion implies that in instances where the agreement contains a stipulation that the interest of the vendor or lessor shall not be subject to a lien such stipulation controls. The cases cited by plaintiffs in error as sustaining their claims to liens where all cases in which there was an absence of such stipulation in the agreement, or as in Illinois, in the case of a so-called lease, the court found that the relation between the parties [599] was in fact not that of lessor or lessee, but as joint venturers in the construction of a building. In Shapleigh v. Hull, 21 Colo. 419, 41 Pac. 1108, the owner agreed to sell land to a named vendee and the vendee agreed to erect houses on two of the lots. The contract was silent as to the right of the vendee to charge the interest of the vendor with a lien, so that there was an entire absence of any stipulation that the interest of the vendor should not be subject to a lien. It was under these circumstances that our court held that a lien would attach to the interest of a vendor. This court has not decided what the law is in the case of the presence of such a stipulation. Since, the decision in Shapleigh v. Hull, supra, sec. 4029, was passed. It was said in the Minnesota case, supra, that such a statute would permit a vendor who had made a contract similar to the one in Shapleigh v. Hull, supra, to free his property from a lien by giving the prescribed notice. If that is true, then the legislature has modified the rule of law as laid down in Shapleigh v. Hull.

On the other hand, in Wilkins v. Abell, 26 Colo. 462, 58 Pac. 612, there was a mining lease. The court said that by the demise the lessee acquired a qualified interest in the property which entitles him to work the same for his own benefit. In fact it may be said that a mining lease presupposes that the lessee will work the mine, else it would be of no use to him. In that case this court held that, "the lessee is in no sense the agent or superintendent of the lessor, nor is he a contractor in the contemplation of the statute." (Mechanics' Lien Stats.)

In Antlers Park Regent Min. Co. v. Cunningham, 29 Colo. 284, 68 Pac. 226, this court refused to decide whether or not the principle upon which Shapleigh v. Hull, supra, was decided would be applicable between a lessor and a lessee.

[600] In Williams v. Eldora-Enterprise Gold Min. Co. 35 Colo. 127, 83 Pac. 780, there was an option to purchase a mining property and a lease thereof. The lessee was required to perform a certain amount of work on the property. After showing that the possession of the claim of the lessee and the doing of the work under the lease was as lessee and not as vendee in the option this court refused to apply the doctrine announced in Shapleigh v. Hull, supra, but applied the doctrine announced in Wilkins v. Abell, supra, and said:

"Nor can a lien be asserted as against the lessor owner on the ground that the lessee here occupied some relation to the mine with respect to the working of it other than that of lessee. The contract of leasing did not call for the erection of any permanent improvements. Its only requirement of the lessee in respect to work was that it should begin development work within a certain time and continuously employ two shifts of five men each. In the nature of things, a lease of a mine contemplates that the lessee must do at least ordinary development work. A mine is valuable principally if not wholly on account of the ore it contains, and to extract the same necessarily requires work to be done upon it. The work required here was merely ordinary development work, which brings the case within the holding in Wilkins v. Abell, supra. In other words, the labor performed and materials furnished by the claimants for which a lien is sought were done for and furnished to one who was in possession and developing the same whose only relation to the property, so far as concerns any requirement of work thereon, was that of a mere lessee."

In Colorado Iron Works v. Taylor, 12 Colo. App. 451, 55 Pac. 942; Dougherty-Moss Lumber Co. v. Churchill, 114 Mo. App. 578, 90 S. W. 405, and Jones v. Menke, 168 N. Y. 61, 60 N. E. 1053, there was no stipulation that the interest of the lessor should not be subject to a lien, and [601] hence those cases are not in point here. In the case of Western Lumber, etc. Co. v. Merchants' Amusement Co. 13 Cal. App. 4, 108 Pac. 891, there was a lease, but it did not contain a stipulation forbidding a mechanic's lien on the interest of the lessor. It appeared in that case, and the court found, that the building was really erected by the lessor and that he was using the corporation lessee as an instrument to

carry out his own venture. Certainly an owner cannot thus free his property from mechanics' liens. And it was for that reason that the California Court held that the lien would attach. In Crandall v. Sorg, 198 Ill. 48, 64 N. E. 769, there was a contract wherein it was agreed that Hullinger would sell and convey the land to Sorg; that the latter would then execute a lease for ninety-nine years to the former and that a building should be erected on the premises. Later on the lease was executed, and provided also for the erection of a building, and had in it a provision that no mechanics' liens should affect the claims of the lessor in the building and his rights in the premises. The court held that the contract and lease were executed as part of the same transaction; that they constituted one writing and should be construed together, and that when so read together it was manifest that Sorg was "not to be regarded as but an ordinary lessor of the premises." But on the contrary, it was held that the instruments disclosed that Sorg and Hullinger "jointly engaged in an enterprise which had for its purpose the construction of a building for rental purposes on the premises in question." Each put up money for that purpose. Under these circumstances, it was held that the clause in the lease concerning mechanics' liens was of no avail because Sorg was in the position of an owner engaged in erecting a building and not as a lessor.

In Provost v. Shirk, 223 Ill. 468, 79 N. E. 178, there was a contract of sale and lease the same as in the former case, so that the socalled lessor and lessee were jointly [602] engaged in the enterprise and were in the position of owners of the property. These Illinois cases placed the lessors and lessees in the position of two tenants in common, who contract with each other concerning the erection of a building upon their joint premises. In such a case, of course, they could not contract with one another so as to free the property of either from mechanics' liens. The question of abridging the right to make a contract concerning one's property with a lessee or vendee, which would be otherwise lawful, is not involved in any of the cases cited, and has never been passed upon by this court. That question is the one that is now presented. It appears to me that a reasonable view of our mechanics' lien laws is that they do not, expressly or by any implication, say that such a contract made between a *bona fide* vendor and vendee, or a *bona fide* lessor and lessee, would have no effect, when due notice has been given thereof. The contract between the lessee and the principal contractors expressly mentioned the lease and it was known that no contract was entered into with the owners of the fee. Owners of property have rights which courts and the legislature must respect. If a contractor has notice that he is to erect a building for a lessee it is reasonable that he should be required to ascertain the contents of the lease if he desires to proceed on the credit of the interest of the lessor. Had the subcontractors and material men investigated the nature of the principal contract they would have known of the lease, could have ascertained all of its provisions, and thus learned that they could not contract or sell on the credit of the lessor's interest. To have done so would have been the exercise of ordinary business diligence. There is nothing in our statutes, that I can find, that permits contractors and others who may have lien claims to proceed without any diligence to ascertain facts that are easily before them. Ordinary diligence [603] may be required of owners who construct or permit to be constructed improvements upon their property which become not only a source of profit to them, but of benefit to an entire community, but ordinary diligence should also be required from those who perform upon the credit of the property. To free lien claimants from ordinary and reasonable diligence is to place an embargo upon improvement and progress. The lease in this case was recorded the day after its execution, and before any right to a lien could have attached. A lease of real property is such an instrument as is entitled to record under sec. 694 Rev. St., and, therefore, its recordation is constructive notice to the world of its contents. While that section does not specifically use the word "lease" it does use the words "agreements in writing of, or effecting title to real estate or any interest therein," and a written lease of land is such an agreement. Besides, sec. 707 says that the term "deed" includes leases, and the term "deed" is used in sec. 694. An instrument that is recorded according to law, and which the statute says shall be notice when recorded, is notice to the world of all the facts and matters therein expressed, and not only of such facts, but of all facts suggested therein and which reasonable inquiry would elicit.—Perkins v. Adams, 16 Colo. App. 96, 63 Pac. 792; Delta County Land, etc. Co. v. Talcott, 17 Colo. App. 316, 68 Pac. 985; Loser v. Plainfield Savings Bank, 149 Ia. 672, 128 N. W. 1101, 31 L.R.A.(N.S.) 1112.

In Armstrong Cork Co. v. Merchants' Refrigerating Co. 184 Fed. 199, 107 C. C. A. 93, there was a lease which provided that the improvements made by the lessee should remain his property, and the court held that the recording of the lease was notice of this stipulation. The court said:

"The record of the lease was notice to the complainant that the improvements he was placing in this warehouse remained the personal property of the lessee, [604] that they

United States.—Foxall v. McKenney, 3 Cranch C. C. 206, 9 Fed. Cas. No. 5,016.

Connecticut.—Webster v. Wiers, 51 Conn. 569.

Maine.—Andrews v. Schoppe, 84 Me. 170, 24 Atl. 805.

Maryland.—See Lyon v. Safe Deposit, etc. Co. 120 Md. 514, 87 Atl. 1089.

New Hampshire.—Benton v. Benton, 63 N. H. 289, 56 Am. Rep. 512.

New York.—Ludwig v. Bungart, 33 Misc. 177, 67 N. Y. S. 177; Fenton v. Fenton, 35 Misc. 479, 71 N. Y. S. 1083; Matter of Delaney, 133 App. Div. 409, 117 N. Y. S. 838, *affirmed* without op. 196 N. Y. 530, 89 N. E. 1098.

New Mexico.—Perea v. Barela, 5 N. M. 458, 23 Pac. 766.

Ohio.—See the reported case.

Pennsylvania.—See Krause's Estate, 19 Pa. Dist. 751.

Vermont.—Peaslee v. Fletcher, 60 Vt. 188, 14 Atl. 1, 6 Am. St. Rep. 103; Blackmer v. Blackmer, 63 Vt. 236, 22 Atl. 600.

In Peaslee v. Fletcher, supra, it appeared that there was a devise and bequest of "my home place . . . with my household furniture, and all my personal goods and chattels on said premises at the time of my decease." It was held that promissory notes and money did not pass. The court said: "We must consider all the language of the clause in question—the words, 'my household furniture,' as well as, 'my personal goods and chattels,' and determine, if we can, what relation the respective words bear to each other, whether or not the latter are restricted in their meaning by the former. The authorities on this point are numerous and somewhat conflicting; but we find that the general current of them, both in England and in this country, is, that except in residuary clauses, general words, such as 'goods' and 'chattels,' when following after and coupled with words of a limited signification, are restricted to the same class as the former. Will. Ex. 1015, 1017, and cases cited. . . . Upon these well recognized rules of construction, we hold that the words, 'goods and chattels,' in the connection in which they are found, should be construed as having only a restricted and limited signification and as not including said Manwell notes and cash on hand; that they are further restricted in their meaning by the word 'personal,' which indicates, when considered in its relations to the words, 'household furniture,' that the testatrix intended by the words in question to bequeath only other articles of the same kind, belonging to the house, 'savoring of the locality,' adapted and pertaining to her personal use. This view is sustained by the fact that no definite amount of money and notes was kept at the house. It often varied with varying circumstances, and the notes and money were carried away and brought back as the testatrix had occasion to go from or return to her home, and were removed when she died." To the same effect see Webster v. Wiers, 51 Conn. 569. In the case of In re Thompson, 217 N. Y. 111, 11 N. E. 762, it was held that a bequest of the "contents of my safe deposit box . . . consisting of jewelry, etc., excepting my Savings Banks books" did not include a certificate of deposit. In Blackmer v. Blackmer, 63 Vt. 236, 22 Atl. 600, it appeared that a clause in a will provided as follows: "I give and devise to my beloved wife, in lieu of dower, my home place. . . . and all the household goods, furniture, provisions, and other goods and chattels, . . . which may be therein at my decease, during her life." It was held that the widow was not entitled to the income of notes which were in the house at the time of the decease of the testator. In Andrews v. Schopp, 84 Me. 170, 24 Atl. 805, it appeared that a testatrix made a bequest to her niece of "all my housekeeping articles, including all my household furniture, beds and bedding, kitchen and table furnishings, books and pictures, all my wardrobe and all other articles of personal property in the house at the time of my death belonging to me." It was held that promissory notes which were in her house at the time of her death were not included in the bequest. The court said: "In this case, the testatrix commences the description of the property which it was her intention to dispose of by this clause with the use of the general term 'all my housekeeping articles.' The evident desire of the testatrix, as manifested from the language used, was to give her niece everything which pertained to her household equipment, and which would render her home life and domestic duties more comfortable and agreeable. In furtherance of this purpose she adds to the general description of her bequest the specification of what her general description includes, namely all her 'household furniture, beds and bedding, kitchen and table furnishings, books and pictures, all my wardrobe and all other articles of personal property in the house at the time of my death, belonging to me.' These specific words of enumeration which the testatrix had used, and which precede the closing portion of the bequest, could not have added anything to the scope of her bequest, if she intended this last clause to cover and pass her entire personal property. If by the language 'all other articles of personal property' she intended to embrace everything which in the broadest legal signification of the term could be the subject of ownership in personal property, the enumeration of the household articles, household furniture, beds and bedding, kitchen and table furnishings,

books and pictures and wardrobe, was entirely superfluous. These words, were we to adopt that understanding of her intention, would be meaningless and useless verbiage. If she had intended to give this niece her entire personal property in the house, in terms unrestricted, she might have easily said so without any specific enumeration. She would hardly have applied the term 'articles' of personal property to promissory notes. It is more reasonable and consistent to believe that by the expression 'articles of personal property in the house' she had in mind that class of property which, in the same sentence, she had been enumerating, movable, tangible property, rather than money or choses in action." In Matter of Delaney, 133 App. Div. 409, 117 N. Y. S. 838 (*affirmed* 196 N. Y. 530, 89 N. E. 1098, and *distinguishing* Matter of Reynolds, 124 N. Y. 388, 26 N. E. 954), it appeared that there was a bequest of . . . "all the household furniture and personal property of whatsoever kind in my dwelling house." It was held that money and jewelry which were found in the house did not pass to the legatee by the bequest.

The presumption of the intent of the testator to give property of the same kind only as that enumerated may be strengthened by the fact that there is a residuary clause by which property of the general description other than that enumerated would pass, or where there would be substantial disappointment of the residuary disposition if the rule of ejusdem generis was not applied. Matter of Reynolds, 124 N. Y. 388, 26 N. E. 954, *affirming* 55 Hun 603, 8 N. Y. S. 403, which *affirmed* 7 N. Y. St. Rep. 725; In re Thompson, 217 N. Y. 111, 111 N. E. 762; Ball v. Dixon, 83 Hun 344, 31 N. Y. S. 990. See also Jones v. Sefton, 4 Ves. Jr. (Eng.) 166; In re Miller, 61 L. T. N. S. (Eng.) 365; In Ball v. Dixon, supra, it appeared that there was a devise of a farm "together with all the personal property upon said farm, including all the personal property in the house and in the other buildings on said premises." It was held that the contents of a safe including promissory notes, a certificate of deposit and pass books representing money in bank, did not pass, since they were embraced in a residuary clause of the will.

On the other hand the absence of a residuary clause tends to show that the bequest is not to be confined to things ejusdem generis. See infra, the subdivision *Exception to Rule.*

Exception to Rule.

The rule that a bequest or devise of the property, or of the property of a general description, contained in a particular place, when the general description of the property given is coupled with a specific enumeration, passes only things of the same kind as those enumerated, yields where the intent of the testator as gathered from the whole instrument indicates that the property passing should not be so limited. In re Johnston, 26 Ch. D. (Eng.) 538, 53 L. J. Ch. 645, 52 L. T. N. S. 44, 32 W. R. 634; In re Lea, 104 L. T. N. S. (Eng.) 253; Mahony v. Donovan, 14 Ir. Ch. 388; Bromberg v. McArdle, 172 Ala. 270, Ann. Cas. 1913D 855, 55 So. 805; Taubenhan v. Dunz, 125 Ill. 524, 17 N. E. 456; Dennett v. Hopkinson, 63 Me. 350, 18 Am. Rep. 227; Perea v. Barela, 5 N. M. 458, 23 Pac. 766. See also Gaff v. Cornwallis, 219 Mass. 226, 106 N. E. 860; Burt v. Harris, 152 N. Y. S. 956; In re Woodside, 188 Pa. St. 45, 41 Atl. 475, 43 W. N. C. 115. In Bromberg v. McArdle, supra, it appeared that a testatrix devised a house to her daughter "together with all household and kitchen furniture, and all other personal property contained in said residence," and imposed on her the payment of a number of demands against the estate. It was held that eight hundred dollars in money found "in a pocketbook in the drawer of a bureau" passed to the daughter. The court said: "It is the contention of counsel for appellant that the words, 'all other personal property,' following as they do, in item 2, the designation of household and kitchen furniture as subjects of bequest to the daughter Elizabeth, restrict the general terms to personalty ejusdem generis with the specified subjects of bequest. The rule to which appellant's counsel appeals is, of course, well recognized. . . . But, as we have said, upon obviously sound reason and abundant authority, the intention of the testator, to be ascertained from the whole instrument, will not suffer sacrifice by adherence, notwithstanding, to the rule stated. . . . The sum of the purpose of the testatrix, to be read from the whole instrument, was to lay the obligation for the payment of the demands mentioned upon the personal estate, in exemption of the real property from charge therefor, and to that end the bequest was of all of the personal estate, contained in the residence, to Elizabeth, whom the testatrix directed to pay and discharge the obligations enumerated. It is argued, in opposition to the interpretation of the will in the particular with which this appeal is concerned, that such a view renders vain the general residuum clause therein. If that effect of the conclusion could, on this record, be affirmed, it would not, in our opinion, suffice to negative the testatrix's stated intent in this regard. Nevertheless, we find nothing in the record even tending to show that at the time of the execution of the instrument the testatrix had no other property, than that previously therein devised or bequeathed, which would then have passed under the in-

fluence of the general residuum clause." In Taubenhan v. Dunz, 125 Ill. 524, 17 N. E. 456, it appeared that the sole devisee and legatee named in a will was given among other property, "all the loose property in, on and around the homestead, consisting of one cow, two hogs and a lot of wood, and all other property of every kind." The testator owned a number of promissory notes for money loaned. It was held that as to them he did not die intestate and that they passed to the legatee under the will. The court said: "We can understand how all the loose property in, on and around the homestead might, by application of the principle, be cut down to articles ejusdem generis with cows, hogs and wood; but what shall be said of the further words, 'and all other property of every kind?' with which class or species of property shall they be held to be ejusdem generis? Shall they be cut down and limited to cows, hogs and wood. The testator only had one cow, two hogs and one lot of wood, and these were specifically bequeathed, and to hold the general words limited to the particular articles bequeathed, would be to render inoperative words of the most general import, because there would be no property upon which they could operate and to which they could attach. Operation and effect must be given to each and every provision in the will, as we have seen, unless there is irreconcilable repugnance, or unless the provision is unintelligible. It is clear neither exception here exists; and if the general words, 'and all other property of every kind,' cannot be cut down to the particular articles named in immediate connection, then there are left no particular words, either immediately preceding or following, by which they may be qualified. There are no following words, and the preceding words (excluding, as we have seen we must, the cow, hogs and wood), are themselves general words,—namely, 'all the loose property,' etc." In the case of In re Lea, 104 L. T. N. S. (Eng.) 253, it appeared that a codicil after devising a house provided as follows: "I bequeath all my furniture, plate, linen, china, glass, books, pictures, and household effects of every description and all other the contents of the said dwelling-house except any articles I may have bequeathed by my said will to my nephew G. L. Wells." The court in construing the bequest said: "The question here is what passed under a bequest in the codicil. By the will there is a specific bequest of a five star diamond broach, a large and small gold rose vase, and 20*l.* to a servant, and with the exception of these bequests to trustees upon trust for conversion, and divide the income among certain nephews and nieces, and on the death of the survivor upon trust for the children of nephews and nieces then living. . . . It is said only ordinary household effects pass, and that does not include personal clothing, jewellery, or cash. In my opinion everything in the house passed. The testatrix clearly intended to pass household effects. It is clear to demonstration, all clothing, jewellery, etc., passed." In Perea v. Barela, 5 N. M. 458, 23 Pac. 766, it appeared that there was a bequest to the testator's wife of "all articles of goods in my house, personal furniture, household furniture, and all that therein exists." It was held that an iron box and a safe and the money that they contained passed to the wife. The court said: "We think there can be no doubt but the iron box and iron safe passed to the wife under enumeration of 'articles of goods, personal furniture and household furniture.' But there was something more in the articles enumerated to be disposed of. Therefore the testator adds: 'And all that therein exists.' These words had a meaning to the testator, because he alone knew that the money was there. Taking the language used in the will in connection with the testator's esoteric knowledge of the existence of a large sum of money in the iron box and iron safe, we hardly see how a man ignorant of the rules of the construction of wills could have expressed his thoughts and intentions more clearly than the same were expressed in this will. The purpose of the testator was to dispose of all his property; and, if the contention of appellant be correct, the will gave to the wife the residence of the testator, and a piece of land near the depot in Las Cruces, known as the 'Juan Bautista Armijo and Lopez' land, the household furniture in the residence, ten cows, one small wagon, and two mules. It made specific bequests to various other persons of one thousand, six hundred head of sheep, a house, cows, asses, money, etc., and the remainder of the property to the defendants, and although possessed of a large amount of money, the wife was left without a dollar, except as she might raise it by a sale of the property devised to her. The complainant was the wife of the testator. They had no children. There is nothing in the record to suggest that the testator did not entertain for his wife that complete affection that all good men should have for good wives. No reason existed to indicate that the testator had any cause to deprive his wife of that maintenance and support from his property to which she was entitled. . . . We think it was the intention of the testator to leave the money to the complainant, and that such intention is clearly expressed in the will."

It seems that the intent of the testator not to limit the bequest to things of the same kind as those enumerated may be inferred from the absence of a residuary clause. Mahony v. Donovan, 14 Ir. Ch. 388; Ball v.

Dixon, 83 Hun 34, 31 N. Y. S. 990; Matter of Reynolds, 124 N. Y. 388, 26 N. E. 954, *affirming* 55 Hun 603, 8 N. Y. S. 403, which *affirmed* 7 N. Y. St. Rep. 725; Peaslee v. Fletcher, 60 Vt. 188, 14 Atl. 1, 6 Am. St. Rep. 103.

KRICKAU

v.

WILLIAMS.

Rhode Island Supreme Court—December 31, 1913.

36 R. I. 85; 89 Atl. 152.

Attorneys — Summary Control — Transaction outside Professional Relation.
The courts will not maintain summary proceedings to discipline an attorney for alleged misconduct, in order to compel him to pay money or perform any other act, in matters disconnected with his professional duties.
[See note at end of this case.]

Same.
Respondent, an attorney, while not acting for petitioner in a professional capacity, received $500 from her as a loan, and executed a mortgage to secure the same on property, the title to which stood in the name of his mother-in-law. He claimed that the property in fact belonged to him, which the holder of the title admitted; that he had executed the mortgage as collateral entirely on his own suggestion; that it was not demanded by petitioner, nor was it an inducement to the loan, which petitioner admitted. It appeared that at the time respondent fully explained the circumstances to petitioner, and since the commencement of the proceedings to discipline respondent, he had offered to repay the loan, with interest, but petitioner thought she was not at liberty to accept the payment until the conclusion of the proceedings. Held, insufficient to justify any order against respondent.
[See note at end of this case.]

Petition for summary order against attorney at law. Emma E. Krickau, petitioner, and James A. Williams, respondent. The facts are stated in the opinion. PETITION DENIED.

Edward L. Singsen for petitioner.
James A. Williams, pro se ipso.

[86] SWEETLAND, J.—This is a petition asking for summary action against the respondent as an attorney at law. The petition was referred to the committee on complaints against members of the bar. After hearing, said committee reported the matter as one requiring examination by the court. A hearing was had before us at which the parties presented their testimony and arguments.

The petitioner claims that she loaned five hundred dollars to the respondent, and that in the transaction, the respondent committed fraud by reason of a false representation which he made to her as to his ownership of certain real estate upon which he gave the respondent a mortgage as collateral security for said loan.

At the time of making said loan and giving said mortgage the relation of attorney and client did not exist between the parties. The respondent at one time, had acted as attorney for the petitioner in an unimportant matter, but that had been concluded a number of years ago.

[87] The respondent admits that he received five hundred dollars from the petitioner, but claims that he received said sum for the purpose of investing it for the petitioner in a venture in which he was interested with others. The respondent, however, is willing that said transaction should be regarded as a loan of money to him, and herein it will be treated in that manner. The respondent admits that he gave the mortgage in question to the petitioner, and at the time of its delivery he did not have the legal title to the land and building which said mortgage purported to convey; but that the legal title to the same was in his mother-in-law, a Mrs. Crittenden. The respondent claims, however, that the mortgage in question was given as collateral security for said loan entirely upon his suggestion; that it was not demanded by the petitioner; that she agreed to loan the money to him before he suggested the giving of said mortgage; and that said mortgage was not the inducement for making said loan. This is admitted by the petitioner in cross-examination.

The respondent further claims that although the legal title to said real estate was in his mother-in-law, the said mortgage in fact constituted a valuable security for said loan; that said lands and building were purchased by him with his own money and that, although the legal title was taken in the name of Mrs. Crittenden, she acknowledges the respondent's ownership of said real estate and will recognize said mortgage as constituting a valid lien upon said real estate. In this claim, the respondent is fully supported by the affidavit of Mrs. Crittenden, which affidavit was admitted in evidence without objection by the petitioner.

The respondent further claims that at the time of giving said mortgage to the petitioner he fully explained these circumstances to her. This latter claim of the respondent is denied by the petitioner.

It appeared at the hearing that the respondent, since the commencement of these proceedings, has offered to repay said loan with interest and is still ready to do so; [88] but that the petitioner has not felt at liberty to accept said payment until the conclusion of these proceedings.

From the circumstances of this matter, it does not appear to us that a summary order against the respondent should be made upon this petition. The transaction in question was entirely unrelated to the professional character of the respondent. The summary jurisdiction of the court invoked by the petitioner arises from the control which the court will exercise over its officers in regard to those relations of trust and confidence existing between such officers and their clients, which relation arises from the special privilege conferred upon such officers and the special credit given to them by the court as persons worthy to assume such relations of trust and confidence. It is the well settled rule in this country that courts will not exercise such jurisdiction to compel an attorney to pay money or to perform any other act in matters unconnected with the professional character of the attorney. 18 Ann. Cas. 115; 27 Ann. Cas. 234. In Windsor v. Brown, 15 R. I. 182, 9 Atl. 135, 2 Am. St. Rep. 892, the money, for the payment of which the petitioner sought to obtain a summary order against the respondent, an attorney at law, came into the respondent's hands by reason of his position of attorney at law acting for the petitioner. The petitioner, however, before filing her petition had brought an action at law against the respondent for the recovery of said money and had obtained judgment against him. The court recognized the principle that its summary jurisdiction over the respondent depended upon the existence of the relation of attorney and client between the parties and held that "the summary jurisdiction of the court cannot be invoked when the relation of attorney and client has been changed to that of debtor and creditor." Anderson v. Bosworth, 15 R. I. 443, 8 Atl. 339, 2 Am. St. Rep. 910, was a petition for an order requiring the respondent to pay over certain moneys received by him as attorney. The court in that case held that, although the relation existing between the parties was not that of attorney and client it would grant the order on the ground [89] that the money came into the respondent's hands as an attorney at law; and the court recognized the principle as well settled that jurisdiction of this kind is restricted to matters in which the attorney has been employed in his professional character. Although the court will not make a summary order against an attorney in matters of business between him and other persons, when such business is not related to his profession, yet the court will, in any circumstances, for the integrity of the legal profession and the protection of the public, when it appears that the attorney is no longer worthy of confidence, declare his privilege as an attorney entirely forfeited or restrain him by proper discipline. Crafts v. Lizotte, 34 R. I. 543, 84 Atl. 1081.

In the matter at bar the court does not find that moral turpitude on the part of the respondent has been established or that under the testimony the court would be justified in the entry of any disciplinary order against the respondent.

It further appears to the court that the order which the petitioner seeks should not be made even if the relation of attorney and client existed between the parties. From the testimony given before us it is by no means established that the respondent was guilty of misrepresentation in obtaining said loan from the petitioner. Upon the establishment of that fact depends the petitioner's right to have the order which she seeks. There is a dispute between the parties as to such alleged misrepresentation; and in that dispute the contention of the respondent is not so unreasonable that it should be disregarded. If a dispute of this nature exists between attorney and client the rule followed in summary proceedings by the courts of the United States is well stated in Strong v. Mundy, 52 N. J. Eq. 834, 31 Atl. 611: "The behavior which will justify the exercise of this summary jurisdiction must be such as is dishonest or oppressive or clearly illegal. If it appears that there exists between a lawyer and his client a fair dispute, which can be decided only on the settlement of doubtful questions of fact or law, the court should not exercise its summary power, but should [90] leave the parties to their ordinary remedies." That rule has been recognized by this court in Peirce v. Palmer, 31 R. I. 432, p. 445, Ann. Cas. 1912B 181, 77 Atl. 201: "But the principles which govern the action of the court in those cases are equally applicable to any case where a summary order is sought. They arise from the nature of the proceeding. The court, in the exercise of its control over attorneys, will not suffer a manifest injustice on the part of such officers to go uncorrected, and at once, in such a case, without requiring the injured party to resort to the ordinary procedure of the courts, this court will direct its officers to take such action, or to make such payment as justice plainly requires. It makes no difference whether the money has been collected by the attorney for the benefit of the client or whether, as in this case, it has been placed in the hands of the attorney by the client for a specific purpose. If it is beyond reasonable question that there has been misconduct on the part of the attorney

in retaining the money, the court will promptly make an order for its payment. But, alike in all cases, for the client to be given this extraordinary relief it must be clear that there has been an injustice done to him. In all cases the client has relief in the ordinary tribunals for the determination of legal controversies, and when his right to have a summary order can be reasonably questioned he must be referred to these ordinary remedies, whatever be the nature of the controversy."

The petition is denied and dismissed.

NOTE.

The reported case holds that a summary order will not be made against an attorney at the instance of a person from whom he has obtained a loan on security claimed to be invalid, the loan having been made at a time when no professional relation existed between the lender and the attorney. The cases discussing the summary power to compel an attorney to pay over money as dependent on the existence of the relation of attorney and client are collated in the notes to Haden v. Lovett, 18 Ann. Cas. 114, and Burns v. Allen, 2 Am. St. Rep. 844, 849. For a discussion of the like limitation on the power to compel summarily acts other than the payment of money, see the note to In re Niagara, etc. Power Co. Ann. Cas. 1913B 234.

SHAW

v.

LORD.

Oklahoma Supreme Court—January 13, 1914.

41 Okla. 347; 137 Pac. 885.

Negligence — Injuring Bystander while Acting in Self-Defense.

It is error to instruct the jury in effect that one who, in his lawful self-defense, at close range shoots at an assailant, and, missing him, accidentally wounds a bystander, who, at the time, is to one side of the line of true aim at such assailant, and a few feet away from him, is, in an action for damages, liable to such bystander if he knew or is chargeable with knowledge of the presence of such bystander, as if this, of itself, constituted want of due care, and therefore was, per se, actionable negligence.

[See note at end of this case.]

Same.

Ordinarily, where a person, in lawful self-defense, shoots at an assailant, and, missing him, accidentally wounds an innocent bystander, he is not liable for the injury, if guilty of no negligence; and the question of negligence is for the jury.

[See note at end of this case.]

(Syllabus by court.)

Error to District Court, Le Flore county: ROSSER, Judge.

Action for damages. Anna Lord, plaintiff, and John Shaw, defendant. Judgment for plaintiff. Defendant brings error. The facts are stated in the opinion. REVERSED.

Andrews & Day for plaintiff in error.

J. E. Whitehead and *C. R. Barry* for defendant in error.

[347] THACKER, C.—Plaintiff in error will be designated as defendant, and defendant in error as plaintiff, in accord with their respective titles in the trial court.

On July 1, 1905, defendant, a deputy United States marshal, and Bert True, a posseman, having a warrant duly authorizing them to do so, undertook the arrest of Joseph Smith, who was a fugative from justice, charged with a felony, and who was believed by defendant to be so dangerous that he might kill an officer trying to arrest him, unless he realized the latter had a clear advantage of him, and that resistance would be futile.

[348] True resided in Wilburton, Okla. (then Indian Territory). Defendant, in response to a phone call from True, who then had possession of the warrant, came to Wilburton about five o'clock in the afternoon, had Smith pointed out to him on a street by some one, and thereafter, between five and six o'clock in the afternoon, with True, for the purpose of arresting Smith, went to a hotel in Wilburton, where Smith was eating supper, and where he had spent the preceding night. Upon arrival at the hotel, defendant requested and caused a lady, who was in the hall leading from the front door, on the north, to the door of the dining room, on the south, to request Dave Nowland, a boarder at the hotel, who was an ex-officer, and well known to defendant, to come from the dining room to the front porch, on the north of the hotel, where, according to the undisputed testimony of defendant, of True, and of Nowland, defendant ascertained from Nowland that Smith was then eating supper in the dining room, informed Nowland of the purpose of himself and True to arrest Smith, and requested Nowland to follow Smith from the dining room into said hall, and there seize him from behind so as to prevent him from drawing any weapon, while they effected the arrest; and, although Nowland testified he did not intend to "arrest" Smith, nor to exactly comply

with defendant's request, when he left the table with Smith, he further testified, in effect, that he started to follow Smith out to see what might occur, and render such assistance as he could; and it appears to be uncontradicted that Nowland assented to defendant's plan for the arrest, and that defendant, with good reason, believed that Nowland would follow and seize Smith so that his arrest might be safely effected. When Smith left the supper table, it appears that Nowland also left it, and went as far as the door of exit from the dining room into the hall, but met and turned back with a fellow boarder to seats at the table, perhaps abandoning his purpose to assist defendant.

It appears that Smith knew defendant, but it does not appear whether the defendant knew or suspected this, nor whether in fact Smith knew he was an officer; and it appears that True, if not the defendant, saw Smith step from the dining room into [349] the hall, then step back into the dining room, and then, at once, come forth into the hall, when the shooting occurred, but it does not appear whether Smith saw or knew True before his final exit from the dining room.

Smith and one Thurston, the latter in front, entered the hall about the same time immediately preceding the shooting, and defendant, who was in waiting with True on the front porch, hearing them, if no one else approaching, either immediately before or immediately after Smith made his final exit from the dining room, advanced to the front door and looked into the hall from the porch, and, evidently to his surprise, discovered that Smith, after making his final exit from the dining room, was approaching without any one holding or in position to seize him, whereupon, when Smith had gotten half or two-thirds the way along the hall, a shooting combat at close range occurred between defendant and True, on one side, and Smith, on the other.

The evidence is very conflicting, and the facts not fully developed as to some of the features of the combat; but it seems reasonably certain that Smith, in a crouching position, and with his hand on his pistol in his hip pocket, was approaching defendant before defendant fired at him, and perhaps before defendant drew or commenced to draw his pistol (one of plaintiff's witnesses, Mr. Thurston, in a measure, corroborates defendant on this point, and it is undisputed). It also seems certain that both defendant and True, the former first, fired at Smith from their position in the front door, at the north end of the hall, and that Smith, after defendant fired, fired and struck the door stop so close to True's head as to cause splinters therefrom to strike his cheek. It also appears reasonably certain, notwithstanding the testimony of one witness to more, that only one shot was fired by defendant and one by True before Smith, who also probably fired only one shot, got out to the steps in front of the hotel.

Plaintiff, then a girl of fifteen years engaged in work at the hotel, without notice of the impending danger, stepped into the hall, from a washroom, within a few feet of Smith, but, it appears, to the east of him, and there received a wound in her [350] right side when the shooting commenced; and, although both defendant and True testified in effect that the shot fired by the latter was the one that struck her, and plaintiff so stated soon after she was shot, we must assume, in deference to the verdict and her testimony to that effect, that defendant's shot, which was the first one fired, was the one that struck her. It appears that the ball entered in front, at about the eighth rib, and made its exit about six inches back, without penetrating the cavity of her body; and, besides being confined to her bed for about two weeks, with the suffering incident to such case, she has since suffered occasional soreness at the places of entrance and exit of ball and, during cold weather, pain in her shoulder, "just like [she] did when [she] was shot." It is alleged in plaintiff's petition that defendant entered the hotel "excitedly, and drew a pistol from his pocket, and began firing the same rapidly and excitedly, and in a very careless manner; that one bullet from the pistol penetrated the body of plaintiff . . . that said shooting by said defendant was wholly without cause; . . . that, by reason of said wrongful and negligent act of the said defendant in shooting this plaintiff, as aforesaid, she has been damaged," etc.

The defendant's answer, besides a general denial, especially denies that he fired the shot which wounded plaintiff, and shows that he was authorized to arrest Smith, that the shot he fired was in necessary self-defense while lawfully and properly endeavoring to arrest Smith, so that, if, by chance, the shot fired by him struck plaintiff, he is not liable for damages for such accident.

The trial court instructed the jury that defendant had the right to fire at Smith when he did; but further instructed in effect that defendant would be liable to plaintiff for damages if he was guilty of negligence in shooting at Smith without due regard for the safety of bystanders, and, still further, as if this, of itself, constituted want of due care, and therefore was, *per se*, actionable negligence, that "if, at the beginning of the difficulty, Shaw saw this woman, or should have seen her, and began firing, [351] knowing she was there, and a ball from his pistol struck her, then he would be responsible."

In Croker on Sheriffs (2d ed.) sec. 62, it is said: "The arrest may be made in any place, for no place affords protection to a criminal,

not even the church or the churchyard." To the same effect, see Murfree on Sheriffs, secs. 161, 162; New England Sheriffs and Constables (Hitchcock) sec. 167; 2 Am. & Eng. Enc. of Law (2d ed.) 855.

There can be no doubt of defendant's right, and under the evidence we must assume it was his duty, to effect the arrest of Smith at the hotel; but, of course, this does not relieve him of the duty to exercise such care to avoid injury to other persons as a person of ordinary prudence would usually exercise in doing so under like circumstances, or, which, in the present case, is its equivalent differently stated in respect to criteria, such care as persons of ordinary prudence usually exercise about their own affairs of great importance, and, in this respect, great care.

In Morris v. Platt, 32 Conn. 75, it is held:

"Where a person in lawful self-defense fires a pistol at an assailant, and, missing him, wounds an innocent bystander, he is not liable for the injury, if guilty of no negligence."

To the same effect, see Paxton v. Boyer, 67 Ill. 132, 16 Am. Rep. 615. These, which are the only cases we find deciding this precise point, appear to be in accord with the general rule that, "where an act is lawful in itself, injury resulting therefrom is not actionable, unless the act is done at a time, or in a manner, or under circumstances indicative of a want of proper regard for the rights of others." Boynton v. Rees, 9 Pick. (Mass.) 528; Howland v. Vincent, 10 Metc. (Mass.) 371, 43 Am. Dec. 442; Tourtellot v. Rosebrook, 11 Metc. (Mass.) 460; Brown v. Kendall, 6 Cush. (Mass.) 292; Rockwood v. Wilson, 11 Cush. (Mass.) 221; Macomber v. Nichols, 34 Mich. 212, 22 Am. Rep. 522; Norfolk, etc. R. Co. v. Gee, 104 Va. 806, 52 S. E. 572, 3 L.R.A.(N.S.) 111; Pickens v. Coal River Boom, etc. Co. 51 W. Va. 445, 41 S. E. 400, 90 Am. St. Rep. 819. And the two cases, Morris v. Platt and Paxton v. Boyer, supra, also appear to be but concrete applications of the rule that [352] there is no liability for the results of an accident, unless the person causing same is guilty of negligence. See 1 Am. & Eng. Enc. of Law (2d ed.) 273. The rule as announced in the cases of Morris v. Platt and Paxton v. Boyer, supra, is stated in Hale on Damages (2d ed.) sec. 5, p. 19, citing, besides said two cases, Scott v. Shepherd, 2 W. Bl. 892, which is reported in 96 Eng. Rep. (Reprint) 525, and is instructive.

Ordinarily, and so far as appears in this case, this must be the correct rule; and the only qualification thereof that in any case would seem to commend itself is that, where such self-defense is obviously dangerous to others, and the necessity thereof may be avoided by withdrawing from the combat, or, in other words, by "retreating to the wall," we apprehend it would be for the jury to say whether due care for the safety of bystanders would not require such avoidance.

The instruction that "if, at the beginning of the difficulty, defendant saw plaintiff, or should have seen her, and began firing, knowing she was there, and a ball from his pistol struck her, then he would be responsible," appears to be error.

If, as affecting only Smith's rights in this regard, defendant had the right to shoot at Smith when he did, the mere fact that he may or should have seen or known that plaintiff was near Smith, but to one side of the line of a true aim, would not necessarily render him liable for the accident; certainly not, if in gun used, in aim taken, and in manner and means of firing he exercised that degree of care which a person of ordinary prudence would usually exercise.

Although defendant may be chargeable with knowledge as to where plaintiff was when he began to fire, the question as to whether he was negligent was for the jury; and, for aught that appears, she may have been so far to one side of a line of true aim as to have reasonably presented to him the appearance of safety, if he saw her—he being close to Smith when he fired.

In anticipation of a new trial in this case, we should, perhaps, state that, if there should be evidence tending to show that, without greater risk of the escape of Smith, the arrest might within the knowledge of or chargeable to defendant have been [353] effected elsewhere, or in a different manner, or by different means than it was, with less danger of resistance by Smith, or less danger of injury to bystanders as a result of such resistance, the defendant being informed and believing that Smith was dangerous to the extent hereinbefore stated, it would not be improper to submit to the jury the question as to whether defendant was in that respect guilty of actionable negligence in failing to exercise due care for the safety of bystanders, which was a proximate cause of the injury inflicted upon the plaintiff, as well as to whether he was guilty of such negligence in the manner or means of his lawful self-defense, if the same was lawful. And, in this connection, it may be observed that, although Smith, in an assault upon defendant, may have been guilty of a wrong making self-defense necessary to defendant, and thus proximately causing the injury to plaintiff, and therefore liable to her in an action for damages, this would not necessarily relieve defendant of liability if he were guilty of a wrong in failing to exercise due care for the safety of bystanders, which was also a proximate cause of the same.

For the reasons stated, this case should be reversed, and a new trial granted.

BY THE COURT.—It is so ordered.

NOTE.

Liability as for Negligence of Person Who Injures Bystander while Acting in Self-Defense.

The question of the liability as for negligence of a person who injures a bystander while acting in self-defense has been passed on in but a few cases. These are, with one exception, in accord with the doctrine of the reported case that under such circumstances there is no liability where the defendant acts as a reasonably prudent man would act in a similar situation. Morris v. Platt, 32 Conn. 75; Paxton v. Boyer, 67 Ill. 132, 16 Am. Rep. 615. See also Courvoisier v. Raymond, 23 Colo. 113, 47 Pac. 284; Crabtree v. Dawson, 119 Ky. 148, 83 S. W. 557, 26 Ky. L. Rep. 1046, 115 Am. St. Rep. 243, 67 L.R.A. 565. Thus in Morris v. Platt, supra, the plaintiff, who had been wounded by the defendant while the latter was defending himself against attack by a number of persons, claimed that he was a bystander and requested the court, in an action brought by him for damages, to charge the jury in substance that if they so found, he was entitled to recover, even though they should also find the defendant to have been lawfully defending himself against his assailants, and that the injury to the plaintiff was accidental. The charge was given, but on appeal was held to be erroneous, the court saying: "That request of the plaintiff embodies the unqualified proposition that a man lawfully exercising the right of self-defense, is liable to third persons for *any* and *all* unintentional, accidental injurious consequences which may happen to them. . . . If the defendant had been in the act of firing the pistol at an assailant in lawful self-defense, and a flash of lightning had blinded him at the instant and diverted his aim, or an earthquake had shaken him and produced the same result, or if his aim was perfect but a sudden violent puff of wind had diverted it or the ball after it passed from the pistol, and in either case the ball by reason of the diversion had hit the plaintiff, the accident would have been so affected in part by the uncontrollable and unexpected operations of nature as to be inevitable or absolutely unavoidable; and there is no principle or authority which would authorize a recovery by the plaintiff. And, in the second place, if while in the act of firing the pistol lawfully at an assailant, the defendant as stricken, or the pistol seized or stricken by another assailant, so that its aim was unexpectedly and uncontrollably diverted towards the plaintiff; or if while in the act of firing with a correct aim, the assailant suddenly and unexpectedly stepped aside, and the ball passing over the spot hit the plaintiff, who till then was invisible and his presence unknown to the defendant; or if the pistol was fired in other respects with all the care which the exigencies of the case required or the circumstances permitted, the accident was what has been correctly termed 'unavoidable under the circumstances,' and whether the defendant should in such case be holden liable or not is the question we have in hand. For, in the third place, if the act of firing the pistol was not lawful or was an act which the defendant was not required by any necessity or duty to perform, and was attended with possible danger to third persons which required of him more than ordinary circumspection and care, as if he had been firing at a mark merely; or if the act though strictly lawful and necessary was done with wantonness, negligence or folly, then, although the wounding was unintentional and accidental, it is conceded, and undoubtedly true, that the defendant would be liable. In this case the rule of law claimed by the plaintiff, and given by the court to the jury, authorized them to find a verdict for the plaintiff if they found the accident to belong to the second class, and to have been 'unavoidable under the circumstances.' We have seen that if the injury had been consequential and the form of action case, the defendant would not have been liable, and the question returns, whether he can and should be holden liable because the injury was direct and immediate and the form of action is trespass. I think not, whether the decision of the question be made upon principle or governed by authority."

So in Paxton v. Boyer, 67 Ill. 132, 16 Am. Rep. 615, which was an action for assault and battery, it appeared that the defendant, while fighting with the brother of the plaintiff, was knocked down and on arising struck the plaintiff with a knife, for which the plaintiff brought action. The jury found generally for the plaintiff in the sum of $450 and found specially that "the blow complained of was struck by the defendant without malice, and under circumstances which would have led a reasonable man to believe it was necessary to his proper self-defense." The appellate court reversed the judgment and said: "Can it be a question that, for an act done under such circumstances, the party doing the act is liable either civiliter or criminaliter? The rule is well established that, in an action of assault and battery, the plaintiff must be prepared with evidence to show, either that the intention was unlawful, or that the defendant was in fault. 2 Greenleaf on Ev. sec. 85. The jury, by their special finding, have ignored the unlawful intention, and have said the defendant was not in fault. On what principle, then, can he be made chargeable? If a person, doing a lawful act in a lawful manner, with all due care and

circumspection, happens to kill another, without any intention of doing so, he is not liable criminally. How, then, can it be said he shall be responsible in a civil case, when, in doing a lawful act with due care, and an injury happens, he shall be deemed in fault, and mulcted in damages?"

In the English case of James v. Campbell (1832) 5 C. & P. 372, 24 E. C. L. 367, however, where a person who had been struck unintentionally by the defendant who was fighting with a third person, brought an action for the assault, the court charged the jury as follows: "If you think, as I apprehend there can be no doubt, that the defendant struck the plaintiff, the plaintiff is entitled to your verdict, whether it was done intentionally or not. But the intention is material in considering the amount of the damages."

SHEROD ET AL.

v.

AITCHISON ET AL.

Oregon Supreme Court—June 16, 1914.

71 Oregon 446; 142 Pac. 351.

Injunctions — Against Criminal Prosecution.

The threatened prosecution of a criminal action will not usually be enjoined, under L. O. L. § 389, authorizing suits in equity where there is not a plain, adequate, and complete remedy at law.

[See note at end of this case.]

Same.

The mere invalidity of a statute or ordinance is not sufficient to authorize an injunction against a prosecution thereunder, since such invalidity may be interposed as a complete defense to the prosecution.

[See note at end of this case.]

Same.

Where an attempted enforcement of an invalid ordinance or statute would do irreparable injury to property rights, a court of equity may restrain the maintenance of the criminal actions.

[See note at end of this case.]

Same.

In an action to enjoin a prosecution for carrying on business without a license in violation of Laws 1913, p. 143, providing that no person shall sell or receive or solicit consignments, or farm, diary, orchard, or garden products for sale upon commission, where the complaint does not deny that plaintiff is engaged in such business, it is insufficient to authorize equitable interference.

[See note at end of this case.]

Actions and Proceedings — Moot Question.

A case in which a party asks to have determined an abstract question which does not arise on existing facts, or involve conflicting rights so far as he is concerned, presents a moot inquiry, which will not be considered.

Appeal from Circuit Court, Multnomah county: CLEETON, Judge.

Action for injunction. J. G. Sherod et al., plaintiffs, and Clyde B. Aitchison et al., defendants. Judgment for defendants. Plaintiffs appeal. AFFIRMED.

[447] This is a suit by J. G. Sherod and others against Clyde B. Aitchison and others, to enjoin threatened prosecution of criminal actions, and is based on the ground that the enforcement of an alleged void statute would injuriously affect the plaintiffs' property rights. The complaint charges, in effect, that the several plaintiffs, either as a person, firm or corporation, has invested sums of money in securing and maintaining at Portland, Oregon, a place of business, and is engaged as a dealer in farm, dairy, orchard and garden produce; that the principal business of each is the purchase and sale of such commodities on his, their, or its own account, and not for any shipper or consignor; that the defendants, Clyde B. Aitchison, Frank J. Miller and Thomas J. Campbell, compose the Railroad Commission of Oregon, and as such claim the right, under Chapter 88 of the General Laws of Oregon of 1913, to demand from each plaintiff a sum of money for a license to engage in such business, and the execution of a bond as security for the faithful performance of the conditions of the statute, and in default thereof to cause the individual, who for himself, or as a partner, or a member of a corporation conducting such purchases and sales, to be arrested and fined; that these defendants have directed the defendant Walter H. [448] Evans, the district attorney of Multnomah County, Oregon, to institute criminal actions against the plaintiffs for that neither has complied with the requirements of that enactment, and criminal complaints are about to be filed against them; that the defendant T. M. Word is sheriff of that county, E. A. Slover is the chief of police of that city, and A. Weinberger is the constable of Portland district; that the statute referred to is void, in that it contravenes certain provisions of the organic law of Oregon and of the Constitution of the United States, setting forth the particulars with respect to each; that unless the defendants are

enjoined from enforcing the provisions of this act, the plaintiffs will suffer irreparable loss and injury, to redress which they are without any plain, adequate or complete remedy at law.

A demurrer to the complaint on the ground *inter alia* that it did not state facts sufficient to authorize equitable interference was sustained, and, the plaintiffs declining further to plead, the suit was dismissed, and they appeal. Affirmed.

Reed & Bell, for appellants.

Andrew M. Crawford, Joseph A. Benjamin, Walter H. Evans for respondents.

MOORE J. (*after stating the facts*).—It will be assumed that the complaint alleges such an injury to property rights as will authorize the intervention [449] of equity to enjoin the maintenance of criminal actions, if it be conceded that the averments of the primary pleading bring the case within the rule which permits a party to challenge a statute or an ordinance on the ground that it is void.

1. Where a party has a plain, adequate and complete remedy at law for the enforcement or protection of a private right or the prevention of or redress for an injury thereto, a court of equity will not intervene, and hence the threatened prosecution of a criminal action will not usually be enjoined: Section 389, L. O. L.

2. The mere alleged invalidity of a statute or an ordinance is not a statement of facts sufficient to authorize equitable intervention, since such void enactments may be interposed as and constitute complete defenses to the prosecution of criminal actions, and for that reason they are available in a court of law: Thompson v. Tucker, 15 Okla. 486, 83 Pac. 413, 6 Ann. Cas. 1012 and notes.

3. One of the exceptions to this general rule is where an attempted enforcement of an invalid ordinance or statute would result in irreparable injury to property rights, in which case a court of equity may restrain the maintenance of criminal actions: New Orleans Baseball, etc. Co. v. New Orleans, 118 La. 228, 42 So. 784, 118 Am. St. Rep. 366, 10 Ann. Cas. 757, 7 L.R.A.(N.S.) 1014. To the same effect, see, also, the notes to Telegraph Co. v. Powers, 1 Ann. Cas. 119; Sullivan v. San Francisco Gas, etc. Co. 7 Ann. Cas. 574. This departure from the ordinary precept has been recognized and followed in Oregon: Sandys v. Williams, 46 Ore. 327, 336, 80 Pac. 642; Hall v. Dunn, 52 Ore. 475, 481, 97 Pac. 811, 25 L.R.A.(N.S.) 193; Portland Fish Co. v. Benson, [450] 56 Ore. 147, 155, 108 Pac. 122; Spaulding v. McNary, 64 Ore. 491, 497, 130 Pac. 391, 1128.

4. A case in which a party seeks to have determined in a judicial proceeding an abstract question which does not arise upon existing facts or involve conflicting rights, so far as he is concerned, presents a moot inquiry which will not be considered. An action, in order to be *bona fide*, must present an actual controversy, having adverse interests, and be instituted and maintained to redress the grievance of the plaintiff and not to affect third persons: Ward v. Alsup, 100 Tenn. 619, 46 S. W. 573.

5. Under the decisions of this court, to entitle a party to invoke equitable intervention to restrain the enforcement of an alleged void penal statute, on the ground that it would injuriously affect his property rights, he must allege in his complaint that the business in which he is engaged is clearly interdicted by the provisions of the enactment, or he may aver that, although the law has no application to his business, yet he is threatened with its attempted enforcement by a criminal action, in which latter case his complaint must, in the description of such business, traverse each specification of the statute or ordinance that is conditionally or ultimately prohibited.

Section 1 of the statute in question reads:

"For the purposes of this act a commission merchant is defined to be a person, firm or corporation whose principal business is the sale of farm, dairy, orchard or garden produce on account of the shipper or consignor, or solicit consignments of any character. No person shall sell or receive or solicit consignments, of such commodities for sale, on commission without first obtaining a license from the State Railroad Commission to carry on the business of a commission merchant and executing and filing with the Secretary of [451] State a bond to the state for the benefit of his consignors; the amount of the bond to be fixed and sureties to be approved by the commission, who may increase or reduce the amount of the bond from time to time."

The complaint herein traverses the several classes of business enumerated in the part of the statute quoted, except the receiving or soliciting of consignments of any farm, dairy orchard or garden produce for sale upon commission.

This specification is by the statute made a prohibited class of business, separate and distinct from the sale of such commodities, and, not having been denied in the complaint, the facts stated therein are insufficient to authorize equitable interference. Such being the case, no error was committed in sustaining the demurrer. The decree should therefore be affirmed, and it is so ordered.

Affirmed.

Rehearing denied July 14, 1914.

NOTE.

Power of Equity to Enjoin Criminal Prosecution.

Scope of Note, 1153.
General Rule, 1153.
Exceptions to Rule, 1154.

Scope of Note.

The present note discusses the recent cases passing on the power of a court of equity to enjoin a criminal prosecution. The earlier cases are discussed in the notes to Fritz v. Sims, 19 Ann. Cas. 458, and Crighton v. Dahmer, 35 Am. St. Rep. 666. For a discussion of the question whether an injunction will be granted against a prosecution under an invalid ordinance see the notes to Thompson v. Tucker, 6 Ann. Cas. 1012, and New Orleans Baseball, etc. Co. v. New Orleans, 10 Ann. Cas. 757.

General Rule.

The general rule that an injunction cannot be employed to restrain a criminal prosecution finds support in the recent cases. De Queen v. Fenton, 98 Ark. 521, 136 S. W. 945; Ferguson v. Martineau, 115 Ark. 317, 171 S. W. 472; Chicago v. Chicago City R. Co. 222 Ill. 560, 78 N. E. 890; Snouffer v. Tipton, 161 Ia. 223, 142 N. W. 97, L.R.A. 1915B 173; Randolph v. Kensler, 95 Kan. 32, 147 Pac. 1132; Franklin v. Lacey, 157 Ky. 261, 162 S. W. 1126; Sennette v. Police Jury, 129 La. 728, 56 So. 653; Milton Dairy Co. v. Great Northern R. Co. 124 Minn. 239, 144 N. W. 764, 49 L.R.A.(N.S.) 951; Claiborne County v. Owen, 100 Miss. 462, 56 So. 525; Kearney v. Laird, 164 Mo. App. 406, 144 S. W. 904; Rosenberg v. Arrowsmith, 82 N. J. Eq. 570, 89 Atl. 524; Chadwick Park Athletic Club v. Peasley, 142 N. Y. S. 586; Genesee Recreation Co. v. Edgerton, 158 N. Y. S. 421; Southern Exp. Co. v. High Point, 167 N. C. 103, 83 S. E. 254; Cullom v. O'Brien, 3 Tenn. Civ. App. 15; Lane v. Schultz (Tex.) 146 S. W. 1009; Winn v. Dyess (Tex.) 167 S. W. 294. See also Georgia Athletic Club v. Atlanta, 139 Ga. 176, 77 S. E. 30; Crawford v. Marion, 154 N. C. 73, 69 S. E. 763, 35 L.R.A.(N.S.) 193. Thus in Kleine v. Oates (Mich.) 153 N. W. 675, the court quoted with approval the following statement: "It is a general rule that criminal prosecutions cannot be restrained by injunction. Once have it understood that they may be, and the public would labor under additional embarrassment to the already great obstacles to the prevention of crime. There is no excuse, upon reason or authority, for enjoining the prosecution of the complainant for violations of the law providing for a close season. If the law were unconstitutional, it would be available by way of defense to the criminal charge, and therefore no occasion for chancery to take jurisdiction for the want of an adequate remedy at law. See Mechem, Pub. Off. sec. 992, and cases cited. It has never been found necessary or expedient that the validity and construction of criminal laws should be determined in chancery, for the guidance of courts of criminal jurisdiction." So in Sociological Research Film Corp. v. New York, 83 Misc. 605, 145 N. Y. S. 492, it was held that an injunction would not be issued to prevent the police from interfering with the production of a moving picture called the "Inside of the White Slave Traffic," which was in violation of the penal code. The court said: "The theatre in question is operated pursuant to a license granted by the city authorities and subject to the inspection and supervision of such authorities. I doubt if the owners of the plaintiff corporation would have had the audacity to undertake the public display of certain revolting details contained in the exhibition, knowing, as they must, that their business exists by mere sufferance of the law, if it were not for the general discredit in which they evidently but erroneously believe the police to be held in this city. The police as body is entitled to, and I believe has, the confidence of the community at large, notwithstanding the reflections now and then cast upon it by the conduct of some of its unworthy members. It would be equally unjust, of course, to stigmatize theatrical managers as a class because of exhibitions of depravity and inordinate greed for gain on the part of some of its members. I have been unable to find in any reported case in this department a single instance of police interference with theatrical productions which was not justified by such disregard for conventional decency on the part of the owners thereof as to amount to a violation of law. When persons engaged in merely licensed callings, as distinguished from concededly lawful lines of business, abuse their license and run foul of the Penal Law, they will be relegated by a court of equity to the tribunal where such matters belong." Similarly in Klinger v. Ryan, 91 Misc. Rep. 71, 153 N. Y. S. 937, it was held that equity would not interfere with the criminal prosecution of a motion picture concern even though the police were mistaken in their conception of the statute. The court said: "The general rule is that equity will not interfere to prevent the enforcement of the criminal law, although the police are mistaken in their opinion as to what constitutes a crime. So held in the cases of Sunday shows at the well-known Eden Musee (wax figures) (125 App. Div. 780); at the Keith

& Proctor theatres (125 App. Div. 791); and at the Manhattan Theatre (movies) (125 App. Div. 784), the Appellate Division, in each case, and many others, reversing Special Term orders granting such injunctions against police interference. I am well aware that equity will by injunction prevent irreparable injury by unlawful trespass of the police on private property, as held in Fairmount Athletic Club v. Bingham, 61 Misc. 419, but that principle has no application here."

In Cutsinger v. Atlanta, 142 Ga. 555, 83 S. E. 263, L.R.A.1915B 1097, an injunction was allowed restraining the city authorities from unwarrantedly prosecuting the defendant, which meant a heavy financial loss to the defendant.

Exceptions to Rule.

The recent decisions support the exception to the general rule that when a criminal statute is void or alleged to be void on constitutional grounds and its enforcement will work irreparable injury, a court of equity may enjoin proceedings thereunder. Philadelphia Co. v. Stimson, 223 U. S. 605, 32 S. Ct. 340, 56 U. S. (L. ed.) 570, *affirming* Same v. Dickinson, 33 App. Cas. (D. C.) 338; Louisville, etc. R. Co. v. Alabama R. Commission, 191 Fed. 757; Little v. Tanner, 208 Fed. 605; Van Deman, etc. Co. v. Rast, 214 Fed. 827; Grand Union Tea Co. v. Evans, 216 Fed. 791, *citing* Little v. Tanner, 208 Fed. 605; American Sugar Refining Co. v. McFarland, 229 Fed. 284; Zweigart v. Chesapeake, etc. R. Co. 161 Ky. 463, 170 S. W. 1194; Clark v. Harford Agricultural, etc. Ass'n, 118 Md. 608, 85 Atl. 503; Huntworth v. Tanner, 87 Wash. 670, 152 Pac. 523. See also Wiseman v. Tanner, 221 Fed. 694; Evansville Brewing Ass'n v. Jefferson County Excise Commission, 225 Fed. 204; Paye v. Bennett Piano Co. 21 Pa. Dist. 381. And see the reported case. Thus in Spaulding v. McNary, 64 Ore. 491, 130 Pac. 391, 1128, it was said: "The rule is well established that if the threatened inforcement by prosecuting officers of a void statute will affect the property rights of a party, injunction will lie to prevent the menace from being carried into effect; and that the conduct of such officers, in the case indicated, are their personal acts in which the state is not involved." And in Lewis v. Turner, 139 Ga. 174, 76 S. E. 999, wherein it appeared that a board of county commissioners were exceeding their power in trying road tax defaulters the court in granting an injunction, said: "As the county commissioners are attempting to try defaulters for the non-payment of their road tax, which under the law could only be done by the district road commissioners, the most effective, if not the sole, remedy of the citizens haled before them is to enjoin them from exercising ultra vires powers. This is not an effort to enjoin a court from exercising its proper powers within its jurisdiction, as was the case of Rowland v. Road Com'rs, etc. 133 Ga. 190, 65 S. E. 404, but is a proceeding against certain officials who have no power to convene themselves as a court to try road defaulters, to prevent them from exercising such ultra vires powers." In Martin v. Baldy, 249 Pa. St. 253, 94 Atl. 1091, *affirming* Martin v. Medical Education, etc. Bureau, 23 Pa. St. Dist. 959, it was held that a person who was prosecuted under a statute regulating the practice of optometry might obtain an injunction. The court said: "A considerable number of persons who assert that they are practicing optometrists within the state, have through their counsel, in writing, expressed their desire to join as parties plaintiff in the present case. Before we take up for consideration what we regard as the principal and most substantial questions in the case, we may as well dispose of two preliminary points which have been raised by counsel. The first is that taken in behalf of the defendants, to the effect that, as a court of equity, we cannot take jurisdiction of the case because of the penal provisions of the statute; in other words, that a court will not enjoin against a criminal prosecution of those who are charged with having committed offenses under the law. It may be conceded without any hesitation, that under ordinary circumstances, where a single individual desires to obtain a decree from a court of equity, to enjoin a proceeding against him in a court of criminal jurisdiction, relief must be denied to him. We regard it as well settled, so well settled as not to require a citation of authorities upon the subject, that, except in cases where a multiplicity of suits would constitute reason for an exception, or where an initial fundamental question of constitutionality or legal right is involved in the case, a court of equity will not intervene, but will leave the plaintiff to have his rights determined in the criminal proceeding. In the present case, however, we have both the elements of a multitude of cases and interests and a serious question of constitutional right and privilege, which the plaintiffs, as it seems to us, have a right to have determined in the first instance, and, if their views of their rights are sustained, to be relieved if the annoyance, expense and the possible prosecution, which might otherwise come to them, if their case cannot now be heard and decided. Their right to practice their occupation is a property right and entitled to protection, unless it is regulated and controlled in a lawful manner." And in Truax v. Raich, 239 U. S. 33, 36 S. Ct. 7, *affirming* 219 Fed. 273, in granting an injunction restraining a

prosecution under the anti-alien law, it was said: "It is also settled that while a court of equity, generally speaking, has 'no jurisdiction over the prosecution, the punishment, or the pardon of crimes or misdemeanors' (In re Sawyer, 124 U. S. 200, 210, 8 S. Ct. 482, 31 U. S. (L. ed.) 402, 405,) a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecution is essential to the safeguarding of rights of property. Davis, etc. Mfg. Co. v. Los Angeles, 789 U. S. 207, 218, 23 S. Ct. 498, 47 U. S. (L. ed.) 778, 780; Dobbins v. Los Angeles, 195 U. S. 223, 241, 25 S. Ct. 18, 49 U. S. (L. ed.) 169, 177; Ex parte Young [209 U. S. 123, 14 Ann. Cas. 764, 28 S. Ct. 441, 52 U. S. (L. ed.) 714, 13 L.R.A. (N.S.) 932]; Philadelphia Co. v. Stimson, 223 U. S. 621, 32 S. Ct. 340, 56 U. S. (L. ed.) 577. The right to earn a livelihood and to continue in employment unmolested by efforts to enforce void enactments should similarly be entitled to protection in the absence of adequate remedy at law. It is said that the bill does not show an employment for a term, and that under an employment at will the complainant could be discharged at any time, for any reason or for no reason, the motive of the employer being immaterial. The conclusion, however, that is sought to be drawn, is too broad. The fact that the employment is at the will of the parties, respectively, does not make it one at the will of others. The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will." In Alexander v. Elkins, 132 Tenn. 663, 179 S. W. 310, wherein it appeared that the defendant was threatened with criminal prosecution under a statute already declared to be unconstitutional the court allowed an injunction, distinguishing that situation from one where the unconstitutionality of a statute was asserted and not proven, and saying: "In the case of Kelly v. Conner, 122 Tenn. 339, 396, 123 S. W. 622, 25 L.R.A. (N.S.) 201, it was said: . . . 'Courts of equity have no jurisdiction to enjoin threatened criminal proceedings under a statute enacted by a state in the exercise of the police power in relation to which the legislature has complete jurisdiction, although it be charged that the statute is invalid, and that a multiplicity of actions thereunder will injure and destroy civil and property rights of the complainants, and that the damages resulting will be irreparable, when the complainant's defense thereto, in a court having jurisdiction of the offense, is adequate and unembarrassed; and we hold that the chancery courts of Tennessee, neither under their inherent nor statutory jurisdiction, have any such power or jurisdiction, whatever may be the exceptions to the general rule in the courts of equity of other jurisdictions.' We adhere to this statement of the law, but it does not apply to prosecutions threatened under acts which have already been adjudged unconstitutional by this court. In Kelly v. Conner that question was not in the mind of the court. There it was sought to enjoin threatened prosecutions under an act which had never been impeached. The bill charged that the act was unconstitutional, and sought to have it so declared. Ample reasons were given in the opinion of the court why such a course of litigation would be inadmissible under the facts presented in that case; but those reasons cannot be held to apply to a spurious prosecution under a supposititious act, already declared and adjudged by the highest judicial authority in the state, in a regular judicial proceeding, to be no true law. A warrant of arrest, charging a party with the violation of such an act, is just as void of efficacy on its face as if it charged a violation of the laws of China or Japan. But if by collusion between an officer of the law and a private citizen, the latter is suffered to procure warrants of arrest, and the purpose is expressed on the part of such private citizen to continue the procurement of such false warrants until he has obtained hundreds of them, if money demanded be not paid, and if the officer of the law agrees to continue to issue them, and to cause the complainant to be arrested on them, until he comply with the unlawful demand to pay money, such citizen is not relieved of the persecution by the fact that the warrants in fact and law charge no crime. He can, it is true, be ultimately relieved when each case is finally brought before the higher courts, but under the allegations of the bill new prosecutions of the same false character will be brought, since, according to the bill, the threats of arrest are made notwithstanding knowledge of the decision of the Supreme Court declaring the act void. It will boot the complainant little that he is sure of overthrowing each new prosecution as it arises. He will suffer the harassment of the repeated interferences with his liberty, the constantly recurring trials, and the accumulating expenses. Under such circumstances the remedy at law is very inadequate. The whole persecution can be ended by the chancery court, through its injunctive power, at one stroke. Why should the court not exercise this power? It is urged that the chancery court has no jurisdiction to interfere with criminal prosecutions, except in the way of protecting property rights already under its care, and sought to be disturbed through the agency of a crimi-

nal prosecution by some party to the litigation, or connected with the interests in litigation, thus depriving the court, indirectly, of its control. Some other cases take a wider view of the power of the court to protect property rights against assaults through criminal prosecutions, but even on the stricter view, there can be, as we think, no objection to the bill before us. The chancery court is not asked to invade the jurisdiction of the criminal court. There is no question of guilt or innocence to be tried. Under the case stated there are no controversies to be settled by a criminal court. There is in this state no law under which the acts charged can be held criminal, and hence no crime is charged. None of the evils therefore stand in the way which are to be encountered when the court of chancery attempts to usurp the functions of courts of criminal jurisdiction. There is before us (accepting the bill as true, as must be done on demurrer) simply a bold misuse of criminal process, actual and threatened, to harass a man without any color of legality, and the expression of a purpose to continue this unlawful use indefinitely, through connivance of one of the law officers of the state, to compel complainant to pay money demanded. If there be no precedent for the interference of a court of chancery in such a case it is time one should be made. Certainly the relief sought falls within the general scope of those equitable principles which entitle a citizen to protection against multiplied, repeated, and vexatious suits."

TINGUE

v.

STATE.

Ohio Supreme Court—June 26, 1914.

90 Ohio St. 368; 108 N. E. 222.

False Pretenses — Obtaining Loan.

The word "obtain," as used in section 13104, General Code, is not limited to getting, securing or appropriating money or property as owner. It includes as well the getting or securing of money or property by way of a loan.

[See note at end of this case.]

Indictment — Variance — Surplusage.

Mere matter of unnecessary particularity or immaterial description contained in an indictment is not sufficient upon which to base a charge of variance between pleading and proof. Such variance must be based upon some essential element of the offense or some essential part of such element.

Criminal Law — Harmless Error Rule.

A mistrial should not be ordered in a cause simply because some error has intervened. The error must prejudicially affect the merits of the case and the substantial rights of one or both of the parties, and this is as true of the temporary absence of the judge as any other departure from due process of law during the trial of a cause.

(Syllabus by court.)

Error to Court of Appeals, Tuscarawas county.

Criminal action. Edward Tingue convicted of obtaining money by false pretenses and brings error. The facts are stated in the opinion. AFFIRMED.

Buchanan, Reed & Russell for plaintiff in error.

W. V. Wright for defendant in error.

[368] WANAMAKER, J.—Plaintiff in error was indicted by the grand jury of Tuscarawas county for obtaining money from one Alice M. Ohliger by false pretenses.

[369] The indictment was in the usual form, save and except the false pretenses pleaded and also certain uses to which the money was to be applied. That portion of the indictment relating to the false pretenses charged is in substance as follows: That said Edward W. Tingue, on the 17th day of May, 1910, in the county of Tuscarawas, with the intent unlawfully and feloniously to defraud one Alice M. Ohliger, did then and there unlawfully, feloniously and knowingly falsely pretend to her, the said Alice M. Ohliger, that he, the said Edward W. Tingue, was then and there the owner of a large estate in the state of New York, worth $20,000, from which he received a large annual income; that he, the said Edward W. Tingue, was then and there the owner of other valuable property in the state of New York of the value of $17,000; that he, the said Edward W. Tingue, was then and there the owner of valuable railroad stock in The Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company; that he, the said Edward W. Tingue, was then and there the owner of valuable stock in a woolen mill in the Dominion of Canada, which said woolen mill would be of the value of $1,000,000 when completed, and that he, the said Edward W. Tingue, then and there had the right to sell and dispose of stock of the aforesaid woolen mill; that, by which said false pretenses, then and there made as aforesaid, said Alice M. Ohliger, then and there believing said false pretenses to be true, and relying and acting upon that belief, was induced then and there to and did pay to the said Edward W. Tingue the sum of $1,500 in money of the personal property of

the [370] said Alice M. Ohliger to be by him, the said Edward W. Tingue, invested in said woolen mill stock in the name of her, the said Alice M. Ohliger.

It is admitted that the indictment negatived the truth of said false pretenses and also charged that said Tingue well knew the said false pretenses to be false at the time of making the same.

A general demurrer was filed to the indictment, which was overruled and the defendant below excepted. A plea of not guilty was then entered and the case proceeded to trial to a jury, resulting in a verdict of guilty. A motion for a new trial, containing some fourteen grounds, was then interposed by the defendant, which motion was by the court overruled, exceptions taken and sentence imposed. Thereupon the case proceeded on error to the court of appeals, which affirmed the judgment below, and to that judgment of affirmance error was prosecuted to this court to reverse the judgment below.

The first question to be determined is, Does the indictment charge the offense of "obtaining money by false pretenses?"

It is elementary that the elements of the offense are provided by the statute.

Section 13104, General Code, reads as follows: "Whoever, by false pretense and with intent to defraud, obtains anything of value or procures the signature of another as maker, indorser or guarantor to a bond, bill, receipt, promissory note, draft, check or other evidence of indebtedness or whoever sells, barters or disposes of a bond, bill, receipt, promissory note, draft or check or offers so to do, [371] knowing the signature of the maker, indorser or guarantor thereof, to have been obtained by false pretense, if the value of the property or instrument so procured, sold, bartered or disposed of, is thirty-five dollars or more, shall be imprisoned in the penitentiary not less than one year nor more than three years, or, if less than that sum, shall be fined not less than ten dollars nor more than one hundred dollars or imprisoned not less than ten days nor more than sixty days, or both."

An examination of the indictment in connection with the statute clearly discloses that every essential element of the offense, both as provided by the statute and numerous decisions thereunder by this court, have been adequately pleaded, and that the demurrer, therefore, was rightly overruled.

Upon the trial the whole transaction between the parties was fully disclosed, both by the prosecuting witness and the other witnesses to the transaction. Upon the evidence the defendant moved for a directed verdict in his favor upon the ground of variance between pleading and proof. That variance he predicates, first, upon the word "obtains." He claims that the evidence clearly shows that the prosecuting witness made the defendant her agent to receive the custody of $1,500 of her money to be invested by him in her name, and that, therefore, he did not acquire title or ownership over said $1,500. However, in order to commit the crime of obtaining money under false pretenses, it is not necessary to acquire title or ownership. One may acquire a mere loan of money by such false pretenses [372] and commit an offense pursuant to the statute. Indeed, it would be a most dangerous doctrine to permit men by falsely and fraudulently representing their financial standing, to secure a loan or credit and then hold that no crime had been committed by false and fraudulent representations.

The word "obtain" means just what it says, to get, to secure possession of. It is used in the ordinary sense and has no technical meaning beyond that.

The second alleged variance is predicated upon the last three or four lines of the indictment, to-wit, "to be by him, the said Edward W. Tingue, invested in said woolen mill stock in the name of her, the said Alice M. Ohliger." The prosecuting witness upon the stand testified that the money was paid to Tingue, not agreeable to this language of the indictment but, upon the contrary, merely as a loan. Whereupon the defendant claims that this was a fatal variance, that the transactions are entirely different and that, therefore, the defendant should have been discharged at the close of the state's evidence. What is a variance as known in criminal law and procedure?

Section 13582, General Code, reads: "When, on the trial of an indictment, there appears to be a variance between the statement in such indictment and the evidence offered in proof thereof, in the christian name or surname, or both or other description of a person therein named or described or in the name or description of a matter or thing therein named or described, such variance shall not be ground for an acquittal of the defendant, unless [373] the court before which the trial is had, finds that such variance is material to the merits of the case or may be prejudicial to the defendant."

The provisions of this section are clear and conclusive, both upon the court and the defendant. The previous section, 13581, General Code, also throws much light upon what are material or immaterial matters in an indictment:

"Sec. 13581. An indictment shall not be invalid, and the trial, judgment or other proceeding stayed, arrested or affected by the omission of the words 'with force and arms,' or words of similar import, or the words 'as appears by the record,' or for omitting to state the time at which the offense was com-

mitted, in a case in which time is not of the essence of the offense; or for stating the time imperfectly; or for want of a statement of the value or price of a matter or thing or the amount of damages or injury, where the value or price or the amount of damages or injury is not of the essence of the offense; or for the want of an allegation of the time or place of a material fact, when the time and place have once been stated therein; or that dates and numbers are represented by figures; or for an omission to allege that the grand jurors were impaneled, sworn or charged; or for surplusage or repugnant allegation when there is sufficient matter alleged to indicate the crime and person charged; or for want of averment of matter not necessary to be proved; or for other defects or imperfections which do not tend to prejudice the substantial rights of the defendant upon the merits."

[374] Under the proof the trial judge held that the variance claimed was not material to the merits of the case and not prejudicial to the defendant. What is meant by the language "not material to the merits of the case?" Clearly it must relate to matters that need to be pleaded and proved by the state. That is, it relates to the elements of the offense. Mere matter of unnecessary particularity or description, being wholly unnecessary and immaterial, should not affect the "merits of the case," and cannot, therefore, be prejudicial to the defendant.

If the defendant Tingue obtained the money by false pretenses, what possible interest could the state have, or anybody else, for any pleading or proving what he did with the money, because the crime had already been committed? Even had he returned the money to Mrs. Ohliger, the prosecuting witness, it would not wipe out the crime any more than the thief by returning the money could wipe out the theft. The variance relates to a matter of immaterial form rather than a material fact and could, therefore, in no way "prejudice the substantial rights of the defendant upon the merits."

The court was right in overruling the motion of the defendant based upon the claimed variance between pleading and proof.

One other error is claimed by reason of which the judgment of the court below should be reversed. It is claimed by the defendant, and he has made an affidavit to that effect, that during the trial, while the arguments of counsel were being made, the trial judge was absent from the court room, and that, [375] therefore, under the authority of Miller v. State, 73 Ohio St. 195, 76 N. E. 823, there was a virtual dissolution of the court and a mistrial, for which the defendant was in no way responsible, and that, therefore, he should go acquit. We are entirely content with the doctrine laid down in the Miller case, supra, but it will be noted that the third paragraph of the syllabus reads as follows:

"Where it is shown that a judge during a trial of one accused of murder is so far absent, and for such length of time, as to prevent his control of the conduct of the trial while the prosecuting attorney is making the last argument to the jury, and during such absence that officer, in the hearing of the jury, comments upon matters not in evidence and extraneous to the case, which are calculated to work serious prejudice to the defendant, and accuses the defendant's counsel of conduct apart from the proceedings of the trial of a highly unprofessional or criminal character, such prejudice will be presumed as to require a reversal of the judgment."

The whole doctrine is predicated upon the misconduct of counsel to the prejudice of the defendant during such absence.

The chief purpose of the presence of the judge while the arguments of counsel are being made to the jury is to see to it that the procedure is regular, that the ethics of counsel shall be duly observed, that no unfair or unjust advantage shall be taken by one side as against the other and that, if objection be made to misconduct of any counsel, there shall be a judge present to entertain it and to properly rule upon it.

[376] Now, it is not claimed in this case that there was any misconduct of counsel during the argument nor anything else irregular or erroneous, except the mere temporary absence of the trial judge during a part of the argument and while said trial judge was preparing his charge to the jury. It does not appear from the record that there was any objection to such absence, nor that it resulted prejudicially in anywise to the defendant.

Others errors are complained of, but we do not deem them of sufficient importance to discuss them in detail.

We find no error in the record and the judgment below is, therefore, affirmed.

Judgment affirmed.

Nichols, C. J., Johnson, Donahue and Newman, JJ., concur. Wilkin, J., not participating.

NOTE.

Obtaining Loan of Money as Constituting Crime of Obtaining Money by False Pretenses.

I. General Rule, 1159.
II. Illustrations of Rule:
1. Statement Concerning Security for Loan, 1160.
2. Statement Concerning Occupation of Borrower, 1160.
3. Statement Concerning Membership in Order, 1160.

4. Statement Concerning Ownership of Property, 1160.
5. Statement in Writing Concerning Financial Ability, 1161.
6. Statement Concerning Supernatural Powers, 1161.
7. Statement Concerning Use to Be Made of Loan, 1161.
8. Statement of Intention to Work Out Loan, 1162.
9. Statement by Bank Officer to Obtain Deposit, 1162.

I. General Rule.

Obtaining a loan of money under a promise to repay it, without other representation, although there is actually no intention to repay it, does not constitute the crime of obtaining money by false pretenses. State v. Montgomery, 56 Ia. 195, 9 N. W. 120. But where one obtains a loan of money by means of false pretenses relating to a past or existing fact, he may be convicted of the crime of obtaining money by false pretenses.

England.—Reg. v. Ball, C. & M. 249, 41 E. C. L. 140; Reg. v. Stevens, 1 Cox C. C. 83; Reg. v. Meakin, 11 Cox C. C. 270, 20 L. T. N. S. 544, 17 W. R. 683; Reg. v. Burgon, 7 Cox C. C. 131, Dears & B. 11, 25 L. J. M. C. 105, 2 Jur. (N. S.) 596, 4 W. R. 525; Reg. v. Roebuck, 7 Cox C. C. 126, Dears & B. 24, 25 L. J. M. C. 101, 2 Jur. (N. S.) 597, 4 W. R. 514; Reg. v. West, 8 Cox C. C. 12, Dears & B. 575, 27 L. J. M. C. 227, 4 Jur. (N. S.) 514, 6 W. R. 506; Reg. v. Archer, 6 Cox C. C. 515, Dears 449, 3 C. L. R. 623, 1 Jur. (N. S.) 479; Reg. v. Villeneuve, 2 East P. C. 830; Rex v. Carpenter, 22 Cox C. C. 618, 76 J. P. 158; Reg. v. Crosseley, 2 M. & R. 17, 2 Lewin C. C. 164.

Canada.—Reg. v. Huppel, 21 U. C. Q. B. 281.

California.—People v. Jordan, 66 Cal. 10, 4 Pac. 773, 56 Am. Rep. 73.

Colorado.—Clarke v. People, 53 Colo. 214, 125 Pac. 113.

Delaware.—State v. Nichols, Houst. Crim. Cas. 114.

Florida.—Morris v. State, 54 Fla. 80, 14 Ann. Cas. 285, 45 So. 456.

Georgia.—Branham v. State, 96 Ga. 307, 22 S. E. 957; Williams v. State, 105 Ga. 606, 31 S. E. 546; Brown v. State, 6 Ga. App. 329, 64 S. E. 1001.

Illinois.—Berkenfield v. People, 191 Ill. 272, 61 N. E. 96; Lucas v. People, 75 Ill. App. 662.

Indiana.—Casily v. State, 32 Ind. 62; Strong v. State, 86 Ind. 208, 44 Am. Rep. 292.

Iowa.—State v. Montgomery, 56 Ia. 195, 9 N. W. 120; State v. Fooks, 65 Ia. 196, 452, 21 N. W. 561, 773. See also State v. Hollingsworth, 132 Ia. 471, 109 N. W. 1003.

Kentucky.—Com. v. Schwartz, 92 Ky. 510, 18 S. W. 775, 36 Am. St. Rep. 609.

Massachusetts.—Com. v. Lincoln, 11 Allen 233; Com. v. Coe, 115 Mass. 481.

Michigan.—People v. Oscar, 105 Mich. 704, 63 N. W. 971; People v. Segal, 180 Mich. 316, 146 N. W. 644.

Missouri.—State v. Hubbard, 170 Mo. 346, 70 S. W. 883; State v. McBrien, 265 Mo. 594, 178 S. W. 489.

New York.—Thomas v. People, 34 N. Y. 351; People v. Aronson, 156 N. Y. S. 396.

Ohio.—See the reported case.

Pennsylvania.—Com. v. Hutchinson, 1 Pr. L. J. Rep. 302, 2 Pa. L. J. 250; Com. v. Lundberg, 18 Phila. 482, 43 Leg. Int. 260; Com. v. Wallace, 114 Pa. St. 410, 6 Atl. 685, 60 Am. Rep. 353.

If a loan of money is obtained by false pretenses, an intent to defraud exists, even though the borrower intends to repay the money. Rex v. Carpenter, 22 Cox C. C. (Eng.) 618, 76 J P. 158; Com. v. Schwartz, 92 Ky. 510, 18 S. W. 775, 36 Am. St. Rep. 609. And the fact that he has good reason to believe that he will be able to repay the money is no defense, if the loan is obtained by false pretenses. Rex v. Carpenter, supra. In that case the court said: "If the defendant made statements of fact which he knew to be untrue, and made them for the purpose of inducing persons to deposit with him money which he knew they would not deposit but for their belief in the truth of his statements, and if he was intending to use the money so obtained for purposes different from those for which he knew the depositors understood from his statements that he intended to use it, then, gentlemen, we have the intent to defraud, although he may have intended to repay the money if he could, and although he may have honestly believed, and may even have had good reason to believe, that he would be able to repay it."

Likewise, actual repayment of a loan does not exonerate a person who has obtained the loan by false pretenses. Williams v. State, 105 Ga. 606, 31 S. E. 546. And see the reported case.

The fact that the money is loaned for an illegal purpose, has been held to be no defense to a prosecution for obtaining the loan by false pretenses. Casily v. State, 32 Ind. 62.

II. Illustrations of Rule.

1. Statement Concerning Security for Loan.

The crime of obtaining money by false pretenses is committed by one who procures a loan of money by reason of fraudulent misrepresentations concerning the security on which the money is loaned. Reg. v. Burgon,

7 Cox C. C. (Eng.) 131, Dears & B. 11, 25 L. J. M. C. 105, 2 Jur. (N. S.) 596, 4 W. R. 525; Reg. v. Meakin, 11 Cox C. C. (Eng.) 270, 20 L. T. N. S. 544, 17 W. R. 683; Reg. v. Huppel, 21 U. C. Q. B. 281; People v. Jordan, 66 Cal. 10, 4 Pac. 773, 56 Am. Rep. 73; Morris v. State, 54 Fla. 80, 14 Ann. Cas. 285, 45 So. 456; Brown v. State, 6 Ga. App. 329, 64 S. E. 1001; Com. v. Coe, 115 Mass. 481; Com. v. Lincoln, 11 Allen (Mass.) 233; People v. Oscar, 105 Mich. 704, 63 N. W. 971; State v. Hubbard, 170 Mo. 346, 70 S. W. 883. Thus, it has been held that a person is guilty of the crime of obtaining money by false pretenses where he misrepresents the value of bonds which he offers as security for a loan. People v. Jordan, 66 Cal. 10, 4 Pac. 773, 56 Am. Rep. 73, or where he procures a loan of money by giving a mortgage on property which he does not own. See the note to Morris v. State, 14 Ann. Cas. 285.

One may be guilty of the crime of obtaining money by false pretenses, in obtaining a loan from a pawnbroker by reason of false pretenses concerning the pledge he offers as a security. Reg. v. Stevens, 1 Cox C. C. (Eng.) 83; Reg. v. Roebuck, 7 Cox C. C. (Eng.) 126, Dears & B. 24, 25 L. J. M. C. 101, 2 Jur. (N. S.) 597, 4 W. R. 514. See also Reg. v. Ball, C. & M. 249, 41 E. C. L. 140. Thus where a person had been in the habit of pledging and redeeming certain ingots of silver, which had been tested and found genuine, it was held that he was guilty of obtaining money by false pretenses, where he obtained a loan on ingots of worthless metal by pretending that they were the genuine silver ingots which he had previously pawned. Reg. v. Stevens, 1 Cox C. C. (Eng.) 83. It has been held that though no reliance is placed on the prisoner's statement as to the value of the pledge, and a loan is not made by reason of tests made by the pawnbroker, the prisoner may be convicted of an attempt to commit the crime of obtaining money by false pretenses. Reg. v. Roebuck, 7 Cox C. C. (Eng.) 126, Dears & B. 24, 25 L. J. M. C. 101, 2 Jur. (N. S.) 597, 4 W. R. 514; Reg. v. Ball, C. & M. 249, 41 E. C. L. 140. However, it has been held that one is not guilty of obtaining money by false pretenses where he obtains a loan of money by reason of "puffing" or exaggerated statements concerning the value of the pledge. Reg. v. Bryan, 7 Cox C. C. (Eng.) 312, Dears & B. 265, 26 L. J. M. C. 84, 3 Jur. (N. S.) 620, 5 W. R. 598; Reg. v. Lee, 8 Cox C. C. (Eng.) 233.

2. Statement Concerning Occupation of Borrower.

A person may be guilty of obtaining money by false pretenses, where he obtains a loan of money by reason of false statements concerning his occupation. Reg. v. Fry, 7 Cox C. C. (Eng.) 394, Dears & B. 449, 27 L. J. M. C. 68, 4 Jur. (N. S.) 266, 6 W. R. 245; Rex v. Villeneuve, 2 East. P. C. (Eng.) 830; Branham v. State, 96 Ga. 307, 22 S. E. 957; Thomas v. People, 34 N. Y. 351. Thus, the crime is committed where a loan of money is obtained by reason of a false statement that one keeps a shop. Reg. v. Fry, 7 Cox C. C. (Eng.) 394, Dears & B. 449, 27 L. J. M. C. 68, 4 Jur. (N. S.) 266, 6 W. R. 245; or is in the employment of a certain person, Rex v. Villeneuve, 2 East P. C. (Eng.) 830; or has been in the employment of a certain person and has money due him, Branham v. State, 96 Ga. 307, 22 S. E. 957; or is a chaplain in the army, and is a friend of a certain person, Thomas v. People, 34 N. Y. 351.

3. Statement Concerning Membership in Order.

It has been held that a person who obtains a loan of money by falsely representing that he is a member of a certain order, is guilty of the crime of obtaining money by false pretenses. Strong v. State, 86 Ind. 208, 44 Am. Rep. 292.

4. Statement Concerning Ownership of Property.

One who obtains a loan of money by falsely representing that he is the owner of valuable property may be convicted of the crime of obtaining money by false pretenses. Williams v. State, 105 Ga. 606, 31 S. E. 546; Casily v. State, 32 Ind. 62; People v. Segal, 180 Mich. 316, 146 N. W. 644; State v. McBrien, 265 Mo. 594, 178 S. W. 489; Tingue v. State, 90 Ohio St. 368, 108 N. E. 222; Com. v. Hutchinson, 1 Pa. L. J. Rep. 302, 2 Pa. L. J. 250; Com. v. Lundberg, 18 Phila. 482, 43 Leg. Int. 260. Thus where it appeared that a person borrowed one hundred dollars by falsely representing that he had just bought a railroad and needed the money to finish paying for it, it was held that he was guilty of obtaining money by false pretenses. Williams v. State, 105 Ga. 606, 31 S. E. 546. Likewise, where it appeared that a loan was obtained by a false representation that the prisoner owned three carloads of potatoes and needed five hundred dollars to complete the deal, the prisoner was held to be guilty of obtaining money by false pretenses. People v. Segal, 180 Mich. 316, 146 N. W. 644. And where a loan was obtained by a false representation that the prisoner had funds in the hands of a guardian, and would procure money from his mother to repay the loan, a conviction for obtaining money by false pretenses was sustained. Com. v. Hutchinson, 1 Pa. L. J. Rep. 302, 2 Pa. L. J. 250.

Where a person obtained a loan of money by falsely representing that he was the owner of three saloons, it was held that he was guilty of obtaining money by false pretenses, even though he actually owned one saloon, and the fact that he thought the other saloons belonged to him by reason of their being his wife's property, would not exonerate him. Com. v. Lundberg, 18 Phila. (Pa.) 482, 43 Leg. Int. 260.

5. Statement in Writing Concerning Financial Ability.

Under statutes making it a crime to obtain credit by means of a false statement in writing concerning one's financial ability, a person may be convicted where he obtains a loan of money by means of a false statement in writing concerning his financial ability. Berkenfield v. People, 191 Ill. 272, 61 N. E. 96; Lucas v. People, 75 Ill. App. 662; People v. Aronson, 156 N. Y. S. 396. Thus, where a husband discounted a note indorsed by his wife, by means of a false statement from the wife concerning her financial ability, it was held that both the husband and the wife were guilty of the statutory crime of obtaining property by use of a false statement and that they could have been convicted of larceny in obtaining money by means of false pretenses. People v. Aronson, supra, wherein the court said: "The defendant's counsel claims the section cannot apply to Harry Aronson, as he made no false statement regarding his own liability, but that of another; second, that it cannot apply to Ida Aronson, as she received no money benefit. Taken apart, this section reads: 'Who shall knowingly cause to be made any false statement, in writing, with intent that it shall be relied upon respecting the financial condition of any other person for whom he is acting, for the purpose of procuring a loan or discount of a promissory note for the benefit of himself, is guilty of a misdemeanor.' The defendant Harry Aronson is directly within this provision, as in presenting the statement of Ida Aronson to the bank he was acting for her, and in consequence received the money. As to Ida Aronson, the section would read: 'Any person who shall make any false statement, in writing, with intent that it shall be relied upon respecting the financial condition of herself for the purpose of procuring the discount of a promissory note, for the benefit of herself, is guilty of a misdemeanor.' 'Benefit,' as used in this section, does not mean that the person must necessarily receive the money, for it includes credit extended to an indorser upon the strength of his statement. An indorser receives benefit from the bank when, in reliance upon his signature and upon his financial statement, the bank extends credit to him by advancing money to another. An indorsement virtually means the giving of the money by the bank to the indorser, who, in turn, pays it over to the maker. By a short cut and means of credit and bookkeeping, the actual money is paid to the maker, instead of indirectly through the indorser. Thus, the indorser receives the benefit."

A member of a firm has been held to be guilty of obtaining credit by means of a false written statement concerning his financial ability, where he obtained a loan of money to the firm by means of a false written statement concerning the financial ability of the firm. Berkenfield v. People, 191 Ill. 272, 61 N. E. 96.

However, it has been said that where a person secured the rediscount of a note by means of a false statement concerning the maker's financial ability, there could be no conviction for obtaining money by false pretenses for the reason that the money had been given and the credit obtained prior to the making of the false representations. Opinion of Brooke, J., in People v. Johnson (Mich.) 156 N. W. 449.

6. Statement Concerning Supernatural Powers.

Where an alleged seer induced a woman to loan money to him by falsely representing that it was necessary to keep others from getting it, it was held that he was rightly convicted of obtaining money by false pretenses. Clarke v. People, 53 Colo. 214, 125 Pac. 113.

7. Statement Concerning Use to Be Made of Loan.

Under the rule that the false pretenses must relate to a past or existing fact, and that the crime is not committed where the inducement is a promise to perform some act in the future, a person is not guilty of the crime of obtaining money by false pretenses where he obtains a loan of money solely by means of false pretenses concerning the use to be made of the money. Reg. v. Lee, 9 Cox C. C. (Eng.) 304; L. & C. 309, 8 L. T. N. S. 437, 11 W. R. 761; Reg. v. Woodman, 14 Cox C. C. (Eng.) 179, 28 Moak 561; Com. v. Lundberg, 18 Phila. 482, 43 Leg. Int. 260. Thus it has been held that a person was not guilty of obtaining money by false pretenses where the false pretense relied on was the statement that the loan was to be used to pay rent. Reg. v. Lee, 9 Cox C. C. (Eng.) 304, L. & C. 309, 8 L. T. N. S. 437, 11 W. R. 761. And it has been held that a person was not guilty of obtaining money by false pretenses where the facts showed that he obtained the loan by the statement that he in-

tended to open a public house. Reg. v. Woodman, 14 Cox C. C. (Eng.) 179, 28 Moak 561.

However, where a loan of money is obtained by means of a false statement concerning an existing or past fact, the fact that there is also coupled with such a false statement, a false statement concerning the use the borrower intends to make of the loan, does not prevent a conviction for obtaining money by false pretenses. Reg. v. West, 8 Cox C. C. (Eng.) 12, Dears & B. 575, 27 L. J. M. C. 227, 4 Jur. (N. S.) 514, 6 W. R. 506; State v. Nichols, Houst Crim. Cas. (Del.) 114; State v. Montgomery, 56 Ia. 195, 9 N. W. 120. See also Smith v. State, 116 Ga. 587, 42 S. E. 766; State v. Fooks, 65 Ia. 196, 452, 21 N. W. 561, 773. Thus, where a borrower falsely stated that he owned certain goods and wanted the loan to pay freight, he was held to be guilty of obtaining money by false pretenses. State v. Montgomery, 56 Ia. 195, 9 N. W. 120. And a person has been held to be guilty of obtaining money by false pretenses, where he obtained a loan of money by the false statement that he had bought certain skins, and would sell them to the prosecutor. Reg. v. West, 8 Cox C. C. (Eng.) 12, Dears & B. 575, 27 L. J. M. C. 227, 4 Jur. (N. S.) 514, 6 W. R. 506.

It has been held that a false representation by a person that he wants the loan in order to make a loan to another, imports a false representation as to an existing fact. State v. Nichols, Houst Crim. Cas. (Del.) 114.

8. Statement of Intention to Work Out Loan.

Under the rule that the false pretenses must relate to a past or existing fact, it has been held that a person cannot be convicted of being a common cheat and swindler, by reason of the fact that he obtains a loan of money by means of a promise to work out the loan, and later refuses to do so. Ryan v. State, 45 Ga. 128.

9. Statement by Bank Officer to Obtain Deposit.

Where an official of a bank obtains a deposit of money by means of false statements concerning the solvency of the bank, he may be convicted of the crime of obtaining money by false pretenses. Rex v. Carpenter, 22 Cox C. C. (Eng.) 618, 76 J. P. 158; Com. v. Schwartz, 92 Ky. 510, 18 S. W. 775, 36 Am. St. Rep. 609; Com. v. Wallace, 114 Pa. St. 410, 6 Atl. 685, 60 Am. Rep. 353.

HOGAN
v.
NASHVILLE INTERURBAN RAILWAY COMPANY.

Tennessee Supreme Court—March 20, 1915.

131 Tenn. 244; 174 S. W. 1118.

Carriers of Passengers — Refusal to Carry Disabled Person.

Any person is entitled to be received as a passenger on payment of fare, notwithstanding a seeming incapacity on his part to take care of himself, if, in fact, he is competent to travel alone without requiring other care than that which the law requires a carrier to bestow on all persons alike. The disability which will disentitle a person to transportation may be mental or physical, and in respect to physical disability the carrier is under no obligation to receive as a passenger one who, without an attendant, is unable because of extreme age or tender years to care for himself, and the same test applies as to other physical disabilities.

[See note at end of this case.]

Same.

A man about 26 years of age, who has always had to walk with two crutches, but who for 10 years has continuously traveled alone and unattended in trains, street cars, etc., and who only requires ordinary care, cannot be excluded from a passenger train on the ground of his physical disabilities.

[See note at end of this case.]

Same.

Acts 1875, c. 130 (Shannon's Code, § 3046), abrogating the common-law rule as to rights of action for exclusion from public conveyances, and declaring that no carrier of passengers need carry or admit any person whom it chose not to, was abrogated by Acts 1897, c. 10, § 14, declaring all corporations, etc., operating railroads to be "common carriers," which term depends upon whether the carrier may determine who he will carry or whether he is bound to carry all alike, and which, under Acts 1907, c. 433, declaring that any incorporated interurban railroad company shall have the same powers and privileges as railroad companies, subject to the same duties and obligations, includes an interurban street railway company.

[See note at end of this case.]

Enforcement of Right to Carriage — Injunction.

A complaint alleging that a common carrier's refusal to accept complainant was a persecution of complainant for having brought a suit for damages against it and an attempted intimidation shows a palpable abuse of a public franchise, which a court of equity will enjoin.

Same.

A complaint alleging that a common carrier had wrongfully refused to accept complain-

ant as a passenger and threatened to continue such wrongful act sets out a right to relief by injunction, on the ground that a single action is a more adequate remedy than an action or actions at law for damages.

Appeal from Chancery Court, Davidson county: ALLISON, Judge.

Action by Woodall Hogan, plaintiff, against Nashville Interurban Company, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. REVERSED.

Fitzgerald Hall for appellant.
Pitts & McConnico for appellee.

[246] WILLIAMS, J.—This case stands for trial on bill of complaint and a demurrer thereto; the appeal being that of complainant, Hogan, from a decree of the chancery court of Davidson county sustaining the demurrer.

The complainant in his bill alleges that he is about twenty-six years of age, and resides near the city of Nashville; that he is a student and instructor in Vanderbilt University, in that city, and has been accustomed to use the cars of the defendant company almost daily since the line of that company was constructed for transportation into the city; that he has since infancy been lame as a result of infantile paralysis, and has been forced to walk ever since with two crutches; that for the last ten years he has continually traveled alone and unattended, riding trains, street cars, interurban [247] cars, and goes everywhere a sound and healthy man can go; that in the use of defendant company's cars he was never injured but once, and that then his injury was due to the gross negligence of the servants of defendant; that in so riding he has never caused any trouble, or asked or received any assistance; that he "acts as other passengers, and has been treated as such;" that when ordinary care is exercised "there is no more danger of injuring him than any other person;" that, following the injury above referred to, complainant brought suit against defendant; that thereafter rumors reached him that the defendant was about to withdraw from him the right of passage on its cars; that yet later a communication was received by him from the company's general manager, as follows:

"Nashville, Tenn., April 23, 1914.

"Mr. Woodall Hogan, R. F. D. No. 2, Brentwood, Tenn.—Dear Sir: We regret to notify you that on and after May 1, 1914, we will decline to convey you as a passenger on our line, unless you are at all times accompanied by an attendant. Your physical infirmity is of such a nature as to cause a continued source of possible injury to yourself and as a possible liability as against us. You are also advised that our trainmen and ticket agents will be notified not to receive you as a passenger unless you are accompanied by an attendant. We regret that conditions are such as require [248] this action but deem it necessary, as well for your protection as for the protection of ourselves.

"Very truly yours,
"[Signed] Meade Frierson,
"General Manager."

The bill of complaint further recites: That on May 1, 1914, complainant, tendering the usual fare, demeaning himself properly and offering to comply with all the usual and necessary conditions to become a passenger, presented himself to defendant for carriage on its line, but was absolutely refused; that in his work he is compelled to go into Nashville every day, and that his only means of transportation is defendant's line; that defendant is a common carrier.

That the refusal to receive him as a passenger is a persecution of complainant for not dropping the above-mentioned suit and an attempted intimidation, with a view to forcing him to abandon his legal rights, and arbitrary and in violation of defendant's charter.

The demurrer interposed set out the following grounds:

(1) That the bill discloses such physical infirmity on the part of complainant as that it was not a part of defendant's duty at common law to receive him for passage.

(2) That by force of a valid statute defendant had a right to decline to carry complainant for any reason whatever deemed sufficient by it.

[249] (3) That there is no case made for resort to injunctive process; complainant having an ample remedy at law.

The chancellor sustained the several grounds of the demurrer.

The rule, broadly stated, is that any person desiring transportation shall be entitled to be received as a passenger on payment of the fare, notwithstanding a seeming incapacity on his part to take care of himself, if, in point of fact, he "is competent to travel alone without requiring other care than that which the law requires the carrier to bestow on all persons alike." Hutchinson on Carriers (3d ed.) section 966.

In the application of the rule to concrete instances the authorities are not in exact agreement, but the points of difference are narrow ones.

The disability claimed to disqualify may be mental or physical. Thus, while a common carrier may not lawfully refuse absolutely to carry persons who are insane, it may do so

where the proposing passenger is not properly attended or guarded. Owens v. Macon, etc. R. Co. 119 Ga. 230, 46 S. E. 87, 63 L.R.A. 946; Meyer v. St. Louis, etc. R. Co. 54 Fed. 116, 10 U. S. App. 677, 4 C. C. A. 221.

In respect to physical disability, the carrier is not under obligation to receive as a passenger a person who without an attendant is unable, because of extreme age or tender years, to care for himself; and the same test applies to other physical limitations. The carrier may [250] refuse to carry unless the applicant be in charge of one fit to serve as attendant.

The clearest and most comprehensive statement of the rules governing is that of the supreme court of Mississippi in a series of cases dealing with blind persons who offered themselves for passage. Blindness is by that court held to be *prima facie* a disqualification; that presumedly the affliction of blindness unfits a person for sale travel by railway, if unaccompanied; that a showing of experience or ability to travel alone on the part of the offerer brought to the knowledge of the railroad company's agent may serve as a basis of liability on the part of the carrier for a refusal to accept him.

That court, on a point pertinent to the case in hand, said:

"We are asked to hold that a regulation that no blind person whatever shall travel unaccompanied by an assistant, no matter how skillful or expert a traveler he may have been, or may be, and no matter how perfectly qualified in every other respect to travel on cars unaccompanied, is a reasonable rule. This cannot be sound. Each case must depend on its own facts, and the reasonableness of the refusal to sell the blind person a ticket must, on principle, depend, not on a universal, arbitrary, and undiscriminating rule like this one, but on the capacity to travel unaccompanied of the particular blind person."

It was therefore held, where a blind person sued, and in his declaration averred that for several years he had [251] traveled on defendant company's cars in the transaction of current business, and had never given cause of complaint to any of its servants, and that no objection had been offered to his riding on the company's train before the date of the exclusion complained of, that this statement of his cause of action was not demurrable, the court holding that it was sufficiently shown that plaintiff was able to take care of himself as a passenger. Zachery v. Mobile, etc. R. Co. 74 Miss. 520, 21 So. 246, 36 L.R.A. 546, 60 Am. St. Rep. 529; Zachery v. Mobile, etc. R. Co. 75 Miss. 746, 23 So. 434, 41 L.R.A. 385, 65 Am. St. Rep. 617; Illinois Cent. R. Co. v. Smith, 85 Miss. 349, 37 So. 643, 70 L.R.A. 642, 107 Am. St. Rep. 293. And see, also, Illinois Central R. Co. v. Allen, 121 Ky. 138, 89 S. W. 150, 11 Ann. Cas. 970.

We have not been cited any case that deals with a disability claimed to exist because of lameness or infirmity of the two lower limbs, making the use of crutches necessary. But we think it clear that the reasoning in behalf of disqualification of such a person for acceptance must be less obvious than in the case of a blind person. It is a matter of common knowledge that, where a man is deprived of the use of his lower limbs, the enforced constant use of his arms increases their strength, enabling him, especially in the case of a youth, to handle himself with considerable facility and safety on crutches. Such persons are seldom attended, and seldom need to be. To deny the right to be so carried to such as complainant is shown to be by the bill of complaint would be to put an unwarranted handicap on [252] a class of men capable of being serviceable to society, and therefore on society itself, which the defendant company, if a common carrier, is under obligation to serve.

We readily decline to give assent to the contention of the railway company that, as a proposition of law, a man may be denied passage merely because fate has placed on him the necessity of using two crutches in locomotion; and we hold that the bill of complaint makes a case of improper exclusion of Hogan.

But it is insisted by the defendant company that it is not under the common-law duty of a common carrier in respect of the matter of accepting complainant as a passenger. This contention is based on a statute passed by the legislature of this State in 1875, doubtless to operate by way of a hedge against the enforcement of the "Civil Rights Bill" passed by the congress of the United States, which bill at that date had not been declared unconstitutional by the supreme court of the United States.

Acts 1875, ch. 130 (Shannon's Code, section 3046), is as follows:

"The rule of the common law giving a right of action to any person excluded from any hotel, or public means of transportation, or place of amusement, is hereby abrogated: and hereafter no keeper of any hotel, or public house, or carrier of passengers for hire, or conductors, drivers, or employees of such carrier or keeper, shall be bound, or under any obligation to entertain, carry, or admit any person whom he shall, for any reason [253] whatever, choose not to entertain, carry, or admit to his house, hotel, carriage, or means of transportation, or place of amusement; nor shall any right exist in favor of any such person so refused admission, but the right of such keepers of hotels and public houses, carriers of passengers, and keepers of places of amusement and their employees to control the access and admission or exclusion of persons to or from their public

houses, means of transportation, and places of amusement, shall be as perfect and complete as that of any private person over his private house, carriage, or private theater, or places of amusement for his family."

On the other hand, it is urged by complainant that, if this act be constitutional, it was impliedly repealed by a later statute (Acts 1897, ch. 10), which undertakes to regulate railroads as carriers of passengers and freight. In section 14 of this last-named act it is provided that all corporations, trustees, receivers, and lessees operating railroads in this State are declared to be common carriers. A later section makes it unlawful for any corporation to subject any person to and undue or unreasonable prejudice or disadvantage.

We are of opinion that, if the defendant company be a railroad within the meaning of this statute, it, along with commercial railroads, was classed as, and onerated by the last-quoted statute with the duties of, a common carrier.

What, then, is the necessary import of the statutory phrase declaring railroad companies to be "common carriers?"

[254] "'Common,' in its legal sense, used as a description of the carrier and his duty and the correlative right of the public, contains the whole doctrine of the common law on the subject. The defendants are common carriers. That is all that need be said. All beyond that can be no more than an explanation or application of the legal meaning of 'common' in that connection." McDuffee v. Portland, etc. R. Co. 52 N. H. 430, 457, 13 Am. Rep. 72; Indianapolis Traction, etc. Co. v. Lawson, 143 Fed. 834, 74 C. C. A. 630, 5 L.R.A.(N.S.) 721, 6 Ann. Cas. 666.

The true test of the character of a party, as to whether he is a common carrier or not, is his legal duty and obligation with reference to transportation. Is it optional with him whether he will or will not carry; or must be carry for all? If it be his legal duty to carry for all alike, then he is subject to all those stringent rules which, for wise ends, have long since been adopted and uniformly enforced, both in England and all the States, upon common carriers. Piedmont Mfg. Co. v. Columbia, etc. R. Co. 19 S. C. 353, 364.

This court, in McGregor v. Gill, 114 Tenn. 521, 86 S. W. 318, 108 Am. St. Rep. 919, in drawing the distinction between public or common carriers and private carriers, said that a common carrier of passengers is one who undertakes for hire to carry all passengers indifferently who may apply for passage.

The result of the declaration in the act of 1879 was to place on railroad companies at least the burdens of common carriers as those burdens are defined and prescribed [255] by the common law. No longer may that particular class of carriers claim the benefit of the act of 1875 abrogating the rule of the common law touching the acceptance of those offering to become passengers.

But is the defendant, an interurban railway company, to be treated as being in the class with ordinary trunk or commercial railroad companies thus regulated? Here, again, the legislature has given the answer.

By Acts 1907, ch. 433, it is provided that any interurban railroad company incorporated under the laws of this State shall have and possess the same powers and privileges as are conferred by the general incorporation act upon railroad companies, and subject to the same general duties and obligations. The classification thus made by our legislature is in line with a strong tendency manifested by the courts of several States to judicially declare interurban railroads to belong to this class. Chicago, etc. R. Co. v. Milwaukee R. etc. R. Co. 95 Wis. 561, 70 N. W. 678, 37 L.R.A. 856, 60 Am. St. Rep. 136; Diebold v. Kentucky Traction Co. 117 Ky. 146, 4 Ann. Cas. 445, 77 S. W. 674, 63 L.R.A. 637, 111 Am. St. Rep. 230; Birmingham Mineral R. Co. v. Jacobs, 92 Ala. 187, 9 So. 320, 12 L.R.A. 830; Katzenberger v. Lawo, 90 Tenn. 238, 16 S. W. 611, 13 L.R.A. 185, 25 Am. St. Rep. 681.

We come now to the consideration of complainant's right to the remedy of injunction by which to restrain defendant company from excluding him from its passenger cars.

[256] It is said in 6 Pom. Eq. Juris. section 633, that a writ of injunction, sometimes even mandatory in form, is granted to compel a carrier to transport freight or to furnish proper transportation facilities, and that unjust and illegal discrimination on the part of public service corporations may be so relieved against, and our case of Memphis News Pub. Co. v. Southern R. Co. 110 Tenn. 684, 75 S. W. 941, 63 L.R.A. 150, is cited.

In that case the bill of complaint was one for injunctive process to compel a common carrier to desist from discrimination, but the form of the injunction sought is not disclosed in the opinion, and it does not discuss that phase of the litigation; any disposition of the point being *sub silentio*.

However, in Coe v. Louisville, etc. R. Co. (C. C.) 3 Fed. 775, Baxter, circuit judge, held that even a mandatory injunction was grantable to require a railroad company defendant to extend transportation facilities to complainant; and see Chicago, etc. R. Co. v. New York, etc. R. Co. (C. C.) 24 Fed. 516; Chicago, etc. R. Co. v. Burlington, etc. R. Co. (C. C.) 34 Fed. 481.

In several cases injunctions were granted to compel a public service corporation defendant to furnish a supply of gas, water, etc., to the complainant, which supply had been

wrongfully cut off. Whiteman v. Fayette Fuel-Gas Co. 139 Pa. St. 492, 20 Atl. 1062; Louisville, etc. R. Co. v. Pittsburg, etc. Coal Co. 111 Ky. 960, 64 S. W. 969, 55 L.R.A. 601, 98 Am. St. Rep. 447; Bourke v. Olcott Water Co. 84 Vt. 125, 78 Atl. 715, 33 L.R.A. (N.S.) 1017, Ann. Cas. 1912D 108.

[257] These cases relate to the protection of a complainant in his property rights. We are cited no case which approves of the issuance of injunctive process to protect one in his right to be accepted and carried as a passenger by a public carrier; but we have not that bald question to decide.

The bill of complaint presents two phases in its allegations which, if sustained by proof to the satisfaction of a chancellor, might warrant the award of an interlocutory injunction:

First, it is alleged that the carrier's refusal to accept complainant for carriage is a persecution of complainant for having brought a suit for damages against the company and in attempted intimidation. This would, if established, evidence a palpable abuse of a public franchise that a court of equity should not hesitate to restrain by the exercise of its highest prerogative with promptitude.

Again, it is shown by the bill of complaint that the carrier threatens to continue the wrongful acts described therein. The modern authorities make it manifest that the rules of equity have grown less strict in respect to interference by a court of equity by way of injunction to restrain repeated wrongful acts, and even purely mandatory injunctions are now granted on clear showing made, where a defendant is guilty of a continuing wrong or threatens repeated perpetration of wrongs which would for remedy at law give rise to a multiplicity of suits, pending the determination of [258] which the wrongs would continue. If a threatened wrong consists of a single act, which will be temporary in effect, the complainant may well be left to his remedy at law for damages. But if persistent repetition of a wrong is threatened, especially by a quasi public corporation involving discrimination as between citizens, equity will move to afford in a single action its more adequate remedy of injunction. Ainsworth v. Munoskong Hunting, etc. Club, 153 Mich. 185, 116 N. W. 992, 17 L.R.A.(N.S.) 1236, 126 Am. St. Rep. 474, 15 Ann. Cas. 706; Colliton v. Oxborough, 86 Minn. 361, 90 N. W. 793; Ladd v. Osborne, 79 Ia. 93, 44 N. W. 235; 1 High on Injunctions, 5.

Here the remedy sought may be by an injunction prohibitory in form operating on future conduct, and not, strictly speaking, to restore a *status* by undoing a past act, and when this may be done a court of equity is less chary in exercising the power. It should, of course, in granting interlocutory injunctions of this character, act only after each party, complainant and defendant, has had an opportunity to present his case by affidavits, in an effort by the court to prevent an abuse of its process.

Deeming the bill of complaint to be framed in a manner that will admit of such procedure and relief, we are of opinion that the court below erred in sustaining this and the several grounds of demurrer interposed by the defendant company, and discussed in this opinion.

[259] Reversed, with remand to the court below for further proceedings not inconsistent with the rulings herein embodied.

NOTE.

The reported case holds that a carrier is not entitled to refuse as a passenger a person suffering from a physical disability, as long as he is able to travel without requiring other care than that which the carrier is required to bestow on all passengers. Applying that rule it is held that a person who is unable to walk without the use of two crutches but who, by the use thereof, has been accustomed for years to travel without requiring special attendance, cannot lawfully be refused passage on a railroad train, and if the refusal is persistent and continued he is entitled to relief in equity. The duty of a carrier to receive for carriage a feeble or infirm person is discussed in the notes to Illinois Central R. Co. v. Allen, 11 Ann. Cas. 970; Connors v. Cunard Steamship Co. 17 Ann. Cas. 1051; and Illinois Central R. Co. v. Smith, 107 Am. St. Rep. 293, 302. The duty to receive as a passenger a person afflicted with a contagious disease is considered in the notes to Pullman Car Co. v. Krauss, 8 Ann. Cas. 218; and Illinois Cent. R. Co. v. Smith, supra. See also note to Jenkins v. Chesapeake, etc. R. Co. 11 Ann. Cas. 967, as to the effect on that duty of an express contract to carry a person so afflicted.

The cases discussing the duty and liability of a carrier to a passenger taken sick during transit are reviewed in the notes to Central of Georgia R. Co. v. Madden, 21 Ann. Cas. 1077, and Middleton v. Whitridge, Ann. Cas. 1916C 856; and those dealing with the duty of a carrier to an insane passenger are collected in the note to Louisville, etc. R. Co. v. Brewer, Ann. Cas. 1913D 151. The right of a carrier to eject a sick passenger for nonpayment of fare is discussed in the note to Buckley v. Hudson Valley R. Co. Ann. Cas. 1915D 143.

LINDSEY

v.

STATE.

Florida Supreme Court—October 28, 1913.

66 Fla. 341; 63 So. 832.

Confessions — Effect of Intoxication.

Intoxication, less than mania, does not exclude a confession made during its continuance, but is a fact for the jury tending to discredit such confession.

[See note at end of this case.]

(Syllabus by court.)

Error to Circuit Court, Santa Rosa county: WOLFE, Judge.

Criminal action. Arch Lindsey convicted of manslaughter and brings error. The facts are stated in the opinion. AFFIRMED.

J. T. Wiggins for plaintiff in error.

T. F. West and *C. O. Andrews* for defendant in error.

[341] TAYLOR, J.—The plaintiff in error, hereinafter referred to as the defendant, on an indictment charging him with murder in the first degree, was convicted, in the Circuit Court of Santa Rosa County, of manslaughter, and from the judgment and sentence imposed takes writ of error here.

[342] One David Mitchell as a witness for the State testified that he arrested the defendant after the tragedy, and found him in a very drunken condition, so that he had to lift him into a buggy to take him off; that while in this condition the defendant, without any threats or holding out of any promises or hope of reward or advantage to himself, freely and voluntarily and of his own volition, told him that he had shot the deceased and had shot him under the shoulder; that he, the witness, told him he thought that he had missed him, to which the defendant replied: "I didn't miss him, I shot him right under the shoulder; about the time I pulled the trigger he turned." The witness further stated that the defendant was so drunk he had to hold him in the buggy, but had intelligence enough to make the above statements to him, and made them on his own initiative and of his own volition without any threats from him or inducements or hope of advantage being held out to him. The defendant here, by his counsel, moved the court to strike this evidence relative to the statements made to the witness by the defendant because there was an inducement when the witness told the defendant that the deceased had been missed; but the court denied this motion, to which exception was taken and this ruling constitutes the first assignment of error. There was no error here. As to the specific ground upon which the motion to strike was based, *viz.*: that because the witness told the defendant he thought he had missed the deceased, that this was an inducement held out to the defendant, we fail to see how this can be construed into any inducement to the defendant to talk. It may have pricked his vanity over his skill in the use of a rifle to have it intimated that he had missed his target, but in the sense [343] contemplated by the rule of law that to make a confession admissible there must be no inducement held out to the accused for such confession, this cannot by any process of legitimate reasoning be contorted into an inducement such as the rule of evidence inhibits. It is contended here in support of this assignment that the defendant was shown by this witness to have been very badly intoxicated when these statements were made by him, and that therefore his statements could not have been freely and voluntarily made. The rule of law seems to be well settled that the drunken condition of an accused when making a confession, unless such drunkenness goes to the extent of mania, does not affect the admissibility in evidence of such confession, but may affect its weight and credibility with the jury. State v. Berry, 50 La. Ann. 1309, 24 So. 329. Intoxication, less than mania, does not exclude a confession made during its continuance, but it is a fact for the jury tending to discredit such confession. State v. Hogan, 117 La. 863, 42 So. 352; Lester v. State, 32 Ark. 727; Eskridge v. State, 25 Ala. 30; State v. Grear, 28 Minn. 426, 10 N. W. 472, 41 Am. Rep. 296; Com. v. Howe, 9 Gray (Mass.) 110; Mixon v. State, 36 Tex. Crim. 66, 35 S. W. 394; White v. State, 32 Tex. Crim. 625, 25 S. W. 784; People v. Kent, 41 Misc. 191, 83 N. Y. S. 948; State v. Feltes, 51 Ia. 495, 1 N. W. 755.

The defendant as a witness on his own behalf, after testifying that he and the deceased, who was his son, had been at outs with each other for two years was asked the following question: "What first started the trouble between you?" "How many of your children took sides with John (the deceased)?" The court sustained objections of the State Attorney to both of these questions, exceptions to the rulings were duly taken and they are [344] assigned as error. We do not think there was any error in either of the rulings. As to what it was that two years before the tragedy first started the ill-feelings between the defendant and his deceased son, was too remote and was wholly immaterial and irrelevant to any issue in the case. And the same may be said of the second of the above questions excluded by the court. After the

defendant had testified in substance that when the deceased drove up to the scene of the tragedy he stated that he had a gallon of whisky and nothing to do but to ride around and drink it, the State Attorney called a witness in rebuttal, and asked the witness who was present at the scene of the tragedy, whether the deceased had then and there made the remark to the effect that he had a gallon of whisky and nothing to do but ride around and drink it. To this question the defendant objected, but the court permitted the question to be asked and answered, to which ruling exception was taken and it is assigned as error. While it is true that this was somewhat of an immaterial point in the case, yet we cannot say that the ruling here assigned was reversible error, since we cannot see how the defendant was materially injured thereby.

The last assignment of error is the denial of the defendant's motion for new trial made on the grounds that the verdict of the jury is not supported by the evidence and is contrary to the evidence. Without a rehearsal of it here, it is sufficient for us to say that the evidence abundantly sustains the verdict returned, and finding no reversible error in the record, the judgment of the Circuit Court in said cause is hereby affirmed at the cost of Santa Rosa County, the plaintiff in error having been adjudged to be insolvent.

[345] Shackleford, C. J., and Cockrell, Hocker, and Whitfield, J. J., concur.

NOTE.

Intoxication as Affecting Admissibility of Confession.

Introductory, 1168.
General Rule, 1168.
Liquor Furnished by Officer, 1169.

Introductory.

The present note discusses the admissibility of a confession as affected by the fact that the accused was intoxicated at the time of making it. The right of an accused to show that he was insane at the time of making a confession is treated in the note to State v. Berberick, 16 Ann. Cas. 1077; and the admissibility of a confession made while asleep is considered in the note to Martinez v. People, Ann. Cas. 1914C 559. As to the admissibility of a confession procured by fraud or trick see the notes to Rex v. White, 15 Ann. Cas. 272; Daniels v. State, 6 Am. St. Rep. 238, 249. The admissibility of a confession induced by duress or by threats or promises of the persons having the accused in custody is treated in the note to Daniels v. State, supra; the admissibility of a confession secured by an exhortation to tell the truth or by an appeal to religious, moral or superstitious sentiment, in the note to State v. Williams, Ann. Cas. 1913B 302, and the effect on the admissibility of a confession of the fact that the accused was tied, chained, shackled or confined in a dark cell, in the note to State v. Miller, Ann. Cas. 1912B 1053. For a general discussion of the inducements which will render a confession inadmissible, see 1 R. C. L. tit. *Admissions and Declarations*, p. 553.

General Rule.

A confession otherwise voluntary is not to be excluded because the accused was intoxicated at the time of making it. That fact goes to the weight only of the confession and is for the exclusive consideration of the jury. Eskridge v. State, 25 Ala. 30; Lester v. State, 32 Ark. 727; People v. Farrington, 140 Cal. 656, 74 Pac. 288; State v. Laughlin, 171 Ind. 66, 84 N. E. 756; State v. Feltes, 51 Ia. 495, 1 N. W. 755; State v. Berry, 50 La. Ann. 1309, 24 So. 329; Com. v. Howe, 9 Gray (Mass.) 110; State v. Grear, 28 Minn. 426, 10 N. W. 472, 41 Am. Rep. 296; Whitney v. State, 8 Mo. 165; People v. Kent, 41 Miss. 191, 83 N. Y. S. 948; Williams v. State, 12 Lea (Tenn.) 211; Leach v. State, 99 Tenn. 584, 42 S. W. 195; Lienpo v. State, 28 Tex. App. 179, 12 S. W. 588; White v. State, 32 Tex. Crim. 625, 25 S. W. 784; Mixon v. State, 36 Tex. Crim. 66, 35 S. W. 394; In re Stanbro, 1 Manitoba 263. See also State v. Bryan, 74 N. C. 351. And see the reported case. *Compare* Trepanier v. Rex, 19 Can. Crim. Cas. 290 (undue influence exerted on intoxicated prisoner). Thus in State v. Grear, 28 Minn. 426, 10 N. W. 472, 41 Am. Rep. 296, it was said: "Upon the trial, the state called a witness by whose testimony it was proposed to prove statements of the defendant in the nature of a confession. Objection was made to this, upon the ground that, as was claimed, the defendant was so intoxicated at the time of the alleged confession that he did not know what he was saying, and defendant's counsel claimed the right to examine the witness upon this point before his evidence of the confession should be received, and offered also to call other witnesses to the same fact at the same stage of the trial. This was refused by the court, and exception was taken. The court was right. Intoxication of the accused at the time when he may have made a confession would have affected the weight of the confession as evidence against himself, but would not go to exclude the confession from being put in evi-

dence. . . . That degree of intoxication which leaves one capable of making a narration of past events, or of stating his own participation in a crime, is not sufficient to exclude the inculpatory statement from the consideration of the jury." In Com. v. Howe, 9 Gray (Mass.) 110, the rule was stated as follows: "The court instructed the jury that the evidence of intoxication was an objection to the weight and not to the competency of the testimony; and that if the defendant was so much under the influence of liquor as not to understand what he was confessing, they should disregard the confessions altogether. These instructions were entirely right." So in People v. Farrington, 140 Cal. 656, 74 Pac. 288, the court said: "The objection that the court erred in permitting the introduction of the statement of the defendant explaining his possession of the money found upon his person cannot be sustained. The objection was, that it should not have been allowed because it appeared that the defendant was drunk at the time he made the statement. There is an old proverb to the effect that drunken persons tell the truth, but, without applying that in this case, it appears that while the defendant may have been slightly under the influence of liquor, he himself claimed that he was 'straight,' and the character of the statement itself clearly indicates that he was not so much intoxicated as to be unconscious of the meaning and effect of his words. The statement was therefore properly admitted for the consideration of the jury." Similarly in Leach v. State, 99 Tenn. 584, 42 S. W. 195, it was said: "It is a vain impeachment of the defendant's confession to say that it was made when he was somewhat under the influence of whisky, and that, subsequently, when sober and imprisoned, he firmly denied its truthfulness. There is no proof or indication that he was not in the fullest possession of his mental faculties at the time he confessed his guilt; on the contrary, the manner, time, place, and substance of the confession show deliberation and intelligence on his part. That the confession was unwise, and the subsequent denial more consistent with his desire to save himself from the consequences of his crime, can hardly be doubted. But slight intoxication could not impair the force or truthfulness of the confession made. Such a condition is not likely to render one false. *In vino veritas.*" In the case of In re Stanbro, 1 Manitoba 263, applying the rule the court said: "It is further contended that the prisoner was, at the time of the making of the confession, so under the influence of liquor, or in such a mental condition from the effects of liquor, that no confession or statement then made, should be admitted as evidence against him. From the effects of the liquor drunk that day, he must, at the time of the interview with Hall, have largely recovered. He was drinking in the morning, was arrested at about twelve o'clock, and the interview did not take place until nine or ten hours afterwards, during all which period he had not been drinking anything. He had however, been drinking heavily for a considerable time before his arrest, and was, as one of the witnesses says, about the time of the interview, 'very much broke up.' The chief of police thinks he was verging on delirium tremens. I do not find that a confession being made by a man while under the influence of liquor, or suffering, as the prisoner was from the effects of liquor, is any reason for excluding it."

Liquor Furnished by Officer.

By the weight of authority a confession by an intoxicated prisoner is none the less admissible because the liquor was furnished to him by the officer having him in custody. People v. Ramirez, 56 Cal. 533, 38 Am. Rep. 73; State v. Hogan, 117 La. 863, 42 So. 352; State v. Brooks, 220 Mo. 74, 119 S. W. 353; Jefferds v. People, 5 Park. Crim. (N. Y.) 522. And see State v. Hopkirk, 84 Mo. 278; Cortez v. State, 43 Tex. Crim. 375, 66 S. W. 453; Jones v. State, 50 Tex. Crim. 329, 96 S. W. 930. In Rex v. Spilsbury, 7 C. & P. 187, 32 E. C. L. 487, it appeared that the prisoner had made a statement to a constable in whose custody he was, but that he was drunk at the time; and "it was imputed that the constable had given him liquor to cause him to be so." Lord Coleridge said: "I am of opinion that a statement being made by a prisoner while he was drunk is not therefore inadmissible as evidence against him; and that, to render a confession inadmissible, it must either be obtained by hope or fear. This is a matter of observation for me, upon the weight that ought to attach to this statement when it is considered by the jury." In State v. Brooks, 220 Mo. 74, 119 S. W. 353, it was said: "In instruction number 10 the court instructed the jury that if they believed from the evidence that the defendant, while in custody of the officers, was given intoxicating liquors and that thereby the defendant was not in a condition to realize what he was doing, and while in that condition a confession was obtained from him, then the jury should reject such confession. So that the defendant had the full benefit of his claim that his confession was not voluntary. But the jury found that the said confession was voluntarily made." In Jefferds v. People, 5 Park. Crim. (N. Y.) 522, the court said: "An officer may be employed by the prosecution for the purpose of watching a supposed criminal, and

for the purpose of detection. Crime often cannot be otherwise discovered. But when such an officer ingratiates himself as a friend to the criminal, when he procures liquor and uses it for the intoxication and ruin of the supposed culprit, when he urges upon him the constant use of intoxicating drinks, until maddened by their use, the accused, in a spirit of boasting rather than in the exercise of his reason, and in response to suggestions made by the officer, proclaims his guilt, it appears to me that the officer goes far beyond the line of his duty, and is guilty of conduct throwing no credit on such an administration of criminal justice. But, however much we may condemn this proceeding, still it was not error to admit the testimony on the trial. The learned judge before whom the case was tried, while he correctly held that the confessions were not to be kept from the jury, felt also unwilling to state to the jury his approval of the mode in which they were obtained. However, in McCabe v. Com. (Pa.) 8 Atl. 45, it was said: "We think the conduct of William H. Kain in furnishing liquor to the defendant after his arrest, and in the attempt which he made to induce declarations from this defendant, and the manner in which that attempt was made, is deserving of the most severe condemnation. No man has a right to seek to induce from a defendant statements by any such means, and declarations induced by such influences ought not to be introduced in evidence, or be given any consideration in determining the defendant's guilt." In McNutt v. State, 68 Neb. 207, 94 N. W. 143, the court said: "In this connection it is shown that immediately after the defendant's arrest, while the sheriff who arrested him was returning him to Hartington, where the crime was committed, the sheriff not only allowed the defendant to have intoxicating drinks, but himself furnished such drinks to the defendant, and afterwards questioned the defendant in regard to the offense. Such conduct on the part of the sheriff is not justifiable, and under ordinary circumstances the admitting in evidence of the testimony in regard to admissions so obtained would be erroneous and require a reversal of the judgment of conviction, but in this case the evidence of the defendant himself shows that this conduct of the sheriff was due rather to thoughtlessness than to any attempt on his part to procure damaging evidence against the defendant, and also shows that the defendant afterwards, of his own free will, repeated the same statements to several other parties, and made other similar statements in open court upon his preliminary examination, so that it is impossible to believe that the defendant has been prejudiced by this improper conduct of the sheriff." In Rex v. Sexton, 3 Russ. C. & M. 462, the granting of a prisoner's request for liquor seems to have been regarded as an inducement, which was held to exclude a confession. In Flagg v. People, 40 Mich. 706, the giving of liquor to an accused person was one of the circumstances which were held to render a confession by him inadmissible. The court said: "When a party under arrest is told by the officer that the best thing he can do is to own up—that he had better make a statement;—when it is supposed that a statement can be forced—'knocked'—out of him because 'he was a weak one;' when intoxicating liquors are furnished him to aid in the forcing process; and when on the following morning he is taken in irons to the office of an attorney, and there, in the presence of those hostile to him, with bolted doors, is interrogated, his answers reduced to writing and sworn to, it is idle to say that such a confession was free and voluntarily made, even although the witnesses may testify that no inducements were made or held out to him."

STATE EX REL. MAYOR AND SELECTMEN OF TOWN OF HOMER

v.

LOUISIANA AND NORTHWEST RAILROAD COMPANY.

Louisiana Supreme Court—March 30, 1914.

135 La. 14; 64 So. 926.

Railroads — Repair of Road — Power of Municipality to Compel.

A mandamus will lie to compel a railroad company to make the necessary repairs to its road running through the streets of a city or town, so as to keep the same free for the use of the public, and clear of all obstructions. Rev. St. § 691, as amended by Acts No. 204 of 1902, p. 395, and No. 157 of 1910, p. 236; Act No. 193 of 1912, p. 381.

[See note at end of this case.]

(Syllabus by court.)

Appeal from Third Judicial District Court, Parish of Claiborne: BARNETTE, Judge.

Action for mandamus. Mayor and Selectmen of Town of Homer, relator, and Louisiana and Northwest Railroad Company, defendant. Judgment for relator. Defendant appeals. The facts are stated in the opinion. AFFIRMED.

John A. Richardson for appellant.
Enos C. McClendon for appellee.

[14] SOMMERVILLE, J.—The town of Homer, alleging that the defendant railroad company has permitted two of its overhead bridges in the town to be out of repair and dangerous, and that it is the duty of the defendant to keep in good order and repair its bridges and other constructions, so that the streets of said town may be unobstructed, and the citizens have the free use of the [15] same, ask that a mandamus issue to compel defendant to reconstruct said two bridges, to put them in good order, and to make them safe for public traffic, within a time to be fixed by the court, and that said bridges be so adjusted that the streets will not be obstructed.

Respondent answered, alleging that one of the two bridges complained of was in good order and repair; and admitted that the second was in bad order. It further admitted that it had caused the two bridges to be built, and that it is its duty to keep all of the bridges constructed by it in the town in a reasonably safe condition for the use of the public. It further expressed a willingness to do the repairing and reconstructing necessary, but alleges that it is not able to procure the funds necessary to do the work, and that it is impossible for it, at this time, to make the necessary repairs.

There was judgment in favor of the relator, ordering defendant to reconstruct one of the bridges complained of, and to repair or strengthen the abutments at the ends of the other bridge. Defendant has appealed.

In this court George W. Hunter has appeared and shown that the defendant company has been placed in the hands of a receiver, and that he is the receiver. He asks to be made a party to the cause. It is so ordered.

It is made the clear duty of the railroad company to keep in good order and repair and free from obstruction the streets of any town or city through which said railroad passes. This proceeding by mandamus is brought under the provisions of the Revised Statutes, § 691, as amended by Act No. 204 of 1902, p. 395, and Act No. 157 of 1910, p. 236, and under Act No. 193 of 1912, p. 381.

Respondent specially complains of that provision in the judgment appealed from which requires it to begin the construction [16] and repair therein ordered with 15 days from the time the judgment became final, and to complete it within 30 days from the time said work was begun. The law provides that railroad companies should have reasonable time in which to reconstruct and make the repairs ordered; and, while the time fixed in the judgment may be short, it is not shown to be unreasonable; and we do not feel warranted in making any change in the judgment appealed from.

The evidence shows that one of the bridges complained of was repaired by respondent before the case went to trial, and that the only additional work necessary in connection with that bridge is to make the abutments at the ends of the bridge more secure; and the trial court ordered this work to be done.

The evidence shows, with reference to the other bridge, that it had fallen into decay, was out of use, and had to be reconstructed.

There is no evidence in the record showing that respondent cannot get the money required to do the work ordered to be done.

Judgment affirmed.

NOTE.

Power of Municipality to Compel Railroad or Street Railway to Repair Bridge within Municipal Limits.

The power of a municipal corporation to impose on a street railway company such regulations as will tend to keep the streets used by the railway in a proper condition is illustrated by the cases upholding the right to compel the sprinkling of the tracks (see the note to St. Paul v. St. Paul City R. Co. Ann. Cas. 1912B 1136) and the repair of the portion of the street occupied by it (see the note to Reading v. United Traction Co. 7 Ann. Cas. 380). In the reported case it is held that a railroad may be compelled to repair a bridge maintained by it within the limits of a municipality in order to prevent an obstruction of the street. A similar holding was made in Queensbury v. Hudson Valley R. Co. 158 App. Div. 258, 143 N. Y. S. 120, wherein a street railway company was required to strengthen a bridge to withstand the increased weight of new rolling stock adopted by it.

LOUDEN

v.

CITY OF CINCINNATI ET AL.

Ohio Supreme Court—March 17, 1914.

90 Ohio St. 144; 106 N. E. 970.

Explosions and Explosives — Blasting — Injury by Concussion.

The use of high-power explosives in making excavations of rock and earth is a lawful method of accomplishing that purpose; but where dirt and stone are thrown by the force of the blast upon the property of another, or where the work of blasting is done in such

proximity to adjoining property that regardless of the care used the natural, necessary or probable result of the force of the explosion will be to break the surface of the ground, destroy the buildings, and produce a concussion of the atmosphere, the force of which will invade the adjoining premises, injuring the buildings thereon and making them unfit and unsafe or habitation, the person or corporation making use of such explosives will be liable for the damage proximately and naturally resulting therefrom, irrespective of the question of negligence or want of skill in the blasting operations.

[See note at end of this case.]

Same.

A petition averring that defendants in the use of high explosives broke into plaintiff's land and dwelling house with force and violence by means of explosions of great power and frequency in the street adjacent to and in close proximity to plaintiff's dwelling house, and thereby produced concussions and vibrations of the earth and air, causing foundations, walls, chimneys, ceilings, cistern and vault and window glass of plaintiff's house to break and fall, rendering such house unsafe for habitation and untenantable, states a cause of action.

[See note at end of this case.]

(Syllabus by court.)

Error to Circuit Court, Hamilton county.

Action for damages. Nancy Louden, plaintiff, and City of Cincinnati et al., defendants. Judgment for defendants in Court of Common Pleas. Judgment affirmed by Circuit Court. Plaintiff brings error. REVERSED.

[145] The plaintiff filed an amended petition in the common pleas court of Hamilton county which amended petition reads as follows:

"Now comes Nancy Louden the plaintiff herein and by leave of court files this her amended petition herein, and says that the defendant, the City of Cincinnati, is a municipal corporation under the laws of the State of Ohio; that the defendant, the Board of Trustees, 'Commissioners of Water Works,' Cincinnati, Ohio, is a legally constituted board appointed and qualified under and in pursuance of the laws of the State of Ohio, for the construction, enlargement, extension and improvement and addition to the Water Works of the City of Cincinnati; that the defendant The W. J. Gawne Company is a corporation under the laws of the State of Delaware.

"And plaintiff says that during all the times hereinafter mentioned this plaintiff was and has been ever since and still is the owner in fee simple and in possession of Lot No. — in S. W. Hartshorn's Subdivision, with a dwelling house thereon known and numbered as No. 3521 Humbert Avenue in the City of Cincinnati.

[146] "That at the time of the doing of the wrongs hereinafter stated said dwelling house was a frame and plastered building with stone and brick foundation and stone and brick chimneys, all occupied by plaintiff as her home and dwelling house.

"That said defendant The City of Cincinnati, through its said Board of Trustees, 'Commissioners of Water Works,' Cincinnati, Ohio, defendant contracted with and employed the defendant The W. J. Gawne Company to excavate and to construct for said city a tunnel for supplying water to said city.

"That said defendants made the excavation for and construction of said tunnel along, through and under the ground adjacent to the said dwelling house of the plaintiff.

"That in the process of so doing, said defendants loosened and removed the earth and rock by means of blasts of high power explosives.

"And that in so doing, the said defendants trespassed upon and under and broke into the plaintiff's said land and dwelling house with force and violence by means of said explosions of great power and frequency, and in close proximity to plaintiff's said dwelling house.

"And that the defendants thereby produced concussions and vibrations of the earth and air and of the material of this plaintiff's said dwelling house.

"And the defendants thereby caused the foundations, walls, chimneys, ceilings, cistern, vault and window glass of plaintiff's said house to crack and break and fall and rendered said house unsafe [147] for habitation and untenantable, and deprived plaintiff of the use of said house.

"And that said defendants by said explosions continued through day and night caused terrifying and disturbing noises and vibrations of the ground and air and dwelling house of this plaintiff, and deprived plaintiff and her family of sleep and rest and of the enjoyment of her home and property and thereby caused her great inconvenience, discomfort, suffering, injury, damage and loss.

"That the excavation for and construction of said tunnel was entirely within and under the management and control of the defendants, and said plaintiff had nothing to do with it except to endure the injuries, suffering, losses and damages herein complained of.

"That by reason of the above described acts of the defendants, the plaintiff has been damaged by the said defendants in the sum of One Thousand Dollars ($1000).

"Wherefore the plaintiff asks judgment against said defendants and each of them for One Thousand Dollars.

"And plaintiff further prays for an order directed to the defendants, The City of Cincinnati and the Board of Trustees, 'Commissioners of Water Works,' Cincinnati, Ohio,

and each of them, from paying over any money now in their hands to the said defendant, The W. J. Gawne Company, until after the claim of this plaintiff has been fully paid and satisfied. And plaintiff further prays for her costs and for all other and further relief to which she is entitled."

[148] To this amended petition the defendants filed the following demurrer:

"Comes now the defendants herein and jointly and severally demur to plaintiff's amended petition for the reason that same does not state facts sufficient to constitute a cause of action."

The common pleas court sustained the demurrer to this amended petition, and dismissed the action at plaintiff's costs. The circuit court affirmed the judgment of the common pleas court.

Patterson A. Reece for plaintiff in error.

Stanley W. Merrill, Joseph W. Heintzman and *Jonas B. Frenkel* for defendants in error.

DONAHUE, J.—The question in this case is raised by the demurrer to the amended petition, and it is one that materially affects property rights in this state. Plaintiff in her amended petition avers that the defendants in the process of constructing a tunnel through and under Humbert Avenue, for supplying water to the city of Cincinnati, loosened and removed earth and rock by means of high-power explosives; that plaintiff was the owner of a frame dwelling house, with stone and brick foundation and stone and brick chimneys, occupied by her and her family as a home; that this tunnel was being constructed through and under the street adjacent to this dwelling house; that defendants trespassed upon and under and broke into plaintiff's land and dwelling house with force and violence by means of explosions of great [149] power and frequency and in close proximity to plaintiff's dwelling house, and thereby produced concussions and vibrations of the earth and air, destroying the cistern on her lot, the foundation of her building, breaking the glass in the windows, cracking and destroying the chimneys, and thereby rendered her house unsafe and unfit for habitation and depriving plaintiff of its use, enjoyment and occupation.

A demurrer to this amended petition was sustained by the trial court for the reason that it contained no averments of negligence or want of skill in the handling of these explosives. The amended petition charges a trespass upon plaintiff's land by the transmission of force through the soil and subsurface and concussion of air produced by the explosion of blasts used in loosening rock and earth in the construction of the tunnel in the street in front of plaintiff's premises.

The question presented is whether the owner of property may make use of high explosives on his own premises in the accomplishment of a lawful purpose, provided he uses due care, notwithstanding the necessary, natural or probable result thereof is to injure or destroy adjacent property. The supreme court of California, in the case of Colton v. Onderdonk, 69 Cal. 155, 10 Pac. 395, 58 Am. Rep. 556, has spoken in no uncertain terms upon this question. In the fourth proposition of the syllabus it is held that "Where the owner of a lot situated in a large city, and contiguous to the dwelling house of another, uses gunpowder to blast out rocks on his lot, he is liable for the damages proximately and naturally resulting [150] to the house of the adjoining owner from the act of blasting, whether the damage was caused by rocks thrown against the house or by a concussion of the air around it." The court, on page 159, uses this language: "The defendant seems by his contention to claim that he had a right to blast rocks with gunpowder on his own lot in San Francisco, even if he had shaken Mrs. Colton's house to ruins, provided he used care and skill in so doing, and although he ought to have known that by such act, which was intrinsically dangerous, the damage would be a necessary, probable, or natural consequence. But in this he is mistaken."

In the case of Cahill v. Eastman, 18 Minn. 324, 10 Am. Rep. 184, it was held: "Where it is sought to make one accountable for the consequences of acts done by him upon his own land, the question, in general, is not whether he exercised due care, but whether his acts caused the damage. If they necessarily tend to injure his neighbor in his pre-existing rights of property, he is liable in damages for the natural and necessary consequences thereof, irrespective of any consideration as to the care and skill with which such operations may have been conducted." To the same effect is the case of Shipley v. Fifty Associates, 106 Mass. 194, 8 Am. Rep. 318; Ball v. Nye, 99 Mass. 582, 97 Am. Dec. 56; Wilson v. New Bedford, 108 Mass. 261, 11 Am. Rep. 352; Joilet v. Harwood, 86 Ill. 110, 29 Am. Rep. 17.

The New York court of appeals held, in the case of Hay v. Cohoes Co. 2 N. Y. 159, 51 Am. Dec. 279, that defendant was liable for injury caused from blasting on its own premises, although no negligence or want of skill in executing the work was alleged or [151] proven. The same principle in relation to the storing of water is announced in the case of Pixley v. Clark, 35 N. Y. 520, 91 Am. Dec. 72. Also in reference to the storage of gunpowder and other explosive materials, in the case of Heeg v. Licht, 80 N. Y. 579, 36 Am. Rep. 654. In the case of McKeon v.

See, 51 N. Y. 300, 10 Am. Rep. 659, an injunction was granted against defendant from operation of machinery by steam power which produced jarring and shaking of plaintiff's building. In the case of Sutton v. Clarke, decided in England in 1815, 6 Taunt. (Eng.) 29, it was stated in the opinion by Sir Vicary Gibbs, C. J., that where a person improves his own land for his own benefit, according to his best skill and diligence and not foreseeing that his act will produce injury, yet if he unwittingly injures his neighbor he is answerable. This was the settled law of England at that time, and many authorities are cited by the court. That doctrine has been modified, at least in this country, to the extent that where the injury was not the natural, necessary or probable consequence of the act of plaintiff, and could not have been foreseen, no recovery can be had unless there be an actual or constructive trespass or negligence in doing the work. In the case of Booth v. Rome, etc. R. Co. 140 N. Y. 267, 35 N. E. 592, 37 Am. St. Rep. 552, 24 L.R.A. 105, the court of appeals seems to have departed from the doctrine announced in the case of Hay v. Cohoes Co. supra. However, the court distinguishes these cases. In the latter the court held that defendant was not liable for the injury caused by blasting notwithstanding that during the progress of the work it was informed of the [152] injury that was being done. This decision was largely predicated upon the particular facts in that case. The rocky surface of the upper part of Manhattan Island made blasting necessary in the work of excavating, and unless permitted, the value of the lots, especially for business purposes, would be seriously affected. However, the fair and legitimate interpretation and application of the doctrine announced in that case, as elaborated and explained in the opinion at page 278, would permit the second proprietor to destroy the building of the first, and the third to destroy the building of the second, and in like manner each succeeding proprietor might destroy the building of his predecessor until the territory was exhausted, and then there would remain upon this territory but one building, the last one, fit and safe for use and occupancy, unless the several owners followed in the trail of devastation and repaired or restored their buildings. There are, of course, two very important considerations to be kept in mind in the disposition of a question of this character. First, to give to the owner the largest liberty possible, in the use, occupation and improvement of his own property, consistent with the rights of others, and the right to employ modern methods and machinery in accomplishing the improvements desired. Second, that one may not use his own property to the injury of any legal right of another. This maxim of the common law, *Sic utere tuo ut alienum non laedas*, is so well established and so universally recognized that it needs neither argument nor citation of authority in its support. But [153] it must be conceded that this is no longer the law if the owner of a lot may employ such means in the improvement of his property as will naturally and necessarily result in the destruction of adjoining property. Particularly would this be true if, as in the case of Booth v. Rome, etc. R. Co. supra, he is informed that the means and methods that he is employing are in fact destroying his neighbor's property, and notwithstanding that knowledge he may continue in the use of these methods and these means without liability therefor, unless perchance he is guilty of negligence or want of skill in the handling of the explosives used. If the means employed will, in the very nature of things, injure and destroy his neighbor's property, notwithstanding the highest possible care is used in the handling of the destructive agency, the result to the adjoining property is just as disastrous as if negligence had intervened. If one may knowingly destroy his neighbor's property in the improvement of his own, it is little consolation to the neighbor to know that his property was destroyed *with due care and in a scientific manner*. If the consequences of the act could not be foreseen, if the means employed by a person in the improvement of his own property would not naturally, necessarily or probably cause the destruction of adjoining property, then the question of negligence in doing the work would become important, but when he makes use of such means as will naturally, necessarily or probably result in the destruction of property, a different rule must obtain, otherwise the maxim of the law above stated, [154] so well established and so universally recognized, must be abandoned forever.

The doctrine announced in the case of Booth v. Rome, etc. R. Co. supra, was reaffirmed by the court of appeals in the case of Benner v. Atlantic Dredging Co. 134 N. Y. 156, 31 N. E. 328, 30 Am. St. Rep. 649, 17 L.R.A. 220, and Holland House Co. v. Baird, 169 N. Y. 136, 62 N. E. 149. In the later case the court stated in its opinion that this is the settled law of that state. The great weight of authorities, however, would seem to indicate that other states have not adopted this rule. Thompson in his Commentaries on the Law of Negligence, Vol. 1, Section 765, says: "It is obvious, upon a moment's reflection, that the work of blasting rocks, being absolutely necessary in excavating through beds of rock, in mining, in digging wells, in excavating foundations for buildings, in improving roads and streets, in digging canals, and in building railways, cannot under all cir-

cumstances be regarded as a *nuisance per se* and condemned as being negligent as a matter of law. On the other hand, it must be regarded—and the decisions so regard it—as a work which one proprietor may lawfully do upon his own land, provided he takes due care to avoid injuring persons and property in the vicinity, and subject to his obligation to pay damages for any injury which he does in case his blasting involves a *direct invasion* of the premises of an adjacent proprietor." In Section 764, the rule is stated that a recovery may be had for damages to adjoining property from blasting: 1. Where dirt and stones are thrown by the blast upon the adjoining property, irrespective of the [155] question of negligence. 2. Where the work of blasting is done in a situation where it is necessarily dangerous to persons or property, whether the injury proceeds from the impact of rocks thrown or from atmospheric concussion, irrespective of the care or skill used. 3. In all other cases liability will attach to the person or corporation carrying on the dangerous employment where the work has been negligently done.

This would seem to be the rule in Ohio. This court affirmed without opinion the case of Columbus v. Williard, reported in 7 Ohio Cir. Dec. 33, 7 Ohio Cir. Ct. page 113, in which it was held that "A municipal corporation which proceeds with skill and care, and without malice, to drain a street for a lawful purpose, is liable to the owner of an abutting lot for such injury as may result to his soil from the withdrawal of its natural support, even though the support withdrawn consists of percolating waters and sand of such nature and so blended with the waters as to be inseparable from them." In this case it is not necessary to extend the rule of liability that far. In that case it does not appear from the report that the damage caused was the necessary, natural or probable consequence of the act of the defendant. Not only that, but it involved the question of percolating waters.

We think the correct rule is stated in the case of Tiffin v. McCormack, 34 Ohio St. 638, 32 Am. Rep. 408, in which it was held that: "Where the owner of a stone quarry, by blasting with gunpowder, destroys the building of an adjoining land owner, it [156] is no defense to show that ordinary care was exercised in the manner in which the quarry was worked." Judge McIlvaine in that case said: "Neither can one in possession of a parcel of land operate and manage a mine or quarry upon it in such manner as to injure or destroy the property of an adjoining proprietor, justify himself by showing that he used ordinary care in the use of his own property." In the case of Bradford Glycerine Co. v. St. Marys Woolen Mfg. Co. 60 Ohio St. 560, 54 N. E. 528, 71 Am. St. Rep. 740, 45 L.R.A. 658, it was held by this court that: "Nitroglycerine is a substance usually recognized as highly explosive and dangerous, the storage of which at any place is a constant menace to the property in that vicinity. And one who stores it on his own premises is liable for injuries caused to surrounding property by its exploding, although he neither violates any provision of the law regulating its storage nor is chargeable with negligence contributing to the explosion."

It is insisted by counsel for defendant in error that this case does not apply to the case under consideration, but when that case was before this court it was then contended that the authorities in reference to the use of explosives did not apply to that case because in one instance the party to be charged was actively engaged in the work that caused the injury, and purposely and intentionally caused the explosion, while in the other case he was merely using the premises to store the dangerous substance, not intending that it should explode; but this court held that both cases involved the same principle and in the discussion of that [157] question said: "The blasting doubtless is a menace to adjacent property, but so is the storing of a highly explosive substance." In the cases of Defiance Water Co. v. Olinger, 54 Ohio St. 532, 44 N. E. 236, 32 L.R.A. 736, and Gas-Fuel Co. v. Andrews, 50 Ohio St. 695, 35 N. E. 1059, 29 L.R.A. 337, this question is further considered and discussed.

We are informed by counsel that the case of Armstrong v. Cincinnati, 12 Ohio Cir. Ct. (N. S.) 76, *affirmed* by this court 82 Ohio St. 454, 92 N. E. 1108, involved facts similar to the facts averred in the amended petition in the case now under consideration. In that case the trial court charged the jury that if the defendants exercised the highest degree of care in the use of explosives, they would not be liable for the damages resulting therefrom. The jury found for the defendant. The plaintiff prosecuted error to reverse this judgment upon two grounds: First, that the verdict was not sustained by sufficient evidence, and, second, for error in the charge of the trial court. The circuit court affirmed the judgment of the common pleas court, and among other things held there was no error in the charge of the court, citing in support of its conclusion the New York cases to which we have referred. The circuit court further found from an examination of the record that: "The jury might well find that the injury, if any, to plaintiff's property was not caused by the work of defendants." The fact that that case involved the weight of the evidence may have been the reason for its affirmance by this court. The law of this state in reference to this subject having been

declared in the cases of Tiffin v. McCormack [158] and Bradford Glycerine Co. v. St. Marys Woolen Mfg. Co. supra, it would follow that if this court intended to depart from the doctrine announced in these cases it would have reported the case and overruled these authorities.

It is insisted by counsel for defendants in error that because no rock, soil or debris was actually thrown upon plaintiff's premises there was no actual trespass, but neither was there such a trespass in the case of Bradford Glycerine Co. v. St. Marys Woolen Mfg. Co. supra. We are unable to distinguish between a case where a fragment of rock or a portion of the soil is thrown onto an adjoining property and a case where the force of an explosion is transmitted through the soil and subtratum, jarring, cracking and breaking it, destroying the cistern and foundation of the building and wrecking the building itself by a concussion of the air around it, thereby doing far more injury than a fragment of rock could do. It is a distinction without a difference. If this terrific force may be set in motion by the owner of one parcel of ground, with full knowledge upon his part that such force will invade, damage and destroy the property of the adjoining proprietor, what difference does it make how this force accomplishes the result that, in the very nature of things, must have been anticipated? Is not a concussion of the air and jarring, breaking and cracking the ground with such force as to wreck the buildings thereon as much an invasion of the rights of the owner as the hurling of a missile thereon? If there is any difference whatever, it [159] is purely technical, and ought to find no favor with the courts. Certainly the application of a force sufficient to crack the surface of the land to such a depth as to destroy the foundations of buildings, to break windows, and throw down chimneys, is a direct invasion of property rights.

The amended petition does not aver in terms that the injury to plaintiff's property was the natural, or necessary, or probable, result of defendants' acts, but it does aver a trespass, and it also avers that these explosives were exploded in such close proximity to plaintiff's premises and that they were of such great power and frequency, day and night, that they did result in the destruction of plaintiff's property. It was not one single explosion, the result of which defendants might not have foreseen, but it was a continuous bombardment, which finally resulted in the injury complained of. It is not necessary that a pleader should draw a conclusion from the facts pleaded. It is sufficient if the allegation of the petition states the facts upon which plaintiff relies for recovery, and if the plaintiff is able to maintain by proofs the allegations of her amended petition, she is entitled to recover for the damages resulting from the invasion of her rights and the destruction of her property.

The judgment of the circuit court affirming the judgment of the common pleas court and the judgment of the common pleas court sustaining the demurrer to the petition, are reversed, and the cause remanded to the common pleas court with [160] directions to overrule the demurrer to the petition, and for further proceedings according to law.

Judgment reversed.

Nichols, C.J., Johnson, Wanamaker, Newman and Wilkin, JJ., concur.

NOTE.

Injury to Property by Concussion or Vibration Resulting from Blasting.

Introductory, 1176.
View that Liability Is Absolute, 1176.
View that Liability Depends on Negligence, 1178.

Introductory.

The earlier cases passing on the liability for injuries to property caused by concussion or vibration due to blasting, are collated and discussed in the notes to Longtin v. Persell, 2 Ann. Cas. 198, Hickey v. McCabe, 19 Ann. Cas. 783, and Weitzmann v. Barber Asphalt Co. 123 Am. St. Rep. 560. This note presents the recent cases on the subject.

For a discussion of the liability for an injury to property caused by blasting accompanied by an actual physical invasion of the property, see the note to Central Iron, etc. Co. v. Vandenheuk, 11 Ann. Cas. 346.

View that Liability Is Absolute.

The trend of the majority of the recent decisions on the question is toward the rule that a person causing blasting to be done is liable for injuries to the property of another caused by the concussion or vibration resulting therefrom, irrespective of the question of negligence, and although there is no actual physical invasion of the property thus injured. Watson v. Mississippi River Power Co. (Ia.) 156 N. W. 188; Faust v. Pope, 132 Mo. App. 287, 111 S. W. 878; Johnson v. Kansas City Terminal R. Co. 182 Mo. App. 349, 170 S. W. 456; Bradshaw v. Kansas City Terminal R. Co. (Mo.) 170 S. W. 458; Patrick v. Smith, 75 Wash. 407, 134 Pac. 1076, 48 L.R.A.(N.S.) 740; Schade Brewing Co. v. Chicago, etc. R. Co. 79 Wash. 651, 140 Pac. 897. And see the reported case. *Compare* Armstrong v. Cincinnati, 32 Ohio Cir. Ct. Rep. 714, *affirmed* 82 Ohio St. 454.

92 N. E. 1108; Cincinnati v. Morrissey, 33 Ohio Cir. Ct. Rep. 541, *affirmed* 87 Ohio St. 525, 102 N. E. 1121. In Watson v. Mississippi River Power Co. supra, it appeared that the construction of a dam required the blasting and removal of a large amount of rock from its natural bed under the river, much of it to the depth of 25 feet, and the plaintiff alleged that the blasting by a series of violent explosions was continued throughout a period of two years or more, and was of such a powerful character that the concussion or jar thereof broke the glass in the windows of his buildings, cracked the walls, loosened and injured the plastering, and otherwise injured those structures. There was no proof that rock or other material was cast on the plaintiff's premises by the blasting, but the injury complained of was caused solely "from the air concussion or earth vibration" set in action by the explosion of the blasts. The court said: "The initial proposition by appellant is that in its charge submitting the case to the jury the court erred in failing to instruct upon the law of negligence as applicable to this controversy. It is said the plaintiff charged negligence in the blasting, that such allegation was material to his right to recover damages, and without proof of the want of due care on defendant's part a verdict for plaintiff cannot be sustained. It is true the plaintiff did charge the blasting was done negligently, and, if we art to hold that a showing of negligence was essential to his right to recover, then the exception is well taken, and appellant is entitled to a reversal. But our practice act provides (Code, sec. 3639) that a party shall not be required to prove more than is necessary to entitle him to relief asked for, and if in this case plaintiff was not required to allege negligence in order to state a cause of action, and did allege facts other than negligence upon which, if true, he was entitled to damages, and introduced evidence tending to support the same, then the failure to prove negligence would not be fatal to his right of recovery, and the failure of the court to instruct upon the subject of negligence would not be prejudicial error. . . . In the case at bar the plaintiff alleged that the acts complained of were wrongful as well as negligent, and under the rule above stated our inquiry is reduced to the single question whether injuries to property caused solely by jar, concussion, or vibration of earth and air produced or set in motion by blasting constitute, under the circumstances stated, any wrong for which the law affords a remedy. This question has had the attention of the courts in several other jurisdictions, but thus far we have had no occasion to pass upon it in the direct and concrete form presented by the record in the present case. An examination of the precedents develops a divergence of judicial opinion. There is a class of cases which, according to appellant's contention hold that without allegation and proof of negligence damages of the kind suffered by the appellee herein cannot be recovered, while others adhere to the doctrine that a showing of negligence is not essential to the liability of a party who uses the dangerous agency of powerful explosives in such place or in such manner that the natural and proximate result thereof is injury to the person or property of another." After an extensive examination and review of the authorities, it was held that the trial court had not erred in failing to charge the jury that proof of negligence was necessary to the plaintiff's recovery. In Patrick v. Smith, 75 Wash. 407, 134 Pac. 1076, 48 L.R.A.(N.S.) 740, wherein it appeared that the defendants exploded "an exceedingly large amount of powder," which resulted in an alleged depletion of the water in the plaintiff's well, the court said: "Where one, blasting upon his land, exercising reasonable care, causes a concussion in the air or a vibration in the earth, or both, to the injury of the premises of another, but casts no physical substance upon his property, the authorities are divided on the question of liability. One line of cases holds that the injured party is without remedy; the other line holds that an actionable wrong has been committed. We think the latter view is both logical and just. It seems illogical to say that, if one puts off a blast of powder, a substance inherently dangerous, on his own premises, which causes a stone to be thrown through his neighbor's window, he is liable without regard to the degree of care used; but if it destroys his neighbor's houses, but casts no physical substance upon the premises, he is immune from liability unless it can be shown that reasonable care was not exercised. Moreover, we think the doctrine of damnum absque injuria when no negligence has been shown has been rejected in at least two cases in this court." And in Schade Brewing Co. v. Chicago, etc. R. Co. 79 Wash. 651, 140 Pac. 897, the court said: "Contention is made that the trial court erred in failing to instruct the jury upon the subject of negligence on the part of appellant, and in submitting the cause to the jury upon the theory that respondent would have the right of recovery regardless of appellant's negligence, if the damage to its building was, in fact, the result of appellant's blasting in excavating for the subway. Such seems to be the theory of the court's instructions, though the question of appellant's negligence is neither specifically submitted to nor withheld from the jury by the court's instructions. We are of the opinion, in view of certain facts which we regard as conclusively shown, that it was proper for

the court to regard the appellant's negligence as being of no consequence in determining its liability to respondent in this cause. It was, we think, conclusively shown by the evidence that the blasting which injured respondent's building, assuming, as the jury must have found, that it was so injured, was of a very heavy nature and effected by the use of dynamite; that the blasting was carried on, at the furthest, within a few hundred feet of the building; that it resulted in seriously cracking both the foundation and upper walls of the building; that is, if it had any injurious effect upon the building, as the jury, of course, found. This contention, we think, is fully disposed of in favor of respondent by the observation of Justice Gose in our recent decision in Patrick v. Smith, 75 Wash. 407, 134 Pac. 1076."

View that Liability Depends on Negligence.

In some jurisdictions it is held that where an injury to property from blasting is due solely to concussion, causing disturbance, jarring and vibration of the earth or air, there can be no recovery therefor unless the work is negligently and improperly done. Cherryvale v. Studyvin, 76 Kan. 285, 91 Pac. 60, 11 L.R.A.(N.S.) 385; Rost v. Union Pac. R. Co. 95 Kan. 713, 149 Pac. 679; Viele v. Mack Pav. etc. Co. 144 App. Div. 694, 129 N. Y. S. 604; Viele v. Mack Pav. etc. Co. 150 App. Div. 839, 135 N. Y. S. 147; Kaninsky v. Purcell, 158 N. Y. S. 165. And see Stancourt Laundry Co. v. Lamura, 147 N. Y. S. 895; Conron v. Fox, 90 Misc. 372, 153 N. Y. S. 425. In Rost v. Union Pac. R. Co. supra, the plaintiff sued for damages to her house caused by blasting done by the defendant in making an excavation on its right of way near where the building was located, resulting in cracking the outer wall of the building, which was of brick, and causing the plastering to break in places and fall. The jury were instructed that the burden of proof was on the plaintiff to prove the negligence alleged, and that negligence could not be presumed but might be inferred from facts and circumstances. The court said: "The rule in Cherryvale v. Studyvin, 76 Kan. 285, 91 Pac. 60, is relied upon. In that case it was decided that as a general proposition whenever an individual, corporation or municipality has the right to do and does a work of this character, and injury results without trespass, the injured party in order to recover must allege and prove that the injury resulted from negligence in the doing of the work. There is no disposition to depart from the result thus stated, and hence the theory contended for by the plaintiff that recovery may be had in the absence of negligence cannot be approved. A careful examination of the record, however, leads to the conclusion, like that in the Studyvin case, that the evidence did in fact warrant the jury in finding the defendant negligent. Although a permit had been procured, and although in a technical sense no express negligence was specifically described, still the plaintiff testified in substance that the blasting had been going on for several months, and 'When the blasting was going on one day I was inside the building and felt the floor raising when the blasts went off. This was the last heavy blasting they did. It cracked a wide strip around the ceiling, which is there to this day. Then they blasted again and cracked it again. The crack appeared both in the ceiling and the wall and the plastering is loose now. This was one afternoon about four o'clock. It seemed to be an extra heavy blast.' Another witness testified that she was in the building when the blast just described was set off and that it shook the whole building and that the windows shook. A fair inference from this is that on the day in question, after a long continuance of the work in a careful manner, excessive charges of explosives were used, that is, charges unnecessarily and carelessly excessive, resulting in damage. This does not mean that it is a case of res ipsa loquitur or that the mere fact of injury is proof of negligence. It simply means that after proceeding with the work for a long time without injury, all at once, on the day in question, although nearer the building than formerly, what appeared to be an extraordinary amount of explosives was used resulting in injury to the building, and that from the whole situation thus presented negligence at that time might fairly and reasonably be inferred." In Kaninsky v. Purcell, 158 N. Y. S. 165, the court said: "The plaintiff has recovered damages for injuries to personal property which he claims were caused by negligent blasting by the defendant. The evidence of negligence is very vague. There is absolutely no testimony which shows the manner in which the blast was set off other than the testimony that the report was very loud and the concussion very great, and that rocks were cast from the blast upon the premises occupied by the plaintiff. Inasmuch, however, as the action was not for injuries caused by the falling of these rocks, but only for injuries caused by the concussion, the testimony of the physical precipitation of the rocks upon the plaintiff's premises is material only in so far as it may tend to show that the blast was excessive. It is well established in this state that there is no liability for consequential injuries caused by a concussion, without proof of negligence, and the mere fact that a blasting causes injury upon adjacent premises gives rise to presumption that the blasting was negligently performed.

In all the cases cited upon the briefs, or which I can now remember, a recovery has been permitted to stand only where the plaintiff has shown the manner in which the blast was actually set off, coupled with further proof that the method used was negligent. Nevertheless it seems quite certain to me that, where the testimony of the results and surrounding circumstances of a blast is so strong that, under ordinary circumstances, such a result could not have occurred unless the blasting was negligently performed, a prima facie case of negligence is made out. Such testimony, however, must undoubtedly clearly show facts which will legitimately lead to this inference, and the rule that the injured party must affirmatively show negligence cannot be disregarded."

In Stewart v. Haveddy, 212 Mass. 340, 98 N. E. 1030, which was an action to abate a nuisance from blasting caused by the defendant in the construction of a tunnel and to recover damages for injuries to the plaintiff's dwelling house and for the interference with her enjoyment of it resulting therefrom, the defendant contended that "the injury to the complainant's house was caused by shrinkage and not by the blasting or by the jar and vibration caused by the blasting." The master found that it "was caused by the vibration and shock due to the blasting done by the respondent." The court said: "On almost all of the matters of fact involved the parties were widely at variance. The plaintiff contended and introduced evidence tending to show that her house was injured and her comfort disturbed by the blasting; that the house was jarred and caused to vibrate by the blasting operations; that the blasting was conducted in an unreasonable and improper manner and could have been modified without loss of efficiency in the work; and that the defendant had ample notice and warning of the damage that was being done but made no change in his method of tunnelling, but continued to employ the same methods. In addition it should be observed that the contract between the defendant and the sewerage board 'required that the blasting shall be conducted with all possible care, so as to avoid injury to persons and property.' On the other hand the defendant contended and introduced evidence tending to show that there was no jar or vibration; that the damage to the plaintiff's house was caused by shrinkage and the manner of its construction; that he used all the care and skill that reasonably could be required, having regard to due efficiency in carrying on the work; that he had no reason to believe damage was being done to the plaintiff's house; that he took all proper precautions; and that no change in the method of blasting was possible within proper engineering practice. . . . The argument addressed to us by the defendant in his brief relates almost wholly to matters of fact. It comes, it seems to us, in substance to the contention that the master should have believed his witnesses and should have adopted his views regarding the case rather than those of the plaintiff. But that was for the master to decide. We have carefully read and considered the printed report of the evidence. It not only cannot be said that the master's findings were plainly wrong, especially when considered in connection with the view which he took, and with the advantage which he had of seeing the witnesses face to face, but they were, it seems to us, warranted by the evidence."

In Adler v. Fox, 74 Misc. 483, 132 N. Y. 302, wherein it appeared that the water pipe leading into the plaintiff's house was broken by the falling in of a large section of rock above the pipe, due to the alleged negligence of the defendant in blasting out rock it was held that the defendant was not liable in trespass if the rock fell from the concussion and not as a direct result of the blast, but, if the rock was hurled on the water pipe, he would be liable in trespass.

In MacGinnis v. Marlborough Hudson Gas Co. 220 Mass. 575, 108 N. E. 364, L.R.A.1915D 1080, the following facts appeared: The defendant, under a license duly issued by the city, opened a trench three and one-half feet deep the whole length of the street and about ten feet from the easterly line of the street, for the purpose of laying a line of gas pipe. In connection with this work the contractor employed by the defendant blasted a ledge which extended from a few feet north of the plaintiff's house in a southwesterly direction across the street. When the frost in the ground began to thaw in the last days of March,—which was about two months after the gas pipe was laid,—and soon after the contractor had used a steam roller on the surface, water in considerable quantities began to percolate into the plaintiff's cellar through and under the wall. The city pumped it out daily for twenty-six days, during which time the water in the pond gradually receded. The jury specially found that the plaintiff's cellar was flooded because the ledge was blown out in the trench near the plaintiff's house; and also found that the work on the trench was not done negligently. The court said: "R. L. c. 110, sec. 76, which authorizes gas light companies to open the streets for the purpose of laying pipes, with the consent in writing of the mayor and aldermen, provides that 'such consent shall not affect the right or remedy to recover damages for an injury caused to persons or property by the acts of such corporations.' We do not undertake to pass upon the question whether this provision was designed to give the plain-

tiff a cause of action where none existed at common law, and to afford compensation for damage necessarily caused by work which was authorized by the statute and was executed in a reasonably proper manner. The present action is one of tort for alleged negligence. The jury specially found that the work on the trench was not done negligently; hence no case of liability at common law was made out,—even assuming that an action of tort would lie for negligent acts done in carrying out the purposes of the statute."

In Harbison-Walker Refractories Co. v. Scott, 185 Ala. 641, 64 So. 547, the ninth count of the complaint charged that the defendant was engaged in blasting on its own premises, and that, though notified by the plaintiff that it was injuring her residence thereby, the defendant nevertheless "wantonly and recklessly used explosives in such quantities and to such an extent as that the blast or explosion therefrom shook and jarred the plaintiff's house," etc. The court said: "A majority of the court are of the opinion that this count sufficiently charges wanton negligence in the conduct of defendant's blasting operations, so as to import liability within the principles stated in Bessemer Coal, etc. Co. v. Doak, 152 Ala. 166, 177 [44 So. 627, 12 L.R.A.(N.S.) 389]. The phrase 'wantonly and recklessly,' as here applied, charges negligence with a knowledge of the injury that would result; and it manifestly characterizes, not merely the act of blasting, but also the extent of the blasting and the quantity of explosives used. . . . To blast to a greater extent, or to use explosives in larger quantity, than is reasonably necessary, to the injury of another, is an actionable wrong, and that is what the count in question fairly and sufficiently charges."

In Deubel v. Millard Const. Co. 82 N. J. L. 523, 81 Atl. 1133, *affirming* 80 N. J. L. 98, 77 Atl. 611, it was held that there was evidence to warrant the drawing of the inference by the trial judge that the injuries complained of (concussion and the throwing of stone) were the results of blasting by the defendant, and also that the defendant did not exercise reasonable care or precautions to prevent injury to the adjoining property.

In Probst v. Hinesley, 133 Ky. 64, 117 S. W. 389, the court said: "Upon the question of blasting there are two classes of cases. In one line of cases, it is held that injuries to a house from blasting caused merely by the shaking of the earth or pulsation of the air, or both, give no right of action in the absence of negligence in doing the blasting. . . . In the other line of cases, it is held that the work of blasting is necessarily and inherently dangerous, and that a person who undertakes to blast near or so close to another's property as to cause injury assumes all risk of his operation. . . . In the case at bar the court did not fully adopt either one of these views, but very properly, we think, left to the jury the determination of the question whether or not, under the circumstances of the case, the natural and probable result of the blasting was to injure the plaintiff's property."

In Hieber v. Central Kentucky Traction Co. 145 Ky. 108, 140 S. W. 54, 36 L.R.A. (N.S.) 54, it was held that one engaged in blasting on his own property was not liable for mere concussion of the air not resulting in actual injury.

CHALVET

v.

HUSTON.

District of Columbia Court of Appeals—
January 4, 1915.

43 App. Cas. (D. C.) 77.

Witnesses — Competency — Knowledge of Facts — Hearing Letter Read.

A witness who heard a letter read may testify as to its contents, the letter being lost and the person who read it being dead; the obligation to the source of his knowledge of the contents going to the weight only of his testimony.

[See note at end of this case.]

Trial — Direction of Verdict.

Evidence considered and held sufficient to go to the jury on an issue whether money, the receipt of which by the defendant was admitted, was a loan or was paid under a contract for the future support of the payor.

Appeal from Supreme Court of District of Columbia.

Action for money loaned. Peter Chalvet, plaintiff, and William D. Huston, defendant. Judgment for defendant. Plaintiff appeals. REVERSED.

[78] Appeal from a judgment upon a directed verdict for the defendant, William D. Huston, appellee here, in an action for the recovery of $1,935 alleged to have been loaned the defendant by Peter Chalvet the plaintiff.

The plaintiff's evidence, in the form of a deposition, was substantially as follows: He was seventy-two years old, and had lived in Olivenheim, California, for thirty-five years. His wife, Minnie Chalvet, had been married before. She was of German descent, and could

read and write the German language, but plaintiff could not. Mrs. Chalvet had several children [79] by her first marriage, one being the wife of the defendant. This daughter and her husband lived at Garrett Park, Maryland, where they owned a small home, for which the plaintiff understood they paid $3,000, and upon which there was an encumbrance of about $2,000. When plaintiff married Mrs. Chalvet he owned a ranch of 320 acres, but she had no property. She died in May, 1911.

The plaintiff offered to prove, through his deposition, that in 1910 Mrs. Chalvet received a letter from the Hustons, saying that they wished to borrow from the plaintiff $2,100 to liquidate the mortgage on their home, and that they would give a new mortgage to secure the loan. This letter was written in German, but was read to the plaintiff by Mrs. Chalvet, and was finally lost. The court, over the objection and exception of the defendant, excluded the evidence.

It further appeared that on October 7, 1910, plaintiff, with money which belonged to him, purchased a draft payable to his order for $2,000, which he indorsed to Mrs. Chalvet. In addition he gave her $100 in cash. Taking the draft and money, Mrs. Chalvet came East and went to the home of the Hustons, in Garrett Park, where she remained about three months, when she returned to her home in California. She then told the plaintiff that the defendant would not give her a mortgage; that he, the defendant, "said that if he gave the mortgage, and the plaintiff and his wife should die, then Mrs. Chalvet's other children would come in and get this note and mortgage, and might foreclose the mortgage, and he, Huston, would thereby lose the $1,500 he had already paid on the place." The $2,000 draft was introduced in evidence, and showed that it had been indorsed by Mrs. Chalvet to the defendant. On December 15, 1910, while Mrs. Chalvet was at the Hustons, the defendant wrote a letter in English to the plaintiff, which was signed "Jenny and Will Huston," and in which the defendant, among other things, said: "We made out the mortgage on our house just as mother wanted it, so you see that everything is alright." On February 5, 1911, after Mrs. Chalvet's return to California, the defendant sent her a letter in German, [80] in which he said: "We hope that you all do very well. You may tell to Pet, that we will do the right thing. You need not be worried about it."

The defendant testified that the $2,100 was given his wife by Mrs. Chalvet; and that he and his wife "agreed to give Mrs. Chalvet a home with them as long as she lived, as well as provide a home for her husband, Mr. Peter Chalvet, the plaintiff, in this case, he to pay board for himself at the rate of $30 per month;" and that to secure the carrying out of this agreement as to Mrs. Chalvet the defendant and his wife executed a mortgage which provided that in consideration of the payment of $2,100 the Hustons would support, maintain, and provide a comfortable home for Mrs. Chalvet during her life. The mortgage contained no power of sale, and was to cease and determine upon the death of Mrs. Chalvet, who retained it in her possession without recording it until she was about to return to California, when she gave it back to the defendant. The money secured from the draft finally found its way into the joint bank account of the Hustons, and Mrs. Huston used several hundred dollars of it to purchase a piano, furniture, and various household necessities. At a later date there was deposited the balance of $1,100 in her individual account. The defendant further testified that in April, 1911, he secured a loan, through other sources, of $1,800 upon his property for the purpose of taking up the existing mortgage thereon. There was some further evidence tending to show that Mrs. Chalvet had expressed the intent to give Mrs. Huston the money which she brought East.

Samuel Herrick, Joseph W. Cox and *Joseph T. Sherrier* for appellant.

Claude W. Owen and *George C. Shinn* for appellee.

ROBB, J. (*after stating the facts*).—It was error to exclude the testimony of the plaintiff as to [81] the contents of the lost letter which his wife had read to him. Gulliford v. McQuillen, 75 Kan. 454, 89 Pac. 927; Ryland v. Heney, 130 Cal. 426, 62 Pac. 616. The letter having been lost, and the person who read it to the plaintiff having died, the testimony offered was the best evidence obtainable. The weight of such evidence, however, is for the determination of the jury. Laster v. Blackwell, 128 Ala. 143, 30 So. 663; Apperson v. Dowdy, 82 Va. 776, 1 S. E. 105.

Having in mind the oft-repeated rule that a verdict should be directed only where, accepting as true every fact offered in evidence by the plaintiff, with every reasonable inference deducible therefrom, a conclusion utterly opposed to plaintiff's right to recover would be reached by all fair-minded men. (City, etc. R. Co. v. Cooper, 32 App. Cas. (D. C.) 550), we think the court erred in directing a verdict in the present case. There was evidence, as we have seen, tending to show that the defendant, whose home was encumbered, wrote the plaintiff for a loan. It is clearly established that the plaintiff, who was under no obligations to the defendant, sent $2,100 of his, the plaintiff's, own funds, which the defendant and his wife received. That the defendant knew that this was not a gift, and

knew that the plaintiff did not so understand it, is evident from his own letter to the plaintiff of December 15, 1910, wherein he informed the plaintiff that "we made out the mortgage on our house just as mother wanted it, so you see that everything is alright." That this money was not actually used in liquidating the encumbrance on defendant's home is merely a circumstance to be taken into consideration, with all the other facts and circumstances of the case. It was for the jury to say whether the failure of the defendant thus to apply the money was not a part of a scheme to appropriate it, and it was equally for the jury to say under the evidence whether the defendant did not really receive the benefit of it.

Judgment reversed, with costs, and cause remanded for a new trial.

Reversed and remanded.

NOTE.

The reported case holds that a person to whom a letter has been read may testify as to its contents where it appears that no better evidence of the contents is available, the letter being lost and the person who read it being dead. The earlier cases discussing the competency of testimony as to the contents of a document by a witness whose knowledge is based wholly on hearing it read are reviewed in the note to Lacy v. Meador, Ann. Cas. 1912D 787.

STATE

v.

LASECKI.

Ohio Supreme Court—February 24, 1914.

90 Ohio St. 10; 106 N. E. 660.

Trial — Objection — Evidence Partly Admissible.

Where the question put to a witness is competent, or not objected to by counsel, and the witness answers, a part of which answer is competent and a part incompetent, a general objection to the whole answer is properly overruled, even though there be some objectionable matter in the answer. To save the objector's rights he should clearly indicate the part of the answer to which he objects and move its exclusion. If the court overrules such motion, he should then save his exception.

Evidence — Res Gestae — Decaration of Infant at Time of Homicide.

The exclamation of a boy four years of age that "the bums killed pa with a broomstick," which was made from 10 to 30 seconds after a fatal assault upon his father, made in the boy's presence, is competent evidence to go to the jury as explanatory and illustrative of the manner and means by which the father was assaulted. The utterance of the boy under such circumstances, made at the earliest opportunity to make an outcry in the presence and hearing of others, was the spontaneous and impulsive language of the situation, free from any subterfuge, artifice or motive to fabricate. Its weight, however, is purely a question for the jury.

[See note at end of this case.]

Scope of Res Gestae Generally.

The doctrine of res gestae, as applied to exclamations, should have its limits determined, not by the strict meaning of the word "contemporaneous," but rather by the causal, logical, or psychological relation of such exclamations with the primary facts in controversy.

[See 10 R. C. L. tit. *Evidence*, p. 974.]

Same.

This doctrine applies equally to participants, bystanders and persons incompetent to be witnesses.

(Syllabus by court.)

Error to Court of Appeals, Cuyahoga county.

Criminal action. John Lasecki convicted in Court of Common Pleas of homicide. Judgment reversed by Court of Appeals. State brings error. REVERSED.

[11] On the evening of January 1, 1913, Mike Zacharias, in company with his little son, aged about four years, and certain other men, visited the saloon of his brother, William Zacharias, in Berea street, Berea.

Across the street from William Zacharias' saloon, another saloon was kept by a man by the name of Frank Niec. Between ten and eleven o'clock in the evening, the defendant, John Lasecki, accompanied by John Wisniewski and Ignatz Maslinski, left Niec's place. Just before they left, Niec passed two clubs over the bar to them. Some few minutes later they returned to Niec's place, without clubs, and went into a side room. At about this time Mike Zacharias was killed in the street not far distant from Niec's place.

Testimony was also offered tending to show that several others left Zacharias' saloon with the deceased at about this time, including the deceased's little son. The party left the saloon for the purpose of taking a car to Cleveland. As they walked towards the car Mike and his son were the last of the party. An altercation was heard between Mike and some other men not of his party. The sound

of two or three blows, as if by a club, was heard by the men ahead of him. One or more of these men ran back and found the deceased lying on the ground and also saw some men running away. As they came up to where Mike was lying, the boy, in a nervous and much frightened state of mind, said, "The bums killed pa with a broomstick." The boy was then about twenty-five feet away from his [12] father and out of the hearing of those who were fleeing from the scene of the attack.

The above statement of facts is taken verbatim from the opinion of the court of appeals, and it is on this exclamation of the boy that the court of appeals reversed the judgment of conviction obtained in the common pleas court, and which judgment of reversal the state asks to have reversed in this court.

Cyrus Locher, Samuel Doerfler and *P. J. Mulligan*, for plaintiff in error.

Henry DuLaurence for defendant in error.

WANAMAKER, J.—Was the exclamation of the boy competent testimony?

Both sides agree that this is the only question in the case, and that the testimony is competent only upon the theory that it is a part of the *res gestae* of the case.

The record discloses that the exclamation arose in the following manner:

"Q. You may tell if anything unusual happened there and what it was, anything out of the ordinary? A. We was walking about one hundred and fifty feet from the car, maybe two hundred, I couldn't tell you, and I heard the hitting twice, like that (indicating), and think there was an argument started and the boy said that the bums had killed his papa with a broomstick. Objection. Objection overruled. Exception."

It will be noted that there was no objection to [13] the question, and that the objection is to the whole answer.

Now, manifestly, the major part of the answer is competent and responsive to the question. If the exclamation of the boy be incompetent, the objection of counsel should have been addressed to that exclamation, asking an order from the court to exclude it from the consideration of the jury. But that was not done. Where objection is made to the entire answer, part of which is competent and part incompetent, there is but one thing for the trial judge to do, that is to overrule the objection, and in this case there was no error on the part of the trial court.

But we are not disposed to decide a case of this importance upon the mere failure of counsel to properly save his rights, and shall consider the case on its merits, as if the objection and exception had been properly made.

Was the exclamation a part of the *res gestae*?

Wharton's definition of *res gestae* is as follows: "Those circumstances which are the undersigned incidents of particular litigated acts, and are admissible where illustrative of such acts. These incidents may be *separated* from the act by *lapse of time* more or less appreciable. Their sole distinguishing feature is that they should be necessary incidents of the litigated act—necessary in this sense: that they are part of the immediate preparations for, or *emanations* from, such acts, and are not produced by the calculated policy of the actors. In other words, they must stand in immediate causal relation to the act—a relation not broken by individual [14] wariness seeking to manufacture evidence for itself. Therefore declarations which are the immediate accompaniments of an act are admissible as part of the *res gestae; remembering that immediateness is tested by closeness, not of time but by causal relation, as just explained.*" 7 Words and Phrases Judicially Defined, 6130.

Again, Wharton says *res gestae* are the facts which form the environment of a litigated issue.

Bishop, in his New Criminal Procedure (2 ed.), Section 1085, uses the following: "But it is difficult, perhaps impossible, to formulate an available rule as to what shall be deemed of the transaction, and what shall not. It appears safe to say that the subsidiary act need not transpire *at the same instant* with the main one, or always even on the same day; and, in reason, as well as in accordance with the current of the authorities, the time which divides the two is not the controlling consideration, though it may be taken into the account. Is it presumable that, distinctly and palpably, it influenced or was influenced by the main act, or proceeded from the same motive? If so, it is admissible, otherwise not."

Again, the same author, in Section 1086, uses this language: "The admissibility of particular acts being conceded, whatever of a nature explanatory thereof was during their performances said, whether by the doers or by the lookers-on, by the parties to the litigation, or by third persons, may, subject to some apparent or real qualifications, be given in evidence whenever the acts are. . . In a general sense, the declarations from whatever [15] source must, to be thus admissible, be contemporaneous with the act they would illustrate. We may have cases apparently requiring them to be strictly so. But it is, at least, the better doctrine that they are competent whenever near enough to the act either before or after it, to be probably

prompted by the same motive, not an afterthought, and apparently to constitute of it a part; otherwise they are not competent."

Professor Wigmore, in his excellant work on Evidence, Vol. 3, Sections 1745 to 1747, discusses this same question with large ability and logical analysis, showing the foundation of the principle in the doctrine of *res gestae* as applicable to exclamations and as constituting a striking exception to the hearsay rule.

In Section 1747 the author uses this language: "This general principle is based on the experience that, under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to [16] the facts just observed by him; and may therefore be received as testimony to those facts. The ordinary situation presenting these conditions is an affray or a railroad accident. But the principle itself is a broad one. Its phrasings differ widely in different courts; but there is in the judicial opinion of to-day something of an approach to uniformity."

The author cites a large number of cases in support of the doctrine.

It is impossible to reconcile the multitude of divers decisions by courts of last resort on the proper scope and limitations of the old phrase *res gestae*. Many of the states follow reverently and rigidly the old English rule, that before any exclamation is admissible in evidence on the theory of *res gestae*, it must be contemporaneous in time with the principal fact in litigation. That is, just as soon as it appears that it is subsequent in time to the principal fact and merely narrative of it, such exclamation is not a part of the *res gestae* and is, therefore, not admissible.

This old English rule had its birth in a strange combination of circumstances. First, the inhumanity and barbarity of the penalties provided by the English law for criminal cases. A century ago two hundred crimes in England were punishable by death. Second, the prisoner had no rights in an English court of justice, save the right to be convicted. He was not competent as a witness in his own behalf, nor indeed were any members of his family. He was not allowed the privilege of having his own counsel address the jury, and indeed, in earlier days, was not even allowed the privilege of [17] counsel. He had no right of appeal, and many other prerogatives now enjoyed by the defendants were wholly unknown to the English law a century or more ago.

With these barbarous penalties and this outrageously unjust procedure it is little wonder that the humanity of the judge as well as his love of legal casuistry should resort to a strained and technical construction of the law to overcome its barbarity.

Now, while this was none the less judge-made law, its evils were much mitigated by the fact that it was done in the name of justice and humanity. The judge's love for justice was greater than his love for law. These were the circumstances and conditions of the English law that gave rise to the technical formalism and procedure in English criminal courts a century and more ago.

Naturally no other country has had as great an influence on our American courts as have our English brethren, because of our speaking a common language and having a common law as well as a multitude of varied and very common interests. This procedure was adopted in many of our states, though the English cruel and barbarous conditions as to penalties and procedure never prevailed in such states; but such is the force of precedent that the English doctrine was faithfully followed by many of the courts of last resort, without the least justification for such superstrict interpretation of the rights of the accused or such over-refined distinctions as to both the substantive and adjective law of the state.

[18] The second class of states practically ignored the old English doctrine of contemporaneous character of facts or exclamation and considerated chiefly the causal connection or logical relation that the secondary facts sustain to the primary facts in controversy.

Now, applying the doctrine or test of causation, it would be expected not infrequently that there would be an appreciable interval between cause and effect, between those things that have a logical relation, such as the commission of an act and an impulsive exclamation concerning the same.

That the natural language of a given situation or environment would not always be contemporaneous with the primary fact is quite obvious. But is it, therefore, any less a part or incident of the primary fact of the situation? The outcry of the injured party immediately after the assault should be as relevant as during the assault, because he may be bound and gagged or unconscious by reason of an assault, so that he could not

make an outcry, which, if made during the assault, would be competent according to all authorities; but by reason of its being delayed ten or twelve seconds after the assault it would not then be competent. This makes the relevancy or relation of the facts turn on a few paltry seconds of time rather than upon the natural and logical relation of the facts.

Now, when the exclamation is the combined result of the tragic circumstances of the situation making an awful and fearful impression upon the human mind, especially that of a child seeing its own father murderously assaulted, the child being [19] overwhelmed with fear and grief because of the darkness of the night, the absence of a helping hand, grief of parental loss, with nobody to appeal to, all these combined placing the child under natural and extreme excitement, and then, after a few seconds, some one comes into his presence to help, what is more natural, indeed necessary, in such situation than just such an exclamation as we have in this case, "The bums killed pa with a broomstick"?

The language proceeds from impulse, from the natural and necessary impressions made by the acts of the parties in controversy, so that the human mind in its helplessness or despair, or its natural and necessary anxiety, acts under an impulse or a spontaneous influence that is a sort of echo or reaction from the general situation. The time limit recognized by those courts that fall under this second class which disregard the strict contemporary character, is placed at a point where there is no opportunity given for fabricating or manufacturing some statement or story according to one's self-interest.

If the father had made some declaration during the assault all authorities agree that it would be competent, but if he had been unconscious or partially unconscious by reason of the severity of the assault, so that he was unable to make any exclamation until a minute or so afterward, would his exclamation be therefore incompetent? We think this is too much like hairsplitting.

But it is said the boy was not participating, that [20] he was a mere bystander, and that therefore his exclamations are not competent.

Under the old English rule this was true. But what reason could possibly exist for such a rule, excepting the bald protection of the defendant, it is difficult to understand. Ordinarily in other cases bystanders are presumed to be rather more impartial, more disinterested, than those who are the active participants, and the average mind would feel this fact should rather strengthen the probative force of the exclamation than weaken it.

Again, it is urged that the boy was not old enough to be a witness, and therefore his exclamation should not be admitted. But exclamations are not admitted on the ground of the legal competency of the person making them, but because they are a part or reflection of the transaction. By the same token the growl of a dog or the neighing of a horse is also competent as *res gestae*. The exclamation in this case should be just as competent, yes more so, than the exclamation of a female person who has been assaulted in a case of rape, which the authorities all agree is allowed as a part of the natural and necessary language of a person who has been brutally assaulted, though the exclamation may be made even some days after the occurrence of the criminal assault if there be a reasonable explanation for the delay.

An interesting incident in the life of Lincoln will serve to illustrate these involuntary acts upon the part of children that are really only a reflection, a natural sequence to certain prior facts. His biographer, Holland, says: "At one time Abraham [21] was obliged to take his grist upon the back of his father's horse and go fifty miles to get it ground. The mill itself was very crude and driven by horse power. The customers were obliged to wait their turn without reference to their distance from home, and then use their own horse to propel the machinery. On one occasion Abraham having arrived at his turn fastened his mare to the lever and was following her closely upon her rounds. When urging her with a switch and 'clucking' to her in the usual way, he received a kick from her which prostrate him and made him insensible. With the first instant of returning consciousness he finished the 'cluck.'" This was one of the most striking and convincing facts as to what Abraham was doing when he became unconscious. What stronger proof that he was driving the horse could be given than this exclamation as soon as consciousness returned?

So, in the case at bar, the causal, logical and psychological relation of the whole situation as affecting the boy and his innocent, spontaneous, impulsive, natural and necessary outcry was exactly in keeping with all human experience and what all men recognize in everyday life as tending to prove certain facts. Why should not the same rules obtain in courts of justice to prove the same kind of facts? The rules of evidence are presumed to be based upon the credibility of human experience.

A most interesting case from Georgia, Grant v. State, 124 Ga. 757, 53 S. E. 334, is singularly analogous to the case at bar:

"4. Exception was taken to the refusal of the court to exclude the following testimony: 'Mary's [22] [deceased's] child said, "Huss [defendant], you have shot mama."' The testimony quoted was that of Jake Colbert, a witness for the state, and it was objected to

'on the ground that the solicitor-general, in opening the case to the jury, had stated that Mary Johnson's [deceased's] child, the one referred to by the witness Colbert, was too young to be a competent witness or to testify.' And movant adds that this (the foregoing statement of the solicitor-general) 'was true, and allowing Colbert to testify as to what the child said was in effect allowing the child to testify.' We can not agree with counsel that permitting the witness to testify to the words of a little child, too young to be brought into court as a witness, was equivalent to permitting the child itself to testify. It appears from the evidence that the witness Colbert, at the sound of the shots which slew the deceased, ran immediately from an adjoining room into the one where the homicide was committed, and said twice to the defendant, 'Have you shot Mary?' The defendant made no answer, but the child, as the defendant silently left the room, uttered the words, 'Huss, you have shot mama.' These words, spoken by a little child immediately after the shocking occurrence, were clearly admissible as a part of the *res gestae*. No declaration could have been freer 'from all suspicion of device or afterthought,' and it was, in point of time, almost concurrent with the act to which it referred. It was the very deed itself speaking through the mouth of a babe."

In another case the supreme court of Georgia, in Kirk v. State, 73 Ga. 620, held as follows: "Evidence [23] that immediately after the deceased was shot, a person near by hallooed and asked him what was the matter, and who had shot him, to which he replied that the defendant had shot him, was admissible both as part of the *res gestae* and as corroborating the dying declarations of the deceased."

The supreme court of Minnesota, in State v. Williams, 96 Minn. 351, 105 N. W. 265, held a statement, to the effect that the defendant shot the deceased and herself, made by a party other than the deceased, but who was mortally wounded at the time of the homicide, and made in close connection with the event and under circumstances precluding any suspicion of fabrication, was properly received in evidence.

The court in its decision uses this language: "It is the contention of the defendant that the statement in question was simply the narration of a past transaction and not so connected with the main fact, the shooting, as to illustrate its character. On the other hand, the state claims that the evidence was clearly admissible as a part of the *res gestae*. We are of the opinion that the evidence was properly received. The record shows that Mrs. Keller was one of the victims of the tragedy; that her statement or declaration to Mrs. Kline was made within a few minutes *after* the shooting took place. It was not mere self-serving, hearsay evidence; for the statement was a natural and instinctive declaration, made in close connection with the shooting and under circumstances precluding any suspicion of fabrication." The evidence was admitted as a part of the *res gestae*.

[24] In an unreported case of Collins v. Com., 70 S. W. 187, 24 Ky. L. Rep. 884, the following is held: "The exclamations of the wife and daughter of H. immediately succeeding the shooting were competent as a part of the *res gestae*."

The supreme court of Illinois has held in 104 Ill. 248, Lander v. People, as follows: "The true test of the admissibility of such testimony is that the act, declaration or exclamation must be so intimately interwoven with the principal fact or event which it characterizes, as to be regarded a part of the transaction itself, and also to clearly negative any premeditation or purpose to manufacture testimony."

Under this doctrine the court held no error was committed on the trial of one upon the charge of rape, where two witnesses were called who were near by and witnessed the perpetration of the offense and testified that they saw and readily recognized the accused near the scene of the transaction on the *next* day thereafter, and that one called the attention of the other to the accused, exclaiming "There goes the man!" and that the other replied, "Yes, there he goes." The defendant objected to the witnesses repeating their exclamations made at the time, but the court permitted the same.

Many more decisions under the same line might be cited and discussed, but the best-considered cases where the courts have gotten away from the old English rule prefer the test of causal connection, logical or psychological relation and association as the true and proper test of relevancy.

[25] Underhill in his excellent work on Criminal Evidence (2 ed.) Section 93, p. 174, uses this language: "These declarations must possess three characteristics: First, they must have been uttered contemporaneously with and grow out of the act upon which they have a bearing so as to be spontaneous and not narrative; second, they must qualify, illustrate, explain or unfold its character or significance, so as, third, to be connected with it in such a manner that the declaration and the act form a single and indivisible transaction."

This doctrine would seem to disqualify the exclamation according to the author's judgment. But just prior to this rule announcing the qualifications necessary to admit the evidence, he uses this language, Sec. 93, p

173: "Usually statements made by third persons not produced as witnesses are objectionable as hearsay. But, it has been remarked, here the events speak for themselves, giving out their fullest meaning through the unprompted language of the participants. The spontaneous character of the language is assumed to preclude the probability of its premeditation or fabrication. Its utterance on the spur of the moment is regarded, with a good deal of reason, as a guarantee of its truth. These instinctive utterances are as much original evidence as are the events whence they emanate or of which they form an inseparable part. Their value as evidence does not depend in the slightest degree upon our confidence in the credibility of the declarant, or upon our knowledge of him as a man who habitually tells the truth. He is regarded merely as the channel through which [26] events described themselves contemporaneously, *or nearly so*, with their occurrence."

So that, taking all that Underhill says upon this subject, it is apparent that he does not intend to give the word "contemporaneously" that strict construction required by the English rule, but the liberal construction, which he indicates by the language "or nearly so," that is now recognized and applied by many of our American states.

To cite other authorities would be superfluous. We feel, however, that it is but just to say that the judgment of the court of appeals in this case finds abundant warrant in the former decisions of this court in analogous cases.

We believe, however, that the demands of justice, as well as the probative force and effect of such exclamations made where there is a maximum probability as to their truth and a minimum possibility of artifice or fabrication by reason of their being the natural, spontaneous and, sometimes, as in this case, the necessary language of a child, require that the old rule should be relaxed and liberalized so as to meet the naturalness and necessities of the case, as well as to put the jury and court in possession of all the facts, circumstances and environment immediately before and after the principal fact in controversy.

The state contended before the court of appeals that, if the admission of the boy's exclamation was error, such error was not prejudicial, because, first, the word "bums" identified nobody, and second, there was other evidence tending to show that the fatal wound was made with a stick or a club. This [27] contention of the state was overruled by the court of appeals, and in this respect the court was undoubtedly right. The exclamation of the boy under the circumstances, that it was made in its relation to the transaction, being the sole eyewitness save and except the defendant, speaking under great excitement and impulse, freed from opportunity or occasion to dissemble or fabricate—all these things undoubtedly gave the boy's exclamation great weight with the court and jury. But the primary reason for such great weight was by reason of its causal connection, its logical relation to the facts in the case, and because it was the natural language of the whole situation speaking through the little boy. That relation made it competent, though it be not strictly contemporaneous.

We find no other error in the record of the court of appeals. The judgment of the court of appeals is reversed and the judgment of the court of common pleas is affirmed, and cause remanded to the court of common pleas for further proceedings according to law.

Judgment reversed.

Nichols, C. J., Johnson, Donahue, Newman and Wilkin, JJ., concur.

NOTE.

Declarations of Infant at Time of Assault or Homicide as Part of Res Gestae.

In Homicide Case.

There are a number of decisions in accord with the holding of the reported case that the declarations of a child made at the time of a homicide are a part of the res gestae and may therefore be given in evidence by a person who hears them. Shirley v. State, 144 Ala. 35, 40 So. 269; Grant v. State, 124 Ga. 757, 53 S. E. 334; Berry v. State, 9 Ga. App. 868, 72 S. E. 433; Kentredy v. Com. 100 S. W. 242, 30 Ky. L. Rep. 1063; Hunter v. State, 54 Tex. Crim. 224, 114 S. W. 124, 130 Am. St. Rep. 887; Wynne v. State, 59 Tex. Crim. 126, 127 S. W. 213; Redman v. State (Tex.) 149 S. W. 670. See also Collins v. Com. 70 S. W. 187, 24 Ky. L. Rep. 884. Thus in Berry v. State, supra, testimony that a child of twelve years, immediately after a killing by shooting, in answer to a question as to what the matter was replied that "Henry Berry has shot Velma," was held to be a part of the res gestae. The court said: "A child so young, in the presence of such a tragedy, with excitement which such an occurrence would naturally produce on her mind, could not do any after-thinking in such a brief period of time. Her declarations were spontaneous and almost involuntary acts, just as much so as would be an exclamation of pain if her hand had come in contact with a red-hot iron. This being so, the fundamental requirement of the res gestae rule was complied with." So in Kennedy v. Com. 30 Ky. L.

Rep. 1063, 100 S. W. 242, it was held that the exclamation, "Don't shoot pap," by a child instantly before the shooting of his father might be testified to by a person who heard it, as it was a part of the transaction. In Grant v. State, 124 Ga. 757, 53 S. E. 334, a witness was permitted to testify that a young child, immediately after the murder of her mother said, "Huss, you have shot mamma." Likewise in Shirley v. State, 144 Ala. 35, 40 So. 269, which was a prosecution for assault with intent to murder, a mother was allowed to testify that her daughter exclaimed, about the time a gun was fired, "Hold! look! look! there is uncle Isaac and uncle Jesse going to shoot us."

In State v. Brown, 64 Mo. 367, however, an exclamation of an infant was excluded on the ground that it was not a part of the res gestae. It appeared in that case, which was a prosecution for murder, that a girl nine years old, immediately after a fatal shooting, while the victim was lying where he had fallen exclaimed that "Mr. Long had a knife in his hand." The court said: "It was no part of the res gestae. It was after Long was killed. If the exclamation had been made while Long was approaching, and before the fatal shot was fired, it would not perhaps have been hearsay, but a circumstance to be considered by the jury in determining whether defendant was acting under an apprehension that deceased was about to assail him with a deadly weapon. After the fight was over the exclamation could not be a part of the res gestae, and the child could have testified as to what she saw." And in Lewis v. State (Miss.) 68 So. 785, it was held that a declaration made to a person accused of murder a few minutes after the fatal shot was fired that "you killed my poor father not for a thing in the world; he hadn't done a thing," was not admissible as a part of the res gestae. The case is not clear as to whether the declarant was an infant.

The fact that the infant who made the declaration is incompetent to testify is not a valid objection to the admissibility of his declarations where they are found to be a part of the res gestae. Grant v. State, 124 Ga. 757, 53 S. E. 334; Hunter v. State, 54 Tex. Crim. 224, 114 S. W. 124, 130 Am. St. Rep. 887. And see the reported case. In Grant v. State, supra, the court said: "We cannot agree with counsel that permitting the witness to testify to the words of a little child, too young to be brought into court as a witness, was equivalent to permitting the child itself to testify. It appears from the evidence that the witness Colbert, at the sound of the shots which slew the deceased, ran immediately from an adjoining room into the one where the homicide was committed, and said twice to the defendant, 'Have you shot Mary?' The defendant made no answer, but the child, as the defendant silently left the room, uttered the words, 'Huss, you have shot mamma.' These words, spoken by a little child immediately after the shocking occurrence, were clearly admissible as a part of the res gestae. No declaration could have been freer 'from all suspicion of device or afterthought,' and it was, in point of time, almost concurrent with the act to which it referred. It was the very deed itself, speaking through the mouth of a babe." No opposite view, however, was taken on this point in Adams v. State, 34 Fla. 185, 15 So. 905, wherein evidence was excluded that a child three and one-half years old exclaimed, "Oh Man, why have you shot my papa," and that at the same time he said to his mother: "Oh, mamma, there's two men out there, there's a white man and a negro, the white man's face was all covered with a beard." The court said: "We think the whole of the child's exclamations and utterances on the occasion should have been excluded. If, nearly two years after the occurence, this child, with its increased age, was found by the court not to have sufficient comprehension and intelligence to be competent as a witness, it would seem superfluous to say that, at the time of the occurrence, when he was two years younger, he would hardly have been possessed of sufficient discrimination or intelligence to comprehend passing events with anything like such accuracy as to render his exclamations or observations in reference thereto at all reliable, or admissible as evidence even though they may have been part of the res gestae. The whole of this child's exclamations and sayings should have been excluded."

In Case of Assault on Infant.

In case of an assault on a child it is well settled that his declarations made at the time of the assault or soon thereafter are admissible in evidence as a part of the res gestae. Soto v. Territory, 12 Ariz. 36, 94 Pac. 1104 (one hour and a half after the assault); People v. Barney, 114 Cal. 554, 47 Pac. 41; Territory v. Godfrey, 6 Dak. 46, 50 N. W. 481; Snowden v. U. S. 2 App. Cas. (D. C.) 89; McMath v. State, 55 Ga. 303 (about one hour after assault; decided under res gestae statute); Pool v. State (Tex.) 23 S. W. 891; Croomes v. State, 40 Tex. Crim. 672, 51 S. W. 924, 53 S. W. 883; Kenney v. State (Tex.) 79 S. W. 817, 65 L.R.A. 316; Thomas v. State, 47 Tex. Crim. 534, 84 S. W. 823, 122 Am. St. Rep. 712 (twenty minutes after assault); Valdez v. State, 71 Tex. Crim. 487, 160 S. W. 341 (twenty minutes after assault). In People v. Colletta, 65 App. Div. 570, 72 N. Y. S. 903, *affirmed* 169 N. Y. 609, 62 N. E. 1099, which was a prosecution for indecent

assault there appears to have been no objection raised to the admission of testimony that the victim of the outrage, a child of five years, had exclaimed more than once at the time of the assault "You hurt me! Stop that."

Declarations of an assaulted child will, however, be excluded where they are not so closely connected with the assault itself as to form a link in the transaction. Thus in State v. Pollard, 174 Mo. 607, 74 S. W. 969, which was a prosecution for feloniously assaulting a girl fourteen years of age it appeared that some time during the morning of the assault the girl made certain statements in regard thereto to a person who at the trial attempted to relate what was told to her. In excluding the evidence the court said: "This statement that 'George forced me' was no sudden exclamation, contemporaneous with the act constituting the offense. Defendant was out in the back yard—was not present. Carrie Downing removed the chair from the door, returned, and was sitting on the bed, combing her hair. This was not all. This declaration was not made to Eva Enoch immediately upon opening the door, but, on the contrary, she at first refused to say anything. Finally she made the statement. The testimony of Eva Enoch, instead of indicating that this statement was a sudden exclamation, following closely the act itself, shows that it was extracted from Carrie Downing after pressing her to tell what was the matter. This, clearly, was no part of the res gestae, and was inadmissible. This question as to when declarations and conversations are admissible as being a part of the res gestae is fully discussed in a recent opinion of this court. . . . . In that case all of this division concurred, and the conclusion was reached that such statements, in order to be admissible, must happen contemporaneous with the main act, and be so closely connected with it as to form a part of it. It was error to admit this testimony, and it was the duty of the court, upon objection by defendant, to exclude it."

The rule in the case of an assault on an infant, as in homicide cases, is that the fact that the child is incompetent to testify is not a valid reason for the exclusion of its declarations where they are a part of the res gestae. Soto v. Territory, 12 Ariz. 36, 94 Pac. 1104; Croomes v. State, 40 Tex. Crim. 672, 51 S. W. 924, 53 S. W. 883; Thomas v. State, 47 Tex. Crim. 534, 84 S. W. 823, 122 Am. St. Rep. 712; Kenney v. State (Tex.) 79 S. W. 817, 65 L.R.A. 316.

RICE

v.

BOARD OF LICENSE COMMISSIONERS OF CENTRAL FALLS.

Rhode Island Supreme Court—November 19, 1913.

36 R. I. 50; 88 Atl. 885.

Intoxicating Liquors — "Premises" of School — Meaning of Term.

Gen. Laws 1909, c. 123, § 2, provides that no liquor license shall be issued to a place within 200 feet, measured by any public traveled way, of the premises of any school. A church owned land on H. street, with a building thereon, 80 feet from the street, the basement of which was used as a parochial school, with a space on each side for yard, with a gate on the street at about the middle of the lot, and a double gate at the northwest corner thereof opening on a driveway on the northerly side of the building, with a post near the northwest corner of the building, both gates being used as means of access by the pupils, who were told not to play in front of the building. The distance from a point on the east side of H. street opposite the southwest corner of a licensed place along the street to the northwest corner of the school lot was 154 feet, and, when prolonged for 200 feet from the starting point, the line extended across the entrance to the middle gate; but a line from the same point of beginning to the post near the corner of the lot, then turning east and extending along and across the driveway to the post, measured 240 feet. Held, that the term "premises," in reference to real estate, usually includes appurtenances, and that as applied to the school included the school yard, driveway, and paths, so that the licensed building was within 200 feet of the school; the fact that the driveway was used by other persons for bringing coal, etc., not making it a "public traveled way."

[See note at end of this case.]

What Constitutes Tavern.

Under Gen. Laws 1909, c. 123, § 2, forbidding the granting of a liquor license to a place within 200 feet of any public or parochial school or to any place except taverns licensed on May 22, 1909, the place must be used as a tavern, and it is not sufficient to show that it was at that time licensed as a tavern, even though such license might afford presumptive evidence that it was so used.

Petition for writ of certiorari. Herbert A. Rice, petitioner, and Board of License Commissioners of Central Falls, respondents. The facts are stated in the opinion. PETITION GRANTED.

James A. Williams for petitioner.

John N. Butman and *Edward D. Bassett* for respondents.

[51] BAKER, J.—This is a petition for a writ of certiorari filed October 20, 1913, by Herbert A. Rice, Attorney General, against John Pearson, Arnold A. Allenson and Jeremiah A. Sherman. The essential allegations of the petition are in [52] substance that said Pearson, Allenson and Sherman were before and on December 1, 1912, and are now the persons constituting the Board of License Commissioners of the City of Central Falls, in this State; that, claiming to act under the provisions of Sec. 2 of Chap. 123 of the Gen. Laws of the State, said commissioners prior to December 1, 1912, upon his application therefor, granted to one William E. Ryan of said city a second class liquor license to sell intoxicating liquors in a certain building or place in said city situate on the corner of Cross and High Streets, numbered 401 and 403, on said High Street, and 45 on said Cross Street; that afterwards on January 13, 1913, upon his application, said license was transferred by said board to one Issachar G. Giberson, and that afterwards, on or about May 24, 1913, upon his application, said board transferred said license to one John Klich, who now holds said license, and ever since said May 24, has sold and is now selling intoxicating liquors at said place under said license; that the building in and for which said license was granted at the time of granting thereof and of said transfers was and is now located "within two hundred feet, measured by a public travelled way," namely, said High Street, of the premises of St. Joseph's Parochial School, which is conducted by St. Joseph's Church, a corporation for religious purposes; that said Sec. 2 contains this provision, namely, "nor shall any license be granted for the sale of such liquors in any building or place, except taverns that were licensed on the twenty-second day of May, nineteen hundred eight, within two hundred feet, measured by any public travelled way of the premises of any public or parochial school;" that neither at the time of the granting of said license nor at present is there a licensed tavern in said building or place licensed to sell liquor as aforesaid; and that for the reasons above stated said commissioners had no right or authority to grant said license and the transfers thereof. Wherefore the petitioner asks that said writ be issued, commanding said commissioners to certify their records of their said [53] proceedings to this court, and that the record of the said several actions of said Board of License Commissioners in the premises may be quashed.

By their answer said commissioners admit all of the foregoing allegations to be true except the one which says that said building or place is within two hundred feet of the premises of said parochial school, measured by a public travelled way, which allegation they specifically deny. They state in addition that the building in which the license was granted was a licensed tavern on May 22, 1908.

The question in dispute is as to the distance of said building or place licensed as aforesaid from the premises of said parochial school, measured by any public travelled way. There is practically no controversy as to the facts, the real question being as to the meaning to be given to the word "premises" upon the evidence in the case.

The evidence shows that said St. Joseph's Church, of Central Falls, owns a parcel of land in said city bounded westerly on High Street 89.32 feet, measuring on its northerly side 181.54 feet, on its easterly side 88.73 feet, and on its southerly side 194.38 feet. Upon this lot said corporation has erected a building, the upper part of which is used as a church, while the lower part or basement has been for five years, and is now occupied and used by the parochial school of said St. Joseph's Church. This building is rectangular in shape, has its western or front end upwards of eighty feet back from High Street, is midway between the northerly and southerly sides of the lot, leaving a considerable space on each side of the building for yard room, and extends back nearly to the east end of the lot. About the middle of the lot fronting on High Street there is a gate with a path leading therefrom to the front step of the church. At the northwest corner of the lot on High Street are double gates opening on a driveway leading back therefrom along the north side of the lot to said building. In front of the church on each side of said path the lot is kept for grass and flowers. At a point near the northwest corner of the church [54] a stone post about four feet high is set in the ground. The parish priest in charge of the church and school had before December 1, 1912, instructed the children not to play to the west of an imaginary line parallel with High Street, passing through this post in front of the building across said lot from north to south; in other words, the children were directed to play in that portion of the lot to the east of said line and not to play in front of the church. The ordinary mode of access to the school from High Street by the pupils was by way of the double gates in the northwest corner of the lot and said driveway. They occasionally came in and went out by the path leading to the front of the church, and apparently they were authoritatively permitted to use either the driveway or the path for that purpose. The southwest corner of said licensed building is about five feet east from High Street, and about three feet north from Cross Street. Measuring from a point on the east side of

High Street opposite said southwest corner, along said High Street to the northwest corner of said church lot, the distance is 154 feet, and the prolongation of this line southerly along High Street for 200 feet from the starting point extends across the entrance to the path leading to the middle of the church; but a line drawn from said point of beginning along High Street to said northwest corner of the church lot, then turning east and extending along and across said driveway to said stone post measures 240 feet.

Upon this state of facts the respondents claim that the school premises are limited to that portion of the church property lying to the east of said imaginary line and that therefore said school premises are more than 200 feet from said licensed building, while the petitioner insists that the portions of the lot customarily used in accordance with the directions of the parish priest by the children attending said school, in passing to and from High Street and the school building are part of the school premises.

[55] In Greenough v. Warwick, Town Council, 31 R. I. on page 561, 78 Atl. 262, the court said: "The premises of a public or parochial school can be neither more nor less than the duly constituted authorities, having jurisdiction in the matter, may see fit to appropriate for that purpose;" and also, that what constitutes such premises "is a matter susceptible of proof." The term "premises," as it refers to real estate, is usually held to include appurtenances. As applied to a school, it will properly include in addition to the room or building, where the school holds its sessions, as appurtenant thereto, such portion, if any, of the land whereon it stands as may be apportioned or designated, by proper authority for the use of the school whether in common with others lawfully using said land or otherwise.

Upon the evidence in this case, we are of the opinion that the constituted authority of St. Joseph's Church had appropriated the basement of the building on said lot as the place of study and recitation for said parochial school; that portion of the lot east of said imaginary line not covered by said building as the playground, and the driveway and the path as the portions of said lot to be used by the scholars of said school in attending thereon, and that said basement, schoolyard, driveway and path are part, at least of the premises of said parochial school. The defendants, however, urge that said driveway is a "public travelled way" within the meaning of said Section 2, because said way is shown to be used by other persons having business on the premises, for example, by men bringing coal or taking away ashes. To call such a way "public" would in our judgment be a forced and unnatural construction of the term, is not warranted upon the evidence and is not adopted. The fact that High street is a "public travelled way" is not questioned. It follows, therefore, that the licensed building in question is "within two hundred feet, measured by a public travelled way of the premises" of said parochial school.

[56] The respondents raise one other point in defence. There is in evidence the bond of William E. Ryan, with sureties, to the Treasurer of Central Falls, dated April 8, 1908, which recites that pursuant to Chapter 101 a license on the day last named had been granted to said Ryan to keep a tavern or hotel in the house numbered 401, 407, on High street, in said city, which license was to be in force, unless sooner revoked, until the first Wednesday in April, 1909, and the respondents claim as a result of the granting of such tavern license that said building and place falls within the exception contained in said Section 2, namely, "except taverns that were licensed on the twenty-second day of May, nineteen hundred eight," so that the prohibition as to licensing a place within 200 feet from the school does not apply to it. This claim, however, is not well founded. And even admitting that the recitals in said bond may afford presumptive evidence that said building was on May 22, 1908, used as a tavern (although an actual use for a particular purpose is not shown by authority to so use) there is no evidence whatever, that after April, 1909, there was any license to keep a tavern in said building or that a tavern was kept there. Said Sec. 2 of Chap. 123 itself declares that the word "tavern" as used in said chapter "shall be construed to mean houses where the principal business is the furnishing of food and sleeping accommodations." Such houses only are recognized as being taverns by this statute and they only are included in the exception. They must be taverns in this sense in order that they may come within the provisions of said exception. It is not enough that they were taverns on May 22, 1908, although that is required. Manifestly it is not sufficient that they simply hold a tavern license when such liquor license is granted. But they must be real taverns in fact in the sense in which that word is defined in Chapter 123 on each occasion when a liquor license is granted to them in order to make the exception applicable to them. The respondents apparently attempt to construe the exception as if it read [57] "except a building or place licensed as a tavern on the 22nd day of May, 1908," which construction, as already indicated, we cannot accept.

As the building in question was not a tavern in December, 1912, or at any time thereafter, it follows that the liquor license to said William E. Ryan and the transfers as

aforesaid were granted without lawful authority and are invalid.

The petition therefore is granted and the writ of certiorari is ordered to issue as prayed for.

NOTE.

What Is Included in Term "Premises" as Used with Respect to Land.

Generally, 1192.
In Statute Regulating Sale of Intoxicating Liquor, 1193.
In Will, 1194.

Generally.

When the word "premises" is used with reference to land, it is ordinarily regarded as a general and comprehensive term, embracing the extent of the land, the buildings and appurtenances, and whatever is under the same control and used in the same connection. Doe v. Willets, 7 C. B. 709, 62 E. C. L. 709; Ross v. Veal, 1 Jur. N. S. (Eng.) 751; Hibon v. Hibon, 9 Jur. N. S. (Eng.) 511; Martin v. Martin, 8 Ont. L. Rep. 462, 24 Occ. N. 367, 3 Ont. W. R. 930; Covy v. State, 4 Port. (Ala.) 186; Swan v. State, 11 Ala. 594; Spencer Stone Co. v. Sedwick, 58 Ind. App. 64, 105 N. E. 525; Greekmore v. Com. (Ky.) 12 S. W. 628; State v. Moore (Miss.) 24 So. 308; Silberman v. Mayer, 48 Misc. 468, 96 N. Y. S. 928; Greenough v. Warwick Town Council, 31 R. I. 559, 78 Atl. 263; Thompson v. Browne, 10 S. D. 344, 73 N. W. 194. See also Winlock v. State, 121 Ind. 531, 23 N. E. 514; McSherry v. Heimer (Minn.) 156 N. W. 130. And see the reported case.

The intention of the one using the word "premises" may determine what it includes. Lethbridge v. Lethbridge, 3 De G. F. & J. (Eng.) 530, 4 De G. F. & J. 35, 31 L. J. Ch. 737, 30 L. J. Ch. 388: Murphey v. State, 115 Ga. 201, 41 S. E. 685; Old South Ass'n v. Codman, 211 Mass. 211, 97 N. E. 766; Steinhardt v. Burt, 27 Misc. 782, 57 N. Y. S. 751; In re Henry, 142 N. Y. S. 485.

Accordingly, in certain statutes the term "premises" means any real estate. Sandy v. State, 60 Ala. 58; Wright v. State, 136 Ala. 139, 34 So. 233; Matter of Cullinan, 113 App. Div. 485, 99 N. Y. S. 374; Hilton's Appeal, 126 Pa. St. 351, 9 Atl. 342. "Trespasses on real estate the statute is intended to prohibit; and any real estate, for an entry on which the prosecutor could maintain a civil action, is within the meaning of the term premises as it is employed in the statute." Sandy v. State, supra.

In other instances, the spirit and purpose of the statute restricts the meaning of "premises." Metropolitan Water Board v. Paine [1907] 1 K. B. (Eng.) 285, 76 L. J. K. B. 151; State v. Wyl, 55 Mo. 67; People v. Shults, 87 Misc. 348, 149 N. Y. S. 913.

Under a statute authorizing a view of the premises by a jury in assessing damages for the taking of a railroad right of way, it has been held that "the premises" embraced the whole tract of land, over which the railroad passed, both within and without the location of the railroad. Wakefield v. Boston, etc. R. Co. 63 Me. 385, wherein the court said: "The company has no more right to insist that the 'view' shall be made solely from within, than the petitioners have that it shall be made only from without, the location. In order to enable the jury to form a correct judgment of the amount of damages sustained by reason of the location of the railroad, they should 'view the premises' from such standpoints, and in such a manner as will give them an accurate knowledge of the considerations that go to make up the damages, such as the value of the land taken and the use to be made of it, the effect of the severance upon the character, situation, present and prospective use of the remainder of the lot, and any other facts that diminish the value of the premises. . . . It is to be observed in conclusion, that the right of examination is not always co-extensive with the claimant's land, but should be confined within what, under the circumstances of the case, would be reasonable limits."

The word "premises" in a covenant concerning land on a water front includes the accompanying rights and privileges to land under the water. Silberman v. Mayer, 48 Misc. 468, 96 N. Y. S. 928. And a right of way over an adjoining strip of land has been held to be included in the "premises" of a stone quarry. Spencer Stone Co. v. Sedwick, 58 Ind. App. 64, 105 N. E. 525.

Under a charter provision to the effect that it should be the duty of the owner of any premises in the city to lay sidewalks in front thereof when ordered to do so by the city council, it has been held that the term "premises" as therein used included depressed railroad tracks. New York Cent. etc. R. Co. v. Buffalo, 76 Misc. 655, 135 N. Y. S. 196.

Bare land is not included by the term "premises" as used in an act providing that the water company shall on request furnish water to any owner or occupier of premises along certain streets. Metropolitan Water Board v. Paine [1907] 1 K. B. (Eng.) 285, 76 L. J. K. B. 151.

The adjacent street and sidewalk are not included in the "premises" of a property owner or occupant, as that term is used in a charter provision imposing on the owners or occupants of any real estate the duty of "keeping their respective premises at all

times in a safe condition, and in a good and thorough state of repair." Amos v. Fond du Lac, 46 Wis. 695, 1 N. W. 346.

Neither the public road over which a rural mail carrier travels nor the buggy in which he travels thereon is included in the "premises" of the mail carrier, as the term is used in a statute allowing "the carrying of arms on one's own premises or place of business." Lattimore v. State, 65 Tex. Crim. 490, 145 S. W. 588.

"Nor was it the legislative intent to include in the phrase 'on his or her own premises,' wild and uninclosed timber or prairie lands, wholly detached from an enclosed field or premises." Baird v. State, 38 Tex. 599.

A barn on the same lot as a barroom but not controlled by the barroom keeper is not included in the "premises" of the barroom. State v. Black, 31 N. C. 378, wherein the court said: "'The premises' mean those places only, which are occupied by the retailer with the house in which he retails, as one whole. They cannot include a place not occupied by him, nor even let to him. It is nothing, that the two places of retailing and gaming were once occupied together by some one, as parts of the same premises; for, if severed and occupied by different persons, when the gaming occurred, they were then not the same premises."

In State v. Moore (Miss.) 24 So. 308, it appeared that under a statute punishing the use of abusive language when uttered at "the dwelling house of another, or the yard or curtilage thereof, or upon any public highway, or any other place near such premises, and in the presence or hearing of the family," etc., an indictment was drawn charging the use of such language "near the premises" of a certain party. The court said: "The word 'premises' in the indictment does not necessarily, or even ordinarily, mean a dwelling house, or the yard or curtilage thereof. Webster says the word 'premises,' when referring to property, means 'a piece of real estate; a building with its adjuncts.' Manifestly, the indictment is bad."

In a prosecution under a statute prohibiting trespassing on the premises of another, it may be shown that the trespass was committed on any part of the real estate, the term "premises" including more that the curtilage of a dwelling. Wright v. State, 136 Ala. 139, 34 So. 233. Accordingly, the term "premises" includes a pasture over a mile from the prosecutor's dwelling house. Sandy v. State, 60 Ala. 58.

But where it appeared that a store keeper ordered a certain man to leave his (the store keeper's) premises and not to come back, it was held that the order was not notice to the man not to trespass on a meadow owned by the store keeper but situated some distance from the store. Murphey v. State, 115 Ga. 201, 41 S. E. 685, wherein the court said: "The accused was ordered to leave the 'premises of the prosecutor, and further notified not to again put his foot upon the prosecutor's 'place.' This was not an explicit notice to the accused not to use the much-frequented path across the pasture belonging to the prosecutor. The most natural construction of the language used by the latter was that he did not desire the accused to again enter his store or the premises immediately surrounding the same. It does not appear that the pasture referred to was a part of or even adjacent to these premises."

In Statute Regulating Sale of Intoxicating Liquor.

Under a statute prohibiting the sale of liquor to be drunk on the premises, it has been held that a bench just outside the street-door of a house and touching the wall of the house is included in the premises, it appearing that the person occupying the house had control of the bench. Cross v. Watts, 13 C. B. N. S. 239, 106 E. C. L. 239, 9 Jur. N. S. 776, 32 L. J. M. C. 73, 7 L. T. N. S. 463, 11 W. R. 210. And a bench, fifteen or twenty steps from the house, is on the premises. Swan v. State, 11 Ala. 594. A piazza, connected with the premises, is a part thereof. Matter of Lyman, 25 Misc. 638, 56 N. Y. S. 369.

But a house twenty-five steps off over which the shop keeper has no control is not on the premises of the shop keeper. Downman v. State, 14 Ala. 242. And beer drunk by a person standing on a highway very close to the house where the beer is sold is not drunk "on the premises" of the seller. Deal v. Schofield, L. R. 3 Q. B. (Eng.) 8, 8 B. & S. 760, 37 L. J. M. C. 15, 17 L. T. N. S. 143, 16 W. R. 77. The premises of a brewery include no more than the buildings occupied by and the grounds used in connection with the establishment. Therefore, a saloon situated on the corporation property but operated independently and apart from the brewery is not included in the premises of the brewery. Orke v. McManus (Ia.) 115 N. W. 580. And a house owned by a wine grower situated apart from the vineyard and place of manufacture is not on the "premises" of the wine grower, within the meaning of the term as used in a statute authorizing any wine grower to sell wine "on his own premises." State v. Wyl, 55 Mo. 67, wherein the court said: "By the word 'premises' in the section is undoubtedly intended the place where the wine was produced or manufactured. The premises for production or manufacture need not necessarily be in or upon the vineyard where the grapes are grown. A man may well have his vineyard at one place, and his wine cellar

and appliances for making and producing wine at another, and this last place, where the wine was actually made and stored, would be, I think, the premises contemplated by the law. That he could sell there without a license, cannot be for a moment doubted. But if, in addition to this, he could bring his wine into town and sell it out he would be allowed the privilege of selling in two places, and if he can sell in two he can sell in a dozen, and thus he might sell wine all over the county, if he happened to own property in different townships, and call it selling on his premises."

In Creekmore v. Com. (Ky.) 12 S. W. 628, it was held that a distiller's residence is not on the premises of the distillery, when it is situated a mile and a half from the distillery and not connected therewith except by narrow strips of leased land acquired by the distiller for the purpose of evading the law.

In People v. Shults, 87 Misc. 348, 149 N. Y. S. 913, wherein it appeared that premises described as 340 West Pulteney Street in the city of Corning were so situated that the boundary line between the city and the town of Corning ran through the hotel building, the court said: "The only exception under which relator claims the right to a certificate, under the provisions of section 17, is that contained in subdivision 9 of section 8, as follows: 'But this prohibition shall not apply to any premises in which such traffic in liquor was lawfully carried on at some time within one year immediately preceding the passing of this act provided such traffic was not abandoned thereat during the said period.' For more than one year prior to the passage of said act relator had trafficked in liquor at his hotel situate partly in the town and partly in the city of Corning. During such period the traffic had been authorized by a liquor tax certificate issued to relator to traffic in liquors in the town of Corning. The decision of this application depends largely upon the construction given to the word 'premises' as used in the prohibitory clause contained in section 17 which provides that a certificate must be issued unless traffic is prohibited at such premises by virtue of the provisions of subdivision 9 of section 8. I cannot believe that the word 'premises' as there used should be so construed as to permit relator to traffic in liquors in any part of the city of Corning under a certificate authorizing him to traffic in liquors in the town of Corning; or to permit him to traffic in liquors in any part of the town of Corning under a certificate authorizing him to traffic in liquors in the city of Corning. It is true the words 'premises' has been construed to include the building and the land and that the trafficking in liquors at a place for which a liquor tax certificate has been obtained 'comprehends more than the service of liquor over the bar, and may include the distribution of liquor by waiters elsewhere about the place where the bar is located.' In re Lyman, 160 N. Y. 96. In the cases where it has been so construed the 'premises' did not extend into a town in which the traffic in liquor was prohibited by a vote of the electors of such town. By the county treasurer is ordered to issue the certificate asked for, it should appear that traffic in liquors was legally carried on in the 'premises' in question at some time within one year prior to June 15, 1910. He was asked to issue such certificate authorizing such traffic in the city of Corning. As I construe the word 'premises' used in the statute, no such traffic was authorized at the premises for which a certificate is now asked, at any time within one year prior to the enactment of the 'ratio law,' even though relator was within that period Trafficking in liquors in another part of his hotel within the town of Corning, under a certificate which authorized such traffic in such hotel in the town of Corning."

In Will.

Where a testator devised to his widow the use for life of the "premises she now lives on" and it appeared that she lived in a house situated on one hundred acres of land, it was held that the entire tract of one hundred acres was included in the devise. Martin v. Martin, 8 Ont. L. Rep. 462, 24 Occ. N. 369, 3 Ont. W. R. 930. Similarly, a devise of a "house and premises" has been held to pass a whole farm, and not merely the house, yard, and immediate appurtenances. Ross v. Veal, 1 Jur. N. S. (Eng.) 751. Under a devise of "my messuage and premises situate no. 4 Furnham-green-terrace, etc.," it was held that the devise included a garden across the road from the house but used in connection therewith. Hibon v. Hibon, 9 Jur. N. S. (Eng.) 511.

Under a devise of the use of "the mansion houses, gardens, and premises" the term "premises" has been held to include a park and orchard. Lethbridge v. Lethbridge, 3 D. G. F. & J. (Eng.) 523, 30 L. J. Ch. 388, wherein the court said: "The first question is, what is the meaning of the word 'premises' in that clause—'the mansion houses, gardens and premises?' In construing the clause, three points seem to me to be necessary to be attended to: first, the terms of the clause; secondly, the context of the will; and, thirdly, what may be termed the surrounding circumstances—the circumstances as they stood at the time when the will was made. Now, as to the terms of the clause, the word 'premises,' as here used seems to me to be used in its popular and not in its legal sense. I have

not been able to find throughout this will any *premissa* to which the word 'premises,' as here used, can properly be referred. Taking the word 'premises,' then, to be used in the popular sense, two points appear to be clear:—first, that the word 'premises' was intended to extend to something beyond the garden, the terms of the devise being 'the mansion-houses, gardens and premises;' and, secondly, the word 'premises' is large enough to include the park, if it appears, by the context and surrounding circumstances that it was intended to be included. Then there is no doubt, on the other hand, that the word admits of a limited as well as an enlarged sense, and that the context and surrounding circumstances must determine whether it was used in an enlarged or in a limited sense. . . . It is said that the testator, having expressly mentioned the gardens, could not intend so large a property as the park, extending to about one hundred acres, to be affected by the general word 'premises;' and certainly I was much struck with that argument at the time when it was advanced. But, on the other hand, it must be remembered, that what the testator was here dealing with was, an occupation with the consent of the trustees, who would be the judges of what the exigencies of the estate might require. Upon the whole, therefore, I think that, the trustees not objecting, the appellant is entitled to the occupation of the park, including the orchard, which, if not part of the park, is part of the premises." In a later decision of another question arising out of the same will, the court in Lethbridge v. Lethbridge, 4 D. G. F. & J. (Eng.) 35, 31 L. J. Ch. 737, said: "The word 'premises,' as used in this clause, must, I think, be taken to mean premises in immediate connection with the mansion, and without the occupation of which the mansion could not be conveniently occupied and enjoyed; and it was upon this ground we held the Petitioner to be entitled to the occupation of the park. . . . Some observations which fell from me when the case was last before the court were relied upon on the part of the petitioner; but what I then said had reference of course to the questions then before us—the occupation of the park—which was in immediate connection with the mansion, and I do not think that the clauses to which I then referred, as indicating an intention as to property in immediate connection with the mansion, can have the same effect attributed to them with reference to this farm, which is more remotely connected with it. As to the other lands, the occupation of which is claimed by this petition, the case is even more difficult than as to the home farm, and I am of opinion, therefore, that this petition must be dismissed."

SCHWARTZ
v.
BLACK.

Tennessee Supreme Court—April 3, 1915.

131 Tenn. 360; 174 S. W. 1146.

Covenants — Damages — Easement Benefiting Land.

Where, in a suit by a grantee for breach of general covenant of warranty and against incumbrances, because of railroad tracks and rights of way over the land, the evidence shows that the railroads are beneficial to the premises, the grantee cannot recover substantial damages.

Railroad Right of Way as Breach of Covenant.

Railroad tracks in existence and operation across a tract of land, when conveyed by deed containing a covenant of warranty and against incumbrances, are incumbrances, where the grantee, though inspecting the premises before purchase, was misled by the grantor into believing that the railroads were paying rent for the right of way.

[See note at end of this case.]

Appeal from Chancery Court, Davis county: ALLISON, Chancellor.

Action for damages. H. Schwartz, plaintiff, and J. T. Black, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. MODIFIED.

Vertrees & Vertrees for appellant.

Samuel N. Harwood and *Louis Leftwich* for appellee.

[361] NIEL, C. J.—The bill in the present case was filed to recover of defendant damages for breach of a general covenant of warranty, and against incumbrances, contained in a deed which defendant made to complainant on October [362] 14, 1911, for certain land lying in East Nashville on the bank of Cumberland river, just north of the Woodland street bridge. The action is based on the fact that, when the deed was made, there were two railway tracks and rights of way on the lot as follows: 'The Louisville & Nashville Railroad Company owned a track and right of way running across the lot in a diagonal direction, thence south to other lots and industries located thereon, the track at its northern end joining another track of the railway at main street, in East Nashville. The conveyance was of a strip of ground sufficiently wide for the construction of a single track railroad, and it provided that, in case the said strip of ground should ever cease to be used for

railroad purposes, the title should revert to the makers of the deed, Wm. Sutherland and Charles Graves, the predecessors in title of defendant Black. The consideration was $3000. This instrument was made May 11, 1889, and filed for registration in Davidson county May 15th of the same year, and duly registered. Subsequently, on the 17th of February, 1904, the standard Lumber & Box Company, then the owner of the lot, supplemented the previous instrument by definitely fixing the limits of the right of way at twenty-five feet; that is to say, twelve and one-half feet on each side of the track. This deed was registered in Davidson county April 19, 1904. There was also a spur track built by the Standard Lumber & Box Company, running out from the diagonal track above mentioned in an eastwardly direction across the lot. The diagonal track referred to [363] was constructed long prior to 1904, and was used by the Louisville & Nashville Railroad Company as a spur track from its main line to numerous industries lying to the south of the lot in question, also to industries operated on the lot in question.

The other track is known as the Ryman track; the facts concerning which are as follows: The Ryman elevator is located on the bank of the Cumberland river below this lot, and Mr. Ryman and the Louisville & Nashville Railroad Company desired to extend the "water track" of the railroad company from the elevator up the river, over the frontage of this lot. On July 5, 1903, Sutherland and Graves, the then owners of the lot, for the consideration of $1,000, conveyed to Thomas G. Ryman a right of way along the river front on this lot from its northern boundary to within fifty-five feet of its southern boundary, subject to several reservations, only two of which need be mentioned. One of these was that Sutherland and Graves were to have the right to cross the track with a "movable track," so as to permit them to draw up and let down timber and lumber from their factory, but not in a manner to obstruct the proper use of the road by the railway company: the other was the right to load and unload cars on the track, but not so as to conflict with the operation of Ryman's boats and elevators. The owners of the lot, when using the cars on the Ryman track for industries located on said lot, paid, as did all other persons, $1 per car for any car of lumber loaded and unloaded on the said track, and more [364] per car for all other kinds of merchandise. But the evidence shows that this was cheaper than hauling the merchandise in wagons to and from the landing.

The contention of the complainant is that these railroads are incumbrances, within the terms of the warranty, and that, as located, they diminish the value of the property at least $10,000. The defendant contends that the railroads are not incumbrances, within the meaning of the deed, and that, as a matter of fact, they do not diminish the value of the property at all.

There is much evidence on both sides of the question, but we are of the opinion that the weight of the evidence, shows that the railroads are not only not injurious to the lot but of great benefit. The lot is flat and low, lying on the bank of the river, and is useful only for factories. The evidence shows that without the roads this lot would be practically useless, and that these roads add to its value from twenty-five to fifty per cent. On the other hand, there is evidence to the effect that the roads, considering the way in which they are located or placed on the land, are an injury to it. But, as stated, the weight of the evidence decidedly sustains the conclusion that the roads are of great benefit to the land. It follows, therefore, that complainants are not entitled to any substantial damages.

It is insisted, however, that at all events the roads are technically incumbrances, and that complainants are entitled to recover their costs.

[365] There is a controversy in the authorities on this subject. In the New England States it is held that even a public road running across the land, in use, open and visible, is an incumbrance, falling within a covenant against incumbrances, and must be accounted for in damages. Kellogg v. Ingersoll, 2 Mass. 97; Hubbard v. Norton, 10 Conn. 422; Alling v. Burlock, 46 Conn. 504; Herrick v. Moore, 19 Me. 313; Lamb v. Danforth, 59 Me. 322, 8 Am. Rep. 426; Butler v. Galle, 27 Vt. 739; Prichard v. Atkinson, 3 N. H. 335; Hayes v. Stevens, 11 N. H. 28. The general reason assigned is that it deprives the owner of that dominion over the land to which he is entitled. A different view is taken in other States. Memmert v. McKeen, 112 Pa. St. 315, 4 Atl. 542, and cases cited; Howell v. Northampton R. Co. 211 Pa. St. 284, 60 Atl. 793; Whitbeck v. Cook, 15 Johns. (N. Y.) 483, 8 Am. Dec. 272; Huyck v. Andrews, 113 N. Y. 81, 20 N. E. 581, 3 L.R.A. 789, 10 Am. St. Rep. 432; Hymes v. Estey, 116 N. Y. 501, 22 N. E. 1087, 15 Am. St. Rep. 421; Hymes v. Esty, 133 N. Y. 342, 31 N. E. 105; Jordan v. Eve, 31 Grat. (Va.) 1; Trice v. Kayton, 84 Va. 217, 4 S. E. 377, 10 Am. St. Rep. 836; Patton v. Quarrier, 18 W. Va. 477; Barre v. Fleming, 29 W. Va. 314, 1 S. E. 731; Desvergers v. Willis, 56 Ga. 516, 21 Am. Rep. 289; Haldane v. Sweet, 55 Mich. 196, 20 N. W. 902. The ground on which these cases rest is that when the road is a public one, actually open, and in use, the parties must be presumed to have taken it into account in fixing the price of the land, and therefore the covenant must be construed [366] as not

intended to embrace the easement. The same rule is followed in some other States as to other open and visible easements. In Kutz v. McCune, 22 Wis. 628, 99 Am. Dec. 85, it appears that the easement held not to be an incumbrance was the right to overflow the land with a millpond; the overflow being, of course, open and visible. The court said that this was equally as obvious as a public road, and that, in case of a public road, the doctrine did not rest on the fact that the road was in favor of the public, but that the easement was obvious and notorious in its character, and therefore the purchaser must be presumed to have been it, and to have fixed his price for the land with reference to the situation as thus presented. The same rule was followed in Bennett v. Booth, 70 W. Va. 264, 73 S. E. 909, 39 L.R.A.(N.S.) 618; the easement complained of there being the right to overflow by a milldam (Ireton v. Thomas, 84 Kan. 70, 113 Pac. 306, 32 L.R.A.(N.S.) 737), a levee, covering several acres (Schurger v. Moorman, 20 Idaho 97, 117 Pac. 122, 36 L.R.A.(N.S.) 313, Ann. Cas. 1912D 1114), an irrigation ditch (Janes v. Jenkins, 34 Md. 1, 6 Am. Rep. 300), the right to the use of open windows looking across a lot which the vendor of the latter had retained, at which time the windows were obvious. Public roads are excluded in some other States, not on the ground that their existence is open and obvious, but because the court judicially knows that they are necessary, and hence useful. Harrison v. Des Moines, etc. R. Co. 91 Ia. 114, 58 N. W. 1081; [367] Killen v. Funk, 83 Neb. 622, 120 N. W. 189, 131 Am. St. Rep. 658; Sandum v. Johnson, 122 Minn. 368, 142 N. W. 878, 48 L.R.A.(N.S.) 619, Ann. Cas. 1914D 1007. The same reasoning was applied to the existence of a drainage ditch, in Stuhr v Butterfield, 151 Ia. 736, 130 N. W. 807, 36 L.R.A.(N.S.) 321; and to a public sewer five feet under ground in Iowa City First Unitarian Soc. v. Citizen's Sav. etc. Co. 162 Ia. 389, Ann. Cas. 1916B 575, 142 N. W. 87, 51 L.R.A.(N.S.) 428. In the following cases it is held that the existence of a railroad right of way is an incumbrance, regardless of its open and obvious character. Pierce v. Houghton, 122 Ia. 477, 98 N. W. 306; Beach v. Miller, 51 Ill. 209, 2 Am. Rep. 290; Burk v. Hill, 48 Ind. 52, 17 Am. Rep. 831; Kellogg v. Malin, 50 Mo. 496, 11 Am. Rep. 426; Tuskegee Land, etc. Co. v. Birmingham Realty Co. 161 Ala. 542, 49 So. 378, 23 L.R.A.(N.S.) 992. The Missouri cases were followed to same effect in Farrington v. Tourtelott (C. C.) 39 Fed. 738, as obstantially binding on the point, but which observations indicating that the doctrine did not wholly meet the approval of the court. Pilcher v. Atchison, etc. R. Co. 38 Kan. 516, 16 Pac. 945, 5 Am. St. Rep. 770, is cited in the brief before us, but there was no question of knowledge from the obvious existence of the railroad discussed. Pryor v. Buffalo, 197 N. Y. 123, 90 N. E. 423, is also cited, but the facts in that case were such as to render it inapplicable to the point we now have under examination. The covenant was of a very special character; and, while it appeared that the covenantee had knowledge of the [368] existence of the railway on the ground contracted for, it was that very ground that had to be furnished by the city, and hence compliance with the covenant necessarily involved the removal of that railway and the delivery of the land to the covenantee. Still we do not doubt that from the reasoning of the New York cases on the subject of public roads, the doctrine applicable to that class of improvements would not be extended to railroads. On the other hand, it is held in the following cases that existing railways in actual operation stand on the same ground as to their public and obvious character as do public highways: Van Ness v. Royal Phosphate Co. 60 Fla. 284, 53 So. 381, 30 L.R.A.(N.S.) 833, Ann. Cas. 1912C 647; Goodman v. Heilig, 157 N. C. 6, 72 S. E. 866, 36 L.R.A.(N.S.) 1004; Ex p. Alexander, 122 N. C. 727, 30 S. E. 336. The same doctrine was substantially laid down in Geren v. Caldarera, 99 Ark. 260, 138 S. W. 335, but the case is put not only on the ground that the purchaser knew that the switch track was on the land, but also that it was shown that the track in question was a direct inducement to his purchase.

We have held that where an intending purchaser inspected the land which he proposed to buy, and saw upon it in operation a line of railway, he could not thereafter complain that the land was so incumbered, and recover therefor under his covenant against incumbrances. Rich v. Scales, 116 Tenn. 57, 66, 69, 91 S. W. 50, 52. In that case the court said:

[369] "But if a part of the land purporting to be conveyed by the deed be held in adverse possession at the time of the conveyance, and the vendee have knowledge of such adverse possession at the time he takes his conveyance, he can have no relief, either upon his covenants at law or in any form in equity; otherwise, if he have no knowledge of such adverse possession at the time." 116, 66, 91 S. W. 50.

Again:

"Treating the case really presented in the bill, an action on the covenants of the deed, upon the ground that a part of the land embraced within the calls was at the time of the conveyance held by an outstanding and better title, that of the railway company, two insuperable objections are apparent: Firstly, as already said, the representation by bounds would control that made by the calls for dis-

tance, and it follows that none of the land described was held by better title, and that the complainant obtained all that he had contracted for; secondly, assuming that the strip claimed in the bill really fell within all the descriptive words of the deed, still the complainant could not recover, because the strip was, when the conveyance was taken, then in the adverse possession of the railroad company in a manner open and obvious to the complainant, and under such circumstances he could assert no right either at law or in equity in respect thereof based upon the deed in question." 116 Tenn. 69, 91 S. W. 52.

[370] The reason is substantially the same as that which applies to the existence of public highways. Perry v. Williamson (Tenn.) 47 S. W. 189.

In the case last cited it was held that the rule would not apply to the existence of a private way, when it did not appear that the purchaser had knowledge of the legal existence of such way.

Similarly, in the case now before us, it is insisted that although complainant inspected the premises before he made his purchase, and had an abstract of title, he was misled by defendant into believing that one of the railroads was paying rent for the use of the right of way. The evidence sustains this contention as to the Ryman track. That is to say, the owners of the Ryman track were paying rent for the right to use a certain part of the lot adjoining the track for loading and unloading, the sum of $8.33 per month. This was so stated to complainant as reasonably to lead him to believe that the rent was being paid for the use of the track, and hence that the track was subject to the control and disposal of the owner of the lot; and it seems that he did believe this, and actually demanded rent for it from the Ryman people a few months after his purchase, and after the time had expired for which the Ryman people had rented the space adjoining the track. The latter informed him of his mistake, referred him to the contract under which they had obtained the right of way, and refused longer to rent the space of ground they had previously used for the loading and unloading. Under these circumstances, [371] we are of the opinion that the inference to be drawn from the open and obvious character of the Ryman track is rebutted, and that this track must be treated as an incumbrance; and although complainant is entitled to no substantial damages therefor, since the evidence shows that it was beneficial to the land, still he is entitled to nominal damages, and to the costs of the cause. Wadhams v. Swan, 109 Ill. 46.

A decree will therefore be entered so modifying the decree of chancellor as to adjudge that, although complainant is not entitled to any substantial damages, he is entitled to nominal damages, and to the costs of the cause.

NOTE.

In the reported case an existing railroad right of way over granted premises which was in use at the time of the sale is held to be a breach of a covenant of warranty and against incumbrances, it appearing that the grantee was misled into believing that the railroad company paid a rental for the right of way. The earlier cases discussing the existence of a right of way as a breach of a covenant of warranty in a deed are reviewed in the note to Van Ness v. Royal Phosphate Co. Ann. Cas. 1912C 647. As to other easements as breaches of a covenant of warranty or against incumbrances see the notes to Schurger v. Moorman, Ann. Cas. 1912D 1114 (right of way for water ditch); Newmyer v. Roush, Ann. Cas. 1913D 433 (private roadway); Sandum v. Johnson, Ann. Cas. 1914D 1007 (public highway); Iowa City First Unitarian Soc. v. Citizens Sav. etc. Co. Ann. Cas. 1916B 575 (public sewer).

COLORED INDUSTRIAL SCHOOL OF CINCINNATI

v.

BATES ET AL.

Ohio Supreme Court—June 23, 1914.

90 Ohio St. 288; 107 N. E. 770.

Wills — Election by Husband to Take Under Wife's Will — Acts Constituting Election.

In order that acts or a course of conduct of the surviving consort of a deceased testator should operate to equitably estop such consort from claiming dower and a distributive share of the personal property under the law and to amount to an election to take under the will, such acts must be of such an unequivocal character as will clearly and distinctly demonstrate a purpose to accept the provisions of the will.

[See note at end of this case.]

(Syllabus by court.)

Error to Court of Appeals, Hamilton county.

Action between Colored Industrial School of Cincinnati and Bates, administrator, et al. To review judgment rendered, Industrial

School brings error. The facts are stated in the opinion. AFFIRMED.

Worthington & Strong, Willis M. Kemper and *Robert S. Fulton* for plaintiff in error.

Healy, Ferris & McAvoy and *William C. Cochran* for defendants in error.

[288] NICHOLS, C. J.—Sallie J. McCall, a resident of Hamilton county, Ohio, died March 6, 1909, leaving a last will and testament. She left surviving her her husband, William A. McCall, and the important question in this case is whether or not William A. McCall elected to take under her will.

The items of the will of testatrix pertinent to this question may be briefly stated as follows:

By item 1 the testatrix devised certain real [289] estate known as the "Andover Building" in Cincinnati to certain trustees in trust for the benefit of the Colored Industrial School of Cincinnati, said trustees to incorporate said school and convey said real estate to it.

By item 2 she devised certain real estate on the north side of Fourth street in Cincinnati to her husband, William A. McCall, during his natural life, with remainder after his death to the said trustees in trust for the Colored Industrial School of Cincinnati, in the same manner as the property devised to said school by item 1.

By item 4 she devised certain real estate on Clinton street in Cincinnati in fee simple to the Ohio State Society for the Prevention of Cruelty to Children and Animals.

By item 8 she devised certain real estate on Main avenue, Avondale, Cincinnati (being the homestead of herself and husband), to her husband, William A. McCall, in fee. She also bequeathed to him all the furniture and household belongings in said house, except such as were otherwise specifically devised.

By item 13 of said will she provided that after the payment and discharge of all bequests made in the will, all bonds and the remainder of all stocks owned by her at the time of her death were bequeathed to the said trustees in trust for the Colored Industrial School of Cincinnati, in the same manner as the property bequeathed in item 1.

By item 14 she appointed her husband, William A. McCall, executor of her will.

On the date of the probate of the will, March 25, [290] 1909, William A. McCall was duly appointed and qualified as executor.

On September 5, 1909, six months after the death of his first wife, William A. McCall was married to Mary A. Andrews, and on September 9, 1909, he died leaving the said Mary A. Andrews McCall, his widow, surviving him.

No citation was ever issued by the probate court to the husband to appear and make his election as provided by Section 5963, Revised Statutes (Section 10566, General Code), and no election was ever made by him in the probate court. He had not settled the estate of his deceased wife or filed an account as executor, at the time of his death. No children were born to either Sallie J. McCall or William A. McCall.

The estate of Sallie J. McCall consisted of the four pieces of real estate in Cincinnati specifically devised by the items of the will to which we have above referred, and a personal estate of the appraised value of $250,325.49; of this personal estate $245,584.25 was in stocks and bonds and the balance was in household furniture, money and overdue coupons. The debts of the estate were comparatively small in amount.

After the death of William A. McCall, an administrator *de bonis non* with the will annexed was appointed of the estate of Sallie J. McCall, and an administrator of the estate of William A. McCall.

The claim is made that William A. McCall having died without electing to take under the will of his wife, his estate is entitled to its statutory share of her estate. On the other hand it is claimed that, [291] though William A. McCall made no formal election to take under said will, yet by his acts he did, as a matter of fact, elect to take under the will of Sallie J. McCall, and his estate is entitled only to the property given to him by said will.

The acts of William A. McCall which are relied upon to establish an election upon his part are the following:

(*a*) William A. McCall, at the time of his wife's death and the probate of her will, was a retired business man, seventy-eight years of age, in good health and full possession of all his mental faculties. Immediately after the death of his wife he employed counsel, proceeded with the administration of the estate, caused an inventory to be made and was advised by counsel as to his rights under the will and under the law.

(*b*) Early in April Mr. McCall gave the agent appointed by the trustees of the Colored Industrial School all necessary information concerning the tenants in and rentals of the Andover building, and also went with the rent collector of said agent to the Andover building, introduced said collector to all the tenants in said building and instructed said tenants thereafter to pay their rent to said collector. From that time on all the rents from said building were paid to and collected by said agent without any objection whatever on the part of Mr. McCall. Mr. McCall also turned over to the agent of the

said trustees the insurance policies on said building.

(c) Beginning with the rent due in April and from that time on until the date of his death Mr. McCall collected the rent from the Fourth street [292] property and deposited it in his individual account in bank, and not in the account kept by him as executor, though he gave receipts signed by himself as executor. This Fourth street property is the property, mentioned in item 2 of the will of Sallie J. McCall, which was devised to the said William A. McCall for and during his natural life, and after his death to the trustees for the said Colored Industrial School in fee. The policies of insurance on this Fourth street property were indorsed by the agent of the insurance companies to the effect that Mrs. McCall had a "life interest" in the property. This indorsement was made at Mr. McCall's request. The same indorsement is made on the policies of insurance on the Avondale property, which had been devised to Mr. McCall in fee.

(d) Mr. McCall took possession of all the personal property in the Avondale house, including property specifically bequeathed to the Cincinnati Art Museum, the gift to become effective after the death of Mr. McCall. Mr. McCall during his life gave away some clothing which had belonged to his wife.

(e) Mr. McCall was elected as one of the trustees for the Colored Industrial School and attended one meeting.

(f) He executed a quitclaim deed to the purchaser of the Clinton street property, when the purchaser declined to take the property from the devisee, the Ohio State Society for the Prevention of Cruelty to Children and Animals, unless Mr. McCall made his election to take under the will or execute a quitclaim deed.

[293] (g) Mr. McCall paid the taxes on the Andover building, Fourth street property and the Clinton street property out of the funds of the estate of Sallie J. McCall and credited himself as executor with such payments. The taxes on the Avondale property he paid out of his individual account.

(h) Mr. McCall had full knowledge of the extent of the estate of Sallie J. McCall and of his rights under the will at the time of the acts above relied upon.

Under the circumstances of this case, are any of the above acts, or all of them taken together, sufficient to constitute an election in fact on the part of William A. McCall to take under the will of Sallie J. McCall?

The statutes governing the matter of election under a will as they stood at the date of the death of Sallie J. McCall were Sections 5963 and 5964, Revised Statutes, which have been carried into the General Code as Section 10566 *et seq.* These sections as they appeared in the Revised Statutes are as follows:

"Sec. 5963. If any provision be made for a widow or widower in the will of the deceased consort, the probate court shall, forthwith, after the probate of such will, issue a citation to such widow or widower to appear and elect whether to take such provision or to be endowed of the lands of the deceased consort and take the distributive share of the personal estate; and such election shall be made within one year from the date of the service of the citation aforesaid; provided, that such widow or widower may, at any time before the period of such [294] election has expired, file her petition in the court of common pleas for the proper county, making all persons interested in said will defendants to such petition, asking a construction of the provisions of said will in her or his favor, and to have the advice of said court, or of the proper appellate court on appeal thereon; and if proceedings for such advice, or proceedings to contest the validity of such will be commenced within such year, the widower or widower shall be entitled to make election within three months after such proceedings shall have been finally disposed of, and said will shall not have been set aside; but the widow or widower shall not be entitled to both dower and the provisions of the will in her or his favor, unless it plainly appears by the will to have been the intention that the widow or widower should have such provision in addition to the dower and such distributive share."

"Sec. 5964. The election of the widow or widower to take under the will shall be made in person, in the probate court of the proper county, except as hereinafter provided; and on the application by a widow or widower to take under the will, it shall be the duty of the court to explain the provisions of the will, the rights under it, and by law in the event of a refusal to take under the will. The election of the widow or widower to take under the will shall be entered upon the minutes of the court; and if the widow or widower shall fail to make such election, the widow or widower shall retain the dower, and such share of the personal estate of the deceased consort as the widow or widower would be entitled to by law in case the deceased consort [295] had died intestate, leaving children. If the widow or widower elect to take under the will, the widow or widower shall be barred of dower and such share, and take under the will alone, unless as provided in the next preceding section; but such election by the widow or widower to take under the will shall not bar the right to remain in the mansion of the deceased consort, or the widow to receive one year's allowance for the support of herself and children, as

provided by law, unless the will shall expressly otherwise direct."

These two sections are based upon sections 45 and 46 of the original act relating to wills, passed March 23, 1840 (38 O. L. 120). They have been often amended and before the court many times. As originally passed, the statute provided for an election within six months and made no provision for citation; and it was at one time held, at least by inference, that the only manner of making an election is that provided by statute. Stilley v. Folger, 14 Ohio 610.

But in so far as that case held that the only method of making an election is that provided by statute, it was overruled by the subsequent case of Thompson v. Hoop, 6 Ohio St. 480; and it has, at least since the decision of the last case, been settled in this state that an election to take under a will can be made by a widow or widower by acts which would estop her or him from denying such election. Baxter v. Bowyer, 19 Ohio St. 490; Stockton v. Wooley, 20 Ohio St. 184; Millikin v. Welliver, 37 Ohio St. 460; Posegate v. South, 46 Ohio St. 391, 21 N. E. 641; Mellinger v. Mellinger, 73 Ohio [296] St. 221, 76 N. E. 615. We know of no exceptions to this rule in any of the other states.

But while an election to take under the will may be made by acts of the party, it is settled that the act or acts relied upon as constituting an election by conduct must be plain and unequivocal, done with a full knowledge of rights under the will and under the law respectively and of the true condition of the estate and generally be of such long duration as clearly shows a purpose to take under the will. Reed v. Dickerman, 12 Pick. (Mass.) 146; Delay v. Vinal, 1 Metc. (Mass.) 57, 65; Thompson v. Hoop, 6 Ohio St. 480, 485; Stark v. Hunton, 1 N. J. Eq. 216, 227; Caston v. Caston, 2 Rich. Eq. (S. C.) 1; Craig v. Walthall, 14 Grat. (Va.) 518, 525; Clay v. Hart, 7 Dana (Ky.) 1, 6; Haynie v. Dickens, 68 Ill. 267; Cory v. Cory, 37 N. J. Eq. 198, 201; Rutherford v. Mayo, 76 Va. 117, 123; Exchange, etc. Bank v. Stone, 80 Ky. 109; Clark v. Middlesworth, 82 Ind. 240, 247; Wilson v. Wilson, 145 Ind. 659, 44 N. E. 665; Cooper v. Cooper, 77 Va. 198, 205; Hovey v. Hovey, 61 N. H. 599; English v. English, 3 N. J. Eq. 504, 29 Am. Dec. 730; Shaw v. Shaw, 2 Dana (Ky.) 341; Forester v. Watford, 67 Ga. 508.

Our statute is different from that of many other states in that by express terms of the statute itself a failure to elect to take under the will within the time prescribed by law works a presumption that the party repudiates the provisions of the will and takes under the law.

The statute was primarily intended to protect the interests of the widow. Since 1889 it has included, [297] of course, widowers as well as widows. It provides that the surviving consort must have an opportunity of making definite choice whether acceptance will be made of the provisions of the will or whether the rights accorded to the party by the law will be retained irrespective of the will. The law provides that the widow or widower shall have one year from the time of issuing of citation to elect, to make choice as to the alternative, and this time is granted so that opportunity may be given to ascertain all the facts in regard to the estate in arriving at a determination as to what may be to the best interest of the party electing. This is plain from the provisions of the act allowing the surviving consort to bring an action for the construction of the provisions of the will in his or her favor before exercising choice, and that when such action is brought the period for election is extended three months after final disposition of such proceedings for construction. There is no sentiment about the law. It presumes that the widow or widower in making election will be guided wholly by her or his interests; in fact, the law provides (Sections 10574 and 10575, General Code) that in the case of a widow or widower of unsound mind the court, if satisfied that the provision made by the will is more valuable than the provision made by law, shall elect for such incompetent widow or widower to take under the will, and of course, under the statute itself, the court can only make this election when it is satisfied that the provision made by the will is more valuable and better than the provision by law. The widow or widower can only take under the will [298] by *electing* so to do. If she or he does not elect, then she or he takes under the law. Therefore (as in the case at bar), when no citation has been issued and when the widower dies in less than a year after the probate of the will of his wife without having made a formal election, it must take some clear and convincing act to constitute an election upon his part to take under the will; some act that is clearly inconsistent with an intention not to take under the law. It is impossible to prescribe any absolute rule under which to designate what acts are sufficient to constitute an election. Each case must be determined by the circumstances peculiar to it.

The fact that William A. McCall died within the period allowed for his election, that he made no formal election and that no citation was issued, brings him clearly within the statute as taking under the law.

This, as we have pointed out before, can of course be controverted by clear proof that he in fact took under the will, but in the absence of such proof the law presumes that he elected to take under the law.

If there is any presumption in the case the presumption is that he took under the law, for the reason that the law contemplates the widow or widower will accept the most valuable provision, and from the extent of this estate, as shown by the inventory, we have no doubt that it was clearly to Mr. McCall's pecuniary advantage not to accept the provision made for him by the will.

Now, considering briefly the facts relied upon in this case, can any of them or all of them be considered as acts which show plainly and unequivocally [299] that Mr. McCall accepted the provision made for him by the will? We are of the opinion that they do not. The estate was very large. Mr. McCall was appointed as executor. He knew that he had a year in which to decide whether he would take under the will or under the law. As executor it was his duty to administer the estate and this he proceeded to do. The statute does not provide that he must exercise his choice immediately upon being advised as to his rights. On the contrary, it expressly provides that he shall have one year after he is cited by the probate court in which to make his election. The Andover building was given expressly to the trustees for the Colored Industrial School. These trustees were entitled to the rents from it from the date of the death of Sallie J. McCall. Mr. McCall had no interest whatever in these rents unless dower should be assigned. If he should decide to take under the law then he would have a claim for dower in said property. Neither did he have any right in the insurance policies upon this building. Whether he elected to take under the will or under the law, the property went to the trustees of the Colored Industrial School, the only difference being that in one event he would have a dower interest in the property and in the other event he would have no interest in it. Therefore, what he did in connection with this property does not amount to an acceptance by him of the provision made for him by the will.

His acts in connection with the Fourth street property we regard as the strongest upon which to base the contention that he elected to take under [300] the will. If he took under the will he was entitled to rentals from this building for his life. On the other hand, if he took under the law he would have no right to these rents—he would only have a dower interest in the property. Therefore, the fact that he collected the rents and placed them in his own individual account was consistent with his taking under the will and, disconnected with the other circumstances as to his situation and rights, inconsistent with his takjng under the law. But we cannot overlook the fact that Mr. McCall was acting as executor of his wife's estate; that until he made his election there was no one else to collect these rents and it was therefore proper for him to do so; that said collections were made during a period allowed him by law within which to come to a decision as to his election; that while he placed the money so collected in his own individual account, the record shows that at all times he had in his account a sum greater than the total amount of rents collected, and, therefore, had he elected to take under the law such amount would have been regarded as held by him in trust for the persons entitled to the same; and the fact that he had it in his possession at all times made it at all times possible for him to make known his election to take under the law and that he held said money for the person or persons entitled to it.

In other words, while his collecting and depositing of these rents to his own individual account was consistent with his taking under the will, it was not inconsistent with his taking under the law if he elected so to do at any time while he lived. No [301] rents were lost by his conduct as to this property, and so long as he did not appropriate and actually use the property it cannot be said that his acts constituted a clear and unequivocal election to take the provision made for him by the will.

We do not regard the indorsements on the insurance policies as material. These indorsements were made by the agent at Mr. McCall's request. Neither Mr. McCall nor the agent seemed to be very clear as to the interest which Mr. McCall had in the properties.

As to the Avondale property, that was the homestead of Mr. McCall and he simply continued to reside there after his wife's death. He had a right to reside there for one year whether he took under the will or took under the law, and, as stated above, he knew that he had at least one year in which to make up his mind whether he would take under the will or under the law, and his conduct with reference to this property shows nothing one way or the other.

We do not think, either, that the fact that he was elected one of the trustees of the Colored Industrial School and attended one meeting throws any light upon the controversy. So far as the record shows he had nothing to do with his election nor did he take any active part in the proceedings of the trustees. There would possibly be nothing inconsistent in his taking under the law and also acting as one of the trustees for said school.

As to the execution of the quitclaim deed for the Clinton street property, this act could probably be construed either way; more logically perhaps as [302] showing an intention to take under the law. If he had intended to take under the will then undoubtedly he

would have complied with the request of the purchaser and filed his election and avoided the necessity of making a quitclaim deed. As he did not do this but made a quitclaim deed, it is presumed that he had some interest in the property, or supposed he would or might have, and thus released it. The only real significance of this act, as we view it, is that it shows that at the time Mr. McCall made this quitclaim deed he was undecided whether he would take under the will or under the law.

The above brief review of the acts relied upon gives our view of their significance as we understand said acts from the evidence disclosed by the record.

We have examined carefully all of the cases referred to in the briefs and many others, and it is clear that to establish by acts an election to take under the will, where the widow or widower dies within the period allowed by law to make such election, such acts must be plain, unequivocal, done with a full knowledge of all the circumstances, of the rights under the will, of the extent of the estate, and must be such as would estop the widow or widower from denying, within such period, that she or he had so elected, had she or he lived and applied during such period to take under the law.

Practically all of the cases where an election to take under the law is involved are cases where the acts not only were plain and unequivocal but were also of long duration. After careful examination of all the cases referred to in the briefs as well as [303] other cases cited by the text-writers, we are more than ever impressed with the language of Johnson, J., in the case of Milliken v. Welliver, 37 Ohio St. 460, 467, that "It is believed no case can be found where the facts are held sufficient to amount to an election to waive the widow's rights under the law, unless they are of such a marked character and of such long duration as will clearly and distinctly evince a purpose to take the provisions of the will, and to operate as an effectual equitable bar to dower."

We do not think it necessary to comment further upon the authorities cited. All of them are in accord with and none of them is contrary to the view that during the period given by the statute within which to make an election to accept the provision made by the will, unless the widow or widower makes a formal election, as provided by the statute, no act can be construed as such an election unless it be an act which would estop a widow or widower should she or he make application for an assignment of dower and distributive share of the personal property during such period.

The court of appeals found all of the bequests made in the will and the codicils of Sallie J. McCall, except the bequest to the trustees for the Colored Industrial School, were specific bequests and should be paid out of the estate before the bonds owned by her and the remainder of the stocks owned by her at her death should go to the trustees for the Colored Industrial School as provided in item 13 of said will, and that any deficiency in the share of William A. McCall, by reason of the delivery in [304] full to said specific legatees of their specific bequests, should be borne by the said trustees of the Colored Industrial School.

To this finding of the court of appeals special exception is made by counsel for the Colored Industrial School, and it is claimed that the legacy to the Colored Industrial School by item 13 of the will is also a specific legacy and is no more chargeable with the payment of claims and expenses than any other specific legacy.

It is also claimed that the legacy to the National American Woman Suffrage Association, given by item 10 of the will and item 7 of the first codicil, is a general and not a specific legacy.

Without making fine distinctions and comparing authorities as to what are and what are not specific legacies, it seems clear that it was the intention of the testatrix, gathered from the whole will and from the language used in item 13, that the bequest to the Colored Industrial School was only to be made after the payment and discharge of all the other bequests named in the will, and therefore the decision of the court of appeals in this respect is correct. Nor does it seem that there should be any question but that the devise to the National American Woman Suffrage Association was specific and was among the legacies to be paid before the bequest to the Colored Industrial School given by item 13 of the will.

The seventh item of the first codicil plainly substituted the stock of The Cincinnati Street Railway Company for the stock of The Cincinnati, Hamilton & Dayton Railway Company bequeathed by item 10 [305] of the will to the National American Woman Suffrage Association, such last-named stock having been disposed of by the testatrix subsequent to the time of making the will and prior to the date of the execution of the first codicil.

Judgment affirmed.

Shauck, Johnson, Donahue, Wanamaker, Newman and Wilkin, JJ., concur.

NOTE.

Sufficiency of Acts to Constitute Election by Husband to Take under Wife's Will.

In General, 1204.
Acts Sufficient, 1204.
Acts Insufficient:
Generally, 1205.
Acts as Tenant by Curtesy, 1205.
Acts as Executor, 1207.
Noncompliance with Statute, 1207.

In General.

As is observed in the reported case, it is impossible, in the absence of a statute to lay down any absolute rule for the determination of what acts are sufficient to constitute an election by a husband to take under his wife's will. Therefore each case depends on its own peculiar circumstances. In the case of In re Melot, 231 Pa. St. 520, 80 Atl. 1051, the court, in considering the question said: "The general rules for determining whether there has been an election by matter in pais have been many times set forth. Thus in Bradford v. Kent, 43 Pa. St. 474, Mr. Justice Strong said (p. 484): 'That an election may be evidenced by matter in pais as well as by matter of record is certain, and it was conceded in the court below. It is true, nothing less than unequivocal acts will prove an election, and they must be acts done with the knowledge of the party's rights, as well as of the circumstances of the case. Nothing less than an act of choice intelligently done will suffice.' A statement of the rule which is in line with our Pennsylvania decisions is found in 11 Am. & Eng. Enc. of Law (2d ed. 97) as follows: 'In order that an act may amount to an election, two things are essential: first, it must be clear that the person alleged to have elected was aware of the nature and extent of his rights; second, it must be shown that, having that knowledge, he intended to elect.'" And in Robertson v. Schard, 142 Ia. 500, 119 N. W. 529, it was said: "At the date when this will came into effect the statute did not make a written election filed in court the only method by which a surviving husband could express his choice in the matter, and any act or declaration of such survivor 'plainly indicating a purpose to take under the will' was a sufficient election."

Acts Sufficient.

It is generally held that where a husband with full knowledge of his rights accepts a beneficial interest which is conferred on him by virtue of his wife's will, he thereby elects to take under the will instead of under the statute. Fry v. Morrison, 159 Ill. 244, 42 N. E. 774 (husband did not renounce will, but entered on enjoyment of property devised); Hawkins v. Bohling, 168 Ill. 214, 48 N. E. 94 (husband enjoyed benefits of will—his heirs could not elect to take against will); Richardson v. Trubey, 250 Ill. 577, 95 N. E. 971 (after being served with statutory notice to elect, husband refused to surrender certain property and filed in probate court sworn answer that he held it under will; Brightman v. Morgan, 111 Ia. 481, 82 N. E. 954 (husband filed election, received benefits under will, and consented to discharge of executrix and settlement of the estate); Smith v. Wells, 134 Mass. 11 (husband proved will, accepted position of executor, gave bond, and continued to occupy real estate left by his wife); In re Melot, 231 Pa. St. 520, 80 Atl. 1051 (see quotation, infra); Scholl's Appeal, (Pa.) 17 Atl. 206 (husband had written his wife's will, acted as administrator, c. t. a., and received benefits under will); Church v. Church, 80 Vt. 228, 67 Atl. 549. See also Coe's Appeal, 64 Conn. 352, 30 Atl. 140. In Fry v. Morrison, supra, wherein it appeared that a woman devised the whole of her property to her husband and then by a codicil bequeathed an annuity to a third person, the court said: "By the terms of the will the property and estate of the testatrix were devised to the appellant subject to this annuity. At no time has he renounced under the will. It is a well settled rule in equity, that a person, by taking any beneficial interest under a will, is thereby held to confirm and ratify every other part of the will,—or, in other words, he shall not take any beneficial interest under a will and at the same time set up any right or claim of his own, even if otherwise legal and well founded, which shall defeat or in any way prevent the full effect and operation of any part of the will." The foregoing rule was applied in the case of In re Melot, 231 Pa. St. 520, 80 Atl. 1051, as follows: "In the present case it can hardly be doubted that appellant had full knowledge of the situation. He was an executor of the will and was active in the settlement of the estate. It also appears affirmatively from the testimony that he knew what his rights were, both under the will and without regard to it. One of the acts of appellant which the court below considered evidence of his intention to take under the will, was the fact that in his account as executor appellant claimed credit for cash paid for the funeral expenses of his wife. This was in accordance with a direction in the will, and it operated to transfer the primary liability for these expenses from the husband upon whom it would otherwise rest. This payment was inconsistent with an intention on the

part of appellant to take against the will. If he had not intended to accept under the will, he could not consistently have repaid to himself the amount expended for funeral expenses. The fact that he did make such payment is therefore persuasive evidence of his acceptance under the will. Another matter which is very significant in this connection, as evidence in support of the same conclusion, is the fact that at the audit of the account appellant submitted a distribution statement, signed by himself, asking the court to distribute the estate in exact accordance with the terms of the will, including the award of his own legacy. This action would seem to indicate conclusively his acceptance under the will, and goes far to sustain the finding of the court below. An examination of the statement, which was in the form of a petition, shows that the prayer of appellant was that distribution should be made among all the parties mentioned in the will in the exact proportion as therein directed, and that the sum of one thousand dollars devised to him, should be distributed to himself. After this formal recognition of the will, made with full knowledge of the facts and circumstances of the estate, it is difficult to see where there is any room for appellant to assert that he did not elect to take under the will."

In each of the following cases it was held that the acts of the husband were sufficient to constitute an election to take under his wife's will: Rowley v. Sanns, 141 Ind. 179, 40 N. E. 674 (husband executed deed to part property devised to him under wife's will and recited in deed that grantor came into possession by virtue of will); Robertson v. Schard, 142 Ia. 500, 119 N. W. 529 (husband made no claim to statutory share and gave his written consent to approval of report of trustees under will); Weller v. Noffsinger, 57 Neb. 455, 77 N. W. 1075 (by written indorsement on will husband consented to its provisions and by his conduct renounced his statutory rights); Wise v. Rhodes, 84 Pa. St. 402 (husband had full knowledge of property that passed by will and allowed devisee to enter on property and for eight months to discharge duties imposed by will).

Acts Insufficient.

Generally.

Consonant with the well recognized rule that one must have full knowledge of his rights in order to make a valid election, it has been held that a husband does not elect to take under his wife's will where without full knowledge of his rights he enjoys both the benefits of the will and the benefits of the statute. Huston v. Cone, 24 Ohio St. 11. And the fact that during the proceedings for probate of the will the husband filed a writing stating that he withdrew all objection to the proof of the will and consented to its allowance on condition that the executor should furnish a certain bond, has been held not to constitute an election by the husband to take under the will. McGrath v. Quinn, 218 Mass. 27, 105 N. E. 555, wherein the court said: "The allowance of a will propounded for probate with the consent of the surviving spouse, who has appeared as the sole contestant, and the right to waive its provisions for his or her benefit are distinct. Bunnell v. Hixon, 205 Mass. 468. If the petitioner had indorsed on the will his assent to its terms, he would not thereby have relinquished his right to take his distributive share as if his wife had died intestate. Bunnell v. Hixon, 205 Mass. 468. A waiver moreover is the intentional relinquishment of a known right. Metropolitan Coal Co. v. Boutell Transp. etc. Co. 185 Mass. 391, 397. And the question is one of fact. Taylor v. Cole, 111 Mass. 363. If we recur to the wording of the paper of withdrawal, the language previously quoted signifies, that all objections to proof of the will were withdrawn. It was on its face an arrangement for the termination of the contest over the petition for the probate of the will. But, if the conditional stipulation as to the bond raises any ambiguity, the intention of the parties may be shown by extrinsic evidence, and all doubt is removed by the testimony of counsel who acted for the executor, that the petitioner's counsel when the agreement was entered into stated to counsel then acting for the executor, that after the probate of the will the petitioner intended to exercise his statutory right of election."

Acts as Tenant by Curtesy.

Where the acts of a husband in reference to his wife's property are performed by him under his statutory right, those acts do not constitute an election to take under his wife's will. Kerrigan v. Conelly (N. J.) 46 Atl. 227; In re Peck, 80 Vt. 469, 68 Atl. 433. See also In re Peck, 87 Vt. 194, 88 Atl. 568. In Kerrigan v. Connelly, supra, the court said: "If the rents were in fact received by the husband as administrator cum testamento annexo, and he was chargeable with them as received in that capacity, the decision in Sims v. Sims, 10 N. J. Eq. 158, 164, and the other cases referred to in the master's report, would seem to justify his conclusion. But the vital question in the case is, did the husband receive the rents and appropriate them as tenant by the curtesy or as an administrator? The difficulty, in my mind, is to see how it is to be held that the husband, who, as tenant by the curtesy, was entitled for life

to the entire rents of this property (and the other real estate of his wife), free from charges for legacies, is, under any proof in this case, or under the circumstances of the case, to be considered as having waived his greater rights as tenant by the curtesy, or to have elected to receive the lesser estate in part of the lands in lieu of his curtesy in the entire land. . . . The devise, . . . by Catharine Kerrigan to her husband and their three children as tenants in common of a life interest in a portion of her real estate, subject to charges, had, so far as the husband was concerned, no effect or operation of itself to deprive him of his legal estate as sole tenant for life in all the real estate of which testatrix died seised, or of his right to receive the entire rents and profits for his life as tenant by the curtesy, free from any charges made by the will. . . . It is indispensable that facts clearly showing an election to take the lesser interest and waiver the larger must be shown. I am of opinion that it has not been shown that the husband did so elect in this case. The burden of showing this is upon the parties asserting the election. Worthington v. Wigonton, 20 Beav. (Eng.) 67, 74. The receipt of the entire rents, and their appropriation to his own use, without paying the legacies, was prima facie an assertion that he did not accept the devise. The only circumstance relied on or proved to show election by the husband to take the devise is his proof of the will on the failure of the executors named to prove it, and his acceptance of letters testamentary cum testamento annexo. But the will was operative as to the personal property of testatrix, which was given to persons other than the husband, and administration by some person was, therefore, necessary; and the husband's mere acceptance of the letters, with the trusts imposed on the administration, is not of itself sufficient to constitute a waiver of his estate by the curtesy, and was not itself an election to take this estate under the will. No benefit came to the husband by the acceptance of the estate under the will, but rather a loss, and therefore intention to elect between the estate given by the will and the curtesy is not to be inferred from this act alone. The case cited by the complainant's counsel—Schenck v. Schenck, 16 N. J. Eq. 174, 182—as to the effect of proving a will as conclusive evidence of the acceptance of a trust does not apply. That was a case where the testator was himself a trustee at the time of his death, and by the law the office of trustee devolved upon his executor. It was held, therefore, that, having become executor in fact, he could not deny that he had succeeded to the trust which the law imposed on him by force of his being executor. In the present case neither the original executors nor the administrator c. t. a. other than the husband could, merely by proving the will, assert against the husband's consent the right to any rents and profits during his life for the purpose of paying the legacies; and, in order to establish such right against the husband, they would require in addition to their proof of the will some conveyance or waiver of his rights; and such waiver, conveyance, or election to take only the partial interest under the will was, in my judgment, equally necessary in order to destroy the husband's curtesy, even if he became administrator. It is not a case where the husband was wrongfully in possession of the rents at the time of proving the will, and where his subsequent receipts must, in equity, be considered as in performance of an obligation to dispose of them under the will. But it is a case where he was rightfully and legally entitled to receive the whole rents without abatement or charge for legacies, and as against the executors or any other administrator than himself the husband would clearly have been entitled to the entire rents and profits as tenant by the curtesy. He should not, therefore, as it seems to me, by the mere proof of the will, and in the absence of any subsequent acts releasing his rights, be chargeable, in favor of himself as administrator, c. t. a., with trusts from which he would have been freed had any other person administered."

Acts which in view of a subsequent express election to take against the will were held not to constitute an election to take under the wife's will were discussed as follows in the case of In re Peck, 80 Vt. 469, 68 Atl. 433: "An election may be by matter in pais, as well as by matter of record; but it can be only by plain and unequivocal acts, with full knowledge of all the circumstances, and of the party's rights; and such acts must be done with the intention of electing. . . . It is admitted by the demurrer that Edward W. had such knowledge. Hence the question narrows itself to the effect of his acts. The allegations show that immediately after the death of his wife he entered into the possession, control, and management of all the estate, and used and appropriated to his own use and benefit the entire income thereof to the time of his death; and they further show that during the same time he appropriated to his own use and used 'large portions of the principal,' so that the rents, income, and principal thus appropriated and used exceeded twenty-five thousand dollars. How much of this aggregate sum was of the principal does not appear; but construing the allegation most strongly against the pleader, it must be the larger part. By the will he was given the possession, management, use, control, and income of all the estate during his natural life, but he was given no part of the principal.

He did not act in ignorance, since as admitted by the demurrer he was fully advised of his rights under the law, also under the will. In what way did he take 'large portion of the principal?' Certainly not under the will. The only way in which he could take of the principal was by an election to take under the statute. There is to be considered in connection herewith the allegation that Edward W. for a large number of years before the testatrix's death had the exclusive control and management of all her property, handling it during all the same time as her trustee and her agent. This shows his relation to the property at the time of her death to have been such as in reason fairly to require him thereafter to continue in the control and management thereof, as far as necessary to its preservation and safety, until such time as he could relinquish the same to her personal representatives. Also the acts of Edward W., set forth in the petition and admitted, in making an application to the probate court within the specific time allowed by statute in which to make an election, asking for further time and stating therein, 'that said matter is now under consideration and that he cannot yet intelligently determine whether he ought' to waive the provisions of the will, and in subsequently making the express waiver against the will. Excluding the acts constituting the express election and the notice thereof, his acts alleged are in part evidence of an intention of election in favor of the will, and in part of an intention of election against it, the latter way of as much or more force as the former. They do not show an intention either way to the rejection of the other, without which there can be no election. It cannot be said therefore that the acts in question show plainly and unequivocally an election to take under the will."

Acts as Executor.

It has been held that acts performed by a husband as executor under his wife's will do not constitute an election on his part to allow the will to settle his own rights. Milner v. Davis, 120 Ia. 231, 94 N. W. 511. See also Tyler v. Wheeler, 160 Mass. 206, 35 N. E. 666. And see the reported case. In Milner v. Davis, supra, the court said: "The election relied upon is the contract with Preston to complete the sale already made by Mrs. Davis, and the subsequent compliance with that agreement. The rule is firmly established that an election must be of record, and that it is sufficient if it discloses an act or declaration plainly indicating an intention to take under the will. Craig v. Conover, 80 Ia. 358; In re Franke, 97 Ia. 704; In re Proctor, 103 Ia. 232. Before her death Mrs. Davis had sold this land to Preston, and a part of the purchase price had been paid to her, and her sickness and death alone prevented the completion of the transaction. The defendant had agreed to this sale, and its purpose was, as stated by him, to secure a home in town. It was perfectly proper, then, for him to agree to complete it as soon as it could be done through legal channels, and we see nothing in the contract itself which even points towards an election on his part. He did nothing more than to agree to qualify as executor, and as such to procure the necessary order for a conveyance of the land according to the terms of the sale made by his wife. True, when he made the contract he had not been appointed by the court because the will had not then been probated, but the purchaser wanted immediate possession of the land, and the contract was so drawn that all interests would be fully protected in case of a failure on his part as executor to carry out its terms. Every act which he agreed to do was to be done as executor under the direction of the court, and every act which he did in closing the sale was so done."

Noncompliance with Statute.

Under statutes requiring the acceptance of the will to be in writing, acts not fulfilling that requirement have been held not to constitute acceptance. Wolfe v. Mueller, 46 Colo. 335, 104 Pac. 487; Tyler v. Wheeler, 160 Mass. 206, 35 N. E. 666. See also Lahr v. Ulmer, 27 Ind. App. 107, 60 N. E. 1009: "Under the terms of the statute, each spouse has the option to take the property given by a will or one-half of the estate, and unless the written consent is given, he must be deemed to have elected to take the portion under the statute." Wolfe v. Mueller, supra. And in Tyler v. Wheeler, supra, the court enforced the statutory requirement of a written consent as follows: "The plaintiff contends that, by applying for an appointment and giving a bond as executor, the husband lost his right to the share which he should otherwise have received. The grounds of this contention are in substance two: first, that his signature to the petition for the appointment and to the bond was a written consent to the will: and, secondly, that his conduct in assuming the position of executor was an election that the will should be given full effect, and was a waiver of his rights under the statute, or an estoppel against his claim. First, did his action constitute a written consent to the will? Manifestly not the kind of written consent contemplated by the statute, for it is evidence that what is meant is a formal, express consent in writing. Conceding that consent may be given in-

formally if it is in writing and its meaning is clear, we have to consider the nature of his action in accepting the trust of executor. In the first place, it is to be remembered that the will was legal and valid, except that it took effect only upon a part of the estate of the testatrix. It was the duty of the person appointed in it as executor to present it for probate, to take out letters testamentary, and to administer upon the estate. If some other person than the husband had been named in the will as executor, he would have presented a petition and signed a bond, as the husband did. In his petition he would have set forth truly that the testatrix left a will, and he would have signed a bond agreeing to administer the estate 'according to law and the will of the testator.' This would have meant a will which did not affect that portion of her estate which the law gave her husband. To administer according to law and the will of the testator, would have meant to turn over to the husband his share, and to dispose of the remainder under the will. There would have been no implication that it would deprive the husband of his share, or that it was a will which could have any more extended operation than that permitted to it under the law. We see no reason why the husband's act should have any different meaning in this respect than that of any other person who might have been appointed executor. He took no beneficial interest under the will. Mere probate of the will, whether on his petition or on that of another person, could not affect his legal rights. There was nothing inconsistent in his proving the will, and at the same time claiming his share of the property which was not affected by it. His performance of his official duty as executor was entirely apart from consent to the will for the purpose of giving it an effect which the law did not otherwise give it. It was a recognition of it as a valid instrument to the extent and for the purposes for which it was made valid by the statute, and not for another and different purpose. We are of opinion, therefore, that his signature in these official proceedings was not a written consent to the will within the meaning of Pub. Sts. c. 147, § 6. Much of what we have said is applicable to the plaintiff's contention that the defendant's intestate is estopped from claiming his share by reason of an election to treat the will as valid. The doctrine is well established, that one who elects to take a devise or legacy under a will is estopped from setting up a claim which would defeat the operation of the will. . . . But this rule has no application to a case where the claimant takes no interest, legal or equitable, under the will. In the present case, the testatrix left nothing by her will to her husband. The allowance which was made to him by the Probate Court for his services as executor was only a fair compensation. We are therefore of opinion, that no election was made which estopped the defendant's intestate from claiming his share of the estate, or which amounted to a waiver of his claim."

Likewise, where a statute provided that the consent to take under the will must be entered on the record of the court, and the statute was not complied with, it was held that there was no election to take under the will. Houston v. Lane, 62 Ia. 291, 17 N. W 514.

TEAT

v.

LAND.

IN RE TEAT.

Louisiana Supreme Court—June 29, 1914

135 La. 782; 66 So. 199.

Jury — Exclusion from Jury Service.

A summary order barring persons from serving as jurors, because they returned a verdict of acquittal, where it is thought by the public that there should have been a conviction, is void, no law authorizing it, even under the maxim, salus populi suprema lex: it not being necessary, or useful, for exclusion of unfit jurors from juror service, and the infliction of punishment not being permissible, unless denounced by the Legislature, and unless preceded by trial.

[See note at end of this case.]

Application by I. H. Teat for writs of mandamus and prohibition to John R. Land, Judge of First Judicial District Court in and for Parish of Caddo. The facts are stated in the opinion. MANDAMUS GRANTED.

Lewell C. Butler for applicant.

[783] PROVOSTY, J.—The respondent judge having made, and caused to be entered upon the minutes of his court, an order forever barring the relator from serving as a juror in the parish of Caddo, the relator unsuccessfully applied to him to rescind said order as being ultra vires and null, and now seeks, by the present proceeding, to have this court, under its supervisory power over inferior courts, direct the respondent to rescind said order. The court of the respondent is the First judicial district court of the state and the sole court having jurisdiction in the parish of

Caddo, where the relator lives, of cases triable by jury.

The relator was one of the 12 jurors in the case of State v. Harvey S. Little and Anna Bond, His Wife. The verdict in this case was so different from what the public expected that a mass meeting was held at which the following resolutions were adopted:

"We confront a deplorable and intolerable situation that demands a remedy, and the remedy should be applied without delay and without favor. The facts are so stupendous, so bold, so astounding, that no right-thinking citizen can fail to see them and discern in them a significance that is appalling. These are the facts: High crime can be committed boldly in Caddo parish; human life can be taken, not in self-defense, nor in the hot passion of physical encounter, but with calmness and deliberation; a man can be shot down like a dog without a chance of defense or escape and without warning of his peril. Justice is invoked; the court assumes its responsibility; the trial is held before a jury; the verdict of acquittal is promptly returned; the law-living community is shocked beyond expression.

"It is not one instance only, but there are many instances, where justice has been violated and her plea has been unheeded. It has been an accumulation, with one instance boldly crowning all.

"We are not dumb, nor do we feel helpless, nor can we afford to remain passive. Therefore be it

"Resolved by the citizens of Caddo parish, in [784] mass meeting assembled: It is the sense of this meeting, and it is hereby urged upon the court, that the names of the jurors, to wit, J. G. Hester, George Ray, W. E. Ross, I. H. Teat, Robert Moss, Fred Whitmeyer, A. K. Lide, G. W. Thomas, O. C. Merret, L. M. Caraway, J. W. Kent, and R. H. Browning, who tried the case of the State v. Harvey S. Little and His Wife, Anna Bond Little, indicted for the murder of J. J. Van Cleve, be inscribed upon the records of the court, and they shall be forever barred as jurors in Caddo parish, for the reason that by their verdict of acquittal they have caused to be liberated the aforesaid Little and his wife, when the state had proved their quilt beyond a doubt. Such a verdict can be viewed in no other light than as a gross miscarriage of justice and of law, which, in its effect, is an encouragement to others who may be inclined to take human life on the flimsiest of pretexts, relying upon their plea of self-defense or the so-called unwritten law in justification of their murderous deeds."

This mass meeting is said to have numbered some 8,000, and to have been composed of the best elements of the city of Shreveport and parish of Caddo, and have been addressed by the leading citizens of that community, and we have no doubt, from the facts as stated by the respondent in his return, that its sense of outrage was fully justified; but we are constrained to hold that the remedy for the conditions thus complained of is not the one which our learned brother has adopted. We know of no law which authorizes such an order to be made. "Salus populi suprema lex" might be such a law, if such an order were necessary, or even useful, for the exclusion of unfit jurors from jury service; but it is not. It is not necessary, because our law has already made full and ample provision for the exclusion of unfit jurors; and it is not useful, because, if it stood as the sole authority for the exclusion of the relator as a juror, the relator could not be excluded. If the relator were excluded from some future trial, not because he was in fact an unfit person to serve on a jury, but because, whether he was fit or unfit, this order had legally disqualified him, the consequence would be that the verdict of the jury, from which the relator had thus been excluded, [785] would, for the reason of this exclusion of the relator, have to be set aside. Hence this order can serve no useful purpose, so far as concerns the exclusion of the relator from future jury service.

The only purpose it could possibly serve would be to punish relator, or to make of him an object lesson to future jurors; and it goes almost without saying that this cannot be done, in the absence of any law to authorize it. Under our law, punishment cannot be inflicted unless denounced by the Legislature and unless preceded by trial; and the law which invests all men with the inalienable rights of life, liberty, and the pursuit of happiness stands in the way of any person being thus summarily and autocratically made use of for the purpose of furnishing an object lesson to future jurors.

It is therefore ordered, adjudged, and decreed that a writ of mandamus issue to the Honorable John R. Land, judge of the First judicial district court in and for the parish of Caddo, directing and ordering him to rescind and cancel the order made by him on March 17, 1914, barring the relator herein, I. H. Teat, as a juror for the parish of Caddo.

NOTE.

Power of Court to Exclude Person from Jury Service.

In the reported case it appears that, pursuant to a resolution of a mass meeting of citizens dissatisfied with the verdict in a criminal case, an order was made excluding the members of the jury who rendered that verdict from future jury service. That order

the court holds to have been unauthorized, and on the petition of a member of the jury issues a writ of mandamus to compel its vacation. A very similar order was reviewed in People v. Murray, 85 Cal. 350, 24 Pac. 666. In that case it appeared that the prosecuting attorney moved to discharge from the jury list the members of a jury which had just returned a verdict. The trial judge, after criticizing the verdict, said: "This court has no further use for the twelve gentlemen that were sitting upon that panel. They will be discharged." The order being complained of by a person subsequently convicted at the same term, the court based its ruling on the ground that he was not prejudiced thereby, but commented on the order as follows: "It must be conceded that this was a novel proceeding. Ordinarily, a court would not be justified in discharging a jury because it had returned a verdict which did not meet with the approval of the court. But the verdict might be such as to convince the court that the jury had purposely and wilfully disregarded the evidence and returned a verdict in violation of their sworn duty. Under such circumstances the court would not only be justified in discharging the jurors, but it would be its duty to do so. The judge of the court below seems to have been of the opinion that the verdict returned in the case referred to was such as to justify the action taken, and in the absence of any showing to the contrary, we must presume in favor of the action of the court."

The reported case appears to be unique in respect to the fact that one of the excluded jurors made application for the vacation of the order of exclusion. The court refers to the order as a "punishment" by which the juror's "inalienable rights of life, liberty and the pursuit of happiness" are invaded. A somewhat different view of the nature of jury service was expressed in Garrett v. Weinberg, 54 S. C. 127, 31 S. E. 341, 34 S. E. 70, wherein it was said: "Indeed, service on a jury is not a matter of right, but a matter of public duty, the performance of which is enforceable by proper penalties. It cannot be regarded as a privilege, but on the contrary is usually regarded as a burden. Hence we see no reason why the state may not, from time to time, make such alterations in the law prescribing the qualifications of a juror by legislation, either constitutional or statutory, as the case may require, as may be regarded most conducive to the public welfare. A citizen cannot claim any vested right in any statutory privilege or exemption, unless it rests upon some consideration importing into it an element of contract."

JOHNSON

v.

FLORIDA EAST COAST RAILWAY COMPANY.

Florida Supreme Court—December 2, 1913.

66 Fla. 415; 63 So. 713.

Pleading — Demurrer — Specification Sufficient.

A specification in a demurrer that a "plea presents no defense to the cause of action," may not be wholly insufficient where the plea is short and contains specific statements.

Scope and Effect of Demurrer.

A demurrer is addressed to a plea as an entirety, and questions its legal sufficiency as the statement of a defense.

Same.

If, considered as a whole, a plea does not in substance sufficiently present all of the essential elements of a valid defense to the declaration or to a designated count thereof, to which it is directed, a demurrer thereto should be sustained.

Carriers of Passengers — Safe Place for Delivery of Baggage.

A primary duty of a railroad common carrier imposed by law is to maintain a suitable and safe place for the delivery of baggage to passengers at their destination on the carrier's line; and, in so far as it affects the safety of passengers in the delivery of their baggage, this duty cannot be delegated to another, whether it be a separate and independent corporation or a mere employee, so as to relieve the carrier of its legal liability for an injury to the passenger caused by the negligence of those engaged in delivering baggage to a passenger on the premises used by the carrier for that purpose.

[See note at end of this case.]

Same.

Whatever may be the rule of liability where injury is caused by the negligence of the employees of an independent contractor in other instances and circumstances, it does not operate to relieve common carriers from their primary duty to maintain safe accommodations for their passengers in the delivery to them of their baggage at the point of destination; nor does the rule exempt such carriers from the legal consequences of the negligence of those engaged in the delivery of baggage to passengers, whether those employed in such delivery be the employees of the carrier or other independent corporations using and directing their own employees in the delivery of baggage to passengers at their destination on the depot premises used by the carrier.

[See note at end of this case.]

Same.

The duty of the carrier to maintain a suitable and safe place for the delivery of baggage to passengers at their destination on the

carrier's line is not changed when the carrier uses the premises, employees and facilities of another independent corporation as its agency for such delivery of baggage to passengers.

[See note at end of this case.]

Same.

Whether the carrier owns or controls the premises or not, and whether the carrier exercises any authority or direction over the employees so engaged or not, the carrier is not relieved of the legal consequences of the negligence of the employees resulting in injury to a passenger of the carrier while properly engaged with the employees in receiving his baggage on the depot premises at his destination.

[See note at end of this case.]

Same.

In an action for injuries to a passenger alighting from a railroad company's train at his destination in the depot of an independent terminal company sustained by the falling of a trunk from a pile on the trunk platform, while the passenger was engaged in identifying his baggage for delivery, a plea that the terminal company "is a separate and independent corporation, engaged in receiving and delivering baggage to passengers" at the terminal depot over whose employees and over which corporation the defendant railroad company has no control, and is not engaged in any way in its management, and that the terminal company, its agents and servants are not the agents and servants of the defendant railroad company except for the purpose of storing and delivering baggage discharged from defendant's trains, does not state a defense to the action, since the duty of the defendant railroad company to provide a safe place for the delivery of baggage to passengers at their destination on the defendant's line cannot be delegated to another.

[See note at end of this case.]

(Syllabus by court.)

Error to Circuit Court, Duval county: GIBBS, Judge.

Action for damages. Nils Johnson, plaintiff, and Florida East Coast Railroad Company, defendant. Judgment for defendant Plaintiff brings error. REVERSED.

[417] The declaration alleges:

"Nils Johnson, plaintiff, by Richard P. Daniels, Jr., and Lucien H. Boggs, his attorneys, sues Florida East Coast Railroad Company, a corporation, defendant, for this to wit:—

That on to wit: the first day of April, 1908, and at all times thereafter, the defendant was and is the owner of a certain line of railway, and a common carrier of passengers thereon for hire to wit: from St. Augustine [418] Florida, to Jacksonville, Florida, and in connection therewith makes use of a certain terminal station in said Jacksonville, Florida, to wit: the terminal station of the Jacksonville Terminal Company, for the discharge, care and reception of passengers alighting from said trains, and their luggage; that on or about the first day of April, 1908, the plaintiff took passage upon the defendant's said line of railway, and the defendant accepted the plaintiff as its passenger, for certain reward to it in that behalf paid, to be conveyed from said St. Augustine to said Jacksonville and the plaintiff likewise then and there delivered to the defendant, and the defendant then and there received of the plaintiff, certain baggage of the plaintiff, to be likewise conveyed by the defendant from said St. Augustine to said Jacksonville; that after plaintiff's arrival in said Jacksonville, to wit, on the third day of April, 1908, the plaintiff at the invitation of the said Jacksonville Terminal Company, its agents or servants which was then and there the agent of said defendant for the purpose of the care, accommodation and reception of passengers and their baggage discharged from defendant's trains, entered upon the baggage premises, to wit: the baggage platform of said Jacksonville Terminal Company for the purpose of identifying his said baggage, and while so upon said baggage platform, one of a certain pile of trunks, carelessly, negligently and insecurely piled or left piled upon said platform, violently fell upon the plaintiff and broke his right leg, and the plaintiff thereby became and was sick, sore, wounded and bruised, and suffered great anguish of mind and body, and was forced to expend large sums of money for necessary medical attendance, nursing and hospital treatment, notwithstanding which the plaintiff became and is permanently [419] disabled and lame by reason of said injury to said limb. And plaintiff avers that said injury occurred to him by the negligence of the defendant, its agents, servants and employees in so inviting him to enter upon said baggage platform, which was then and there not a reasonably safe place, and in not maintaining said baggage platform in a reasonably safe condition.

Wherefore the plaintiff sues the defendant and claims Twenty Thousand Dollars damages."

Among other pleas the following was filed:

"And for a fifth plea the defendant says that the Jacksonville Terminal Company is a separate and independent corporation, engaged in receiving and delivering baggage to passengers going to and from Jacksonville, over whose employees and over which corporation the defendant has no control, and is not engaged in any way in its management, and that the said Jacksonville Terminal Company, its agents and servants are not the agents and servants of the defendant, except for the purpose of storing and delivering baggage discharged from defendant's trains, and for no

other purpose." A demurrer to this plea on the grounds that it presents no defense, that it is not responsive to the declaration, and that it admits the agency of the terminal company, was overruled. The plaintiff refused to join issue on this plea or to file a replication thereto. Final judgment for the defendant was rendered, and the plaintiff took writ of error.

Daniel & Boggs for plaintiff in error.
John E. Hartridge for defendant in error.

WHITFIELD, J. (*after stating the facts.*)—The declaration alleges that the defendant railroad company "makes use of . . . the terminal station of the Jacksonville Terminal Company for the discharge, care and reception of passengers alighting from (defendant's) trains, and their baggage;" that the defendant transported [420] the plaintiff and his baggage from St. Augustine to Jacksonville, and that "after plaintiff's arrival in Jacksonville, . . . the plaintiff at the invitation of the . . . Jacksonville Terminal Company, its agents or servants which was then and there the agent of said defendant for the purpose of the care, accommodation and reception of passengers and their baggage discharged from defendant's trains, entered upon the baggage premises, to wit: the baggage platform of said Jacksonville Terminal Company for the purpose of identifying his said baggage, and while so upon said baggage platform, one of a certain pile of trunks, carelessly, negligently and insecurely piled or left piled upon said platform, violently fell upon the plaintiff injuring him; and plaintiff avers that said injury occurred to him by the negligence of the defendant, its agents, servant and employees in so inviting him to enter upon said baggage platform, which was then and there not a reasonably safe place, and in not maintaining said baggage platform in a reasonably safe condition."

Under these allegations the negligence relied on by the plaintiff is "the negligence of the defendant, its agents, servants and employees in inviting him to enter upon said baggage platform which was not . . . a reasonably safe place, and in not maintaining said baggage platform in a reasonably safe condition." It is alleged that the defendant railroad company "makes use of . . . the terminal station of the Jacksonville Terminal Company, for the discharge, care and reception of passengers alighting from its trains, and their baggage," and that the Jacksonville Terminal Company was the agent of the defendant railroad company "for the purpose of the care, accommodation and reception of [421] passengers and their baggage discharged from defendant's trains."

The plea in effect avers that the terminal company "is a separate and independent corporation, engaged in receiving and delivering baggage, . . . over whose employees and over which corporation the defendant has no control, and (the said defendant) is not engaged in any way in its management," and that the terminal company, its agents and servants *are not the agents and servants* of the defendant, except for the purpose of storing and delivering baggage discharged from defendant's trains.

It is contended for the defendant that the specifications of the demurrer to the plea viz: that it presents no defense to the action, that it is not responsive to the declaration, and that it admits the agency alleged, are not proper grounds of a demurrer, if they be appropriate in a motion to strike the plea: and that the sufficiency in law of the plea as a defense to the declaration was not raised by the grounds of the demurrer.

Even if it can be said that the last two grounds of the demurrer do not properly question the legal sufficiency of the plea as a defense to the declaration as it is framed, the first specification is that the "plea presents no defense to the cause of action." This general ground of demurrer considered in the light of the specific statements of the rather brief pleadings, is not wholly insufficient to present the question of the legal sufficiency of the plea as a defense to the action.

A demurrer is addressed to a plea as an entirety, and questions its legal sufficiency as the statement of a defense. If, considered as a whole, a plea does not in substance sufficiently present all of the essential elements [422] of a valid defense to the declaration or to a designated count thereof, to which it is directed, the demurrer should be sustained.

Taken as a whole, the plea in substance avers that the terminal company is a separate and independent corporation engaged in receiving and delivering baggage to passengers, over whose employees the defendant has no control, and that as such separate and independent corporation the terminal company is the agent of the defendant only for the purpose of storing and delivering baggage discharged from defendant's trains. The question to be determined is whether the alleged negligence in inviting the plaintiff, a passenger alighting from the defendant's train, to the baggage platform of the terminal company and the alleged dangerous position of the trunks on the platform, can legally be attributed to the defendant railroad company.

A primary duty of a railroad common carrier imposed by law is to maintain a suitable and safe place for the delivery of baggage to passengers at their destination on the carrier's line; and in so far as it affects the safety of passengers in the delivery of their baggage, this duty cannot be delegated to another, whether it be a separate and independent corporation or a mere employee, so as to relieve

the carrier of its liability for an injury to the passenger caused by the negligence of those engaged in delivering baggage to a passenger on the premises used by the carrier for that purpose. See 2 Hutchinson on Carriers, Sec. 938. Whatever may be the rule of liability where injury is caused by the negligence of the employees of an independent contractor in other instances and circumstances, it does not operate to relieve common carriers from their primary duty to [423] maintain safe accommodations for their passengers in the delivery to them of their baggage at the point of destination; nor does the rule exempt such carriers from the legal consequences of the negligence of those engaged in the delivery of baggage to passengers, whether those employed in such delivery be the employees of the carriers or other independent corporations using and directing their own employees in the delivery of baggage to passengers at their destination on the depot premises used by the carrier. The duty of the carrier to maintain a suitable and safe place for the delivery of baggage to passengers at their destination on the carrier's line, is not changed when the carrier uses the premises, employees and facilities of another independent corporation, as its agency for such delivery of baggage to passengers. Whether the carrier owns or controls the premises or not, and whether the carrier exercises any authority or direction over the employees so engaged or not, the carrier is not relieved of the legal consequences of the negligence of the employees resulting in injury to a passenger of the carrier while properly engaged with the employees in receiving his baggage on the depot premises at his destination. See Thompson on Neg. Secs. 665, 669, 2804, 3392 and authorities cited; Herrman v. Great Northern R. Co. 27 Wash. 472. 68 Pac. 82, 57 L.R.A. 390; Bennett v. Louisville, etc. R. Co. 102 U. S. 577, 26 U. S. (L. ed.) 235; Illinois Cent. R. Co. v. Griffin, 80 Fed. 278, 53 U. S. App. 22, 25 C. C. A. 413; Montgomery, etc. R. Co. v. Thompson, 77 Ala. 448, 54 Am. Rep. 72; Penfield v. Cleveland, etc. R. Co. 29 App. Div. 413, 50 N. Y. S. 79; Floody v. Great Northern R. Co. 102 Minn. 81, 112 N. W. 875, 1081, 13 L.R.A.(N.S.) 1196; Elliott on Railroads (2nd ed.) Sec. 1590; Atlantic Coast Line R. Co. v. McCormick, 59 Fla. 121, 52 So. 712.

[424] The plea in effect avers "that the said Jacksonville Terminal Company, its agents and servants are . . . the agents and servants of the defendant, . . . for the purpose of storing and delivering baggage discharged from defendant's trains." The averment of the plea that the terminal company, "is a separate and independent corporation, engaged in receiving and delivering baggage to passengers going to and from Jacksonville, over whose employees and over which corporation the defendant has no control, and is not engaged in any way in its management," does not relieve the defendant common carrier of its legal liability for the negligence of the employees of its agents who are engaged in delivering baggage on the depot premises to passengers there alighting from defendant's train.

The averment of the quoted plea does not state the essential elements of a defense to the allegations of the declaration that "after plaintiff's arrival in Jacksonville . . . the plaintiff at the invitation of the said Jacksonville Terminal Company, its agents and servants which was then and there the agent of said defendant for the purpose of the care, accommodation and reception of passengers and their baggage discharged from defendant's trains, entered the baggage premises, to wit, the baggage platform of said Jacksonville Terminal Company for the purpose of identifying his said baggage, and while so upon the baggage platform, one of a certain pile of trunks, carelessly, negligently and insecurely piled or left piled upon said platform, violently fell upon the plaintiff" and injured him.

The terminal company and its employees while engaged on the depot premises in delivering baggage to a passenger alighting there from defendant's train, were performing [425] a primary duty imposed by law upon the carrier defendant to maintain a suitable and safe place for the delivery of baggage to passengers at their destination on its line which duty cannot be delegated so as to avoid responsibility for its performance; and the defendant carrier is liable for the legal consequences of a negligent performance of that duty by the employees of the terminal company.

The judgment is reversed.

Shackleford, C. J., and Taylor, Cockrell and Hocker, J. J., concur.

NOTE.

Duty of Carrier to Provide Safe Place for Delivery of Baggage to Passenger.

In the few instances in which the question has arisen, it has been held that it is the duty of a railroad company to provide and maintain a reasonably safe place for the delivery of baggage to passengers. Illinois Cent. R. Co. v. Griffin, 80 Fed. 278, 53 U. S. App. 22, 25 C. C. A. 413; Bates v. Chicago, etc. R. Co. 140 Wis. 235, 122 N. W. 745, 133 Am. St. Rep. 1069. And see the reported case.

In Bates v. Chicago, etc. R. Co. supra, the following facts appeared: The baggage room of the defendant was so constructed that a

depression or pit extended from the double doors at the west side of the room eastward into the room about twenty-four feet and nearly across the room. This was about two feet nine inches in depth and slightly wider than the baggage truck, and it was used for running the baggage truck into the room so that the platform of the truck would be practically on a level with the floor of the room. This was an obvious convenience in loading baggage on the truck and transferring the loaded truck from the baggage room to the platform which was on the lower level. At both sides and at the end of this pit or depression the floor of the baggage room was available for and used for the deposit of baggage. The plaintiff was a passenger on the defendant's road, and went into the baggage room with the baggage master to identify her baggage and have the same checked. Near where she stood there was a truck in the pit or depression, and she accidentally stepped between the edge of the truck and the edge of the pit or depression, breaking her leg and sustaining injuries. She had not noticed nor had her attention been called to the pit, depression, or truck up to this time. The jury found, in a special verdict, that the plaintiff when injured was in the baggage room of the defendant at the invitation of the baggage master, and that this baggage room was not then reasonably safe for the use of passengers invited thereto to identify their baggage, and that this condition of the baggage room was the proximate cause of the plaintiff's injury, and that there was no want of ordinary care on the plaintiff's part which contributed to the injury. The court said: "Upon this state of facts the defendant denies the right of the plaintiff to recover damages because the construction of the baggage room was 'an engineering problem,' and contends that its construction and maintenance was no breach of duty to any one; that it was a customary and usual mode of constructing baggage rooms and handling baggage and necessary to the easy and convenient operation of that branch of the carrying business; and that therefore the jury was not warranted in finding that the baggage room was not reasonably safe. . . . Generally speaking, and without reference to special statutes or exceptional rules, the law confers upon the master the right to construct and maintain his own property and appliances in his own way and according to his own judgment, and so long as there is no latent or hidden danger in such construction or maintenance the servant accepting employment from the master does so subject to this right of the master, and assumes the risk of injury from the open and obvious character of such appliances. Consequently in such cases, where the defect causing the injury presents a mere question of this kind, courts have sometimes designated it as a mere 'question of engineering,' meaning a question of judgment in the construction of the appliance. There is no legal rule or doctrine by force of which a court or jury is disabled from deciding a cause merely because in such decision there may be involved 'a question of engineering.' The expression relates to a condition of fact pertinent in cases between master and servant, and not to a rule of law. The rule above stated obtaining between master and servant and relied upon by appellant has no application between carrier and passenger, which was the relation of the parties in the instant case. As to the respondent it was the duty of appellant to have its baggage room reasonably safe. . . . Whether or not the appellant performed this duty may be a question of law or a question of fact, and the inquiry in the instant case is whether there was sufficient evidence to go to the jury on this point. . . . Whether the baggage room constructed as described was reasonably safe for the use of passengers claiming or identifying baggage therein was in the case at bar, we think a question for the jury, notwithstanding the particular defect which rendered it unsafe inhered in a plan of the room deliberately adopted and used at La Grosse and elsewhere by the appellant. Not that the jury may at its will condemn any plan or building as not reasonably safe, but facts and circumstances may be laid before them tending to show that the building is dangerous for the use to which it is put by the carrier, and it is for the court to say whether the evidence has any such tendency, and for the jury to pass upon its weight and sufficiency. No doubt, if the baggage room so constructed was only for the purpose of transferring baggage to and from outgoing and incoming trains with the truck described, there would be no evidence of its insufficiency for that purpose, but when it is also used as a place for passengers to enter and walk about in for the purpose of identifying baggage at all hours and under all conceivable conditions of congestion of baggage, it may well be found to have been so constructed as to be dangerous to those passengers so using it. The finding of the jury covers both construction and maintenance, and the maintenance of this unguarded opening in a baggage room used for such purposes might well, upon the evidence before the jury, be found to constitute a failure to maintain the baggage room in a reasonably safe condition. It is not necessary to this to say that a barrier or railing around the pit or opening would destroy or impair its efficiency for the purpose of loading or unloading and removing baggage. For such purposes the baggage room was reasonably safe. It is only when the additional use by

passengers for the purpose of identification is added that the room can be said not to have been reasonably safe for such additional use. Criticisms upon the instructions to the jury because such instructions permit the jury to consider whether or not the appellant was negligent in constructing and maintaining the pit in question are disposed of by these considerations."

In Illinois Cent R. Co. v. Griffin, 80 Fed. 278, 53 U. S. App. 22, 25 C. C. A. 413, wherein it appeared that the plaintiff entered the baggage room in order to point out the baggage wanted, at the invitation and for the benefit of the railroad company, and was injured by the falling of a defective door which she attempted to open, the court said: "The primary question, upon which all other questions of importance in this case turn, is whether the railroad company was under any duty to the defendant in error to make the baggage room a safe place. The contention of the plaintiff in error is that while railway waiting rooms, platforms, and the approaches thereto, are places to which the public having business with the railroad company are invited, a baggage room is necessarily a private place, where the one who goes without invitation, express or implied, is a trespasser, or at best a mere licensee, to whom no duty is owing, and that in this case, there being no pretense of an express invitation to the plaintiff to enter the room, there was no implied invitation, because she entered solely for her own convenience; the proper place for receiving her baggage being at the door or on the platform outside, and her presence inside being in no sense to the advantage of the company. We do not agree that a baggage room at a railway station, when open for the reception and delivery of baggage, is a private room, as against owners of baggage who are permitted to enter. In its relation to the public, the company is represented by the baggage master or other employee whom it puts in charge of the room; and, if an owner of baggage enters upon the invitation or by permission of the baggage master, it is the invitation or permission of the company; and whether, in a given instance, one who goes in by permission does it only for his own benefit, or for the advantage of both parties, must ordinarily be a question for the jury. If thereby the baggage master is aided in the performance of his duties or labors, the company which he represents is benefited. In this case the baggage master was told before he opened the door that a part of three pieces of baggage was wanted, and it was certainly to his convenience that the part or piece desired should be pointed out without his being required to bring the three pieces to the door or platform; and when he passed in, leaving the door open and giving no admonition to Miss Griffin to stay out, it was, to say the very least, a question for the jury whether she was not invited to go in. . . . The evidence in that respect being sufficient to support the verdict, it must be assumed, for the present purpose, that the entrance of the defendant in error into the baggage room was at the invitation and for the benefit of the railroad company, as well as for her own convenience; and, that conceded, the evidence which tended to establish negligence on the part of the defendant, and freedom from fault on the part of the plaintiff, was such as to forbid the withdrawal of the case from the jury."

In the reported case, it appears that the station at which the plaintiff was injured was the property of a terminal company, an independent corporation, engaged in receiving and delivering their baggage to passengers, over whose employees the defendant had no control, and that as such a separate and independent corporation the terminal company was the agent of the defendant only for the purpose of storing and delivering the baggage discharged from the defendant's trains, and that the station was also used by the defendant for the discharge, care and reception of its passengers. It also appears that the plaintiff was injured while he was on the baggage platform of the station at the invitation of the terminal company. In holding the defendant liable for the plaintiff's injuries, the court declares that it is the duty of a railroad carrier to provide a suitable and safe place for the delivery of their baggage to its passengers and that this duty is not changed, though the carrier uses the premises, employees or facilities of another independent corporation, as its agents. It is further held that in so far as the safety of the passengers in the delivery of their baggage is concerned, this duty to provide a reasonably safe place cannot be delegated and the railroad company thereby relieved of its liability for an injury to a passenger caused by the negligence of those engaged in delivering baggage to a passenger on premises used by the carrier for that purpose. Nor does the fact that the carrier uses the premises of another or that it does or does not exercise any control or authority over the employees so engaged, relieve it of its liability.

In Pineus v. Atlantic Coast Line R. Co. 140 N. C. 450, 53 S. E. 297, 111 Am. St. Rep. 856, the evidence showed that on the plaintiff's arrival at a certain station, his trunks were placed with checks on them in the defendant's warehouse by the direction of the defendant's agent. The warehouse was on the defendant's right-of-way and was used by the defendant for freight purposes, and passengers' baggage was stored and handled in the warehouse. The plaintiff's baggage

had been previously stored there and he had gotten on and off the train there. Shortly before the arrival of the next train the defendant's agent sent his clerk with the plaintiff to this warehouse for the purpose of rechecking the trunks. After rechecking the trunks the plaintiff started to take the approaching train. It was at night. There was no light on the platform and it was encumbered with cotton. The plaintiff stepped into a hole in the platform and was injured. The court said: "If these facts are true plaintiff was a passenger when injured. He had a right to seek his baggage and recheck it. It matters not whether Sharpsburg was a regular or a flag station, the defendant owed plaintiff the duty to provide a safe platform, especially as plaintiff entered on it at invitation of defendant's agent for a legitimate purpose. . . . The duty of a railroad company in respect to keeping safe station premises extends to all who rightfully come upon the premises in pursuance of the invitation which it holds out to the public, and embraces all who come there on legitimate business to be transacted with its agent."

MALAKIA

v.

RHODE ISLAND COMPANY.

Rhode Island Supreme Court—January 28, 1914.

36 R. I. 149; 89 Atl. 337.

Carriers of Passengers — Contributory Negligence — Extending Arm Outside Car.

Plaintiff, while riding on an interurban car, to flick the ashes from his cigar thrust his hand over the guard rail a sufficient distance beyond the side line of the car to bring it in contact with the trunk of a tree standing beside the track; the force of the blow breaking his wrist. Held, that he was guilty of contributory negligence as a matter of law.

[See note at end of this case.]

Exceptions from Superior Court, Kent county: STEARNS, Judge.

Action for damages. Joseph Malakia, plaintiff, and Rhode Island Company, defendant. Judgment for defendant. Plaintiff alleges exceptions. The facts are stated in the opinion. AFFIRMED.

Alberic A. Archambault and *Raoul Archambault* for plaintiff.

Joseph C. Sweeney and *Alonzo R. Williams* for defendant.

[150] VINCENT, J.—This is an action of trespass on the case for negligence and was tried to a jury in the Superior Court, in Kent County. At the conclusion of the testimony for the plaintiff, the presiding justice, on motion of the defendant, adjudged the plaintiff nonsuit to which the plaintiff duly excepted. Said exception is now before this court.

The plaintiff claims that the Superior Court erred in granting the defendant's motion for a nonsuit because (1), whether or not plaintiff was guilty of such contributory negligence as would bar him from recovery was a question for the jury; that (2), the plaintiff's case was sufficiently made out and the proof of the proximity of the tree to the tracks was sufficient to show negligence on the part of the defendant; and, therefore, the question as to the negligence of the defendant should have been left to the jury.

It appears from the evidence that on Sunday morning, July 21, 1912, the plaintiff boarded one of the defendant's cars, bound to Providence, at or in the vicinity of the village of Natick and seated himself upon the extreme left of the second seat from the rear end, being one of the smoking seats, so-called. The guard rail on the left hand side of the car was down. The plaintiff was smoking a cigar. When the car was turning from Reservoir Avenue into Elmwood Avenue, the plaintiff in flicking the ashes from his cigar extended or thrust his left hand over the guard rail and a sufficient distance beyond the side line of the car to bring the heel of the palm of the hand in contact with the trunk of a tree standing beside the track, the force of the blow breaking his wrist.

In his testimony at the trial the plaintiff admitted that he had been a passenger upon this line of the defendant's cars once or twice a week for a period of twelve years and that during that time he had known of the trees along the side of the track. The plaintiff also testified that when he extended his hand in flicking the ashes from his cigar he did not look to see where his hand was going.

[151] The evidence does not show definitely the distance to which the plaintiff must have extended his hand to bring the heel of the palm in contact with the tree. He estimates the distance at not more than six or seven inches but it is evident that six or seven inches would not carry it beyond the line of the car. Adding to the line of the car the measurement of the hand from the end of the fingers to the heel of the palm, which would be some five or six inches, it is evident

that the plaintiff is mistaken as to the distance to which he extended his hand, a mistake which is not surprising as he confessedly was paying no attention to what he was doing. It is not, perhaps, under the circumstances of this case, important to determine the exact distance which the plaintiff extended his hand beyond the guard rail. That he extended it a considerable or substantial distance is clear from his own testimony and the testimony of other witnesses. The plaintiff admits that in extending his hand beyond the guard rail he did so with the full knowledge that there were trees in close proximity to the track and that he did not look or make any effort whatever to ascertain the safety of the movement which he was about to make. While the position of the guard rail would deter passengers from alighting from that side of the car it would also be a notice to them to keep their bodies and limbs within the same and not expose themselves beyond the line thereof.

The great weight of authority in this country seems to support the proposition that a passenger upon a car who rides with his arm or hand out of the window or otherwise allows his hand or arm to extend outwardly beyond the side line of the car is not in the exercise of due care, but is guilty of contributory negligence. Elliott on Railroads, Volume 4, Section 1633; Todd v. Old Colony, etc. Ry. 3 Allen (Mass.) 18, 80 Am. Dec. 49; Cummings v. Worcester, etc. Ry. 166 Mass. 220, 44 N. E. 126; Moore v. Edison Electric Ill. Co. 43 La. Ann. 792, 9 So. 433; Indianapolis, etc. R. Co. v. Rutherford, 29 Ind. 82, 92 Am. Dec. 336; Benedict v. Minneapolis, etc. R. Co. 86 Minn. 224, 90 N. W. 360, 91 Am. St. Rep. 345, 57 L.R.A. 639; Clarke v. Louisville, etc. R. Co. 101 Ky. 34, 39 S. W. 840, 36 L.R.A. 123; Dun v. Seaboard, etc. R. Co. 78 Va. 645, 49 Am. Rep. 388.

[152] Many other cases, to the same effect, cited in the opinions are not included in the above.

The plaintiff has cited numerous authorities in support of his contention that the trial court erred in granting the nonsuit and that the question of the plaintiff's contributory negligence should have been left to the jury. All of these cases have been carefully examined and we think that they are readily distinguishable from the case at bar. In some of them the question of the plaintiff's contributory negligence rested upon disputed facts while in others the questions raised by the facts were those upon which reasonable minds might differ. In the case at bar, as we have already seen, there are no material disputed facts, and reasonable minds could hardly differ as to the plaintiff's contributory negligence when he admits that the guard rail was down, that he knew of the proximity of the trees, and that he did not even take the precaution to look before thrusting his hand out beyond the line of the car. Without attempting to distinguish each and all of the cases which the plaintiff cites in his brief and point out the features which distinguish them from the case at bar, a reference to some of them may be advantageous.

In the case of Elliott v. Newport St. R. Co. 18 R. I. 707, 28 Atl. 338, 31 Atl. 894, 28 L.R.A. 208, the plaintiff, with others, was riding upon the footboard of one of defendant's cars, holding on to two of the stanchions supporting the roof of the car, on either side of him, with his face turned toward the opposite side of the car. The plaintiff had never ridden over that part of the defendant's road before that time and was ignorant of the location of the trolley pole by which he was struck. After passing eight of the trolley poles safely, the plaintiff, while in the act of taking his fare from his pocket, came in contact with the ninth trolley pole erected on the edge of the curbstone and ten and one-half inches from the outer edge of the footboard on which the plaintiff stood and was thrown to the ground and injured. The plaintiff was riding on the footboard without objection and there was testimony [153] that he did not hear any warning as to the danger of contact with the trolley poles. The court held that under all these circumstances and conditions the question of contributory negligence should have been left to the jury. It is quite different from the case at bar where the plaintiff was fully acquainted with the situation and made no effort to look out for his own safety.

In the case of Dahlberg v. Minneapolis, St. R. Co. 32 Minn. 404, 21 N. W. 545, 50 Am. Rep. 585, the plaintiff sat down at an open window in the defendant's car resting his hand upon and grasping the window sill so that his fingers only were outside of the car. While the car was passing, at considerable speed, a plank sheathing surrounding the construction work of a sewer, one of the planks, only one inch from the car, grazed his fingers. The plaintiff had no knowledge of the situation. There was also conflicting testimony upon several points and the court held that the case was for the jury, but stated the general proposition of law that if a man should thrust his hand outside of a car window carelessly and negligently, so as to come in contact with an object which was at a reasonably safe distance from the car, he could not recover at all. The facts in that case do not seem to warrant its application to the case at bar.

In the case of Kird v. New Orleans, etc. R. Co. 109 La. 525, 33 So. 587, 94 Am. St. Rep. 452, 60 L.R.A. 727, the injury to the plaintiff occurred by coming in contact with

a bale of cotton placed upon and overhanging the defendant's platform to such an extent that it grazed the cars as they passed and struck the plaintiff's elbow which was resting on the window sill. We think that that case presented very different conditions from the case at bar.

In Francis v. New York Steam Co. 114 N. Y. 380, 21 N. E. 988, there was a conflict of testimony as to whether the plaintiff's arm, at the time of the accident, was wholly within the car or protruding therefrom. In Beaver v. Atchison, etc. R. Co. 56 Kan. 514, 43 Pac. 1136, the question was as to defendant's negligence in dumping a pile of cinders between two tracks where its inspector, the plaintiff, was required to pass in the discharge [154] of his duty. In Detroit, etc. R. Co. v. Van Steinburg, 17 Mich. 99, where the plaintiff sought to recover damages for injuries sustained by being struck by defendant's locomotive at a crossing, the testimony as to speed, warning, and the conduct of the plaintiff was conflicting. In Cummings v. Wichita R. etc. Co. 68 Kan. 218, 1 Ann. Cas. 708, 74 Pac. 1104, the plaintiff was riding in an open car without screens or guard rails, his back toward the front of the car. The track was double with trolley poles between. The car was wider than those previously used by the defendant, but the difference in width was unknown to the plaintiff. The position of the trolley poles had not been changed. The court said: "Might not plaintiff, by the absence of a rail or screen, have been assured that there was no danger to be apprehended."

The other cases cited by the plaintiff are as readily distinguishable from the case at bar as the cases to which we have specifically referred and we do not think that they need to be separately considered.

We think that the nonsuit was fully justified by the evidence. The plaintiff's exception is overruled and the case is remitted to the Superior Court with direction to enter judgment for the defendant upon the nonsuit.

NOTE.

Contributory Negligence of Passenger in Permitting Part of His Body to Protrude from Car.

Introductory, 1218.
Passenger on Steam or Electric Train, 1218.
Passenger on Street Car, 1219.

Introductory.

The purpose of this note is to review the more recent cases which have passed on the question whether it is negligence as a matter of law for a passenger to allow a part of his body to protrude from the car in which he is riding, or whether the question of his negligence ought to be determined by the jury. The earlier cases are reviewed in the notes to Cummings v. Wichita R. & C. Co. 1 Ann. Cas. 708 and Interurban R. etc. Co. v. Hancock, 116 Am. St. Rep. 710.

Passenger on Steam or Electric Train.

The later decisions are in accord with the majority view that it is negligence per se for a passenger, on a steam or electric train voluntarily or inadvertently to permit any part of his person to protrude beyond the outer surface of the car. Hewes v. Chicago, etc. R. Co. 119 Ill. App. 393, *affirmed* 217 Ill. 500, 75 N. E. 515; Benedict v. Minneapolis, etc. R. Co. 86 Minn. 224, 90 N. W. 360, 91 Am. St. Rep. 345, 57 L.R.A. 639; Talbert v. Charleston, etc. R. Co. 97 S. C. 465, 81 S. E. 182; Rose v. Northern Pac. R. Co. 81 Wash. 684, 143 Pac. 145, L.R.A.1915B 166. Thus in Hewes v. Chicago, etc. R. Co. supra, it was held that it was negligence as a matter of law for a passenger to stand on the lower step of a railroad car and to swing his body out from the car a distance of some six inches where it appeared that the next stopping place was one hundred and fifty to two hundred feet ahead. To the same effect see Rose v. Northern Pac. R. Co. 81 Wash. 684, 143 Pac. 145, L.R.A.1915B 166. Likewise in Benedict v. Minneapolis, etc. R. Co. 86 Minn. 224, 90 N. W. 360, 91 Am. St. Rep. 345, 57 L.R.A. 639, wherein it appeared that the plaintiff's intestate leaned out from a car platform beyond the line of the car and was struck by a post adjacent to the track it was held that he was negligent and no recovery could be had for his death. So in Talbert v. Charleston, etc. R. Co. 97 S. C. 465, 81 S. E. 182, the court, in holding that an injured passenger was guilty of negligence, said: "No other reasonable inference can be drawn from the evidence but that the injury to the plaintiff was due to his own contributory negligence. He left the coach provided for passengers: had he remained there he would have been safe. He went on the platform; had he remained there he would have been safe. He descended the steps and stood on the lowest step in the company's yard; had he even then exercised due care and precaution, he would not have been injured, but he poked his head out beyond the line of the cars and looked backwards instead of forward, and was injured. His whole action was careless and negligent, and showed a total absence of care and precaution on his part."

But in Devine v. Chicago, etc. R. Co. 177 Ill. App. 360, wherein it appeared that the plaintiff was sitting on the second step of a railroad car because the door leading into the car was locked and the platform of the

car ahead was crowded, and that he suffered injuries because his leg, which he stretched out beyond the line of the car, was struck by an iron girder some eight inches from the car, it was held that the question of his negligence was for the jury. The court said: "It is insisted, however, that in stretching out his leg while seated there, Ruhle was carelessly and even recklessly unmindful of his duty to use such care as his situation required. But this was a most natural thing to do, and was an act fraught with no danger whatever under ordinary circumstances. Whether it was negligence per se depends, therefore, upon his knowledge, or means of knowledge, of the existence and location of the iron girder. There is no evidence that he had any actual knowledge. There was no gate or other barrier to serve as a warning. There was evidence that one of the trainmen warned the women who sat on the steps on the other side of the platform, but none that Ruhle or his companions were thus warned. There was also evidence that the train passed three or four similar girders after leaving Halstead Street and before it reached the girder at Throop street, but the top of the girders was only a little higher than the floor of the cars and there is no evidence tending to show that the girders would be likely to attract the attention of passengers in passing, nor that the train in fact passed any of such girders after Ruhle took his seat upon the steps. Furthermore, the platforms being vestibuled, the view of Ruhle was obstructed in all directions except straight out through the open door of the vestibule, and therefore any object which the train passed as close as these girders were to the train, would only appear in sight for an instant to those who were seated upon the platform or steps. Under these circumstances, we think it cannot be held, as a matter of law, or found, as a conclusion of fact, that Ruhle did not exercise that degree of care for his own safety which a reasonably prudent man in the same situation and with the same knowledge or means of knowledge, would have exercised under like circumstances."

It has been held that it was not negligence per se for a passenger on a crowded electric train to sit in the doorway of the baggage compartment of a car with his legs hanging outside, where it appeared that he took this position at the implied invitation of the trainmen who spread papers at the door for passengers to sit on, and that the conductor had taken tickets from passengers who during the trip occupied the same seat. Shields v. Minneapolis, etc. Electric Traction Co. 124 Minn. 327, 144 N. W. 1092, 50 L.R.A.(N.S.) 49.

Where a passenger's hand was injured by reason of a window falling on it while she was riding in a railroad coach, it was held that the question of her negligence was for the jury though it appeared that in spite of the fact that the window had fallen twice in her presence she thereafter placed her hand in such a position that it was hit by the window in its third fall. Cincinnati, etc. R. Co. v. Lorton, 110 S. W. 857, 33 Ky. L. Rep. 680.

Passenger on Street Car.

It has been held that it is negligence per se for a passenger in a swiftly moving interurban electric car purposely and unnecessarily to extend his arm out of a window of the car. Interurban R. etc. Co. v. Hancock, 75 Ohio St. 88, 3 Ann. Cas. 1036, 78 N. E. 964, 116 Am. St. Rep. 710, 6 L.R.A.(N.S.) 997. And the reported case holds it to be negligence, as a matter of law for a passenger on an open car to reach his arm out over a guard rail which runs along left side of the car.

The weight of authority, however, is that in the case of street cars the question whether a passenger is guilty of negligence in permitting part of his body to protrude from the car is for the jury. Georgetown, etc. R. Co. v. Smith, 25 App. Cas. (D. C.) 259, 5 L.R.A. (N.S.) 274; Chapman v. Capital Traction Co. 37 App. Cas. (D. C.) 479; Salmon v. City Electric R. Co. 124 Ga. 1056, 53 S. E. 575; Pell v. Joliet, etc. R. Co. 238 Ill. 510, 87 N. E. 542; La Barge v. Union Electric Co. 138 Ia. 691, 116 N. W. 816, 19 L.R.A.(N.S.) 213; Wichita R. etc. Co. v. Cummings, 72 Kan. 694, 84 Pac. 121; Schloemer v. St. Louis Transit Co. 204 Mo. 99, 102 S. W. 565; Gardner v. Metropolitan St. R. Co. 223 Mo. 389, 18 Ann. Cas. 1166, 122 S. W. 1068; Smith v. St. Louis Transit Co. 120 Mo. App. 328, 97 S. W. 218; Boldt v. San Antonio Traction Co. (Tex.) 148 S. W. 831. See also Simpson v. Toronto, etc. R. Co. 16 Ont. L. Rep. 31, 10 Ont. W. Rep. 39, 11 Ont. W. Rep. 207. Thus it has been held that the question of negligence is for the jury where a passenger allows his arm to protrude through an open barred car window beyond the outer surface of the car. Chapman v. Capital Traction Co. 37 App. Cas. (D. C.) 479 (protrusion of four and one-half inches); Gardner v. Metropolitan St. R. Co. 223 Mo. 389, 18 Ann. Cas. 1166, 122 S. W. 1068 (slight protrusion); Smith v. St. Louis Transit Co. 120 Mo. App. 328, 97 S. W. 218 (slight protrusion). Boldt v. San Antonio Traction Co. (Tex.) 148 S. W. 831 (protrusion of two to four inches). And the same ruling has been made where the window was open and unguarded. Pell v. Joliet, etc. R. Co. 238 Ill. 510, 87 N. E. 542, wherein the court said: "In the absence of barrier or warning a passenger is not bound to presume that other cars will pass so close as barely to miss the car in which he is riding. There is usually a reasonable space

between the passenger car and any structure or passing car, and at any rate the court could not say that cars are usually operated in such close proximity as they were in this case and that the passenger ought to have known that fact. The question whether the plaintiff was guilty of negligence contributing to his injuries was one of fact, and in determining that question the manner in which the plaintiff was sitting, the facts that he had his arms on the window sill and projecting somewhat beyond it, and was holding the sill with his hand, were to be considered by the jury, the trial court and the Appellate Court; but the question was not one of law, to be determined by the court on the motion to withdraw the case from the jury and direct a verdict." So in Salmon v. City Electric R. Co. 124 Ga. 1056, 53 S. E. 575, wherein it appeared that a person who was riding on the rear unenclosed platform of a street car received injuries to his head when he projected it some two or three inches beyond the side line of the car in order to expectorate, it was held that the question of his negligence was for the jury. Likewise in La Barge v. Union Electric Co. 138 Ia. 691, 116 N. W. 816, 19 L.R.A. (N.S.) 213, wherein it appeared that a person who was standing inside of an open street car at the extreme left hand side thereof, next to a guard rail, was struck on the head by a car which came from the opposite direction, when he, in laughter, momentarily threw back his head so that it extended from three to six inches beyond an upright post which marked the side of the car, it was held that he was not, as a matter of law, negligent.

In *New York* the rule is still, as laid down in the case of Tucker v. Buffalo R. Co. 53 App. Div. 571, 65 N. Y. S. 989, that whether the question of negligence in such cases is one of law or fact must be determined by the circumstances of the case. Goller v. Fonda, etc. R. Co. 110 App. Div. 620, 96 N. Y. S. 483, wherein it was held that it could not be said as a matter of law, even though some part of a passenger's arm extended beyond a screen running across the outside of a street car window (it did not appear exactly how great the protrusion was) that the passenger was guilty of negligence.

A passenger who rests his arm on the sill of an open window in a car, without protruding it beyond the car, from which position it is thrown outside of the car by a sudden jolt, cannot be held to be guilty of negligence as a matter of law. Jacksonville Electric Co. v. Dillon, 67 Fla. 114, 64 So. 669. See also Schloemer v. St. Louis Transit Co. 204 Mo. 99, 102 S. W. 565; Lange v. Metropolitan St. R. Co. 151 Mo. App. 500, 132 S. W. 31. Nor is it negligence per se for a person who is suddenly seized with nausea to thrust his head out of an open street car window which is neither screened nor barred, by reason of which action his head comes in contact with a plank near the track and is injured. Lacey v. Minneapolis St. R. Co. 118 Minn. 301, 136 N. W. 878. And it has been held that the question of negligence was for the jury where a person who had become ill left his seat on the inside of a street car, went to the rear platform and leaned about six inches beyond the outer surface of the car in order to vomit. Gage v. St. Louis Transit Co. 211 Mo. 139, 109 S. W. 13. On the other hand in Christensen v. Metropolitan St. R. Co. 137 Fed. 708, 70 C. C. A. 657, it was held that it was negligence per se for a passenger on a moving street car, who had suddenly become ill and who wished to vomit, to arise from his seat and thrust his head through an open window which was screened to a height of fourteen to sixteen inches above the sill, leaving an open space of about fourteen inches between the top of the screen and the top of the window.

CROUCH
v.
SOUTHERN SURETY COMPANY.

Tennessee Supreme Court—March 20, 1915.

131 Tenn. 260; 174 S. W. 1116.

Fidelity Insurance — Recovery of Premium.

Where a county trustee gave bond with a surety company as surety for the faithful performance of his duties, and paid a premium of $4,000 in advance, and died after six months, during which time the bulk of the funds passing through his hands were collected and disposed of, his administratrix cannot recover back one-half of the premium, since the risk had attached, and neither it nor the premium can be apportioned.

[See note at end of this case.]

Pleading — Necessity of Answer.

Where a bill seeking a recovery of part of advance premium paid for surety bond on ground of insured's death at expiration of half of period raises questions of estoppel and waiver which the demurrer does not reach, such questions require an answer.

Appeal from Chancery Court, Davidson county: ALLISON, Judge.

Action to recover premium. Mrs. Josie A. Crouch, plaintiff, and Southern Surety Company, defendant. Judgment for plaintiff.

Defendant appeals. The facts are stated in the opinion. REVERSED.

Aust & McGugin and *A. G. Moseley* for appellant.

Thos. H. Malone and *Larkin E. Crouch* for appellee.

[261] GREEN, J.—Peter W. Crouch was elected trustee of Davidson county at the August election in 1912. He was inducted into office in September, 1912, and gave bond in the sum of $1,000,000 to the State and county, to secure the faithful performance of his duties during his term, with the defendant company as surety on his bond. At the same time a contract was entered into between Mr. Crouch and the defendant company, whereby the latter agreed to become his surety for a premium of $4,000 per annum. The first year's premium was paid in advance.

Mr. Crouch died in February, 1913, about six months after he qualified as trustee. This suit was brought by his widow, as administratrix, to recover $2,000, or one-half of the first annual premium paid to defendant company as aforesaid.

A demurrer was interposed by the defendant, which was overruled by the chancellor, and defendant permitted to appeal.

The first ground of demurrer makes the point that, when Mr. Crouch took charge of the office, the entire risk was assumed by the defendant and the entire premium earned under the contract; that the premium was not apportionable, and complainant was not entitled to a return of any part thereof, even though Mr. [262] Crouch died when about one-half of the year for which he was bonded remained.

The defendant invokes the rule applicable to marine insurance, life insurance, and fire insurance that, where a risk has once attached, even for a moment, the insured is not entitled to a return of any part of the premium paid.

This rule seems to have been first announced by Lord Mansfield, in the case of Tyrie v. Fletcher, 2 Cowp. (Eng.) 666. In that case a ship was insured for twelve months at a stipulated premium, but was captured by an enemy in about two months after sailing, and suit was brought against the insurer for a return of a proportionate part of the premium.

Lord Mansfield said:

"If the risk of the contract of indemnity has once commenced, there shall be no apportionment or return of premium afterwards. For, though the premium is estimated, and the risk depends upon the length and nature of the voyage, yet, if it has commenced, though it only be for twenty-four hours or less, the risk is run; the contract is for the whole entire risk, and no part of the consideration shall be returnable. They might have insured from two months to twelve months, or in any less or greater proportion, if they had thought proper so to do; but the fact is they have made no division of time at all, but the contract entered into is one entire contract from August 19, 1776, to August 19, 1777, which is the same as if it had expressly said: '. . . If you, the underwriter, [263] will insure me for twelve months, I will give you the entire sum; but I will not have any apportionment.' The ship sails, and the underwriter runs the risk for two months. No part of the premium shall be returned."

This case has been universally followed, and the rule therein stated has been applied to life insurance, fire insurance, and casualty insurance contracts. May on Insurance, section 567; Joyce on Insurance, section 1420; Mutual L. Ins. Co. v. Kelly, 114 Fed. 268, 52 C. C. A. 154; Dickerson v. Northwestern Mut. L. Ins. Co. 200 Ill. 279, 65 N. E. 694; New York F. Marine Ins. Co. v. Roberts, 4 Duer (N. Y.) 141; Waters v. Allen, 5 Hill (N. Y.) 421; Connecticut Mut. Ins. Co. v. Pyle, 44 Ohio St. 19, 4 N. E. 466, 58 Am. Rep. 781; Hoyt v. Gilman, 8 Mass. 336; Joshua Hendy Machine Works v. American Steam-Boiler Ins. Co. 86 Cal. 248, 24 Pac. 1018, 21 Am. St. Rep. 33; Blaeser v. Milwaukee Mechanics' Mut. Ins. Co. 37 Wis. 31, 19 Am. Rep. 747.

This rule, in fact, seems not to have been questioned in any American case, but has been accepted and applied by the courts as settled law.

This rule is said to be based on just and equitable principles, for the insurer has, by taking upon himself the whole peril, become entitled to the whole premium, and, although the application of the rule may result in profit to the insurer, it is but a just compensation for the dangers or perils assumed. It has also been pointed out that the danger incurred may be greater in one moment than during the entire voyage, and it would be extremely difficult to fairly apportion the premium, [264] if a recovery of any part thereof were permissible. Joyce on Insurance, section 97.

It is difficult to see why this rule should not apply with equal vigor to fidelity insurance. Upon what fair basis can the premium, the consideration paid for undertaking the risk of fidelity, be apportioned?

This hazard is proportioned to the fallibility of the subject of insurance, and its extent is measured by the amount of funds in his custody. Moral stamina is a varying quantity, even in the same person. It is influenced by many things. It is impossible to say at what time the temptation of

an individual bonded is greatest and the greatest risk is being run by the surety. Likewise the amount of money in the hands of the official, or the employee, fluctuates from day to day, and it is difficult and often impossible to determine on what day the liability of the surety is greatest in extent.

Who can say how much of the surety's risk was run during any given period? How then can it be determined what part of the premium has been earned during any given period? A premium cannot be apportioned where a risk is unapportionable. Premium and risk are interdependent and inseparable. It being impossible to say what part of a risk has been run, it is likewise impossible to say what part of a premium is unearned—what part should be returned.

The case before us illustrates the difficulty of attempting an apportionment of premiums in fidelity insurance, for it here appears that the great bulk of [265] the funds passing through this official's hands were collected and disbursed by him on one month of the twelve for which he was bonded. That is to say, this surety's risk was greater in extent for this one month than during the remaining eleven months combined.

An argument is made on behalf of Mrs. Crouch in which it is urged that this contract of suretyship should be treated as a contract for personal services, which it became impossible to execute by reason of the death of one of the parties, and it is insisted that only so much of the consideration should be retained as might be recovered on a *quantum meruit*.

All insurance, fire and life, as well as guaranty, is somewhat personal in its nature, resting to a great extent on the reputation and character of the insured, but all such contracts are essentially entire. It is impossible to say what part of the risk has been run, or how much of the consideration has been earned at any particular time during the period of insurance. Even though, therefore, the completion of such a contract becomes impossible, there is no way to fix the value of the services rendered.

We think, therefore, the chancellor was in error in overruling the first ground of demurrer. It is impossible to apportion such a hazard, and the whole risk having attached, there can be no return of any part of the premium, upon the facts so far stated.

The bill contains other features, which we have not commented upon, with reference to certain dealings between the complainant and the surety company after [266] the death of Mr. Crouch. In these negotiations it is averred that Mrs. Crouch permitted the defendant to take charge of the trustee's office and obtain certain fees therefrom, after her husband's death, with the understanding that a portion of this premium was to be returned to her. Some questions of estoppel and waiver are made by the bill which the demurrer does not reach. At any rate, the matters so alleged require an answer. The chancellor correctly so held, overruling other grounds of demurrer.

The case will therefore be remanded for answer and further proceedings, and the surety company will pay the costs of this appeal.

NOTE.

Recovery of Premium Paid for Fidelity Insurance.

The reported case holds that where a public officer who has given a fidelity insurance bond dies during his term his personal representative is not entitled to a refund of the unearned portion of the premium. No other case appears to have passed on the recovery of unearned premiums paid for fidelity insurance, but the reported case applies the rule which has been held consistently as to insurance of other kinds. The prevailing doctrine seems to be that a recovery back is allowed (1) if the risk has never attached, (2) if the insurer withdraws from the contract, or (3) if the insured cancels the contract pursuant to a reserved option. See 16 Am. & Eng. Ene. Law p. 954. As to the recovery back of premiums paid for life insurance, see the note to Metropolitan L. Ins. Co. v. Felix, 4 Ann. Cas. 121. In the recent case of Plummer v. Insurance Co. of North America (Me.) 95 Atl. 605, it was said of a recovery back of the premium paid on a marine policy: "Where the policy has once attached and the risk is entire there can be no such recovery." In Maryland Casualty Co. v. Little Rock R. etc. Co. 92 Ark. 306, 122 S. W. 994, it was held that a premium paid on a casualty insurance policy was not apportionable so as to admit of a recovery of a portion thereof which was paid under a mistaken belief that the scope of the insurance was thereby extended.

WOODLE

v.

SETTLEMYER.

Oregon Supreme Court—April 28, 1914.

71 Oregon 25; 141 Pac. 205.

Appeal and Error — Liability on Bond — Abandonment of Appeal.

An undertaking on appeal from a justice of the peace is to be construed strictly in

favor of the surety, and, where it is conditioned that the appellant will pay all costs and disbursements that may be awarded against him on the appeal, and satisfy any judgment that may be given against him in the appellate court, and the appeal is abandoned and no judgment is rendered in the appellate court, the surety is not liable.

[See note at end of this case.]

Appeal from Circuit Court, Multnomah county: Morrow, Judge.

Action on appeal bond. Claude P. Woodle, plaintiff, and George T. Settlemyer, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. REVERSED.

Kimball & Ringo for appellant.

Christopherson & Matthews and *Claude W. Devore* for respondent.

[26] RAMSEY J.—On the 5th day of December, 1912, the plaintiff recovered against W. H. Harrington, in the justice's court for the district of Portland, in Multnomah County, a judgment for the sum of $150, with interest thereon at the rate of 6 per cent. per annum from July 27, 1912, and the further sum of $12.50 for costs of said action.

On the 26th of December, 1912, the plaintiff caused an execution to be issued upon said judgment, and placed the same in the hands of the constable of said Portland district for service. Said constable, by virtue of said writ, levied upon certain property of said Harrington, consisting of horses, wagons, and wood, to satisfy said writ of execution.

On the 31st day of December, 1912, the said judgment debtor, W. H. Harrington, gave notice of an appeal from said judgment to the Circuit Court of Multnomah County. Said notice was duly served, and then filed with the clerk of said justice's court, with the proof of service thereof. Thereafter, on said 31st day of December, 1912, the said W. H. Harrington, for the purpose of perfecting said appeal and staying the execution of said judgment, during the pendency of said appeal, filed in said justice's court his undertaking for the appeal, with George T. Settlemyer, the defendant herein, as surety. The following is a copy of said undertaking:

[27] "Whereas, the above-named plaintiff recovered a judgment against the defendant W. H. Harrington, the defendant herein, for one hundred fifty dollars and interest thereon from July 27, 1912, and costs and disbursements in a civil action tried before Justice Bell, a justice of the peace in and for said district, and said judgment having been rendered on the 5th day of December, A. D. 1912; and whereas the said W. H. Harrington is about to appeal from said judgment to the Circuit Court of the State of Oregon, for the County of Multnomah:

"Now, therefore, we, W. H. Harrington, appellant, and G. T. Settlemyer, of the County of Multnomah, State of Oregon, surety, undertake that said appellant will pay all costs and disbursements that may be awarded against him on the appeal, and that said appellant will satisfy any judgment that may be given against him in the appellate court, on the appeal.

"[Signed] W. H. Harrington,
"Geo. T. Settlemyer."

The plaintiff excepted to the sufficiency of the surety on said undertaking on January 2, 1913, and it does not appear that he justified or that any new undertaking was given. No transcript in said action was filed in the Circuit Court of Multnomah County, and said appeal was abandoned, and no judgment or order was ever made by said Circuit Court in relation to said action, on said supposed appeal. Said justice's court did not make any order allowing said appeal or staying proceedings therein. The docket of said court shows that an execution in said cause was issued December 26, 1912, but it fails to show that it was returned.

Before the commencement of this action, the plaintiff demanded of George T. Settlemyer and W. H. Harrington that they pay said judgment rendered in said justice's court; but they refused to pay it, and said judgment is wholly unpaid.

[28] The complaint in this cause alleges most of the facts above stated, and it alleges also that, in consideration of the execution and filing of said undertaking for the appeal and for a stay of proceedings in said cause, the constable of said district released from the levy in said cause all property that had been attached or levied upon therein.

The complaint alleges also that W. H. Harrington is insolvent and has left the state, and has no property out of which said judgment could be made.

The answer denies most of the allegations of the complaint, and sets up affirmatively, in substance, that no judgment of any kind was ever rendered or entered in said action in the Circuit Court of Multnomah County, on said appeal, against either said W. H Harrington or George T. Settlemyer, for any sum or for any purpose, and that the execution in said cause issued out of said justice's court was not in any manner stayed.

The reply admitted the affirmative matter of said answer, excepting that part thereof relating to the stay of execution, and denied that said execution had not been stayed. This cause was tried without a jury, and findings and a judgment for the amount de-

manded by the complaint were rendered in favor of the plaintiff.

When all the evidence for the plaintiff was in, the defendant moved for a judgment of nonsuit; but the court below denied this motion. When the trial began in the court below, the defendant objected to the admission of any evidence, for the reason that the complaint does not state facts sufficient to constitute a cause of action. Said objection was overruled, and the defendant excepted to said ruling. There is no disagreement as to the material facts in this case.

[29] As stated supra, the plaintiff obtained a judgment in the justice's court against W. H. Harrington, and the latter gave notice of an appeal to the Circuit Court, and filed an undertaking in due form for the appeal, and for a stay of proceedings. The plaintiff filed exceptions to the sufficiency of the surety on the said undertaking, and the surety failed to justify. No new undertaking was filed. The defendant failed to file a transcript of said cause in the appellate court, and the appellate court never gave or entered any judgment of any kind in said cause. In fact, said cause was never in the appellate court for any purpose. Before beginning this action, the plaintiff demanded of the defendant that the latter pay said judgment rendered in said justice's court, and the defendant refused to pay said judgment.

The court below made no finding as to the release of the property of said Harrington by the constable, or as to the exceptions to the sufficiency of the surety on said undertaking, and we will not consider those matters; but, in the view that we take of the case, those facts would not materially affect the decision, if there were findings thereon.

1. The undertaking for the appeal is in proper form, and the promissory part thereof is as follows:

"Now, therefore, we, W. H. Harrington, appellant, and G. T. Settlemyer, of the county of Multnomah, State of Oregon, surety, undertake that said appellant will pay all costs and disbursements that may be awarded against him on the appeal, and that said appellant will satisfy any judgment that may be given against him in the appellate court on the appeal."

It is to be noted at the beginning that the surety on said undertaking promises two things: (a) That the appellant will pay all costs and disbursements *that may be awarded against him on the appeal;* (b) and [30] that said appellant will satisfy any judgment *that may be given against him in the appellate court on the appeal.*

The evidence shows that the appeal was abandoned, and there is no claim on the part of the plaintiff that the Circuit Court of Multnomah County ever had said appeal before it for any purpose or rendered any judgment or order of any kind in relation thereto. We assume that said appeal was not in the appellate court at all, and that the appellate court never awarded any costs or disbursements against the said appellant, Harrington, and that said appellate court did not give or enter any judgment against him on said abandoned appeal. Under such a state of facts, can the plaintiff, Woodle, maintain an action against the defendant, Settlemyer, as surety on said undertaking?

32 Cyc. page 73, says:

"Sureties are said to be favorites of the law, and a contract of suretyship must be strictly construed to impose upon the surety only those burdens clearly within its terms, and must not be extended by implication or presumption. This rule is followed both at law and in equity."

2 Brandt, Suretyship and Guaranty (3 ed.) Section 513, says:

"Sureties on an appeal bond are bound *only according to the terms of their contract.* An appeal bond from a judgment rendered by a justice of the peace provided that, if the parties appealing should pay and satisfy whatever judgment might be rendered by the Circuit Court of *Hancock County* upon the dismissal or trial of the appeal, then the obligation should be void. The venue in the case was changed from *Hancock County* to *another county*, and a judgment was there rendered against the party appealing. Held, the surety was not liable on the bond."

[31] In Phoenix Mfg. Co. v. Bogardus, 231 Ill. 531, 83 N. E. 285, the court says:

"The law is well settled that the undertaking of a surety is to be strictly construed, and his liability not to be extended by construction."

In State v. Baxton, 101 Md. 598, 61 Atl. 624, the court says:

"As to the general principle applicable to a case of this kind there can be no question. It is familiar law that the contract of sureties upon an official bond is subject to the strictest interpretation. They undertake for nothing which is not within the strict letter of their contract. The obligation is *strictissimi juris*, and nothing is to be taken by construction against the obligors. They have consented to be bound to a certain extent only, and their liability must be found within the terms of that consent."

In Kirschbaum v. Blair, 98 Va. 35, 34 S. E. 895, part of the syllabus is:

"But, having ascertained what the contract is, he is bound by this alone. There is no implied liability resting on him. His liability is always *strictissimi juris*, and is not to be extended by implication or construction."

In Omaha First Nat. Bank v. Goodman, 55 Neb. 419, 420, 71 N. W. 757, the court says:

"That a surety is entitled to stand upon the strict terms of his contract is a proposition of law upon which the authorities all agree. To the extent, and in the manner, pointed out in his obligation he is bound, *but no farther.* It has been often said by judges and text-writers that sureties are favorites of the law, and that their liability will not be extended by implication."

Childs, Suretyship and Guaranty, pages 124, 125, says:

"While a surety is denominated a favorite of the law, there is a very limited field for the application of [32] this doctrine. The nature of the contract invokes equitable consideration, but the general rules for the construction of contracts are not excluded thereby. *This liability will not be extended by implication* and his contract is strictly construed. . . . In cases of doubt, the doubt is solved generally in his favor."

The surety on said undertaking agreed that:

"The appellant will pay all costs and disbursements *that may be awarded against him on the appeal,* and that said appellant will satisfy any judgment *that may be given against him in the appellate court on the appeal.*"

This undertaking is to be construed strictly in favor of the surety. He is bound for nothing that is "not nominated in the bond."

The surety undertakes two things: (1) That the appellant will pay all costs and disbursements that may be awarded against him on the appeal; (2) that the appellant will satisfy any judgment that may be given against the appellant on the appeal. The undertaking of the surety was to pay any judgment that should be awarded against the appellant by the appellate court, and, as that court did not render any judgment against the appellant, there was nothing for the surety to pay. The surety did not undertake that the appellant would pay the judgment rendered by the justice's court. Construing said undertaking according to its terms, the surety promised that the appellant would pay any judgment that the appellate court should render in said cause against the appellant, and he incurred no liability on said undertaking, because the appellate court rendered no judgment against the appellant on said appeal.

In 1 Enc. Pl. & Pr. 1013, that work says:

"As a general rule the rendition and entry of a final judgment of affirmance *on appeal* is required to subject the sureties to liability on the bond."

[33] In Roppenhusen v. Seeley, 41 Barb. (N. Y.) 451, the court says:

"Although there was an *order* of the general term affirming the judgment of August 13, 1860, no *judgment* of affirmance could be entered, if the defendants in that judgment availed themselves of the leave to answer contained in and forming a part of the said order. When those defendants answered, a new issue, differing in its character and mode of trial from that upon which the prior judgment had been entered, was formed, and the right to enter a judgment of affirmance, or to issue an execution on any judgment of affirmance, was forever gone. The plaintiff must have the right to enter and collect a *judgment of affirmance* before he can proceed against the sureties in such an undertaking as the present. The plaintiff has never acquired such a right."

In Wood v. Derrickson, 1 Hilt. (N. Y.) 410, the court says:

"The action was upon an undertaking given on appeal, and was conditioned for the payment of all costs and damages which might be awarded on appeal, and of the judgment of affirmance. It did not require the issuing of an execution, but was forfeited as soon as the affirmance of the judgment took place, and the debtor made default in its payment."

In Gregory v. Stark, 3 Scam. (Ill.) 612, which was an action on an appeal bond, the court says:

"The moment judgment was rendered in the appeal cause, unless the money was paid immediately, the condition of the bond was forfeited, and action could be brought upon it at any time before that judgment was actually satisfied."

2 Cyc. 946, says:

"To establish the breach of the *condition to satisfy* the affirmed judgment, it is only necessary to show *that after said affirmance* the judgment has not been satisfied."

[34] The same volume, on page 933, says:

"Before a breach of the condition to prosecute to effect can be maintained, *there must have been a final judgment of the appellate court, dismissing the appeal or affirming the judgment appealed from, which judgment must be alleged and proved.*"

4 Am. & Eng. Enc. of Law & Pr. 943, says:

"As a general rule, the rendition and entry of a final judgment of *affirmance on appeal* is required to subject the sureties to liability on the bond."

The same volume, on page 944, says:

"It is generally held that, upon affirmance of the judgment from which the appeal is prosecuted, the liability of the sureties upon the appeal bond or undertaking becomes fixed and absolute."

See, also, Steinhauer v. Colmar, 11 Colo. App. 494, 55 Pac. 291; Blackmore v. Winders, 144 N. C. 212, 56 S. E. 874; Odell v. Wootten, 38 Ga. 224.

The liability of the defendant on said undertaking was *contingent* on the entry of a judgment in the appellate court against the

appellant in said action. We have no power to extend the defendant's liability beyond the terms stated in the undertaking. It is the province of courts to construe contracts, but not to make them for parties.

As the Circuit Court of Multnomah County did not enter any judgment against Harrington in said cause upon said supposed appeal, the defendant herein, as surety upon said appeal, is not liable to the plaintiff herein upon said undertaking. The undertaking sued on did not provide that the appellant named therein should prosecute said appeal, or that, in case he should abandon said appeal, the surety would pay the judgment appealed from.

[35] In order to recover upon said undertaking, it was necessary to allege and prove that the Circuit Court of Multnomah County, on said supposed appeal, rendered judgment against the appellant, Harrington. The complaint does not allege that such a judgment was rendered, but does allege that said supposed appeal was abandoned; and hence the complaint does not state facts sufficient to constitute a cause of action.

We hold that the complaint does not state facts sufficient to constitute a cause of action; that there was not evidence sufficient to make out a *prima facie* case for the plaintiff; and that the court below erred in overruling the defendant's motion for a nonsuit.

The judgment of the court below is reversed, and the case is remanded to the court below, and that court is directed to enter a proper judgment dismissing said cause.

Reversed with directions.

Moore, Burnett and Bean, JJ., concur.

Rehearing denied June 2, 1914.

NOTE.

Effect of Abandonment or Dismissal of Appeal on Liability of Sureties on Appeal Bond.

Scope of Note, 1226.
General Rules, 1226.
Failure to Perfect Appeal, 1228.
Express Condition as to Dismissal, 1231.
Dismissal by Consent, 1232.

Scope of Note.

It is the intention of this note to consider those cases which have discussed the effect of the abandonment or dismissal of an appeal on the liability of the sureties on the appeal bond.

For a consideration of the liability of the sureties on an appeal bond where the appeal is dismissed because of the insufficiency of the bond, see the note to Bortree v. Dunkin, Ann. Cas. 1915C 1005.

General Rules.

A surety on an appeal bond is ordinarily liable in case of a dismissal of the appeal. Thus the dismissal or abandonment of an appeal operates as an affirmance of the judgment within the meaning of an appeal bond or undertaking conditioned to respond in case the judgment is affirmed.

Arkansas.—Compare Ashley v. Brasil, 1 Ark. 144, Miller v. Heard, 7 Ark. 50; Seabrook v. State, 28 Ark. 396.

California.—Karth v. Light, 15 Cal. 324; Chamberlin v. Reed, 16 Cal. 207; Chase v. Beraud, 29 Cal. 138. See also Osborn v. Hendrickson, 6 Cal. 175. *Compare* In re Kennedy, 129 Cal. 384, 62 Pac. 64.

Colorado.—McMichael v. Groves, 14 Colo. 540, 23 Pac. 1006; Shannon v. Dodge, 18 Colo. 164, 32 Pac. 61; Lux v. McLeod, 19 Colo. 465, 36 Pac. 246; Long v. Sullivan, 21 Colo. 109, 40 Pac. 350; Wilson v. Welch, 8 Colo. App. 210, 46 Pac. 106; Creswell v. Herr, 9 Colo. App. 185, 48 Pac. 155. *Compare* Freas v. Engelbrecht, 3 Colo. 377.

Illinois.—McConnel v. Swailes, 2 Scam. 571; Sutherland v. Phelps, 22 Ill. 92; Koelling v. Wachsning, 174 Ill. App. 321. See also Garrick v. Chamberlain, 97 Ill. 620. *Compare* Blair v. Reading, 103 Ill. 375.

Indiana.—See Reeves v. Andrews, 7 Ind. 207; Keitzinger v. Reynolds, 11 Ind. 545; Stultz v. Zahn, 117 Ind. 297, 20 N. E. 154.

Iowa.—Coon v. McCormack, 69 Ia. 539, 29 N. W. 455. See also Jewett v. Shoemaker, 124 Ia. 561, 100 N. W. 531.

Kentucky.—Harrison v. Bank of Kentucky, 3 J. J. Marsh. 375; Fearsons v. Wright, 6 Ky. L. Rep. 747, abstract; Harris v. West, 13 Ky. L. Rep. 334, abstract.

Maryland.—Compare Keen v. Whittington, 40 Md. 489.

Mississippi.—Pass v. Payne, 63 Miss. 239.

Missouri.—Arkansas Valley Trust Co. v. Corbin, 179 S. W. 484. *Compare* Hill v. Keller, 157 Mo. App. 710, 139 S. W. 523.

Montana.—State v. Biesman, 12 Mont. 15, 29 Pac. 534.

Nebraska.—See Gudtner v. Kilpatrick, 14 Neb. 347, 15 N. W. 708; Dunterman v. Storey, 40 Neb. 447, 58 N. W. 949.

New York.—Compare Watson v. Husson, 1 Duer, 242, affirmed 14 N. Y. 60.

Oklahoma.—McClain v. Starr, 150 Pac. 666.

Oregon.—Simpson v. Prather, 5 Ore. 86.

Pennsylvania.—Mair's Estate, 12 Phila. 2, 34 Leg. Int. 20.

Texas.—Compare Givens v. Blocker, 23 Tex. 633.

In McConnel v. Swailes, 2 Scam. (Ill.) 571, the court said: "This court does not entertain a doubt that the dismissal of an appeal, or certiorari, is equivalent to a regular, technical affirmance of the judgment, so as entitle the party to claim a forfeiture of the

bond, and have his action therefore. The bond given in such case is conditioned 'to pay the debt and costs, in case the judgment shall be affirmed, on the trial of the appeal.' . . . What is the object of this requirement, and what its meaning and intention? Manifestly to secure the opposite party in his debt and costs, in case the judgments shall not be reversed; in case he shall be, in the circuit court, the successful party. By a dismissal of the appeal, either by the court, or by the act of the appellant himself, the appellee is the successful party; he has not lost what he gained before the magistrate. He is placed in the same situation he occupied before the appeal was taken; and we see no propriety in attributing to such a judgment of dismissal less efficacy than to a more formal and technical one of affirmance." So in Harrison v. Bank of Kentucky, 3 J. J. Marsh. (Ky.) 375, it was said: "The main, if not only object in requiring an appeal bond, is to secure to the plaintiff in the judgment the payment of such judgment, with costs and damages, when awarded, unless it should be reversed by the appellate court; and to attain that object such must be considered to be its legal effect, in every case where it has been executed in the words of the act, or in other words substantially the same. In such cases we must remember that *'qui haeret in litere, haeret in cortice;'* we must regard substance and not form, or the law will have been in vain; and under that view of it the dismission must be considered as a virtual affirmance of the judgment." In Coon v. McCormack, 69 Ia. 539, 29 N. W. 455, the court said: "The word 'affirm,' as used in the statute and bond, should not be construed in a narrow and strictly technical sense, but a broad and comprehensive meaning should be attached thereto; that is to say, if the legal effect of the dismissal is to affirm the judgment, then the latter includes the former, and both mean the same thing. It will be conceded that there may be cases where a dismissal would not amount to an affirmance, as an appeal has not been perfected by the service of the requisite notice. But when the appeal has been perfected, and it is dismissed by the supreme court, the ordinary rule and effect is that it amounts to an affirmance, and he who asserts the contrary must plead and establish such fact."

In Long v. Sullivan, 21 Colo. 109, 40 Pac. 359, it was held that the dismissal of an appeal might be made without prejudice to another appeal or to a writ of error, but, unless another appeal or supersedeas was taken or allowed within thirty days, the dismissal operated as an affirmance. See to the same effect Mueller v. Kelly, 8 Colo. App. 527, 47 Pac. 72; McMichael v. Groves, 14 Colo. 540, 23 Pac. 1006.

On the other hand, in the case of In re Kennedy, 129 Cal. 384, 62 Pac. 64, it was held that the dismissal of an appeal as prematurely taken did not operate as an affirmance of the judgment. And in Watson v. Husson, 1 Duer (N. Y.) 242, *affirmed* as Drummond v. Husson, 14 N. Y. 60, the court said: "The undertaking in this case is in the precise words of the statute, and the only question is, whether the contingency upon which the liability of the defendants was to attach has occurred. The contract of the defendant is, that 'if the judgment appealed from or any part thereof be affirmed' the appellant shall pay, etc. A dismissal of the appeal for want of prosecution, is clearly not an affirmance of the judgment. This court has decided nothing whatever in respect to the validity of the judgment." So in Freas v. Engelbrecht, 3 Colo. 377, it was held that the dismissal of an appeal was not the equivalent of the affirmance of a judgment. The court said: "It may be said that by the judgment below, the party prevailing is prima facie established in his title to that which is adjudged to him, and ought not to be delayed in having the lawful fruits of his recovery by an interminable series of appeals and writs of error, successively discontinued by default of his adversary. But the allowance of process of review in the first instance implies that the judgments even of superior courts are not above the suspicion of error, and if after the first appeal or writ of error, supersedeas be denied (as it seems is the rule), the inconvenience to the defendant in error is not more striking than in other cases. Moreover in the case of appeals, the appellee is in general indemnified for the delay which he has sustained by the damages which the law awards upon discontinuance. Upon reason and analogy, therefore, the discontinuance of an appeal ought not to be treated as an affirmation of the judgment." In Blair v. Reading, 103 Ill. 375, it was held that the surety on a supersedeas bond was not liable where the writ of error was dismissed because of want of jurisdiction. The court said: "The decree contained in the transcript was not 'affirmed by a dismissal of the writ' of error in the Supreme Court. It was dismissed for want of jurisdiction in the court to hear the writ at all. That was in no sense an affirmance of the original decree. A dismissal of a writ of error for want of prosecution when the court has jurisdiction of the case, has always been treated as an affirmance of the decree or judgment, within the meaning of the usual conditions of such bonds. But the rule must be different where the court has no jurisdiction in the premises. It is for the obvious reason the court has no jurisdiction to pronounce a judgment of affirmance, and it would be a *non sequitur* to

say a court may affirm a decree when it has no jurisdiction to hear the case for any purpose." See also Swofford Bros. Dry Goods Co. v. Livingston, 16 Colo. App. 257, 65 Pac. 413; Henry v. Great Northern R. Co. 16 Wash. 417, 47 Pac. 895.

A dismissal or abandonment of an appeal caused by the failure to prosecute the same, constitutes a breach of an appeal bond conditioned for the prosecution of the appeal with effect. Callbreath v. Coyne, 48 Colo. 199, 109 Pac. 428; Mueller v. Kelly, 8 Colo. App. 527, 47 Pac. 72; Swofford Bros. Dry Goods Co. v. Livingston, 16 Colo. App. 257, 65 Pac. 413; Reeves v. Andrews, 7 Ind. 207; McKinney v. Hartman, 143 Ind. 224, 42 N. E. 681; Everly v. State, 10 Ind. App. 15, 37 N. E. 556; Fitzgerald v. Wellington, 37 Kan. 460, 15 Pac. 582; Champomier v. Washington, 2 La. Ann. 1013; Wilcox v. Daniels, 22 Mo. 493; Maryland Casualty Co. v. Lucky Budge Min. Co. (Mo.) 180 S. W. 1011; Marryott v. Young, 33 N. J. L. 336; Levine v. Lindenthall, 1 White & W. Civ. Cas. Ct. App (Tex.) § 1149; Trent v. Rhomberg, 66 Tex. 249, 18 S. W. 510; McSweeney v. Reeves, 28 Nova Scotia 422. See also Perreau v. Bevan, 5 B. & C. 284, 11 E. C. L. 230; Tummons v. Ogle, 6 El. & Bl. 571, 88 E. C. L. 571; Jackson v. Hanson, 8 M. & W. (Eng.) 477; Biggs v. Rickards, 3 Har. (Del.) 283. *Compare* Shedd v. Cooke, 33 Ohio Cir. Ct. Rep. 505, judgment *affirmed* 86 Ohio St. 364, 99 N. E. 1132; Com. v. Krause, 198 Pa. St. 391, 48 Atl. 256. Thus in Everly v. State, 10 Ind. App. 15, 37 N. E. 556, the court said: "The ordinary conditions of appeal are that the defendant or principal obligor will prosecute his appeal to effect, and pay the judgment that may be rendered against him on appeal. If he fails in either of these conditions, the bond is subject to an action for the penalty therein provided. In the present case, the condition violated is, in effect, the prosecution of the appeal to effect within the year allowed for such appeals." So in McKinney v. Hartman, 143 Ind. 224, 42 N. E. 681, it was said: "Therefore, if, after perfecting the term time appeal, the appealing party had dismissed such appeal, there would and could be no breach of that condition of the bond obligating the appealing party to pay the judgment rendered or affirmed in this court against him, because in that event there would be no judgment rendered or affirmed against him in this court. In such a case there would be a breach of the other condition in the bond, namely, to duly prosecute the appeal. The dismissal of the appeal would not be a due prosecution thereof; it would be an abandonment of the appeal."

Failure to Perfect Appeal.

The dismissal or abandonment of an appeal for failure to perfect the same or to observe statutory or other requirements, operates as an affirmance rendering the sureties liable on the bond. Dunterman v. Storey, 40 Neb. 447, 58 N. W. 949; Flannagan v. Cleveland, 44 Neb. 58, 62 N. W. 297; Cohen v. Cover, 4 Ohio Cir. Dec. 7, 8 Ohio Cir. Ct. 678; Morgan v. Soisson, 21 Pa. Super. Ct. 141; Winchester v. Rich, 40 Pa. Super. Ct. 46. See also Beale v. Dougherty, 3 Bin. (Pa.) 432. *Compare* Shivery v. Grauer, 12 Pa. Co. Ct. 471, 2 Pa. Dist. 387. Thus in Winchester v. Rich, supra, the court said: "The appeal was not quashed because of any defect in the recognizance, but because the original defendants had failed to perform a collateral act, which the court held they were required to do. . . . When an appeal is taken from a judgment of a justice, the ordinary course results in the entry of a judgment after a jury trial, but it was not necessary that there should be a jury trial in order to constitute an affirmance of the judgment of the justice, within the meaning of the recognizance of the appellee. The failure of the party appealing from the judgment of the justice to file the transcript in the common pleas within the time allowed by law, would in such a case constitute an affirmance of the judgment. . . . That judicial act of the appellate court by which the controversy between the parties comes to an end, and the plaintiff is placed in position to collect his judgment, is an affirmance of the judgment of the justice. When the appeal is dismissed, or quashed or stricken off because it is not filed in time the judgment is a final one and prevents all further proceedings in the suit, constituting an affirmance of the judgment." And in Cohen v. Cover, 4 Ohio Cir. Dec. 7, 8 Ohio Cir. Ct. 678, wherein it appeared that the petition in error filed was dismissed for the reason that the plaintiff in error had failed to have the record in the case printed as required by the practice of the court, it was held that the judgment of dismissal was equivalent to and in substance an affirmation of the judgment. So in Dunterman v. Storey, 40 Neb. 447, 58 N. W. 949, the surety was held liable on appeal bond conditioned for the payment of the judgment in case of an affirmance. The bond recited that the defendant had filed in the supreme court the transcript and petition in error for the purpose of obtaining a reversal. Proceedings in error or appeal however were never instituted. The court said: "By the execution and filing of the supersedeas bond Bernhart took one step in the proceedings to have reviewed on error the Storey judgment. He then abandoned all further attempts to reverse the judgment, thus leaving it in full force. The judgment, then, is in the same plight that it would have been had Bernhart filed his transcript of the record of said judgment and bill of exceptions in

this court and then had neglected to have a summons in error issued within one year from the date of the judgment and this court had dismissed such error proceeding. We have already seen that had this court dismissed the error proceedings, by reason of the failure of Bernhart to comply with some requirement necessary to a review of the judgment on error, the dismissal, of the proceedings would in effect be an affirmance of the judgment rendered. Is not the effect on the judgment just the same, whether proceedings in error be instituted and then dismissed without an examination of the case upon its merits, or whether the judgment debtor, after taking one or more steps looking towards reviewing the judgment on error, abandons the proceedings? A judgment debtor, by filing a supersedeas bond with the clerk of the district court and a petition in error in this court, stays the execution of the judgment at least for one year from the date of its rendition, as the filing in this court of the petition in error does not invest this court with jurisdiction over the person of the judgment creditor. For this purpose it is necessary that a summons in error shall be issued within a year from the date of its rendition, although it may be served afterwards. Now, if the contention of counsel for the plaintiff in error be correct, a judgment debtor, by filing a supersedeas bond with the clerk of the court and a petition in error here, may stay the execution of the judgment for a year, and then, by voluntarily abandoning the proceedings in error, or by failing to have a summons in error issued, may thus deprive the judgment creditor of the power of collecting his judgment for the length of time intervening between its rendition and the dismissal of the error proceedings, and at the end of that time leave the judgment creditor with no more security for the collection of his judgment than he had on the date of its rendition. Such a construction of the statute would deprive the judgment creditor of the very rights given him by the statute. It would be in effect a judicial enactment of a stay law without bond. A judgment is the final and solemn adjudication and determination of the rights of the parties in and to the subject-matter litigated, and a creditor on obtaining a judgment against his debtor is entitled to an immediate execution for the satisfaction of such judgment, unless the judgment debtor stays such execution by complying with the provisions of the statute therefor." Likewise in Morgan v. Soisson, 21 Pa. Super. Ct. 141, it was held that where after a judgment is entered a person holds himself as bail for an appeal "conditioned for the payment of the debt, interest and costs that may be legally recovered against the said appellant company" in accord with a statute providing that in such case bail "shall be taken absolute for the payment of the debt, interest and costs on the affirmance of the judgment," the surety is liable, although the appeal is never entered in the appellate court. The court said: "The appellant contends that, the judgment never having been affirmed, he is not liable upon his recognizance and that the judgment of the justice of the peace against him in the suit on the recognizance was, therefore, void and the appeal therefrom should have been sustained by the court. This contention is based upon the meaning given by the appellant to the word 'affirmance,' as used in the act of assembly. He confines its application to the ratification or upholding of a judgment of a lower court by an appellate court, but it has a much broader meaning than this. An affirmance may be 'the confirmation of a voidable act by the party acting, who is to be bound thereby or by a court in the manner contended for by the appellant and it may be either express or implied.' See 1 Bouvier's Law Dictionary, 112. Even if the appellant's contention as to the limited meaning of the word 'affirmance' were correct, we would hesitate long before allowing such a technicality to prevail, but it is not necessary for us to consider this narrow aspect of the question. The judgment obtained before the justice by the plaintiff against the corporation was voidable and could be rendered void, first, by an appeal; second, by the entry of the appeal in the court of common pleas within the time limited by law, and third, by the reversal of that judgment in the said court in the manner pointed out by Law. The appeal was taken; the judgment could be affirmed either by the act of the appellant in failing to enter the appeal or by the formal action of the court." But in Shivery v. Grauer, 12 Pa. Co. Ct. 471, 2 Pa. Dist. 387, it was held that the failure of a corporation to enter an appeal at the next term after the appeal was taken did not fix the liability of the surety, as the condition of the recognizance was not broken.

The dismissal or abandonment of an appeal for failure to perfect the same or to observe statutory or other requirements constitutes a breach of an appeal bond conditioned to prosecute, or to prosecute with effect, the appeal, and renders a surety liable on the bond. Dexter v. Sayward, 84 Fed. 296; Ellis v. Hull, 23 Cal. 160; Thalheimer v. Crow, 13 Colo. 397, 22 Pac. 779; Meserve v. Clark, 115 Ill. 580, 4 N. E. 770; Woods v. Thomas, 5 Blackf. (Ind.) 553; Rock v. Gordon, 6 Blackf. (Ind.) 192; Davis v. Sturgis, 1 Ind. 213; Gavisk v. McKeever, 37 Ind. 484; Taylor v. Conway, man. unrep. Cas. (La.) 193; Nowlin v. Tibbits, 44 Mich. 77, 6 N. W. 118; Healy v. Newton, 96 Mich. 228, 55 N. W. 666; Bernecker v. Miller, 44 Mo. 126; Skidmore v.

Hull, 33 Mo. App. 41; Campbell v. Harrington, 93 Mo. App. 315; Flannagan v. Cleveland, 44 Neb. 58, 62 N. W. 297; Philbrick v. Buxton, 40 N. H. 384; Michael v. Ball, 8 Tex. Civ. App. 406, 27 S. W. 948. See also Adams v. Thompson, 18 Neb. 541, 26 N. W. 316; Estado Land, etc. Co. v. Ansley, 6 Tex. Civ. App. 185, 24 S. W. 933. *Compare* Gregory v. Obrian, 13 N. J. L. 11; Burris v. Peacock, 2 Ohio Dec. (Reprint) 482, 3 West. L. Month. 264; McIntosh v. Langtree, 6 Yerg. (Tenn.) 317; Brown v. Newton, 6 Yerg. (Tenn.) 436. Thus in Philbrick v. Buxton, 40 N. H. 384, the court said: "The recognizance is conditioned that two distinct things shall be done; the appeal must be prosecuted by the appellant, and he must also pay the costs which may be recovered against him; and a failure to perform either of these conditions forfeits the recognizance, and that forfeiture cannot be cured by a performance of some other part of the condition." And in Healy v. Newton, 98 Mich. 228, 55 N. W. 666, wherein it appeared that the principal in a bond "took no further proceedings to take said cause to the Supreme Court on writ of error than the settlement of said bill of exceptions and never sued out a writ of error in said cause, and did not prosecute said writ of error to effect," the court held that an action would lie on the bond. So in Gayisk v. McKeever, 37 Ind. 484, the court said: "The statute, . . . requires that one condition of such bond, among others, shall be, 'that he will duly prosecute his appeal.' This condition is not in this bond, and it is therefore defective, but this defect may be cured by a suggestion . . . .; and this court has held, that when the bond is filed with and made a part of the complaint, and the defect is palpable from inspection, it is a sufficient suggestion of the defect." In Ellis v. Hull, 23 Cal. 169, the court said: "This is an action upon an undertaking on appeal, and the only ground of error assigned is that no appeal had been taken, and therefore that the undertaking was without consideration. The evidence sustains the findings of the court that an appeal had been taken, which was dismissed by the Supreme Court with costs, on the ground of the failure of the appellants to file the transcript. The objection, therefore, is not well taken." See to the same effect Thalheimer v. Crow, 13 Colo. 397, 22 Pac. 779; Flannagan v. Cleveland, 44 Neb. 58, 62 N. W. 297. And in Meserve v. Clark, 115 Ill. 580, 4 N. E. 770, it was held that a surety on an appeal bond was liable where the appeal was dismissed "on the ground the record had not been filed within the time prescribed by law." In Bernecker v. Miller, 44 Mo. 126, the court said: "The appeal was not prosecuted with effect, for no steps were taken by Miller, after filing the bond, to perfect or prosecute his appeal. This condition having been broken, the liability to a judgment for the penalty is complete, and the only question is one of damages." See also Rock v. Gordon, 6 Blackf. (Ind.) 192, wherein the court said: "We think the first breach is well assigned. We understand the averment to be, that Gordon having prayed an appeal and entered into bond, wholly neglected to take further steps in prosecuting it to effect. This is sufficient. . . . The third breach is also well assigned. . . . A bond with a condition to prosecute an appeal with effect, was broken by an irregularity which caused the appeal to be dismissed." In Davis v. Sturgis, 1 Ind. 213, it appeared that the appellee moved for a dismissal of the appeal because of the insufficiency of the bond, the appeal being dismissed because of failure on the part of the appellant to comply with an order for a further bond. It was held that the nonprosecution of the appeal to effect was a breach of the condition of the appeal bond. The court said: "The operation of the foregoing section, taken together, is, to make the bond filed with, and approved by, the justice, effectual to remove the cause to the Circuit Court, hold it there until such bond is shown, in that Court, to be insufficient, and to stay, in the mean time, execution upon the judgment of the justice. The bond, therefore, though it may afterwards be shown to be insufficient, is not void ab origine, and is a valid consideration. And as the law permits the bond filed with the justice, though approved by him, to be shown to be insufficient in the circuit court, and requires, in that event, a further bond, the giving of such further bond, when required by the Circuit Court, must be regarded as one of the acts necessary to be performed by the appellant in prosecuting his appeal to effect, and hence included in the condition of the first bond. A failure, therefore, to give such further bond, when so required, is a breach of the condition of the first, and renders the surety in it liable to an action; and we think no such estoppel as contended for exists."

On the other hand in Burris v. Peacock, 2 Ohio Dec. (Reprint) 482, 3 West. L. Month. 264, it was held that a failure to perfect an appeal, neither party filing a transcript, was not a breach of the terms of an undertaking to prosecute it to effect and without unnecessary delay. The court said: "Now, the condition of the appeal undertaking sued on in this case, is not that the appellant shall perfect an appeal—not that he will perform the conditions required by the statute to give the appellate jurisdiction—but it simply is, that if the appeal shall be perfected, then the appellant will prosecute it 'to effect and without unnecessary delay.' This is appar-

ent from the words used.' And in McIntosh v. Langtree, 6 Yerg. (Tenn.) 317, it appeared the condition of a bond for the prosecution of a certiorari was "to prosecute his certiorari with effect, or in case he fail, pay and satisfy, whatever judgment the said court might render finally against him." The court held that the condition did not authorize a judgment against the security where the suit was dismissed on a rule to justify the surety. See also Brown v. Newton, 6 Yerg. (Tenn.) 436. So in Gregory v. Obnian, 13 N. J. L. 11, it was held that a defect in an affidavit on which the appeal was granted which caused the dismissal of the appeal, did not constitute a failure to "prosecute the appeal," within the condition of the appeal bond.

In a few cases a dismissal of an appeal at the instance of the appellee because of some defect of procedure has been held not to render the sureties liable, the precise terms of the bond not appearing. Thus in Zimmer v. Massie, 117 Mo. App. 344, 93 S. W. 859, a motion made by the appellee to dismiss an appeal because it was not taken in time, was sustained. Thereafter the appellee instituted an action against the appellant's bondsmen, but the court held that the appellee was bound by the judgment he had obtained and could not recover. In Martin v. Crocker, 62 Ia. 328, 17 N. W. 533, a statute providing that when an appeal was dismissed judgment should be rendered on the appeal bond was held not to apply to a dismissal of the appeal because it was not taken within the time specified in the statute. In Tilden v. Worrell, 30 Pa. St. 272, it was held that the nonprossing of a writ of error for the reason that the bail did not justify on exception to their sufficiency was not such a nonprossing as was contemplated by the statute making the bail liable in case of affirmance of judgment or of discontinuing or nonprossing the writ of error.

The general rule that the surety is liable in case of a dismissal for defects in procedure has been enforced in other cases wherein the terms of the bond do not appear. Thus in La Kimball Printing Co. v. Southern Land Improvement Co. 57 Minn. 37, 58 N. W. 868, an appeal from an order denying the defendant's motion for a new trial was dismissed on motion of the plaintiff, for the failure of the appellant to serve his paper book and points and authorities. The court said: "The question now presented is as to the liability of the sureties upon the bond for the full amount of the judgment in the Municipal Court. On the trial of the present action the court held that the liability of the sureties arising out of the extra-statutory condition above quoted was simply for the amount of the judgment entered in this court on the order of dismissal. The controlling words used and to be construed are, 'after decision of the Supreme Court,' and, of course, as against these sureties, they are to be construed with reasonable strictness. It is contended by the appellant that a dismissal under the rules is a decision within their meaning, but we think not, as did the court below. Certainly there was no decision upon the merits. Every question which could have been presented on that appeal might have been raised subsequently on an appeal from the judgment." In Simonds v. Heinn, 22 La. Ann. 296, it appeared that the appellee took a rule on the appellant to test the solvency of the surety on the bond. The appellant abandoned the appeal fearing he could not sustain the solvency of the surety. The court held that the abandonment did not release the surety. In Love v. Estes, 6 Vt. 286, it was held that under a statute providing that if the appellant did not enter and procure the appeal, the appellee might procure an affirmance of the judgment, such an affirmance was prerequisite to an action on the appeal bond. To the same effect, see Probate Court v. Gleed, 35 Vt. 24. In Lux v. McLeod, 19 Colo. 465, 36 Pac. 246, the statute involved provided as follows: "The security in any appeal bond shall be liable thereon for the amount of the original judgment and all costs thereon, in case the said appeal be dismissed." Saying that this statutory provision entered into and became a part of the condition of the bond, the court held the surety liable on a bond given on an appeal from a justice of the peace to the county court for the amount so specified, where the appeal was dismissed because of a failure to pay the docket fee.

Express Condition as to Dismissal.

If a bond is conditioned for the payment of the judgment in case the appeal is dismissed, the sureties are liable whatever may be the cause of the dismissal. Adams v. Billingsley, 107 Ark. 38, 153 S. W. 1105; Moffat v. Greenwalt, 90 Cal. 368, 27 Pac. 296; Noaln v. Fidelity, etc. Co. 2 Cal. App. 1, 82 Pac. 1119; Wheeler v. McCabe, 47 How. Pr. (N. Y.) 283; Clark v. Miles, 2 Pin. (Wis.) 432, 2 Chand. 94. See also Blair v. Reading, 103 Ill. 375. *Compare* Bosley v. Bruner, 24 Miss. 457. Thus in Nolan v. Fidelity, etc. Co. 2 Cal. App. 1, 82 Pac. 1119, the court said: "One of the conditions of a stay bond is that, if the appeal be dismissed, the judgment and costs will be paid, and sureties on such bonds take the risk that appeals may be erroneously dismissed." In Wheeler v. McCabe, 47 How. Pr. (N. Y.) 283, the undertaking sued on was "to the effect that if the judgment appealed from, or any part thereof, be affirmed, or the appeal be dismissed, the appel-

lant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed; if it be affirmed only in part, etc." It appeared that the appeal was dismissed with costs for failure to serve the printed case and exceptions as required by a court rule. The court said: "There can be no question but that this was an effectual dismissal of the appeal within the terms of the undertaking." So in Clark v. Miles, 2 Pin. (Wis.) 432, 2 Chand. 94, wherein it appeared that an appeal was dismissed for the want of an affidavit, required by statute, the court held that the surety was liable on a bond conditioned for payment in case the appeal was dismissed or discontinued. In Moffat v. Greenwalt, 90 Cal. 368, 27 Pac. 296, sureties who failed to justify were held to be liable where the appeal was dismissed for that reason. The court said: "By their undertaking the defendants promised and agreed that 'if the appeal be withdrawn or dismissed,' the appellant would pay the amount of the judgment so appealed from. This was an original and independent agreement on their part . . ., and in legal effect was entered into by them with the plaintiff. By virtue of the provisions of section 979 of the Code of Civil Procedure, upon the filing of the undertaking staying proceedings, all proceedings under the execution are to be stayed; and it was shown at the trial that upon the making and filing of said undertaking the property levied upon under an execution upon the judgment was released. The consideration recited in the undertaking was the 'staying of the execution of the judgment appealed from.' As soon as this undertaking was filed, it became an executed obligation on their part, and whenever the contingency upon which the obligation was to depend arose, their liability became fixed. This liability could not thereafter be defeated by any act or omission on their part, or on the part of their principal. Their agreement to be found in case the appeal should be dismissed extended as well to a dismissal resulting from their failure to justify as to a dismissal resulting from a failure on the part of their principal to prosecute the appeal." In Adams v. Billingsley, 107 Ark. 38, 153 S. W. 1105, it was held that a complaint which alleged the obtaining of a judgment, the execution of a supersedeas bond conditioned to pay the judgment if an appeal therefrom was dismissed, and the dismissal of the appeal, stated facts sufficient to constitute a cause of action against the obligors on the bond. But in Bosley v. Bruner, 24 Miss. 457, it was held that the surety on an appeal bond was not liable for the judgment, the court saying: "The term 'dismiss' was not originally applied to common law proceedings, but seems to have been borrowed from proceedings in the court of chancery, where in practice the term is applied to the removal of a cause out of court, without any further hearing. . . . The term when used is applied to the removal or disposal of the cause itself, and not to the mere abolment of the writ. Such we conceive to have been the sense in which the parties to this bond used the word 'dismissal.' And in our opinion, the condition of the bond to pay the judgment, etc., if the writ of error should be 'dismissed,' has not been broken by a refusal to pay on the judgment of the court 'quashing' the writ."

Dismissal by Consent.

A dismissal of an appeal by consent imposes no liability on the sureties on the appeal bond. Thus in Tournillon v. Ratcliff, 20 La. Ann. 179, it was held that the consent of the appellee to the dismissal of the appeal released the security of the appeal bond. The court said: "It is a well-settled rule of law, that all laws governing certain contracts, make part of such contracts. . . . Following that rule, it was impliedly understood and agreed between the parties to the bond of appeal, including the appellee, as a kind of proviso, that after the Supreme Court had jurisdiction of the case, the appellant would not be bound to prosecute his appeal, and would be allowed to withdraw it, if he obtained the consent, to that effect, of the appellee; this having been done accordingly, the appellant was not bound to prosecute his appeal, and he was released from that penal obligation by the appellee, who cannot now, with good grace, say to the surety: Your principal has broken the condition of the bond by not prosecuting his appeal, and you must pay me the penalty. The surety can reply successfully: You have by your own act and consent, dispensed and relieved the principal obligor from that prosecution under the understanding in the bond." So in Leonard v. Gibson, 6 Ill. App. 503, it appeared that the plaintiff and the defendant, pending an appeal, entered into an agreement for the payment of a certain sum by installments in satisfaction of the judgment appealed from, without the knowledge or consent of the sureties. Thereafter, the appeal was dismissed in pursuance of that agreement, and the court held that the sureties were not liable on their bond although the appellant failed to make the payments as agreed.

HAILE

v.

NEW ORLEANS RAILWAY AND LIGHT COMPANY.

Louisiana Supreme Court—May 11, 1914.

135 La. 229; 65 So. 225.

Carriers of Passengers — Insulting Language to Passenger.

Objectionable remarks, addressed by a street car conductor to a patron of the road, referring to her personal appearance, while on the car, which mortify and humiliate her, are actionable, and the car company will be held in damages therefor. Lamson v. Great Northern Ry. Co. 114 Minn. 182, 130 N. W. 945, Ann. Cas. 1914A 15.

[See note at end of this case.]

(Syllabus by court.)

Appeal from Civil District Court, Parish of Orleans: SKINNER, Judge.

Action for damages. Mrs. A. Virginia Haile, plaintiff, and New Orleans Railway and Light Company, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. AFFIRMED.

Hall, Monroe & Lemann for appellant.
Woodville & Woodville for appellee.

[230] SOMMERVILLE, J.—Plaintiff, a passenger on one of defendant's cars, fell while the car was making a curve at the intersection of two streets in New Orleans, and she was injured to a certain extent. She also alleges that she was humiliated and mortified by the actions of the conductor on the car, for all of which she asks pecuniary damages.

There was a verdict and judgment for $500 against defendant, and it has appealed.

The testimony fails to disclose any fault on the part of defendant, for the accident to plaintiff. The tracks and rolling stock of defendant were not shown to be in poor condition, and it does not appear that the speed of the car was at an unusual rate in making the curve around the corner referred to. Defendant used proper precautions in operating the car at the time of the accident; and it cannot be held in damages for an accident in a curve which it was required to make, and which accident occurred without its fault.

The humiliation and mortification of which plaintiff complains were caused by the conductor while she was in the act of alighting from the car. He referred to her as "a big [231] fat woman," and he assumed to reprimand her for sitting where she had been seated in the car. Plaintiff testifies that the conductor said to her:

"You had no business sitting in front of the car—a big fat woman like you had no business sitting in front of the car. Why didn't you sit in the back?"

The conductor was absent from New Orleans at the time of the trial, and a statement made by him was admitted in evidence by consent of plaintiff, so as not to delay the trial of the cause. He was not therefore subjected to cross-examination. The conductor states that he told plaintiff "that a stout person like herself ought to seat herself at the rear end of the car."

The statements of plaintiff and the conductor show that the latter used language to plaintiff which was disrespectful and humiliating to her. The personal appearance of a patron of a street car is not a proper subject of comment by the employees of the defendant company. Neither should the conductor undertake to dictate to a passenger as to where she should sit in a car which has no reserved seats.

The language used by defendant's employee was humiliating and mortifying to a sensitive woman, and defendant did not give to plaintiff that care and respectful consideration and attention which it, as a common carrier, owed her while she was using its car, and it is responsible in damages for the annoyance and injured feelings caused to plaintiff through the fault of its employee. Lamson v. Great Northern R. Co. 114 Minn. 182, 130 N. W. 945, Ann. Cas. 1914A 15.

It is ordered, adjudged, and decreed that the judgment appealed from be amended by reducing it to $250, and, as thus amended, it is affirmed.

NOTE.

The act of a street railway conductor in referring to a passenger as "a big fat woman" is held in the reported case to give a right of action against the company. The earlier cases discussing the liability of a carrier of passengers for rude and insulting language by an employee are reviewed in the note to Lamson v. Great Northern R. Co. Ann. Cas. 1914A 15.

MAHONEY LAND COMPANY

v.

CAYUGA INVESTMENT COMPANY.

Washington Supreme Court—December 11, 1915.

88 Wash. 529; 153 Pac. 308.

Nuisances — Estoppel to Object — Consent to Structure.

Where the owner of apartment houses consented to and encouraged the construction of private garages in the rear of such buildings, securing the preference for his tenants, he cannot subsequently seek an injunction on the ground that the noises and smells from such garages prove a nuisance by reason of the residential nature of the neighborhood.

[See note at end of this case.]

Appeal from Superior Court, King county: RONALD, Judge.

Action for injunction. Mahoney Land Company, plaintiff, and Cayuga Investment Company, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. REVERSED.

Peterson & Macbride for appellant.

Robt. F. Booth and *G. B. O'Herra* for respondent.

[529] BAUSMAN, J.—Action by Mahoney Land Company against Cayuga Investment Company, to restrain the operation of certain private garages erected by the Investment Company on its own land across an alley from the Mahoney Company's high-class apartment house. The lower court permanently enjoined the use of these garages, and allowed $750 damages as well.

Noises and smells from these garages have undoubtedly proved a great annoyance to tenants in at least so much of the apartment house as faces the alley. On the other hand, it is neither alleged nor proved that these garages are used in an unusually noisy or disorderly way. In other words, negligence is lacking. The argument of plaintiff consequently must be that they were a nuisance in themselves.

If this were the only point, we should be obliged again to enter into the perplexing question of when an otherwise lawful [530] occupation or enjoyment of property becomes a nuisance by reason of its being in a location prejudicial to other modes of life, or to more refined employments, and to repose. But this we are spared here by another point, which to our minds, is decisive.

It appears that, before the Cayuga Company ran up any of these garages, it discussed the project favorably with the Mahoney Company's manager. Indeed, the latter contributed toward the enterprise by agreeing himself to store an automobile there, and by advancing the Cayuga Company several months' rent. He even arranged that his tenants should have a preference in the use of these garages. Nothing, in short, is plainer than that, at the outset, this manager believed these garages would be useful to his own customers, and this suit was brought more than a year afterwards.

Plaintiff contends, though, that he consented only to the first five, and his grievance seems to date from the building of eight others, additional and adjacent. But even against these he did not at first absolutely protest. He certainly acquiesced in their being run up, for, to please him, a change was made in their height so that their roofs should not obstruct his tenants' view. What he then said was: "The thing that might prove a nuisance to me was that he shut off the views from all the windows of the main floor."

What shall be said of the law if it permits me to encourage my neighbor to run up structures on his land, and then to complain of them when they are used just in the way that might have been expected? Am I to encourage him to spend his money and then, simply because the completed thing turns out to be more annoying than I had reckoned, to tell him either to shut them up or let them rot? Suppose the owner of this apartment house had found it a good thing for his tenants to have the Cayuga Company build a cafe there. Should he get an injunction when the smells and noises of [531] the kitchen, kept as other kitchens are, proved disagreeable to them? This would be an intolerable shifting, yet it is practically what is done here, where there is no claim that these garages are being conducted in a manner different from what a reasonable man might have foreseen. In fine, the grievance of the Mahoney Company is not that the Cayuga Company built garages against its consent, but that, building garages with its encouragement and acquiescence, they have proved disagreeable. The direct encouragement and acquiescence shown here as to an alleged private nuisance is fatal to equitable as well as legal relief. Huntington, etc. Land Development Co. v. Phoenix Powder Mfg. Co. 40 W. Va. 711, 21 S. E. 1037; Sprague v. Steere, 1 R. I. 247; Attorney-General v. New York, etc. R. Co. 24 N. J. Eq. 49; Fresno v. Fresno Canal, etc. Co. 98 Cal. 179, 32 Pac. 943; Buchanan v. Logansport, etc. R. Co. 71 Ind. 265. *Volenti non fit injuria.*

The judgment is reversed, and the case ordered dismissed.

Morris, C. J., Parker, Main, and Holcomb, JJ., concur.

NOTE.

Acquiescence in or Consent to Erection of Structure as Precluding Objection Thereto as Nuisance.

Scope of Note, 1235
Acquiescence, 1235
Consent or Procurement, 1236

Scope of Note.

This note does not treat of the effect of laches or acquiescence by a person injuriously affected by a nuisance after its character as such is manifest, but is confined to a discussion of the right of a person, who has consented to or acquiesced in the erection of a structure, thereafter to assert that it constitutes a nuisance.

Acquiescence.

Mere acquiescence by an adjoining owner in the erection of a lawful structure or failure to protest, by reason of injury which may be anticipated therefrom, does not preclude him from asserting that the existence or operation of the completed structure is a nuisance. Deweese v. Husmann, 146 Ill. App. 55; Pettis v. Johnson, 56 Ind. 139; Harley v. Merrill Brick Co. 83 Ia. 73, 48 N. W. 1000; Stephens v. Gardner Creamery Co. 9 Kan. App. 883 mem. 57 Pac. 1058; Louisville, etc. R. Co. v. Walton (Ky.) 67 S. W. 988; Townsend v. Epstein, 93 Md. 537, 49 Atl. 629, 86 Am. St. Rep. 441, 52 L.R.A. 409; Matthews v. Stillwater Gas, etc. Co. 63 Minn. 493, 65 N. W. 947; Carter v. New York Elevated R. Co. 14 N. Y. St. Rep. 859; Chapman v. Rochester, 110 N. Y. 273, 18 N. E. 88, 6 Am. St. Rep. 366, 1 L.R.A. 296; Cilly v. Cincinnati, 7 Ohio Dec. (Reprint) 344; 2 Cinc. L. Bul. 135; Barkau v. Knecht, 9 Ohio Dec. (Reprint) 66, 10 Cinc. L. Bul. 342; Hallock v. Suitor, 37 Ore. 9, 60 Pac. 384; Burt v. Smith, 3 Phila. 363, 16 Leg. Int. 132. *Compare* Attorney-General v. New York, etc. R. Co. 24 N. J. Eq. 49; Simpson v. Justice, 43 N. C. 115. In Harley v. Merril Brick Co. supra, it was said: "The defendant pleaded as a defense that the plaintiff was estopped to recover in this action, for the reason that she knew that the works in controversy were to be constructed, but made no objection thereto, although she knew the purpose for which they were designed; but with that knowledge she permitted the defendant to construct the works at a large expense, and acquiesced therein. The appellant complains of the portion of the charge which relates to that defense, on the ground that it failed to state, as an element of the estoppel pleaded, that the conduct of the plaintiff must have induced the defendant to act in constructing its works. We think the complaint is well founded. There was evidence which tended to show that the defendant was not in any manner influenced in what it did by the conduct of the plaintiff. There was nothing in her conduct from which acquiescence might have been inferred, unless from her silence. She claims that she objected to the construction of the works, and that her objections were made known through her husband. But if she did not so object there was nothing done or omitted on her part which should estop her to recover, if the defendant was not induced to act upon what she did or omitted to do." So in Matthews v. Stillwater Gas, etc. Co. 63 Minn. 493, 65 N. W. 947, the court said: "It was not the construction of the plant, but the operation of it in the manner found by the court, which constitutes the nuisance. It was neither plaintiff's right nor duty to object to defendant's constructing a plant on its own premises. It was its own duty to see to it that when constructed the plant should not be so operated as to become a nuisance to others, and plaintiff had a right to assume that it would perform this duty. Plaintiff owed the defendant no duty to speak at that time, and a person is never estopped by his silence, except when it is his duty to speak. As soon as the plant was so operated as to become a nuisance to plaintiff, he did object, and has continued to object and remonstrate ever since." In Townsend v. Epstein, 93 Md. 537, 49 Atl. 629, 86 Am. St. Rep. 441, 52 L.R.A. 409, the rule was applied to a public nuisance working special injury to the plaintiff, the court saying: "The further contention on behalf of the appellee is that the appellants are estopped from maintaining their present suit because of acquiescence on their part in the erection of the structure now complained of or of laches in no sooner making known their objection to the same. This contention is based on the grounds: 1st. That there is evidence that Mr. Townsend one of the appellants when consulted by the appellee in regard to his plans which included the construction of the tunnel under and the structure across Garrett street gave his assent to the same and even encouraged the appellee to carry them forward; 2nd. That pending the proceedings for procuring the ordinance to authorize the carrying out of the plans of the appellee, the appellants did not appear to make any objection or offer any suggestion as to the same; 3rd. They stood by and saw the tunnel completed and the superstructure nearly so before making known the objections they now urge. In regard to the first of these grounds it may be sufficient to say that the evidence fails to clearly establish it. The appellee testified on his own

behalf to the purport which has been indicated as to what said by Mr. Townsend when the appellee sought him in reference to his plans, etc. Mr. Townsend, however, denies that the conversation was as detailed by the appellee and gives quite a different version of it. Besides this, Mr. Townsend is only one of the appellants, and if the conversation occurred between him and the appellee, as the appellee states, there is no evidence that he communicated it to his co-appellants and co-owners with him of the abutting property which they occupied, and we may at least express a doubt whether an express acquiescence on his part in the plans of the appellee would bind his partners as respects the interests they had in the property. As to the second it is not perceived how the failure to object to an ordinance which we find to be invalid and inoperative could give the ordinance validity or effect or to authorize an act which with or without the ordinance was unlawful and a public nuisance. As to the third ground the appellants could not complain of injury to themselves until it was ascertained that injury would result to them from the acts of the appellee. They seem to have been prompt to act when that discovery was made. Until then they had only the right to object as members of the public and their failure to object in that capacity could not render a public nuisance lawful."

Consent or Procurement.

A person who actively encourages the erection of a structure is, by the weight of authority, estopped to assert that any use thereof which is reasonably to be expected constitutes a nuisance. Williams v. Jersey, Cr. & Ph. 91, 41 Eng. Rep. (Reprint) 425; Heenan v. Dewar, 17 Grant Ch. (U. C.) 638; Fresno v. Fresno Canal, etc. Co. 98 Cal. 179, 32 Pac. 943; Irvine v. Oelwein, 170 Ia. 653, 150 N. W. 674; Carlisle v. Cooper, 21 N. J. Eq. 576; Woodward v. West Side Mill, 43 Wash. 308, 86 Pac. 579. See also Sprague v. Steere, 1 R. I. 247. And see the reported case. In Huntington, etc. Land Development Co. v. Phoenix Powder Mfg. Co. 40 W. Va. 711, 21 S. E. 1037, it appeared that the plaintiff, a land company, encouraged the location of a powder factory and sold to the defendant a site therefor. The court said: "Should the plaintiff, a speculative corporation, be permitted to induce various kinds of manufacturers to purchase of its lands, make great outlays in creating plants, and then because plaintiff ascertains that any such manufactory is an injury to the sale of others of its lands, is it to have the privilege of calling upon a court of equity to destroy the property and investment of those who have been induced to purchase of it in good faith, and without any attempt to deceive it as to the character of the manufactory to be established? Plaintiff says, 'I was mistaken.' Equity says, 'Make good the loss the defendant will incur, and you will be relieved of its obnoxious presence; otherwise you must bear it as a burden of your own assuming. At least, a court of equity will not lend you its assistance under such circumstances. If you would be heard, come with clean hands and a righteous cause.'" In Louisville, etc. R. Co. v. Daugherty (Ky.) 36 S. W. 5, it was said: "It is also well settled that maintenance of dams in such way as to emit disagreeable or unwholesome odors affords a right of action to those who may be made sick or even inconvenienced. And this is true, however innocent of intentional wrong may be the party erecting the nuisance, or however needful the structure in his business. But here, in addition to the general issues presented by the answers, it is alleged, in paragraphs of the answers to which demurrers were sustained, that the company procured the ground for the purpose of constructing the pond as it was constructed, and confined the stream so as to make the pond complained of, with the consent of the appellee James Daugherty, and with full knowledge on his part of the company's purpose, and that he was active and influential in the negotiations resulting in the purchase of the ground where the pond was erected. It is therefore insisted by the company that, whether the appellees are estopped or not in maintaining these actions, the company was, at least, entitled to some notice from the complainants, before the institution of these suits, that the pond was offensive or obnoxious to them. And this we believe to be the law of the case." In Heenan v. Dewar, 17 Grant Ch. (U. C.) 638, it appeared that the plaintiff encouraged the defendant in his project; told him that it was the best thing he could do; that it was a money-making business; and that certain persons named and known to both, had made their first rise in that business. It was held that the plaintiff was estopped to assert that the structure was a nuisance. In Burkam v. Ohio, etc. R. Co. 122 Ind. 344, 23 N. E. 799, the court in applying the rule said: "The appellant seeks by his complaint the abatement of a nuisance by the removal of a railroad track from William street, in the city of Lawrenceburgh, and also to obtain an injunction and to recover damages. The trial court admitted evidence tending to prove that the appellant consented to the occupancy of the street, and assisted in making the fill upon which the track was laid. This evidence was clearly competent. An abutting owner who expressly consents to the occupancy of a street cannot afterwards ask a court to enjoin the use of the street or award him damages."

In like manner a structure cannot be complained of as a nuisance by a person who has licensed its construction. Ruthven v. Farmers' Co-operative Creamery Co. 140 Ia. 570, 118 N. W. 915. "It was a fraud in the plaintiff to attempt to make a private nuisance of that which was erected by his own license." Dorrance v. Simons, 2 Root (Conn.) 208.

But in Batchelder v. Sanborn, 24 N. H. 474, it appeared that "the plaintiff was present several times during the construction of the dam; worked for the defendant in making the repairs; knew that the dam when put in use would flow his land; that the intention was to keep up the water during the whole year; there was no evidence that he forbade the defendant to proceed with the work; and he said to third persons that the mill would be a benefit to the neighborhood, and urged the workmen to make the dam tight." It was held that he was not estopped. So in Pilcher v. Hurt, 1 Humph. (Tenn.) 524, it was said of a nuisance consisting in an obstruction of navigation: "We do not think that the assent of the defendant to the erection of a nuisance in the river would take away his right to abate it afterwards if he thought proper."

In order that a person may be estopped by encouraging the erection of a structure to assert that its operation constitutes a nuisance, the consequences of which he complains must be such as should have been anticipated by him. Thus in Corley v. Lancaster, 81 Ky. 171, it was said: "Even assuming that it is sufficiently pleaded and proved that Corley did advise and consent to the building of the dam, still appellants are not estopped thereby, unless it be shown that he gave such advice and consent, knowing, or having reason to suppose, that the dam when erected would be a nuisance; the rule in such cases being that, in order to constitute an estoppel, 'the acts of the party affected by the nuisance must have been such as to make any attempt on his part to stop the nuisance, or recover damages therefrom, a postive fraud.'" So in Hudson v. Densmore, 68 Ind. 391, the court said: "The case at bar is very similar, on the point under consideration, to the case of Bell v. Elliott, 55 Blackf. 113. That was an action of trespass on the case, by Elliott against Bell, for erecting a mill-dam upon his premises, which dam caused the land of Elliott to be overflowed. On the trial of the cause the circuit court had instructed the jury, that if they believed, from the evidence, that the plaintiff had made no objection to the erection of the dam, and had assisted in erecting it with a view to his own benefit, still, if they believed that the plaintiff did not know, or could not have foreseen, that the dam would cause his land to be overflowed, they could not presume a license from the circumstances stated. The correctness of this instruction, as a matter of law, was the question for the decision of this court, and the conclusion of the court was, that the instruction was unobjectionable. In delivering the opinion of the court, Blackford, J., said: 'If the plaintiff had given an express and legal license to the defendant to build the dam, that would have been, in effect a license to overflow the land; because such would have been the plain object of the license; and it could not have had any other object. But the circumstance that the plaintiff did not object to the building of the dam, and assisted in building it, is no evidence of itself that he consented to waive any injury which the dam might afterward occasion to his land. If he had no knowledge that the dam would cause his land to be overflowed, his conduct can be readily accounted for, without supposing that he intended by it to give a license for the unforeseen injury. Unless he knew that the dam would cause an injury to his property, it was not his duty to object to it, nor could it be expected that he would do so.' The doctrine of the case cited is, we think, directly applicable to the question under consideration, in the case now before us. The appellee's conduct, as stated in the second paragraph of the answer, is that he stood by and, without objection, encouraged, advised, directed, assisted in and consented to the erection of the appellant's steam grist-mill and machinery, can be readily accounted for on other more rational hypotheses than that he thereby intended to license the appellant in the commission of unforeseen injuries and grievances to his property, himself and his family. It is certain, we think, that such a license, and authorizing the commission of the grievances and injuries complained of, could not be fairly implied, inferred or presumed from the appellee's said conduct in the premises, unless he knew and could have foreseen that such injuries and grievances would necessarily result from the erection and operation of the appellant's mill and machinery."

ALBERT PICK AND COMPANY

v.

JORDAN.

California Supreme Court—December 15, 1914.

169 Cal. 1; 145 Pac. 506.

Courts — State Court Following Federal Decision.

A state court in deciding a federal question must conform to the latest decision of

the federal Supreme Court thereon, though it necessitates the reversal of its own prior decisions.

[See Ann. Cas. 1913E 281.]

Taxation — Definition of Excise Tax.

An "excise tax" is an inland impost levied on articles of manufacture or sale and also on licenses to pursue trades or dealing in commodities, and is frequently denominated a privilege or occupation tax.

Foreign Corporations — Imposition of License Tax — Validity.

The taxes imposed by Pol. Code § 409, requiring the Secretary of State to charge and collect fees for filing articles of incorporation, graduated on the amount of the capital stock, and by St. 1905, p. 493, imposing an annual license tax on foreign corporations doing business in the state, are excise taxes, demanded as a privilege for the right to do a domestic business, and not taxes based on the capital stock but merely measured thereby, and the imposition of the taxes on a foreign corporation selling its merchandise in the state, though manufactured elsewhere, is not an interference with interstate commerce.

[See note at end of this case.]

Appeal from Superior Court, City and County of San Francisco: SEAWELL, Judge.

Petition for mandate. Albert Pick and Company, plaintiff, and Frank C. Jordan, Secretary of State, defendant. Judgment for plaintiff. Defendant appeals. The facts are stated in the opinion. REVERSED.

U. S. Webb, Raymond Benjamin and *John H. Riordan* for appellant.

McClellan & McClellan for respondent.

J. C. Campbell, David L. Levy and *J. C. Campbell, Weaver, Shelton & Levy, Amici Curiæ.*

[2] HENSHAW, J.—Petitioner is a corporation, organized under the laws of the state of Illinois, for the purpose of manufacturing and selling and generally dealing in china, glassware, pottery, restaurant supplies, and other merchandise. It manufactures none of the enumerated articles in the state of California. However, as it avers, in its petition, it has for a long time been engaged in interstate commerce in these goods and wares between the state of Illinois, the state of California, and other states of the United States. It maintains a branch office and place of business in the city and county of San Francisco, and sells its goods, wares, and merchandise in the city and county of San Francisco and in other states of the United States, and ships its goods, wares, and merchandise from the state of Illinois into the state of California [3] and into other states, and from the state of California into other states. It has tendered to the secretary of state for filing a certified copy of its articles of incorporation with other appropriate papers required by the laws of the state, and the secretary of state has refused to file the same excepting upon prepayment of the fee fixed by section 416 of the Political Code (now 409, Pol. Code), and the fee prescribed by section 2 of the act relating to revenue and taxation providing for a license-tax on corporations. (Stats. 1905, p. 493.) Petitioner, refusing to pay the fees, made application to the superior court of the city and county of San Francisco for mandate against the secretary of state directing him to file these papers without payment of the fee exacted by the terms of subdivision 4 of section 409 above cited and the corporation license-tax of 1905.

The secretary of state answered, setting forth that the petitioner, besides the conduct of interstate commerce in which it is admittedly engaged, transacts "a large volume of intrastate business within the state of California; that said intrastate business forms no part of and is neither inextricably nor necessarily connected with the interstate business of said company, and respondent further alleges that its said interstate business is nowise dependent upon the aforesaid intrastate business of said company; that the authorized capital stock of said company amounts to one million dollars." A general demurrer to this answer was interposed and sustained, and the trial court filed its findings of fact and conclusions of law, wherein it declared in accordance with the allegations of the petition and awarded the mandate prayed for. The secretary of state has appealed from this judgment.

Upon this appeal we are asked to distinguish this case from that of Mulford Co. v. Curry, 163 Cal. 276, 125 Pac. 236, where this court, in the matter of the exaction of taxes or fees upon corporations engaged in interstate commerce, sought (though perhaps in vain) to determine the underlying principles and to follow the rulings of the supreme court of the United States enunciated in that series of cases, beginning with Western Union Tel. Co. v. Kansas, 216 U. S. 1, 54 U. S. (L. ed.) 355, 20 S. Ct. 190. We are asked to do this because of the new light which it is said has been shed upon the legal questions involved by the cases of Baltic Min. Co. and S. S. White Dental Mfg. Co. v. [4] Massachusetts, decided by the supreme court of the United States, and reported in 231 U. S. 68, 58 U. S. (L. ed.) 127, 34 S. Ct. 15.

In Mulford Co. v. Curry this court expressed the reluctance it felt over the necessity of applying the principles of the Western Union Tel. Co. v. Kansas and the other like cases to the fiscal and revenue laws of the state. It did so under the compulsion of its oath to uphold the constitution and laws of

the United States as expounded by its highest judicial tribunal. If we were in error in our understanding of the law, if the supreme court of the United States has latterly thrown new light upon its own exposition of the law, or if it has receded from any of the views which it has expressed in the earlier cases, it is for this court to remodel its own decisions in swift conformity therewith.

It becomes necessary, therefore, even at the peril of prolixity, to set forth the understanding which this court had, and which in Mulford Co. v. Curry, it expressed, of the legal principles enunciated and the legal controversies decided in that series of cases beginning with the Western Union Tel. Co. v. Kansas. By the law of Kansas every foreign corporation "seeking to do business in this state" was required to file a copy of its charter or of its articles of incorporation with the secretary of state, and, when so filing, to "pay to the state treasurer of Kansas, for the benefit of the permanent school fund, a charter fee of one-tenth of one per cent. of its authorized capital upon the first $100,000 of its capital stock or any part thereof, and upon the next $400,000 or any part thereof one-twentieth of one per cent.; and for each million or major part thereof over and above the sum of $500,000, $200." The Western Union Telegraph Company, a New York corporation, was conducting business in the state of Kansas. That business was both interstate, involving the reception within the state of messages from points outside of the state, and, conversely, the sending of messages from points within the state to points outside the state, and intrastate or domestic, consisting of the sending and reception of messages between different points wholly within the state. It refused to make the filing and pay the fee prescribed by the Kansas statute, and the state brought its action in one of its own courts against the company, seeking to oust and restrain it from doing any *domestic* business within the state, such being one of the penalties by the laws of Kansas [5] prescribed. The state court rendered its decree of ouster and restraint as prayed for. The cause was transferred under writ of error to the supreme court of the United States, and there decided by a sharply divided court upon an elaborate opinion handed down by Mr. Justice Harlan. The western Union Telegraph Company was capitalized for one hundred million dollars. The "charter fee" (such is the description of the fee used by the state of Kansas) in the case of the Western Union Telegraph Company amounted to twenty thousand one hundred dollars.

Amongst the contentions of the state of Kansas in support of the validity of the judgment of its court were that it had the absolute right to impose the terms and conditions upon which a foreign corporation might do a domestic business within its territorial limits; that the fiscal law under review imposed as such condition the payment of a charter fee based on or admeasured by the par value of the capital stock of corporations; that this was not a tax upon the property of the corporation either within or without the state, but was "a local police regulation on local business only;" that the fact that the statute might cause inconvenience to interstate business did not render it unconstitutional; and that the failure to comply with the law did not prevent the foreign corporation from continuing to the fullest extent in engaging in interstate commerce. The opposed contentions of plaintiff in error are set forth by the supreme court in the opening paragraph of the opinion which it rendered in that case. They are as follows:

"The contentions of the company, to which particular attention will be directed, are, in substance, that the requirement that it pay, for the benefit of the permanent school fund of the state, *a given per cent. of its authorized capital*, wherever and however employed, as a *condition* of its right to continue to do domestic business in Kansas, is a regulation which, by its necessary operation, directly burdens or embarrasses interstate commerce, and, therefore, is illegal under the commerce clause of the constitution; further, that such a requirement involves the taxation not only of the company's interstate business everywhere, but equally the property employed by it beyond the limits of the state, a thing which could not be done consistently with the due process of law enjoined by the fourteenth amendment."

[6] And, here, at the outset, it may be well to state that each and every one of these contentions is to the fullest extent sustained by the decision. It is to be remembered that the supreme court itself declares that these contentions are the ones to which particular attention will be directed. What the supreme court decides is, that without regard to the name by which the license, or fee, or excise, or impost, or occupation, or privilege tax may be called, when it takes the *form* that it took in Kansas, of an exacted payment of a given per cent. of the authorized capital stock, this exaction accomplishes two distinct illegal and unconstitutional results. First, it is in legal effect a tax upon all of the property represented by the capital stock of the corporation, therefore a tax upon such parts of the property as were engaged in interstate commerce, and therefore an invalid tax under the commerce clause of the constitution of the United States; and, second, it is an attempt by the state to tax property beyond its territorial jurisdiction, and is therefore confiscatory in nature and violative of the fourteenth

amendment of the constitution. That there can be no possibility of misunderstanding the meaning of the supreme court in this particular we shall employ a few quotations from its decisions. But before doing so we will quote one sentence from the dissenting opinion of Mr. Justice Holmes in this particular case. Bearing in mind that the majority of the supreme court declared that the Kansas law imposed a tax, we note Justice Holmes in dissenting saying: "I assume that a state cannot tax a corporation on commerce carried on by it with another state, or on property outside the jurisdiction of the taxing state; and I assume further that for that reason a tax on or *measured by* the value of the total stock of a corporation like the Western Union Telegraph Company, is void." (Mr. Justice Holmes' argument proceeds upon the view that Kansas had not imposed a tax at all. "She simply has said to the company that if it wants to do local business it must pay a certain sum of money. . . . The whole matter is left in the Western Union's hands.") The prevailing opinion declared that there was no decision "holding that a state may by any device or in any way, whether by a license-tax in the form of a fee, or otherwise, burden the interstate business of a corporation of another state. . . . If the statute reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to [7] be invalid whatever may have been the purpose for which it was enacted, and although the company may do both an interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere form, but will look through the form to the substance of things." Then says the court:

"Looking, then, at the natural and reasonable effect of the statute, disregarding mere forms of expression, it is clear that the making of the payment by the Telegraph Company, as a charter fee, of a given per cent. *of its authorized capital*, representing, as that capital clearly does, *all* of its business and property, both within and *outside of the state*, a *condition* of its right to do local business in Kansas, is, in its essence, not simply a tax for the privilege of doing local business in the state, but a burden and tax on the company's interstate business and on its property located or used outside of the state. The express words of the statute leave no doubt as to what is the *basis* on which the fee, specified in the state statute, rests. That fee, plainly, is not based on such of the company's capital stock as is represented in its local business and property in Kansas. The requirement is a given per cent. of the company's authorized capital, that is, all its capital wherever or however employed, whether in the United States or in foreign countries, and whatever may be the extent of its lines in Kansas as compared with its lines outside of that state. What part of the fee exacted is to be attributed to the company's domestic business in Kansas and what part to interstate business, the state has not chosen to ascertain and declare in the statute. It strikes at the company's entire business wherever conducted, and its property wherever located, and, in terms, makes it a *condition*, of the telegraph company's right to transact purely local business in Kansas that it shall contribute for the benefit of the state school fund a given per cent. of its whole authorized capital, representing all of its property and all its business and interests everywhere. . . . So, in the case now before us, the exaction as a condition of the privilege of continuing to do or doing local business in Kansas, that the Telegraph Company shall pay *a given per cent. of its authorized capital stock*, is, for every practical purpose, a tax both on the company's local business in Kansas, and on its interstate business or on the privilege of doing interstate business; for, the statute, by its necessary operation, will accomplish precisely [8] the result that would have been accomplished had it been made, *in express words*, a condition of doing local business that the Telegraph Company should submit to taxation upon both its interstate and intrastate business and upon its interests and property everywhere, as represented by its capital stock. The exaction made by the Kansas statute is as much a tax on the interstate business of the company and on its property outside of the state as a fee or tax on the sale of an article imported only for sale or as a tax on the occupation of an importer would be a tax on the property imported."

In the course of its argument and in demonstration that its reasoning was not meant to apply exclusively to that class of corporations known as common carriers, it uses this illustration: "If a domestic corporation engaged in the business of soliciting orders for goods manufactured, sold and delivered in a state, should, in addition, solicit orders for goods manufactured in and to be brought from another state for delivery, could the former state make it a *condition* of the right to engage in local business within its limits that the corporation pay a given per cent. of *all* fees or commissions received by it in its business, interstate and domestic? There can be but one answer to this question, —namely, that such a condition would operate as a direct burden on interstate commerce, and therefore would be unconstitutional and void. Consistently with the constitution no court could, by any form of decree, recognize or give effect to or enforce such a con-

dition." And, in announcing the familiar doctrine that Kansas might exact a license-tax of the corporation "strictly on account of local business done by it in that state," it couples this statement with the declaration: "But it is altogether a different thing for Kansas to deny it the privilege of doing such local business, beneficial to the public, except on condition that it shall *first* pay to the state a given per cent. of all its capital stock, representing all of its property, wherever situated, and all its business in and outside of the state." And the opinion concludes as follows: "The right of the Telegraph company to continue the transaction of local business in Kansas could not be made to depend upon its submission to a condition prescribed by that state, which was hostile both to the letter and spirit of the constitution. The company was not bound, under any circumstances, to surrender its constitutional exemption from state taxation, direct or indirect, in respect of its interstate business and its [9] property outside of the state, any more than it would have been bound to surrender any other right secured by the National Constitution."

The next case of Pullman Co. v. Kansas, 216 U. S. 56, 54 U. S. (L. ed.) 378, 30 S. Ct. 232, arose under the same Kansas statute, Mr. Justice Harlan again delivering the opinion. It reiterates and affirms the opinion and decision of the Western Union case, and defines that decision in terms, in the following language.

"The Charter Board, we have seen, gave it permission to engage in intrastate business in Kansas on *condition* that it should pay to the state treasurer *for the benefit of the permanent school fund of the state*, as a charter fee, the sum of $14,800, which is the prescribed statutory per cent. of the company's authorized capital, representing *all* of its property and interests everywhere, in and out of the state, and *all* its business, both interstate and intrastate. It does not appear how much of the single 'fee' demanded by the state is to be referred to the interstate business of the company nor how much to its property outside of the state, nor what part has reference to its intrastate business or to its property within the state." . . . "We hold (2) That the requirement that the company, as a condition of its right to do intrastate business in Kansas, should, in the form of a fee, pay to the state a specified per cent. of its authorized capital, was a violation of the constitution of the United States, in that such a single fee, based as it was on all the property, interests and business of the company, within and out of the state, was, in effect, a tax both on the interstate business of that company, and on its property outside of Kansas, and compelled the company, in order that it might do local business in Kansas in connection with its interstate business, to waive its constitutional exemption from state taxation on its interstate business and on its property outside of the state and contribute from its capital to the support of the public schools of Kansas."

Mr. Justice White filed a concurring opinion in that case, in which, while assenting to the views of his associates, he carried the doctrine further than they, declaring, with unimpeachable logic: "It is not by me doubted that as a practical question the arbitrary prohibition against doing a local business imposed on one engaged in and having the right to engage in interstate commerce is to burden that business." Epigrammatically, [10] he presents the controversy in the following sentences: "The only right here challenged is the authority of a state to impose an unconstitutional tax and validate the tax by making the payment of the unlawful tax a condition of the right to do a local business. And this upon the false assumption that absolute power to exclude exists; that is, to impose an unlawful tax and sustain it by another unlawful assumption of power, a process of reasoning which, to my mind, must rest on the proposition that in deciding questions of constitutional power it is to be held that two wrongs make a right." Mr. Justice Holmes again dissented, reiterating in amplified form the views expressed in his earlier dissent, and concluding: "I think that the tax in question, *for I am perfectly willing to call it a tax*, was lawful under all the decisions of this court until last week." (The italics are ours.)

The next case was Ludwig v. Western Union Tel. Co. 216 U. S. 146, 54 U. S. (L. ed.) 423, 30 S. Ct. 280. This case had to do with an Arkansas law, which required all foreign corporations to file copies of their charters or articles of incorporation with the secretary of state, under heavy penalties for failure so to do, and required them also to pay into the treasury of the state, "for the filing of said articles a fee of $25 where the capital stock is $50,000 or under; $75 where the capital stock is over $50,000 and not more than $100,000, and $25 additional for each $100,000 of capital stock." The supreme court of the United States declared that the case could not "be distinguished in principle from Western Union Tel. Co. v. Kansas and Pullman Co. v. Kansas," and that the difference in the wording of the Kansas and Arkansas statutes—the former being in the nature of a percentage tax, the latter naming fixed sums of money based upon capitalization—did not differentiate the cases so as to take the Arkansas statute out of the ruling of the former cases. These cases were followed by Atchison, etc. R. Co. v. O'Connor,

223 U. S. 280, Ann. Cas. 1913C 1050, 56 U. S. (L. ed.) 436, 32 S. St. 216. The statute of Colorado exacted a "fee" of a foreign corporation of two cents upon each $1000 of its capital stock, which fee it was declared was for the right to do a local business within the state. The action was brought to recover the tax paid under protest. Mr. Justice Holmes, who dissented in the earlier cases, delivering the opinion of the court, declared: "Therefore it is obvious that the tax is of the kind decided by [11] this court to be unconstitutional, since the decision below in the present case, even if the temporary forfeiture of the right to do business declared by the statute be confined by construction, as it seems to have been below, to business wholly within the state."

Again the question arose in International Text-Book Co. v. Pigg, 217 U. S. 91, 18 Ann. Cas. 1103, 27 L.R.A.(N.S.) 493, 54 U. S. (L. ed.) 678, 30 S. Ct. 481. The International Textbook Company was a Pennsylvania corporation, organized for purposes of profit and with a capital stock. It combined the publication of textbooks and courses of instruction in various arts and sciences with an educational school conducted by correspondence, to the students of which it transmitted for a consideration these textbooks and educational courses. It employed salaried agents within specified territories to secure pupils or students. It did so in Kansas It failed or refused to comply with certain provisions of the Kansas statute, one, the provision for the charter fee considered in Western Union Tel. Co. v. Kansas, 216 U. S. 1, 54 U. S. (L. ed.) 355, 30 S. Ct. 190, and, another, the provision requiring it to file with the secretary of state a detailed statement showing the authorized capital, the paid-up capital stock, the amount of assets and liabilities, etc. etc. Among the penalties prescribed for a failure so to do was the denial of the right to the defaulting corporation to maintain an action in any of the courts of the state. The International Textbook Company sued Pigg as a debtor under one of its contracts of instruction. The supreme court of the United States reaffirmed the invalidity of the Kansas charter fee statute, and further declared: "It is the established doctrine of this court that a state may not, in any form or under any guise, directly burden the prosecution of interstate business. But such a burden is imposed when the corporation of another state, lawfully engaged in interstate commerce, is required, as a condition of its right to prosecute its business in Kansas, to make and file a statement setting forth certain facts which the state, confessedly, could not control by legislation. It results that the provision as to the statement mentioned in section 1283 must fall before the constitution of the United States, and with it—according to the established rules of statutory construction—must fall that part of *the same section* which provides that the obtaining of the certificate of the secretary of state that such statement has [12] been properly made shall be a condition precedent to the right of the plaintiff to maintain an action in the courts of Kansas."

And, finally, was decided Bucks Stove, etc. Co. v. Vickers, 226 U. S. 205, 57 U. S. (L. ed.) 189, 33 S. Ct. 41, where this purely manufacturing and mercantile corporation offended against the same Kansas law, and was held by the supreme court to be immune from punishment therefor, under authority of the Pigg case.

We have now considered all of the decisions of the supreme court of the United States (saving the Massachusetts cases hereinafter to be reviewed) which can have any bearing upon the questions before us. It becomes pertinent here to take up for brief analysis the case of H. K. Mulford Co. v. Curry, 163 Cal. 276, 125 Pac. 236, wherein in this state the foregoing decisions of the supreme court first came under review. The more pertinent does it become to do this since the statutes in the present case under review are in all substantial particulars identically the same as they were when H. K. Mulford Co. v. Curry was decided. A reference to H. K. Mulford Co. v. Curry will save a repetition of the language of those statutes. It should be added that section 410 of our Civil Code declares that every foreign corporation which shall neglect or fail to comply with the conditions of sections 408 and 409 of the code shall be subject to a fine of not less than five hundred dollars, to be paid into the state treasury to the credit of the general fund, and every such corporation so failing is denied the right to "maintain any suit or action in any of the courts of this state, or acquire or convey any legal title to any real property within the state, until it has complied with said section." This language is as general as language can be made. It is declared applicable to "*every* corporation organized under the laws of another state or territory or of a foreign country." Section 408 requires "*every* corporation organized under the laws of another state, territory, or of a foreign country, . . . file in the office of the secretary of state of the state of California a certified copy of its articles of incorporation," etc. The language of section 416 of the Political Code quoted in H. K. Mulford Co. v. Curry has become by amendment the language of the present section 409 of the same code.

The Mulford Company, like the petitioner in the case at bar, was a commercial corporation organized to do, and doing, an inter-

state business and an intrastate business within the state [13] of California. Like the present petitioner, it objected to the payment of the fees exacted by our laws, and after tendering certain nominal filing fees sought mandate against the secretary of state to compel him to receive and file certain documents, the filing of which was called for by our laws. That part of our laws to which the Mulford Company in especial objected was section 416 of the Political Code (now 409). This law, it will be noted (as did the Kansas statute), imposes a single fee upon corporations which it is made mandatory upon the secretary of state to collect for filing their articles of incorporation, the other sections referred to requiring that such articles be filed. In addition to this law, requiring foreign corporations to pay this fee before they can engage in business in the state of California at all, we have upon our books another law designated in its title as "A license-tax upon corporations," requiring them to pay an annual license-tax for the right to continue in business. (Stats. 1905, p. 493.) It was the first license law which this court had under especial consideration in the case of H. K. Mulford Co. v. Curry. This may be noted from the declaration in the case where the annual license-fee law is set out, that it is set out as "having further relation to the matter." It was not important, to the decision in the Mulford Company case to elaborate our views upon these acts separately. The latter one was referred to: 1. Because it formed a part of the same fiscal system; 2. Because it, too, based its license fee charges upon the authorized capital stock or corporations, and 3. Because the practical effect in the case of every foreign corporation seeking to engage in business in the state of California was to require it to pay two fees. To illustrate, if the Western Union Telegraph Company had undertaken to engage in business in California, an analysis and computation will show that it would have been required to pay a fee of ten thousand dollars under sections 409 of the Civil Code and 416 of the Political Code, and a fee of two hundred and fifty dollars under the corporation License Tax Act, or a total of ten thousand two hundred and fifty dollars in California, as compared with twenty thousand one hundred dollars in Kansas.

Turning to the judgment in H. K. Mulford Co. v. Curry, it will be found that the only judgment rendered is a declaration that the requirement of section 408 of the Civil Code, that the petitioner file its articles of incorporation, is a reasonable requirement, [14] but that the further requirement that as a condition of such filing the petitioner pay the fee exacted by section 409 of the Civil Code and 416 of the Political Code is illegal. Neither by the terms of the judgment nor by any express language in the opinion itself was the annual license-tax declared to be unconstitutional under the authority of the federal cases. But since the supreme court of the United States had declared that such fees, when based upon the total capital stock, were invalid exactions for the reasons given, the fear was felt and expressed that even the annual corporation license-tax so founded upon the total capital stock might fall under the same ban, and this court sought to advise the legislature as to what it conceived the supreme court of the United States had declared to be the limit of the law-making power in the matter.

What, then, did the supreme court of the United States decide in its cases?

It decided: (a) That it would review and consider the language of each state fiscal act and determine for itself, regardless of the determination of the states' legislative or judicial departments, what in fact the law did mean and what in fact it did accomplish, quoting with approval from Galveston, etc. R. Co. v. Texas, 210 U. S. 217, 52 U. S. (L. ed.) 1031, 28 S. Ct. 638, to the following effect: "Neither the state courts, nor the legislatures, by giving the tax a particular name, or by the use of some form of words, can take away our duty to consider its nature and effect." (b) If under the interpretation of the supreme court it resulted that a particular statute "either directly or by its necessary operation burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business." (c) It decided that interstate commerce was illegally burdened by a tax or fee directly on or based on the total capital stock of a corporation which, though engaged in local business within a state, was also engaged in interstate commerce. Thus we find the court in Pullman Co. v. Kansas, saying that "the requirement that the company, as a condition of its right to do intrastate business in Kansas, should, in the form of a fee, pay to the state a specified per cent. of its authorized capital, was a violation of the constitution of the United States, in that such a single fee, based as it was on all the property interests and business [15] of the company within and without the state, was in effect a tax both on the interstate business of that company and on its property outside of Kansas." Again, we find Mr. Justice Holmes in his dissenting opinion "assuming" and conceding that "a tax or *measured by* the value of the total stock of a corporation like the Western Union Telegraph Company is void." And again we have him declaring

in his dissenting opinion in the Pullman case; "I think that the tax in question (for I am perfectly willing to call it a tax) was lawful." (d) We find that the unconstitutionality and illegality of the tax so based and levied are declared to exist upon two separate and wholly unrelated grounds, which grounds are enunciated and re-enunciated time and again. Those grounds may be thus stated: The requirement to pay a given per cent. of the capital stock as a prerequisite of the right to do a local business, exacts burdensome and unconstitutional conditions from the corporation; the first, that the state thus taxes the instrumentalities and properties used in interstate commerce which lie without the taxing power of the state, and thus unduly burdens interstate commerce in violation of the commerce clause of the constitution; and, second, that such an act in taxing property without the jurisdiction of the taxing power requires a corporation seeking to do local business within a state to waive its constitutional right of exemption from taxation on its property lying outside of the state. (e) These results are declared to follow from the act of taxing the whole capital stock of such a corporation and are nowhere and nowise declared to be dependent either upon the amount of the capitalization of the corporation, nor upon the amount of the tax exacted from that corporation. We perceived, or thought we perceived, the ground for this in the principle that if the power to tax in a given way be conceded, the amount of the tax is vested wholly in the discretion of the taxing power, and we had in mind only the language of Chief Justice Marshall "that the power to tax involves the power to destroy." (M'Cullough v. Maryland, 4 Wheat. 316, 14 U. S. (L. ed.) 579), but also the danguage of Brennan v. Titusville, 153 U. S. 289, 38 U. S. (L. ed.) 719, 14 S. Ct. 829, quoted with approval in the Western Union case, in reference to such license-taxes, that "if a state may lawfully exact it, it may increase the amount of the exaction until all interstate commerce in this mode ceases to be possible." (f) That [16] in thus guarding interstate commerce from unlawful interference, the supreme court would be governed not by what a given charge was or was called, but by consideration of what in its operation was its effect upon such commerce. For we find in the Western Union Telegraph case the following language quoted with approval from Ashley v. Ryan, 153 U. S. 436, 38 U. S. (L. ed.) 773, 14 S. Ct. 865: "Whether this charge be viewed as a tax, a license or a fee, if its exaction violated the interstate commerce clause of the constitution of the United States, or involved the assertion of the right of a state to exercise its powers of taxation beyond its geographical limits, it was void, whatever might be the technical character affixed to the exaction." (g) We believed that the supreme court meant and declared for the indicated reasons that the method of charging a fee upon foreign corporations for the right to do a local business on or based on the capital stock of such corporations was forever inhibited, the supreme court saying, "There are sufficient modes in which the internal business, if not already taxed in some other way, may be subjected to taxation without the imposition of a tax which covers the entire operations of the company." (Leloup v. Mobile, 127 U. S. 640, 32 U. S. (L. ed.) 311, 8 S. Ct. 1383.) And to the declaration of Mr. Justice Holmes in his dissenting opinion to the following effect: "If after this decision the state of Kansas, without giving any reason, sees fit simply to prohibit the Western Union Telegraph Company from doing any more local business there, or from doing local business until it has paid $20,100, I shall be curious to see upon what ground that legislation will be assailed," we believed that the answer would be, as above indicated, that it was not the *amount* of the charge which determined the invalidity, but the fact that in its form the charge was laid upon property without the taxing power of the state, and that to submit to the payment of it in such a form (that is, a tax on all the capital stock) would be to force the surrender upon the part of the corporations of their well-defined constitutional rights. Thus, if a man who is on his way to church to give a hundred dollars to charity is robbed of that hundred dollars by a highwayman, his financial condition is exactly the same as it would have been had he carried out his purpose. Yet it will not be said that this fact leaves him uninjured and without grievance.

[17] These, then, were some of the conclusions which we drew from the decisions of the supreme court and which, with more or less completeness, we sought to declare in H. K. Mulford Co. v. Curry. One part of the judgment of the supreme court we conceived to be apodictic and that was that all the capital stock of such a corporation could not be subjected to any tax without doing violence to the constitution of the United States, and it was under this conviction that we sought in H. K. Mulford Co. v. Curry to enlighten our legislative department as to the danger which would attach to all laws basing license fees of a foreign corporation on this method of taxation.

There arose in Massachusetts two cases of similar import, Baltic Min. Co. v. Com. 207 Mass. 381, 93 N. E. 831, and the S. S. White Dental Mfg. Co. v. Com. 212 Mass. 35, Ann. Cas. 1913C 805, 98 N. E. 1056. For convenience we may refer to but one and call that the Dental Company case. The Dental Manu-

facturing Company was a Pennsylvania corporation, having no factories in Massachusetts, but engaged in domestic business within the state of Massachusetts, as well as in interstate commerce. The Massachusetts revenue laws provided that, "Every foreign corporation shall, in each year, at the time of filing its annual certificate of condition, pay to the treasurer and receiver general, for the use of the commonwealth, an excise tax, to be assessed by the tax commissioner, of one-fiftieth of one per cent. of the par value of its authorized capital stock as stated in its annual certificate of condition; but the amount of such excise tax shall not in any one year exceed the sum of $2000." The Dental Manufacturing Company objected to the payment of the tax upon the three grounds so clearly enunciated in Western Union Tel. Co. v. Kansas. Those grounds, as stated by the supreme court of the United States, to which the case subsequently went on writ of error, being: "First, the tax is a regulation of interstate commerce, in that it imposes a direct burden upon that portion of the business and capital of the plaintiffs, in error which is devoted to interstate commerce; second, the tax is in violation of the due process of law clause, because it attempts to impose taxes upon property beyond the jurisdiction of the commonwealth of Massachusetts; and, third, the tax denies to the plaintiffs in error the equal protection of the law." [18] The supreme court of Massachusetts, after a painstaking review of its taxation history, its peculiar system of taxation and the decisions of its courts, held the tax to be a pure excise tax, "excise tax" as thus employed meaning a privilege tax upon the right to pursue an occupation, and not a tax upon property at all. It declared that it recognized that the supreme court of the United States would look through the form to the substance and determine for itself whether such an impost was or was not a property tax or a burden upon interstate commerce, and to this point cited the decisions of the supreme court which we have been considering. But it declared that there were "at least two important and, as we think, vital distinctions between these cases and the one at bar." The first of those distinctions is declared to be the fact that in the cases before the supreme court of the United States the corporations, though one and all engaged in domestic commerce, were common carriers, organized for the transportation of intelligence, commerce, and persons between the states, and that their local business could not be given up without impairing their capacity to transact their interstate business. And the second distinction was that the maximum fee allowed by the Massachusetts statute was two thousand dollars, while in the Kansas and Arkansas statutes the tax was graded and increased by the amount of the capital stock, and to the mind of the supreme court of Massachusetts "this provision demonstrates that it is not a property tax but only an excise, so limited that it cannot reach beyond a reasonable license fee." Further, the supreme court of Massachusetts points out that a flat rate of two thousand dollars might have been exacted of all corporations without doing violence to any right guaranteed by the constitution of the United States, and that in fact what Massachusetts has done has been to diminish the burden upon corporations of smaller capitalization. Again, the Massachusetts court denotes, as a compelling reason for its determination, that the authorized capital stock of the Dental Company is a million dollars, while its assets aggregate $5,711,718.29, thus to its mind evidencing the fact that the tax was an excise and not a property tax on or based on its authorized capital stock. And, lastly, the supreme court of Massachusetts decided that the act did not apply to common carriers, railroad, telegraph, and telephone, which were taxed upon another plan; that it did not apply [19] to corporations whose sole business within the state was interstate commerce, nor yet to corporations carrying on both interstate and domestic commerce, whose domestic or intrastate business was conducted in such close connection with the other that it could not be abandoned without serious impairment of the interstate business. It held that the Dental Company's intrastate business was severably distinct from its interstate business, and that therefore it was liable to the payment of this excise tax for the privilege of carrying on that intrastate business.

These cases (Baltic Min. Co. and S. S. White Dental Mfg. Co. v. Commonwealth of Massachusetts, 231 U. S. 68, 58 U. S. (L. ed.) 127, 34 S. Ct. 15), as has been said, went to the supreme court of the United States, and in an opinion handed down by Mr. Justice Day, the judgment of the supreme court of Massachusetts, upholding the validity of its foreign corporation license-tax law and the liability of the Dental Company to pay this tax, was sustained, Chief Justice White, Mr. Justice Van Devanter and Mr. Justice Pitney dissenting. The ground of their dissent has not been stated, but we think it beyond peradventure that, looking through form to substance, they believed this Massachusetts tax, call it excise or what you will, was in fact a tax upon the total capital stock of the dental corporation and thus was a tax within the inhibition declared in the Western Union Tel. Co. v. Kansas and the other like cases.

The supreme court of the United States adopts without reservation the determination of the supreme court of Massachusetts that

this fee is an excise tax as distinguished from a property tax. It may at once be granted that it is that form of an excise tax which is frequently denominated a privilege or occupation tax, but it by no means follows that being an excise tax this is conclusive that it is not levied upon property. Indeed, many forms of excise tax are distinctly and admittedly levied upon property, and every definition of excise includes this kind of tax. An excise is "an inland impost levied upon articles of manufacture or sale and also upon licenses to pursue certain trades or dealing in certain commodities." (Patton v. Brady, 184 U. S. 617, 46 U. S. (L. ed.) 713, 22 S. Ct. 496.) To say that because a tax is an excise it is not levied upon property is to throw all the reasoning of the supreme court in all these cases to the four winds. [20] The argument was made in these Kansas cases, and it was a sound argument, that the laws under consideration merely imposed an occupation or privilege tax—in short an excise tax—for the right to do a local business, and this was conceded by all of the justices of the supreme court. Their answer, however, to the conclusion sought to be drawn from this was that, notwithstanding that it is an excise tax or privilege or occupation tax, it is levied upon property beyond the taxing power of the state, and by the fact that it is so levied imposes a burden upon property without the state which is engaged in interstate commerce. We are unable to perceive, therefore, how the determination that the Massachusetts tax is an excise tax relieves it from the condemnation imposed upon the Kansas statute for attempting to do the same thing by fixing or basing its tax on the total capital stock of the corporation. As little do we perceive that the amount of the tax imposed by the Massachusetts law has materiality in the consideration. If the principle upon which its tax is based is a sound one, it may tomorrow increase the amount of the tax to any extent. It is true that in the earlier cases the corporations involved were common carriers and the supreme court of the United States makes mention of that fact in the Dental case, but it does not say that this consideration influenced or was determinative of the controversy. To the contrary, it does say that all corporations engaged in interstate commerce are under the equal protection of the commerce clause of the constitution, and, indeed, no distinction between them can justly be drawn. If it is important that common carriers—the instrumentalities by and through which commerce is conveyed, shall be protected from unwarranted burdens, it is equally necessary that the owners of the commerce to be conveyed should receive a like protection. While interstate commerce would unquestionably be vitally impaired if common carriers were eliminated, interstate commerce would be totally destroyed if the goods, wares, and merchandise embraced within the meaning of the word were debarred from interstate and foreign transportation. The supreme court of the United States points out very truly that in the Western Union Telegraph Company case and in the Pullman case, "there was no attempt to separate the intrastate business from the interstate business." No such attempt is made by the Massachusetts law. True, the Massachusetts supreme [21] court, under a stipulation of facts, finds that about five per cent. of the business of the Dental Company was intrastate. But there is no attempt in the law to impose any tax upon that part of its business nor upon the one hundred thousand dollars' worth of property which represents the company's holdings in the state. It would have been just as easy and as practicable to have shown in the Western Union Telegraph Company case the proportion of its local business as compared with its interstate business, and, indeed, in the case of every common carrier or commercial concern, we venture the assertion that not the slightest difficulty will be found in so doing. Indeed, we may recall the fact that this is required to be done in this state as a part of its revenue laws in the case of every common carrier engaged in interstate as well as intrastate business, and we have yet to hear of the first complaint touching the difficulty or impracticability of so doing. True it is that in the case of most, and we may say all, common carriers engaged in interstate commerce, the deprivation of local business is an injury and impairment of their business as a whole. But this is equally true of every commercial corporation likewise engaged in interstate and domestic business. Nor have we yet been told, nor are we told by this last decision of the supreme court, that this is fundamental ground for destroying a state privilege tax otherwise constitutional. True, also, it is that in Western Union Tel. Co. v. Kansas, it is said that, "We cannot fail to recognize the intimate connection which at this date exists between the interstate business done by interstate companies and the local business which for the convenience of the people must be done, or can generally be better and more economically done, by such interstate companies rather than by domestic companies organized to conduct only local business." But in that same connection it is said that "It is of the last importance that the freedom of interstate commerce shall not be trammeled or burdened by local regulations, which, under the guise of regulating local affairs, really burden rights secured by *the Constitution and laws of the United States*." But as a state may absolutely exclude even a common carrier from doing a local busi-

ness within its territory, and as this has been distinctly and in terms held in Osborn v. Florida, 164 U. S. 650, 41 U. S. (L. ed.) 586, 17 S. Ct. 214, and Pullman Co. v. Adams, 189 U. S. 420, 47 U. S. (L. ed.) 877, 23 S. Ct. [22] 494, where in the prevailing opinion in the Western Union Telegraph Company case it is said, referring to these two cases, both dealing with common carriers, "The company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce," and as, in even stronger language the same principle is declared in Horn Silver Min. Co. v. New York, 143 U. S. 305 [36 U. S. (L. ed.) 164, 12 S. Ct. 403], it is not permissible for us to hold that the mere interference with or deprivation of local business by a state statute not in itself otherwise unconstitutional, becomes unconstitutional for its indirect influence on the interstate business of the company affected. As little are we able to perceive that the accidental fact that the White Dental Company's capital stock is one million dollars, while its total assets aggregate five million, seven hundred and eleven thousand dollars, has any determinative value in this consideration. If a corporation called upon to pay a tax of one-fiftieth of one per cent. of its total capital stock, has assets amounting to five times the par value of its total capital stock, the tax amounts to one-two hundred and fiftieth of one per cent. upon its total assets. If other corporation, however, capitalized for the same amount has assets to the value of only one-fifth of its capital stock, it results that the property of that corporation is taxed one-tenth of one per cent. So the burden is the heavier upon the poorer corporation. And in neither of the Massachusetts cases is there any attempt to segregate and impose the tax upon that portion of the property or that portion of the whole business lying within or done within the state imposing the tax. Or, again, if we consider the Kansas law in connection with the Massachusetts law, it is indisputable that both levy a *per centum* tax in terms upon the total capital stock. An important difference in favor of the Kansas law is that when this charge is once paid, the privilege of engaging in domestic business is continuously and indefinitely assured. It is one single occupation tax. In Massachusetts, however, it is an annual burden year by year. The corporation annually must pay the *per centum* for the renewed right to continue in business. In Kansas a corporation with a capital stock of two million five hundred thousand dollars would pay a single tax of seven hundred dollars. In Massachusetts that same corporation would pay annually a tax of five hundred dollars. It is certainly reasonable to suppose [23] that corporations engaging in interstate and domestic commerce desire to continue their local business for more than one year. In two years the Massachusetts tax upon this corporation would exceed the Kansas charge. So while the supreme court of the United States does not follow the reasoning advanced by the supreme court of Massachusetts, which the latter court held to differentiate its revenue law from that considered in the Kansas and other cases, it does in its recitals state many of the facts which the supreme court of Massachusetts considered to have a determinative bearing upon the question, some of which we have just now ourselves been considering. What the supreme court of the United States does say is to reannounce the familiar proposition that every case, involving the validity of a tax must be decided upon its own facts, and at the conclusion of this recital to declare as follows: "The conclusion, therefore, that the authorized capital is only used as the measure of a tax, in itself lawful, without the necessary effect of burdening interstate commerce, brings the legislation within the authority of the state. So, if the tax is, as we hold it to be, levied upon a legitimate subject of such taxation, it is not void because imposed upon property beyond the state's jurisdiction, for the property itself is not taxed. In so far as it is represented in the authorized capital stock, it is used only as a measure of taxation, and, as we have seen, such measure may be found in property or in the receipts from property not in themselves taxable." If we analyze this language correctly, it is a declaration that if a state imposes a privilege tax upon the right of a foreign corporation to engage in strictly domestic business within that state (thus we construe the language "the tax levied upon a legitimate subject of such taxation") "this tax is not void because it is imposed (levied or assessed) upon property beyond the state's jurisdiction" for the reason that "the property itself is not taxed. The authorized capital stock is used only as a measure of taxation." Still further paraphrasing this language, we are unable to perceive that it means anything other than if a state desires to impose an occupation tax upon a foreign corporation for the right to do a strictly domestic business within its limits, it may impose this license tax upon the capital stock of the corporation, because, notwithstanding that the tax is imposed upon the capital stock and thus upon property beyond the state's jurisdiction, the [24] supreme court of the United States will hold that the tax is valid, because it will say that in the last analysis the property itself is not taxed, but that the capital stock is used only as a "measure of taxation." Again we fail to perceive how every word of this might not equally well have been said in the Western Union Tele-

graph Company case, thus forcing the irresistible conclusion that the supreme court has receded from the position which it took, and has abandoned the views which it expressed in that and the like cases. But again, unfortunately, we are confronted in the same opinion with the declaration of the court that it has "no disposition to limit the authority of those cases." We are constrained to admit our inability to harmonize this language and these decisions, though we make haste to add that undoubtedly the failure must come from our own deficient powers of perception and ratiocination, and for this deficiency it is no consolation to us to note that our brethren of the supreme court of Montana are similarly afflicted, for they, too, declare (State ex rel. v. Alderson, 49 Mont. 29, 140 Pac. 82): "We are unable to appreciate the distinction attempted to be made by the supreme court of the United States between the Kansas statute considered in Western Union Tel. Co. v. Kansas, and held to impose a general tax upon all the property of the company, and the statute of Massachusetts considered in Baltic Min. Co. and S. S. White Dental Mfg. Co. v. Massachusetts, 231 U. S. 68, 58 U. S. (L. ed.) 127, 34 S. Ct. 15, and held to be a mere excise."

We have said here, as well as in H. K. Mulford Co. v. Curry, that we sought to arrive at, and thought we had arrived at, the fundamental and governing principle of the decisions, which was that to tax the total capital stock of a corporation for the indicated purposes compelled the corporation paying the tax to submit to two unconstitutional burdens, and that while in dollars and cents the same charge might be imposed upon the corporation, this particular form of tax could not be permitted. It is apparent from the last decision of the supreme court that in some forms it *is* permitted, and only the supreme court of the United States can say what are the permitted forms. We have reached the point where, if it be *said* that the state occupation or privilege charge be an excise tax (and every one of them of necessity must be excise taxes) then it is not a property tax. And even if it be in terms a percentage tax [25] upon the capital stock of a corporation, if it be *said* that this is not a tax on the capital stock, but that the capital stock and *per centum* are taken as constituting merely a convenient measuring rod for fixing the tax, then the property is not taxed, and all constitutional objections are obviated.

Since these questions greatly affect the revenues as well as the rights of the states, since the determination of each one of them is to rest upon its facts, and since, in the event of a decision adverse to a state by its own courts, the state, because of a most unfortunate hiatus in the law, is deprived of a right of a review of the question by the supreme court of the United States, we are moved in the present condition of the decisions to hold and we do hold, that as to both of the license fees in question their payment is exacted as a privilege or occupation tax exclusively upon the right to do a domestic business within the state of California; that these taxes are excise taxes and not property taxes, and that the tax is not on, nor based on, the capital stock of the corporation, but is merely admeasured by that capital stock; that in every case, and so in this case, it is practicable (for what it may be worth) to segregate the strictly domestic business of a corporation from its interstate business; that the case of H. K. Mulford Co. v. Curry should no longer be regarded as an authority; that the respondent in this case should pay the fees prescribed by our law; that the general demurrer sustained to defendant and appellant's answer in the trial court should not have been sustained; that the judgment rendered in favor of respondent in the trial court should be reversed and the relief accorded it denied. And in conclusion we may add that if again we are mistaken, it is comforting to know that the doors of the supreme court of the United States are open for the correction of our error.

The judgment appealed from is therefore reversed, with directions to the trial court to proceed in accordance with the views herein expressed.

Shaw, J., Melvin, J., Lorigan, J., Sloss, J., Angellotti, J., and Sullivan, C. J., concurred.

Rehearing denied.

NOTE.

Imposition of License Tax or Fee on Foreign Corporation.

Introductory, 1248
Corporation Doing Intrastate Business, 1249
Corporation Doing Interstate Business, 1249
Corporation Doing Interstate and Intrastate Business:
Tax Held Valid, 1249
Tax Held Invalid, 1253

Introductory.

The purpose of this note is to review the recent cases discussing the right to impose a license tax or fee on a foreign corporation. The earlier cases on the subject are collated in the notes to Atty.-Gen. v. Electric Storage Battery Co. 3 Ann. Cas. 631; S. S. White Dental Mfg. Co. v. Com. Ann. Cas. 1913C 805, and Hager v. Walker, 129 Am. St. Rep. 238, 288.

Corporation Doing Intrastate Business.

Since a state has the power to prescribe the conditions on which a foreign corporation may enter and do local business, it may impose on such a corporation a license tax or fee for the privilege of doing business within the state. Hirschfield v. McCullagh, 64 Ore. 502, 130 Pac. 1131. See also Dalton Adding Mach. Co. v. Virginia Corp. Commission, 236 U. S. 699, 35 S. Ct. 480, 59 U. S. (L. ed.) 797, *affirming* 213 Fed. 889; State v. Agey (N. C.) 88 S. E. 726.

It has been held that a foreign corporation is liable to taxation under a statute imposing a tax on persons and corporations selling sewing machines at places other than their regularly established places of business. Singer Sewing Mach. Co. v. Atty.-Gen. of Alabama, 233 U. S. 304, 34 S. Ct. 493, 58 U. S. (L. ed.) 974.

The power of a state to tax a foreign corporation is further discussed, and fully sustained as to intrastate business, in the cases dealing with the more complicated question of taxation of a corporation doing both intrastate and interstate business. See infra, the subdivision *Corporation Doing Interstate and Intrastate Business.*

Corporation Doing Interstate Business.

A foreign corporation cannot be compelled to pay a license tax or fee to a state for the privilege of carrying on interstate commerce. Sault Ste. Marie v. International Transit Co. 234 U. S. 333, 34 S. Ct. 826, 58 U. S. (L. ed.) 1337, 52 L.R.A.(N.S.) 574, *affirming* 194 Fed. 522; Ewart Lumber Co. v. American Cement Plaster Co. 9 Ala. App. 152, 62 So. 560; Marconi Wireless Tel. Co. v. Com. 218 Mass. 558, 106 N. E. 310; Dalton Adding Mach. Co. v. Com. (Va.) 88 S. E. 167.

The rule was applied in a case involving foreign commerce, Sault Ste. Marie v. International Transit Co. supra, wherein the court said: "The ordinance requires a municipal license; and the fundamental question is whether in the circumstances shown the state, or the city acting under its authority, may make its consent a condition precedent to the prosecution of the business. If the state, or the city, may make its consent necessary, it may withhold it. The appellee, having its domicile in Canada, is engaged in commerce between Canada and the United States. At the wharf which it leases for the purpose on the American shore, it receives and lands persons and property. Has the state of Michigan the right to make this commercial intercourse a matter of local privilege, to demand that it shall not be carried on without its permission, and to exact as the price of its consent —if it chooses to give it—the payment of a license fee? This question must be answered in the negative. . . . The fundamental principle involved has been applied by this court in recent decisions in a great variety of circumstances, and it must be taken to be firmly established that one otherwise enjoying full capacity for the purpose cannot be compelled to take out a local license for the mere privilege of carrying on interstate or foreign commerce."

A statute imposing a tax on corporations doing business in the state will be construed by the state court so as not to apply to corporations doing only an interstate business within the state, since the last mentioned corporations cannot be subjected to state taxation. Northern Pac. R. Co. v. Gifford, 25 Idaho 196, 136 Pac. 1131; State v. Alderson, 49 Mont. 29, 140 Pac. 82; Smith v. Dickinson, 81 Wash. 465, 142 Pac. 1133. And this rule applies to trading corporations as well as to those engaged in transportation. Marconi Wireless Tel. Co. v. Com. 218 Mass. 558, Ann. Cas. 1916C 214, 106 N. E. 310.

Corporation Doing Interstate and Intrastate Business.

TAX HELD VALID.

A state may impose a license tax or fee on a foreign corporation engaging in both interstate and intrastate business, provided the tax or fee is imposed on the intrastate business and does not burden interstate business or tax property beyond the jurisdiction of the state. Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 34 S. Ct. 15, 58 U. S. (L. ed.) 127 (*affirming* Baltic Min. Co. v. Com. 207 Mass. 381, 93 N. E. 831, and S. S. White Dental Mfg. Co. v. Com. 212 Mass. 35, Ann. Cas. 1913C 805, 98 N. E. 1056); Western Union Tel. Co. v. Frear, 216 Fed. 199; Northern Pac. R. Co. v. Gifford, 25 Idaho 196, 136 Pac. 1131; State v. Sessions, 95 Kan. 272, 147 Pac. 789; Marconi Wireless Tel. Co. v. Com. 218 Mass. 558, 106 N. E. 310; State v. Alderson, 49 Mont. 29, 140 Pac. 82; Atlas Powder Co. v. Goodloe, 131 Tenn. 490, 175 S. W. 547; General Ry. Signal Co. v. Com. (Va.) 87 S. E. 598; State v. Great Northern Exp. Co. 80 Wash. 309, 141 Pac. 757 (*overruling* 76 Wash. 636, 136 Pac. 1160), *affirmed* 81 Wash. 701, 143 Pac. 99 (privilege tax of five per cent. on gross receipts of intrastate business of express companies). See also Crane Co. v. Looney, 218 Fed. 260; New Orleans, etc. R. Co. v. State (Miss.) 70 So. 355; Dalton Adding Mach. Co. v. Com. (Va.) 88 S. E. 167. And see the reported case.

The general principles governing this question were stated in Baltic Min. Co. v. Massachusetts, supra, as follows, the statute involved being quoted in the reported case: "It is well settled and requires no review of the

decisions of this court to that effect that the power of Congress over interstate commerce is supreme under the federal constitution and that the states may not burden such commerce, it being the purpose of the Constitution of the United States to bring commerce of this character under one supreme control and to vest the exercise of authority over it in the general government. It is equally well settled that forms of regulation prohibited to the state by the constitution may consist of efforts to tax the carrying on of such commerce and of attempted levies of taxes upon the receipts of interstate commerce as such. . . . While this is true, other equally well established principles must be borne in mind in considering the validity of a state tax attacked upon grounds of unconstitutionality. The mere fact that a corporation is engaged in interstate commerce does not exempt its property from state taxation. United States Exp. Co. v. Minnesota, 223 U. S. 335, 344 [32 S. Ct. 211, 56 U. S. (L. ed.) 459, 465]. It is the commerce itself which must not be burdened by state exactions which interfere with the exclusive federal authority over it. A resort to the receipts of property or capital employed in part at least in interstate commerce, when such receipts or capital are not taxed as such but are taken as a mere measure of a tax of lawful authority within the state, has been sustained. . . . The right of a state to exclude a foreign corporation from its borders, so long as no principle of the federal constitution is violated in such exclusion, has been repeatedly recognized in the decisions of this court, and the right to prescribe conditions upon which a corporation of that character may continue to do business in the state, unless some contract right in favor of the corporation prevents or some constitutional right is denied in the exclusion of such corporation, is but the correlative of the power to exclude. . . . For example, a state may not say to a foreign corporation, you may do business within our borders if you permit your property to be taken without due process of law, or you may transact business in interstate commerce subject to the regulatory power of the state. To allow a state to exercise such authority would permit it to deprive of fundamental rights those entitled to the protection of the Constitution in every part of the Union. Having these general principles in mind, we will proceed to a consideration of the statute of Massachusetts directly involved in these cases. The supreme judicial court of Massachusetts in considering the character of the tax assessed under the statute of 1909 said (207 Massachusetts 388): 'The required payment is strictly of an excise tax, and not of a tax upon property. . . . This excise tax is for the commodity or privilege of having an establishment for business in Massachusetts, with the protection of our laws and the financial and other advantages of a situation here.' We have no fault to find with the conclusion that this is an excise tax. See also Provident Institution v. Massachusetts [6 Wall. 611, 18 U. S. (L. ed.) 907] supra; Hamilton Co. v. Massachusetts, supra, in which this court had occasion to consider the taxing system of Massachusetts. That the state may impose a tax upon a corporation, foreign or domestic, for the privilege of doing business within its borders is undoubted, and such has long been the legislative policy of the commonwealth of Massachusetts, as appears from the history of legislation set forth in the opinions in the cases last cited. Construing the act in question, the supreme judicial court of Massachusetts has held that it does not apply to corporations engaged in railroad, telegraph, telephone, etc., business which are taxed on another plan under the provisions of the statute. It is held not to apply to corporations whose business is interstate commerce or who carry on interstate and intrastate business in such close connection that the intrastate business cannot be abandoned without serious impairment of the interstate business of the corporation. And the statute, it is held, does not apply to corporations which have places of business for the transaction solely of interstate commerce. Atty.-Gen. v. Electric Storage Battery Co. 188 Mass. 239. The tax is levied upon the privilege of carrying on business within the state and not upon property therein which is otherwise taxed. It is said, notwithstanding, that this tax is a direct burden upon interstate commerce and an attempt to tax property beyond the jurisdiction of the state within the authority of the Kansas cases, Western Union Tel. Co. v. Kansas [216 U. S. 1, 30 S. Ct. 190, 54 U. S. (L. ed.) 355], supra; Pullman Co. v. Kansas [216 U. S. 56, 30 S. Ct. 232, 54 U. S. (L. ed.) 378], supra. . . . An examination of the previous decisions in this court shows that they have been decided upon the application to the facts of each case of the principles which we have undertaken to state, and a tax has only been invalidated where its necessary effect was to burden interstate commerce or to tax property beyond the jurisdiction of the state. In the cases at bar the business for which the companies are chartered is not of itself commerce. True it is that their products are sold and shipped in interstate commerce, and to that extent they are engaged in the business of carrying on interstate commerce and are entitled to the protection of the federal constitution against laws burdening commerce of that character. Interstate commerce of all kinds is within the protection of the Constitution of the United States, and it is not within the authority of a state to tax it by

burdensome laws. From the statement of facts it is apparent, however, that each of the corporations in question is carrying on a purely local and domestic business quite separate from its interstate transactions. That local and domestic business, for the privilege of doing which the state has imposed a tax, is real and substantial and not so connected with interstate commerce as to render a tax upon it a burden upon the interstate business of the companies involved. In these cases the ultimate contention is not that the receipts from interstate commerce are taxed as such, but that the property of the corporations, including that used in such commerce, represented by the authorized capital of the corporations, is taxed and therefore interstate commerce is unlawfully burdened by a state statute. While the tax is imposed by taking a percentage of the authorized capital, the agreed facts show that the authorized capital is only a part of the capital of the corporations, respectively. In the Baltic Mining Company Case, the authorized capital is $2,500,000, while the entire property and assets are $10,776,000; and in the White Dental Company Case the authorized capital is $1,000,000, while the assets aggregate $5,711,718.29. Further, the Massachusetts statute limits the tax to a maximum of $2,000. The conclusion, therefore, that the authorized capital is only used as the measure of a tax, in itself lawful, without the necessary effect of burdening interstate commerce, brings the legislation within the authority of the state."

Following the rule announced in Baltic Min. Co. v. Massachusetts, supra, the court in Northern Pac. R. Co. v. Gifford, 25 Idaho 196, 136 Pac. 1131, upheld the validity of an *Idaho* statute taxing both domestic and foreign corporations according to a graduated scale based on the authorized capital stock of the corporation. Concerning that statute the court said: "It seems to us that the Idaho statute is freer from objection than the Massachusetts statute upon the point that it attempts to tax the property of the corporation outside of and beyond the jurisdiction of the state. The Massachusetts statute, as will be observed, measures the license or excise tax to be collected by a straight percentage of 'one-fiftieth of one per cent. of the par value of its authorized capital stock,' while under the Idaho statute the fee charged is a trifle, based upon a slightly ascending scale, starting with the sum of ten dollars on a five thousand dollar corporation and ascending at stated amounts until the largest possible corporation is required to pay an annual fee of one hundred and fifty dollars, while in the Massachusetts case the maximum fee might reach the sum of two thousand dollars. Our statute is not based on any established percentage of the company's property or capital stock. The fee exacted under the Idaho statute is an excise tax on the right of a foreign corporation to carry on business within the state, that is, intrastate business, or purely local and domestic business, as distinguished from any interstate business it may be doing. This statute provides by secs. 4, 5, 6, 7 and 8 for the termination of the right of a foreign corporation 'doing business within the state' after failing to pay its license tax. No such consequence can be visited upon a corporation for engaging in any interstate business within the state, and a forfeiture under the statute of the right of a foreign corporation to do local or domestic business would in no way effect the right of a corporation to continue to carry on its interstate business and to do all things necessary to be done in conducting such business." Continuing, the court, after quoting from the opinion in Baltic Min. Co. v. Massachusetts, remarked: "The foregoing excerpt reminds one of the impression he has after reading the Kansas cases, namely, that the really controlling consideration with the great jurist who wrote the majority opinion of the court in those cases was the fact that the amount of the excise or license fee laid upon the corporations by the statute of Kansas was so exorbitant and unreasonable that the companies would not likely have been able to pay the same and would have as an alternative been obliged to abandon their local or intrastate business if the statute had been upheld, and that the Kansas legislature was in fact trying to tax the whole property of the corporation, and so the court concluded that it amounted to really laying a tax upon all the property of the companies, whether within or beyond the state, and had the effect of both interfering with interstate commerce and taking the property of the company without due process of law. . . . The comment of the writer of the latest opinion to the effect that it is the settled purpose of that court to decide each case upon its own facts, irrespective of any theoretical rule, convinces us that the supreme court intend to determine the effect of the statute as it will apply in actual practice, rather than decide it upon the theory of any apprehended dangers which might flow from other similar legislation which might prove more exacting. Indeed, the court says: 'A tax has only been invalidated where its necessary effect was to burden interstate commerce or to tax property beyond the jurisdiction of the state.'"

Likewise, a *Kansas* statute, taxing foreign corporations according to a graduated scale based on the proportion of the issued capital stock of the corporation represented by its property and business in Kansas, has been upheld. State v. Sessions, 95 Kan. 272, 147 Pac. 789, wherein the court, presuming that the taxing officer excluded interstate business

and considered only the local business as "business in Kansas," said: "The privilege of a foreign corporation to engage here in business, other than interstate commerce, being one which the state may grant or withhold, is a legitimate subject of taxation. That privilege is protected by state laws, in common with other interests, and the giving of such protection adds something to the cost of local government. They who exercise the privilege ought, in fairness, by reason of it to bear a small additional share of the common burden of taxation. The amount of contribution asked is arrived at in what seems to be the most reasonable way. The effort to reach a just result without interfering with the operations of interstate commerce has obviously been made in good faith, and we think with entire success."

A *Montana* statute was upheld by the court in State v. Alderson, 49 Mont. 29, 140 Pac. 82, wherein it was said: "The fee demanded by section 165 is graduated according to the par value of the company's capital stock, without reference to the full cash value of the property owned by the corporation. For instance: A corporation with a capital stock of one hundred thousand dollars is required to pay only fifty dollars, though its property represented by that capital stock may be worth a million dollars. Further more, this fee is not a recurring one; it is demanded but once. That the legislature did not treat it as a property tax is indicated by the failure to provide any means for its collection. A foreign corporation may be denied admission here, but it cannot be made to pay the fee in the same sense that any other tax-paying individual or corporation may be coereed into paying property taxes. This fee does not become a lien upon any property which the corporation may have in this state, as does a property tax under section 2600, Revised Codes. The amount of this fee is fixed by law and does not vary from time to time, while the rate of taxation for property taxes is fixed by the legislature for the state and by the county boards for the respective counties, and varies from year to year with the necessities for greater or less revenue. These considerations justify our conclusion that the fee is not a property tax. It is an impost, an excise, or a license tax exacted of every corporation, domestic as well as foreign, engaged in intrastate business, for the privilege of doing business within this state, enjoying the protection of our laws and the pecuniary advantages afforded by our markets. . . . . The par value of the capital stock is merely made the standard or measuring rod, upon the assumption, whether justified or not, that the advantage gained by corporations in transacting business within this state will be in some measure proportioned according to the amount of their capital stock."

A *Tennessee* statute, taxing foreign corporations according to their authorized capital stock for the privilege of doing business in Tennessee, has been upheld. Atlas Powder Co. v. Goodloe, 131 Tenn. 490, 175 S. W. 547, wherein the court said: "Where the imposition of a tax by a state does not burden or affect interstate commerce, the control of the legislature over foreign corporations is supreme. . . . . The present case must be determined upon its own facts. There is a strong similarity in facts here to the business of the Baltic Company and the Dental Company. All are engaged to a large extent in interstate commeree, but they are each primarily manufacturing corporations, and engaged in selling their own products upon the market. In those two federal cases neither company owned a factory in Massachusetts, but each had local storehouses where local sales were made. They could have omitted the local business if they saw proper, and thus separated the local business from the interstate commerce. This was entirely optionary, as it is in the case at bar. A sharp distinction exists in the Pullman Company and the Western Union Telegraph Company cases, in that those concerns were public service corporations and were bound to accept local business. One important feature in the case at bar is that it is engaged in manufacturing black gunpowder at its factory at Ooltewah, in this state, and it also has six storage magazines where explosives are kept. It also has its places in this state in a number of cities where local sales are made. It occurs to us that any part of this local business is of such character as to render the complainant liable to the payment of this charter tax, or tax on its right to enter the state to do intrastate business. Certainly the manufacturing business in this state and the operation of storage magazines are so far separated from the interstate sales of explosives that there can be but little difficulty in the conclusion that the right of the state to impose this tax is clear, and we so hold."

Holding that a discriminatory tax on foreign corporations is not necessarily a denial of the equal protection of the laws, the court, in Baltic Min. Co. v. Massachusetts, 231 U. S. 68, 34 S. Ct. 15, 58 U. S. (L. ed.) 127, supra, said: "It is further contended that the imposition of the tax denies the equal protection of the laws, and this upon the authority of Southern R. Co. v. Greene, 216 U. S. 400 [17 Ann. Cas. 1247, 30 S. Ct. 287, 54 U. S. (L. ed.) 536]. In that case the railway company had gone into the state of Alabama and, under authority of the state, acquired a large amount of railroad property upon which it paid taxes as well as a license tax imposed by the state. After the payment of all such taxes and in this condition of affairs, the state undertook to levy upon the

railroad company a privilege tax because it was a foreign corporation, not imposing the same tax upon domestic corporations doing precisely the same business. This court held that the railroad company was a person within the meaning of the Constitution and entitled to the equal protection of the laws and that by the taxation of its railroad property under such circumstances it was denied the equal protection of the law, no like tax being levied upon domestic corporations. It was said in that case (p. 416): 'We have here a foreign corporation within a state, in compliance with the laws of the state, which has lawfully acquired a large amount of permanent and valuable property therein, and which is taxed by a discriminating method not employed as to domestic corporations of the same kind, carrying on a precisely similar business.' The conditions existing in the Southern Railway Co. v. Greene Case are not presented here. It is true that the plaintiffs in error paid taxes assessed against foreign corporations before the passage of the law of 1909 and that the White Dental Company had a leasehold for storerooms in the state, but we do not find in this situation an acquisition of permanent property, such as was shown in the Greene Case. And there is no question of the continued authority of the state to tax a foreign corporation for the privilege of doing business within its borders, which authority the state possesses so long as it does not violate rights secured by the Federal Constitution. Even if, as plaintiffs in error contend, under the statute, domestic corporations are favored, the statute is not invalid, for no limitation upon the power of a state to exclude foreign corporations requires identical taxes in all cases upon domestic and foreign corporations."

A municipal tax may be imposed on a telegraph company where the tax does not apply to government messages or to interstate messages. Ferguson v. McDonald, 66 Fla. 494, 63 So. 915, wherein the court said: "The mere fact that the telegraph company is engaged in sending interstate and government messages does not exempt the company or its agents from the operation of valid state and municipal taxation and regulations of local and intrastate business, where such regulations do not burden interstate commerce or violate any paramount authority or regulation of Congress. Allen v. Pullman's Palace Car Co. 191 U. S. 171, 24 S. Ct. 39 [48 U. S. (L. ed.) 134]. It does not appear that Congress has made or authorized any regulations upon the subject, and there is nothing to indicate that the enforcement of the license ordinance has in any way encroached upon the authority of Congress in the premises, or interfered with or burdened the business of the company in transmitting interstate or government messages."

TAX HELD INVALID.

A tax on property beyond the jurisdiction of the state or one burdening interstate commerce cannot be imposed. Crane Co. v. Looney, 218 Fed. 260; Illinois Cent. R. Co. v. Mississippi R. Commission, 229 Fed. 248; Chicago, etc. R. Co. v. Swindlehurst, 47 Mont. 119, 130 Pac. 966; Hirschfield v. McCullagh, 64 Ore. 502, 127 Pac. 541, 130 Pac. 1131. In Crane Co. v. Looney, supra, the court explained and applied the rule as follows: "The necessary effect of the enforcement of the two statutes brought into question is to make plaintiff's right to do a Texas intrastate business dependent upon the payment of a sum which becomes greater or less according as its assets outside of the state and its interstate and foreign business grow greater or smaller, though its property situated in Texas and its intrastate business there may remain stationary. The case of the Baltic Mining Company, cited supra, was not one in which there was any such necessary relation between the amount of the excise charge and the amount or value of the corporation's property outside of the state or of its interstate or foreign business. The charge imposed by the statute there in question was measured by the amount of the par value of its authorized capital, without regard to the actual value of its assets, whether more or less than that of its nominal capital stock. The charge was not measured by the amount or value of the corporation's assets or the extent of its actual business anywhere or of any kind. The terms of the statute made the charge the same, whether the actual value of the assets of the corporation was more or less than the amount of the par value of its authorized capital stock, and whatever may have been the nature or extent of the business in which it was engaged. Nothing said in the opinion rendered in that case indicates the court's departure from or modification of the rule announced in Western Union Tel Co. v. Kansas, 216 U. S. 1, 42, 30 S. Ct. 190, 54 U. S. (L. ed.) 355, to the effect that a state may not forbid the doing of a local business within its limits by a corporation of another state or foreign country except subject to the condition that such corporation first pay to the state a given per cent. of its entire capitalization, representing the value of all its business, property, and interests within and without the state, thereby placing a direct burden on the privilege or franchise of transacting interstate commerce and taxing property rights beyond the jurisdiction of the state for purposes of taxation. The joint effect of the two statutes, considered together, as they must be, as the right of the corporation to do business in the state is withheld if either of them is not complied with, is to make the privilege of doing a local business

in Texas subject to the condition that it shall first pay to the state a given per cent. of all its capital and surplus, representing all of its property wherever situated, and all its business, intrastate and interstate. An imposition which is based, whether in whole or in substantial part, on the value of property outside of the state, or on interstate or foreign commerce engaged in, so that the amount of it grows in exact proportion to the growth of such property or commerce, is a burden on such property or commerce. This burden the state cannot impose, either directly or as a condition to the grant of a privilege which it may confer or withhold."

SAULMAN

v.

MAYOR AND CITY COUNCIL OF NASHVILLE.

Tennessee Supreme Court—March 19, 1915.

131 Tenn. 427; 175 S. W. 532.

Municipal Corporations — Operation of Electric Plant — Liability for Personal Injury.

A city, owning and operating an electric plant, as authorized by Acts 1891, c. 207, and Acts 1901, c. 11, though only to light its streets and municipal buildings, is engaging in performing a private function; and hence the rule of respondeat superior applies to it, so as to render it liable for negligent construction and maintenance of a heavily charged wire, which by coming in contact with a guy wire attached to a telephone pole caused the death of a lineman employed by the telephone company.

[See note at end of this case.]

Certiorari to Court of Civil Appeals.

Action for damages. Mrs. Ida Saulman, administratrix, plaintiff, and Mayor and City Council of Nashville, defendant. Judgment for plaintiff in Circuit Court. Judgment reversed by Court of Civil Appeals. Plaintiff brings certiorari. The facts are stated in the opinion REVERSED.

Pendleton & De Witt for plaintiff.

A. G. Ewing and F. M. Garard for defendant.

[428] BUCHANAN, J.—The question on which this case turns is whether, under its facts, the city was, at the time of the acts on which its liability is predicated, engaged in the performance of a governmental function or a private one. The case is before us on *certiorari*. The court of civil appeals held that the city was engaged in the discharge of a governmental function.

The liability of the city is predicated upon the negligent construction and maintenance of a heavily charged electric light wire, which, on account of such [429] negligence, came into contact with a guy wire attached to one of the poles of a telephone company, and charged the guy wire with a deadly current of electricity, which was communicated to the body of the intestate of the administratrix, and caused his death, when he attempted, in the exercise of due care, to ascend the telephone pole in the discharge of his duties as a lineman in the employ of the telephone company. No question is made by the city against the judgment of the court of civil appeals; the case being before us solely on the petition and assignments of error filed by the administratrix.

The following facts appear without dispute: The municipal defendant, prior to and at the time of the injury to plaintiff's intestate, was authorized by its charter to build or purchase, own, and operate electric light works, for the purpose of lighting public buildings or streets, or other public places in the city, and for the sale of electric current to all persons desiring to purchase the same, either for lighting, heating, or power, or for any purpose whatsoever. This authority was vested in the defendant under chapter 207, Acts 1891, and chapter 11, Acts 1901, and pursuant to this authority the city, at the time of the injury, owned, controlled, and was operating an electric light works, plant, or system, and the wire, which was so constructed and maintained that it was the cause of the injury to plaintiff's intestate, was a part of the system, plant, or works so owned and operated by the city. But at the time of the injury the [430] city was not and had not been engaged in the sale of electric current or the furnishing of electric lights to private consumers, and the current generated by the city was used exclusively for the purpose of lighting the streets, fire halls, and public buildings of the city. That the injury was caused by the negligence of the municipal defendant in the original suspension and subsequent maintenance of the wire owned by the city which came into contact with the guy wire of the telephone company is a fact undisputed aand settled by the verdict of the jury. It is manifest that the communication of the deadly current from the wire of the city to the guy wire was the result of friction which destroyed the insulation of the city's wire. It is also clear that at the time of the fatal injury plaintiff's intestate was rightfully upon the pole owned by his

employer in the discharge of his duties, and in no sense a bare licensee or trespasser, and the verdict of the jury settled the fact that he was free from contributory negligence at the time of his injury.

Originally plaintiff's suit in this cause was brought against the telephone company and the municipal defendant as joint tort-feasors, but subsequent to the origin of the suit the telephone company, by payment of a sum certain to plaintiff and taking from her a covenant not to further prosecute her suit against it, in the form approved in our recent case (Smith v. Dixie Park, etc. Co. 128 Tenn. 112, 157 S. W. 900), discharged its liability, and that branch of the case is not before us now.

[431] Passing, now, to the single issue of law arising upon the facts, we observe in the outset that, since the decision in Russell v. Men of Devon County, 2 T. R. (Eng.) 667, it has been settled at common law that liability does not exist against a political subdivision of the State, based upon the misconduct or nonfeasance of public officers, in favor of an individual, and in the cases which undertook to give a reason for the rule it was held to be better that the individual should suffer than that he should be allowed to inflict on the public the inconvenience of affording him redress. Other reasons were given by later cases.

But in Moodalay v. Morton, 1 Bro. Ch. (Eng.) 469, the Master of the Rolls, while admitting the rule, denied that the defendants fell within it. "They have rights," said he, "as a sovereign power; they have also duties as individuals. If they enter into bonds in India, the sums secured may be recovered here. So, in this case, as a private company they have entered into a private contract, to which they must be liable."

From this slight relaxation of the original rule, exceptions to it have grown up, until, on examination of the reported cases, they appear to be quite as numerous as applications of the rule. An instructive note reviewing the earlier cases accompanies Barron v. Detroit, 94 Mich. 601, 54 N. W. 273, 34 Am. St. Rep. 366, 19 L.R.A. 452. In fact, so large has been the ingrafting of exceptions upon the original rule by our American courts that in his excellent work on Municipal [432] Corporations (volume 4, section 2622) Mr. McQuillan says:

"Yet in every State except South Carolina it is the settled rule that a municipality is liable at common law for its torts in the performance or nonperformance of municipal or corporate duties, as distinguished from governmental duties."

And to sustain the quoted text the author cites Irvine v. Greenwood, 89 S. C. 511, 72 S. E. 228, 36 L.R.A.(N.S.) 363. And this learned author in the same section adds:

"In other words, where its officers or servants are in the exercise of power conferred upon the municipality for its private benefit or pecuniary profit, and damage results from their negligence or misfeasance, the municipality is liable to the same extent as in the case of private corporations or individuals."

To sustain the text just above set out, the author cites cases from twenty-nine courts of last resort in the United States and one from the supreme court of the United States, and in the same section it is said:

"That while acting in its private capacity a municipality is liable to the same extent as a private corporation or individual [citing Provine v. Seattle, 59 Wash. 681, 110 Pac. 619; Toledo v. Cone, 41 Ohio St. 149]. Furthermore, for torts committed by its agents and servants in the performance of corporate or private duties the municipality is liable, whether the tortious act was done negligently or intentionally" [433] (citing Johnson v. Somerville, 195 Mass. 370, 81 N. E. 268, 10 L.R.A.(N.S.) 715).

In substantial accord with the views above stated are those announced in Dillon on Municipal Corporations (last edition) sections 1665, 1666, 1670, 1671. Coming nearer to the exact question in the present case is what is said by the author last named at section 1670 of his work, as follows:

"Thus, in the case of municipal electric light works, the city is under obligations to exercise reasonable care in constructing and maintaining its poles and wires in the public streets and on private property, and if any person in injured through neglect of the city or its officers, agents, or employees in that respect, the city is liable in damages."

And, says Mr. McQuillin, in his work on Municipal Corporations (section 2680):

"It is settled beyond dispute that a municipality which operates its own water, electric light, or gas plant acts in a private and not a governmental capacity, and is liable for its negligence in connection therewith."

See, also, the following authorities: Abbott on Municipal Corporations, section 955; Davoust v. Alameda, 149 Cal. 69, 84 Pac. 760, 5 L.R.A.(N.S.) 536 and note, 9 Ann. Cas. 847; Bullmaster v. St. Joseph, 70 Mo. App. 60; Boothe v. Fulton, 85 Mo. App. 19; Rhobidas v. Concord, 70 N. H. 90, 47 Atl. 82, 51 L.R.A. 381 and note, 85 Am. St. Rep. 604; Brown v. Salt Lake [434] City, 33 Utah 222, 93 Pac. 570, 14 L.R.A.(N.S.) 619, 126 Am. St. Rep. 828, 14 Ann. Cas. 1004, and note.

The court of civil appeals in the present case denied the liability of the city upon the ground that, at the time of the injury and prior thereto, the city was using its electric light plant only for the purpose of lighting its streets and municipal buildings, and had not sold any of its electric light current to private consumers. We think it is error to

suppose that the sale of part of the electric current which it manufactured was the only way in which the city could derive a corporate emolument from the possession, ownership, and operation of such a plant. Of course, the taking of money from private consumers of its current might be the most unequivocal proof that the city was deriving corporate emolument as the result of such operation; but this is the utmost significance which such a fact should have in determining the ultimate question. At most, it is but a conclusive badge indicating a private as contradistinguished from a public use. But the absence of such a badge clearly does not convert the user into a private one, nor amount to conclusive proof that such was the character of the user.

The city is a corporate entity, located within the physical boundaries of the State, and existing by virtue of the sovereign will of the State. "*Imperium in imperio.*" The city holds an easement in the streets in trust for the convenience of the citizens. "The corporation has the power to grade, macadamize, or do anything else for the improvement of the streets whereby [435] they may be made to answer the end for which they were designated. Humes v. Knoxville, 1 Humph. (Tenn.) 403, 406, 34 Am. Dec. 657. Springing out of this right and power of the corporation is a liability against it for a wanton or negligent failure to use reasonable diligence and care, so to exercise the power as not unnecessarily to injure the property of abutting owners. Humes v. Knoxville, supra; Knoxville v. Harth, 105 Tenn. 436, 58 S. W. 650, 80 Am. St. Rep. 901.

From the same easement and power over its streets there flows another corporate liability, to wit, for "the wrongful acts and neglects of their servants and agents" which unreasonably expose persons who use the streets for purposes of travel to injury, and where injury results while the traveler was in the exercise of reasonable and ordinary care, or free from contributory negligence. Memphis v. Lasser, 9 Humph. (Tenn.) 757; Nashville v. Brown, 9 Heisk. (Tenn.) 1, 24 Am. Rep. 289; Knoxville v. Bell, 12 Lea (Tenn.) 157; Oliver v. Nashville, 106 Tenn. 273, 61 S. W. 89; Doyle v. Chattanooga, 128 Tenn. 433, Ann. Cas. 1915C 283, 161 S. W. 997.

In the leading case of the line just named (Memphis v. Lasser, supra), the city sought to avoid liability upon the ground that at the time it performed the act resulting in plaintiff's injury it was engaged in the discharge of a public function or duty, to which the [436] doctrine of *respondeat superior* did not apply; but the court said, "No," and further:

"All the powers conferred upon a corporation for the local government of a town or city are, in judgment of law, for the private benefit of such corporation, although the public at large may also derive benefit therefrom. And whether the object of a given improvement be to confer a direct benefit or convenience upon the inhabitants of the corporation, as to furnish water facilities or the like, or whether it be to swell the revenues of the corporation, is wholly immaterial. The principle governing the liability of the corporation is precisely the same in both cases. And it is the province of the court to construe and interpret the charter of the corporation, to determine the nature and extent of the powers conferred, and to judge what acts do or do not fall within the legitimate scope of the authority bestowed and the purposes for which it may have been created. The court in this case did not err, therefore, in tacitly assuming as a matter of law that the construction of the work in question was within the scope of the powers conferred and for the private benefit of the corporation."

Further in the opinion, and quoting from Lord Ellenborough in Yarborough v. Bank of England, 16 East (Eng.) 6, it was said:

"Whenever a corporation is competent to do, or order to be done, any act on its behalf, it is liable for the consequences of such act, if it be of a tortious nature, and to the prejudice of another."

[437] We think the opinion above quoted from is full negation of every reason advanced in the present case to free the city from liability. To be sure, in Memphis v. Lasser, the manifest purpose of the city in digging the cistern into which Lasser fell was to furnish water for the extinguishment of fires, while in the present case the purpose for which it maintained the electric wire was to furnish light for its streets and public buildings. If there is any material distinction between the two purposes, which would make for liability in the one and avoid it in the other, we are unable to perceive it.

The reason on which the court of civil appeals bases its holding freeing the city from liability because it did not sell any of its current to private consumers is in conflict with the opinion in the Lasser Case, where it is said:

"And whether the object of a given improvement be to confer a direct benefit or convenience upon the inhabitants of the corporation, as to furnish water facilities or the like, or whether it be to swell the revenues of the corporation, is wholly immaterial. The principle governing the liability of the corporation is precisely the same in both cases."

Our case (Memphis v. Kimbrough, 12 Heisk. (Tenn.) 133) presents a case of municipal ownership. There the property owned by the city was a steamboat wharf, on which

an iron cylinder was negligently allowed to remain concealed by the water of the river, which had overflowed it. A collision between a steamboat and the cylinder resulted in the sinking of the [438] boat, and the owner sued the city for damages and recovered a judgment, which this court affirmed. It appeared that one of the officers of the city provided for by its charter, and to be elected, was a wharfmaster; also that the ordinances of the city required him to keep the wharf free from obstructions. The city received money from steamboats for the use of the wharf, but this fact was clearly not regarded as controlling on the ultimate question of liability. The court said the duty imposed on the city by its charter was a corporate one and not a public one; in respect of the whole public, its duty was absolute and perfect, and not discretionary or judicial, in character, and plaintiff had an interest in the discharge of the duty of the city to keep the wharf in repair. The wharfmaster was not acting as a public officer, but as the agent or servant of the corporation, for its benefit and that of the individuals using the wharf. It is clear that the collection of tolls for use of the wharf was only a matter of evidence tending to shed light on the character of the act on which liability was predicated. That its absence would not have avoided the liability of the city is manifest from the long line of cases, beginning with Memphis v. Lasser, supra, where no such fact appears. That our view of the question is supported by the clear weight of authoritative English and American decisions we have no doubt. There are some opposing views in other jurisdictions, but they are not supported by reason nor by weight of authority.

[439] We have another line of cases where, on the facts in each, liability of the municipal defendant was denied on the ground that, at the time of the injury complained of, the city was engaged in the discharge of a public function. Some of these cases are Foster v. Lookout Water Co. 3 Lea (Tenn.) 42; Davis v. Knoxville, 90 Tenn. 600, 18 S. W. 254; Irvine v. Chattanooga, 101 Tenn. 291, 47 S. W. 419; Chattanooga v. Reid, 103 Tenn. 616, 53 S. W. 937.

The principles governing in those cases do not apply to the facts of this one. Here we have a municipal corporation authorized by its charter to own and operate for its private emolument an electric light plant, and we find it in the exercise of that power, enjoying the franchise conferred upon it by the sovereign State for the private emolument of it as a corporation and of its citizens residing within its local boundaries. We find it and its citizens deriving from the use of the property a private benefit not enjoyed by the general public composing the sovereign State, resident outside the boundaries of the corporate defendant—the same kind of private benefit which the same corporate defendant and its citizens realize from the use of improved streets and other local comforts. Under such conditions as these, the municipal corporation may no more be relieved of liability where by the misfeasance of its servant it places a death trap on a telephone pole than if such a trap had been placed on the street. Its servant was bound to know that, in [440] the discharge of their duties, the linemen of the telephone company would be under necessity of ascending the pole, just as its servant in charge of its streets is bound to know that travelers are under necessity of using its streets. No material distinction can be drawn, and in either case the violation of implied duty is tortious in its character, and the doctrine of *respondeat superior* applies.

The judgment of the court of civil appeals was erroneous, and will be reversed. The judgment of the circuit court is affirmed.

NOTE.

The reported case holds that a municipality operating an electric lighting plant exercises a private and not a governmental function, though the light is used only for lighting the streets and the public buildings, and accordingly is liable for a personal injury caused by the negligent manner in which the plant is maintained or operated. The earlier cases discussing the liability of a municipal corporation for negligence in the operation of an electric light plant are reviewed in the notes to Davoust v. Alameda, 9 Ann. Cas. 847; Young v. Gravenhurst, Ann. Cas. 1912B 812; Hebert v. Lake Charles Ice, etc. Co. 100 Am. St. Rep. 505, 515.

CHACE

v.

CITY COUNCIL OF PROVIDENCE.

Rhode Island Supreme Court—March 23, 1914.

36 R. I. 331; 89 Atl. 1066.

Public Officers — Removal — Hearing — Right to Appoint Committee.

Where charges are filed before a city council against relator to remove him from the position of milk sample collector for cause, the fact that a joint committee is appointed to

take the evidence and report findings to the council does not deprive him of a trial before council as a whole; if it meets in joint session after the report and findings of the committee are filed, and gives relator an opportunity for a hearing before it, of which he neglects to avail himself, prior to the adoption of a resolution finding him guilty of the charges in accordance with the findings, and ordering his removal.

[See note at end of this case.]

Mandamus — Grounds — Restoration to Office.

A petition for mandamus is appropriate to compel the restoration to office of a rightful incumbent who has been wrongfully removed.

Municipal Corporations — Power to Remove Officer — Milk Inspector.

Act March 14, 1870, c. 829, provided that the mayor and aldermen of any city and town council of any town might annually appoint one or more milk inspectors for their respective places, and Laws 1912, c. 863, required the election of a milk inspector in the city of Providence obligatory. Laws 1896, c. 333, § 1, authorized inspectors to employ, subject to the approval of the town council and the mayor and aldermen, one person as collector of samples, which collector, on being employed, is required to be engaged to the faithful discharge of his duties before the city or town clerk, who was required to keep a record thereof, and should receive such salary as the mayor and aldermen or town council should determine. Laws 1900, c. 785, § 1, provides that the inspector may at any time dismiss such collector, and, subject to the same approval, may appoint another person in his stead. Held that, since boards of aldermen and town councils are expressly authorized to act as local boards of health, and the city council of the city of Providence is vested with such jurisdiction by its charter, a milk sample collector appointed pursuant to such statutes in the city of Providence was not a state or public officer, but was an employee whom the city council could remove for cause, and whom the council might suspend from service pending the determination of charges.

Appeal from Superior Court, Providence and Bristol counties: STEARNS, Judge.

Action for mandamus and original petition for writ of certiorari. Baylies R. Chase, plaintiff, and City Council of Providence, defendant. Judgment for defendant in Superior Court. Plaintiff appeals. The facts are stated in the opinion. Judgment of Superior Court AFFIRMED and petition for writ of certiorari DENIED.

Cooney & Cahill for petitioner.
Albert A. Baker and *Elmer S. Chase* for respondent.

[333] PARKHURST, J.—These are two cases between the same parties; and although they were argued at different times, the questions arising in both cases are so closely related and interwoven that, for convenience, we shall consider and determine both cases in one opinion.

The first case is an appeal from the judgment of the Superior Court denying and dismissing the petition of Baylies R. Chace for a writ of mandamus to compel the defendant members of the city council of the city of Providence to convene and to remove the suspension of said Chace from the office of collector of samples of milk and to restore him to said office, from which he had been suspended by the following joint resolution of said city council, passed on July 8, 1913:

"Resolved, That Walter O. Scott, Inspector of Milk, and Baylies R. Chase, Collector of Samples, of the city of Providence, be and they hereby are severally suspended from their said respective offices, such suspensions to continue in effect from the date of the passage hereof and until the hearings on the pending charges against said officers respectively shall have been had and the city council shall have taken final action relative to such respective charges.

"And that the superintendent of health of the city is hereby authorized and directed during the period of said suspension of said inspector of milk to supervise the quality of milk sold and delivered in the city of Providence, and to take any lawful steps necessary to prevent and restrain the sale of adulterated milk or milk below the required standard and deemed adulterated under Chapter 173 of the General Laws, entitled 'Of Milk,' and said superintendent is hereby authorized to cause all samples of milk collected by any officer of the city, or by any person employed by said superintendent to obtain specimens of the milk being supplied in the city, or received by said superintendent from any residents of the city to be tested and analyzed, and to notify [334] the chief of police of all violations discovered by him in said Chapter 173 of the General Laws; and said superintendent may use any property of the city used by or in charge of the inspector of milk; and the expenses of said superintendent hereunder shall be charged to the appropriation for the health department.

"And that the city clerk is hereby directed forthwith upon the passage hereof to cause copies hereof, duly certified by him, to be served by the city sergeant upon said Walter O. Scott and Baylies R. Chace severally."

Said charges are specified in papers accompanying a joint resolution of said city council, also passed July 8, 1913, entitled "Resolution Creating a Joint Special Committee with Certain Powers and Duties Relative to Charges Against Members of the Milk De-

partment of the City," which resolution reads as follows:

"Resolved, That the Mayor and Aldermen Moulton and Kelso of the board of aldermen, designated by the Mayor, and Messrs. Harden, Phillips and Berth of the common council, designated by the president thereof, be and they hereby are appointed a joint special committee of the city council, with the following powers and duties. Said joint special committee shall hear and receive the evidence presented in support of and against the accompanying charges against two officers of the milk department of the city, namely, Walter O Scott, Inspector of Milk, and Baylies R. Chace, Collector of Samples, which charges, as recommended by the committee on milk to the board of aldermen, have been formulated by the law department; and said joint special committee shall cause said evidence to be taken stenographically, transcribed and with any documentary, book or other exhibit evidence in any form received by said committee to be filed with either branch of the city council, and therewith said committee shall submit to the city council its report relative to such charges and evidence, its findings thereon and its recommendations, for such further action as the city council may determine. Said [335] committee may cause the transcribed evidence to be printed, and printed copies thereof to be also filed as aforesaid for the use of the city council, and may make its report in print.

"In case pending such proceedings any further or other charge or charges shall be made to said committee by any citizen or citizens of the city against said inspector or said collector, or any other member of the milk department, said committee in its discretion may also investigate as to such charge or charges, after giving the accused reasonable notice therof, and in such case shall also submit the evidence relative thereto and its report thereon to the city council as aforesaid.

"Such officer or officers of the law department as designated by the city solicitor shall prosecute said charges before said joint special committee; and any expenses of said joint special committee relative to its duties hereunder on the approval of its chairman, and the expenses of the law department incident to summoning witnesses, investigating any relevant matters or otherwise relative to prosecuting the charges, on the approval of the city solicitor, shall be paid from the balance of the appropriation made by resolution No. 217, approved May 22, 1913, and any amount of any such expenses in excess thereof from the appropriation for the city council. Forthwith upon the passage of this resolution, the city clerk or one of the deputy city clerks shall cause copies hereof and of the accompanying charges, duly certified by him, to be served by the city sergeant upon said Walter O. Scott and Baylies R. Chace severally, and on Monday, July 14, 1913, at 10 o'clock A. M., at the council chamber, city hall, said committee shall convene, and proceed with the performance of its duties hereunder."

The city sergeant of said city on July 8, 1913, duly served copies of both said resolutions, and of said charges, duly certified by the city clerk of said city on said Scott and Chace severally.

[336] Said charges allege grave dereliction of duty on the part of both said Scott and Chace, and include charges against said Chace that he had received money graft or bribes, and are serious, substantial and specific.

Immediately after the passage of said resolutions and notice thereof and of said charges, said Chace filed this petition, which was denied by a judge of the Superior Court after hearing evidence and argument; a decree was entered denying and dismissing the petition and an appeal to this court was duly claimed and prosecuted, and is now before this court.

The petition sets forth the appointment of the petitioner to the office of collector of samples of milk by Scott, the inspector of milk, and that he was at the time of the passage of the above quoted resolutions suspending him from office, to wit, on the 8th day of July, 1913, and for a long time prior thereto, a duly qualified collector of samples of milk for the city of Providence and was and had been for a long time discharging the duties of said office. It then sets forth the passage of the above quoted joint resolution of suspension, and alleges that the city council has deprived the petitioner of his office room, books, papers, records, etc., and has prevented and still prevents him from exercising the duties of his office.

Said petitioner then sets forth his contentions, as follows:

"Fourth. And your petitioner further shows that the office of collector of samples of milk, of which he is the incumbent duly appointed by the milk inspector of the city of Providence, by virtue of Chapter 173, General Laws, Rhode Island, 1909, is a State or public office, and not a city or corporate office, and your petitioner as such collector of samples of milk under and by virtue of Section 9, cap. 173, General Laws of Rhode Island, 1909, is a State or public officer, and not a city or corporate officer, and he avers that said city council was not only without authority, but wholly without jurisdiction to act in the premises.

[337] "Fifth. Your petitioner further shows that said common council did not elect or appoint your petitioner to his said office, nor participate in his election or appointment, and they had no lawful right, power or au-

thority to join with the board of aldermen in said purported suspension of your petitioner as above set forth.

"Sixth. And your petitioner alleges that the matter of said purported suspensions was not within the jurisdiction of said city council."

Petitioner then alleges service upon him of a certified copy of said joint resolution of suspension, and the filing by him of a protest, in writing, addressed to said city council, on the ground that said council was without lawful authority or jurisdiction in the premises, and prays for a writ of mandamus as above set forth.

The city charter contains the following provisions:

Section II. "Clause 1. The administration of all the fiscal, prudential and municipal affairs of said city, with the conduct and government thereof, shall be vested in one principal officer to be styled the mayor; one council of ten persons to be styled the aldermen; and one council of forty persons to be styled the common council; together with such other magistrates or officers as are hereinafter specified, or by the laws of this State or the ordinances of the said city are, or hereafter may be, authorized or prescribed.

"Clause 2. The mayor, aldermen, and common council, in their joint capacity, shall be styled the city council."

Section VIII. "Clause 1. The mayor and aldermen shall exercise the executive powers of said city generally, and the administration of police; together with such other powers as now are, or hereafter may be, conferred upon them by the laws of this State or by the ordinances of the city council."

Section IX. "Clause 1. The city council of said city shall have power to make laws, ordinances and regulations for the government of of said city, relative to" . . . "the [338] police department" . . . "the public health," etc. . . .

"Clause 4. The city council shall have power to appoint . . . "an officer to be styled the chief of police, and to prescribe his duties and fix his compensation." . . .

"Clause 9. The city council may by a concurrent vote, two-thirds of the members elected to either board voting in the affirmative, remove all officers for misconduct or incapacity." (See Charter and Special Laws, City of Providence, 1901, pp. 1-et seq.)

Prior to 1798, by the laws of this State, the town councils of the respective towns were authorized "to make and prescribe such orders and regulations as they may deem prudent and advisable, for the preservation of the health of the inhabitants," etc. (See Revision of 1798, p. 344, Sec. 19.)

In Rev. Stat. 1857, Chap. 34, § 11, p. 100, it is provided as follows: "Sec. 11. The several town councils and boards of aldermen shall be *ex officio* boards of health in their respective towns, and may make such rules and regulations not repugnant to law, as they shall judge proper, for the preservation of the health of the inhabitants thereof," etc.

These provisions have been substantially reënacted in every subsequent revision and have remained in force down to the present time, and now appear in Gen. Laws, 1909, Chap. 50, § 13, p. 232, and under said provisions, and by virtue of the city charter Section VIII. Clause 1, above quoted, the mayor and aldermen of the city of Providence have always acted as the board of health of the city of Providence, and have been so designated in its official manual down to the present time.

By act of the General Assembly, c. 829, passed March 14, 1870, it was provided that "the mayor and aldermen of any city, and the town council of any town, may annually appoint one or more persons to be inspectors of milk for their respective places," etc., providing for giving public [339] notice of appointment "in the city or town," for keeping an office and record of dealers in milk "within their limits;" and for taking specimens of milk and for analysis; and for various penalties for sale of adulterated milk, etc. This act has passed through the various subsequent revisions of the statutes, and remained, with some changes and additions, a general permissive act as to all cities and towns, until the enactment of General Laws, 1896, Chap. 147, § 2, which provided as follows: "Sec. 2. The mayor and aldermen of any city, and the town council of any town, may annually elect one or more persons to be inspectors of milk therein, who shall be engaged to the faithful discharge of the duties of their office. Every such inspector shall give notice of his election by publishing notice thereof for two weeks in some newspaper published in the city or town for which he shall be appointed; or, if no newspaper be published therein, by posting up such notice in two or more public places in such city or town: *Provided*, that the mayor and aldermen of the city of Providence shall annually, in the month of August, elect such person or persons to be inspectors of milk and may, at any time during the year thereafter, fill by election any vacancy occurring by reason of death, resignation, absence from the city, or inability to act." By this act the election of an inspector of milk in the city of Providence became obligatory. Certain changes in this section, which are not important to the present consideration, have been made by subsequent revision, the latest change being that providing for biennial elections. (See Pub. Laws, Jan. 1912, Chap. 863.) (See Gen. Laws, 1909, Chap. 173, Sec. 8.)

It may be noted here that, since the provisions last above quoted, for the election of

inspectors of milk, were obviously passed with a view to the preservation of health, it was most appropriate that the election of such inspectors should be confided to the respective town councils and boards of aldermen, which, as we have already seen, were and are *ex officio* local boards of health in their respective towns and [340] cities, thereby giving them power to elect a special health officer for the purpose of assisting them in the more efficient performance of one of their most important duties, viz.: in regulating the sale of milk and preventing the sale of adulterated milk.

Another step in the same direction was the provision for the employment of collectors of samples by such inspectors. This was brought about under Chap. 333, Pub. Laws of R. I., passed May 13, 1896, the first section of which reads as follows: "Section 1. Any inspector of milk of any town or city now in office or hereafter elected under authority of Chapter 147 of the General Laws, entitled 'Of Milk,' or of any act in amendment thereof, may employ, subject to the approval of the town council or the mayor and aldermen, one person as collector of samples, who shall have the same powers and be subject to the same duties and liabilities provided by law relative to the taking of specimens or samples, as an inspector of milk. All specimens or samples taken and retained by any such collector shall be delivered to such inspector, who shall have the same powers and duties relative to the same as in case of specimens or samples taken by himself. Such inspector at any time may discontinue the employment of any such collector, and subject to the approval aforesaid, employ another person in his stead. Such collector upon being employed shall be duly engaged to the faithful discharge of his duties before the city or town clerk, who shall keep a record thereof; and shall receive such salary as the mayor and aldermen or town council shall determine."

Special provision for the city of Providence was later made by Pub. Laws, Chap. 785, passed May 31, 1900, as follows: "Section 1. Any inspector of milk in the city of Providence now in office, or hereafter elected under authority of Chapter 147 of the General Laws, entitled 'Of Milk,' or of any act in amendment thereof or in addition thereto, may appoint, subject to the approval of the mayor and aldermen of said city of Providence, two persons as [341] collectors of samples, each of whom shall have the same powers and be subject to the same duties and liabilities provided by law relative to collectors authorized by the provisions of Chapter 333 of the Public Laws, entitled 'An act in amendment of and in addition to Chapter 147 of the General Laws, entitled 'Of Milk,' passed at the January Session, A. D. 1896.' All specimens or samples taken and retained by any such collector shall be delivered to such inspector, who shall have the same powers and duties relative to the same as in case of specimens or samples taken by himself; such inspector may at any time dismiss any such collector, and, subject to the approval aforesaid, appoint another person in his stead. Each such collector, upon appointment, shall be duly engaged to the faithful discharge of his duties before the city clerk of said city, who shall keep a record thereof, and shall receive such salary as the mayor and aldermen of said city shall determine."

These provisions now appear without substantial change, in Gen. Laws, R. I., 1909, Chap. 173, § 9.

That a proceeding by way of petition for a mandamus is appropriate to compel the restoration to office of a rightful incumbent who has been wrongfully removed is amply supported by authority cited on behalf of the petitioner and is not questioned on behalf of the respondents. We see no occasion therefore to discuss this question. The sole question to be determined in this first case is whether, in view of the laws of this State, as above set forth, the city council of the city of Providence had the power to suspend the petitioner as collector of samples of milk from his office, pending the investigation of charges against him, by its resolution as above set forth.

The second case is an original petition in this court for a writ of certiorari. The petition sets forth the appointment and qualification of the petitioner as a collector of samples of milk, in somewhat greater detail, but substantially as above set forth, and his continuance in office until July 8, 1913, and his then exclusion from his office; the presentation [342] of the charges, already referred to, to the mayor on July 7, 1913, and the convening of the city council by the mayor on July 8, 1913, in special session for consideration of and action upon said charges; the presentation of said charges to said city council, at that meeting, and the passage of the joint resolution appointing the joint special committee on July 8, 1913, which said joint resolution has been hereinbefore fully set forth; that pursuant thereto the committee sat, from time to time, and heard and took evidence upon said charges, and on December 26, 1913, reported to the city council, and in their report found the petitioner guilty of misconduct in his official capacity and recommended that he be dismissed from his office. The petition further shows that on December 26, 1913, the city council voted to receive said report and on the same date passed a joint resolution, as follows:

"*Resolved*, That Baylies R. Chace, Collector of Samples, be and he hereby is required to appear before the city council of the city

of Providence on Tuesday, the thirtieth day of December, 1913, at seven o'clock P. M. in the chamber of the common council, city hall, and show cause why, relative to the charges against him accompanying the joint resolution of said city council No. 281, approved July 8, 1913, entitled 'resolution creating a joint special committee with certain powers and duties relative to charges against members of the milk department of the city,' and the proceedings of said committee and the evidence presented before said committee in support of and against said charges, and the report made by said committee to said city council on the twenty-sixth day of December, 1913, a copy of which report is hereunto annexed, he should not be removed from his said office of collector of samples of said city.

"And that said Baylies R. Chace be notified hereof by the city clerk causing a copy hereof with a copy of said report, duly certified by him, to be served by the city sergeant as soon as may be upon said Baylies R. Chace [343] by leaving the same with him or at his last and usual place of abode with some person living there."

The petition further shows that the petitioner, after being cited by said resolution to appear, protested in writing to said city council against its proposed action "for the reasons that he is a State or public and not a city or corporate officer, and that said city council is without jurisdiction in the premises."

The petition further shows that, December 30, 1913, the city council passed in concurrence the following resolution:

"*Resolved*, That after considering the evidence presented relative to the charges against Baylies R. Chace, Collector of Samples of Milk, accompanying joint resolution of the city council No. 281, approved July 8, 1913, the city council finds:

"First, that although the allegations of said charges numbered 1, 2, 3 and 4 are proven, yet being in effect charges of negligence, and said Chace as such collector having acted under the general directions of his superior officer, he is not considered to be sufficiently responsible to be held guilty of misconduct therefor;

"Second, that said Baylies R. Chace is guilty of the misconduct stated in said charges numbered 5, 6, 7 and 8, and in view charges numbered 5, 6, 7 and 8, copies whereof and of the bill of particulars to the same respectively being hereunto annexed;

"*And Further Resolved*, That, said Baylies R. Chace being guilty of the misconduct specified in said charges numbered 5, 6, 7 and 8, and in view thereof not being a fit person to hold said office of collector of samples, said Baylies R. Chace be and he hereby is removed from his said office of collector of samples of milk of the city of Providence;

"*And Further Resolved*, That said Baylies R. Chace be notified hereof by the city clerk causing a copy hereof, duly certified by him, to be served by the city sergeant as soon as may be upon said Baylies R. Chace by leaving the same with him or at his last and usual place of abode with some person living there."

[344] The charges and specifications upon which petitioner was so found guilty are stated in full in the petition and were annexed to the last quoted resolution; they consist of a corrupt proposition to a former inspector of milk involving prospective protection to milkmen and prospective collection of graft; and various charges of the receipt and collection of money graft or bribes from various named parties at different times during petitioner's incumbency of office; petitioner admits service upon him of a certified copy of said resolution and charges, December 31, 1913. He further alleges that he did not attend said meeting of the city council on December 30th when he was given an opportunity to appear and be heard; that no testimony was taken or presented at that meeting in relation to said charges; that all such testimony was taken before said committee and that there never has been any such testimony taken or presented by or before two-thirds of the said city council; petitioner then sets forth certain clauses of the city charter already herein set forth and referred to, and reiterates his claim that under the law of his appointment "his said office of collector of samples of milk is a State or public office, and not a corporate or municipal office," and that petitioner is a "State or public officer, and is not an officer of the city of Providence;" and in conclusion claims that the city council was without jurisdiction to remove him from office and prays for a writ of certiorari to bring up the record of said city council relating to the matter of his removal to the end that the same may be quashed.

It thus appears that three principal questions are raised: 1. Did the city council on July 8, 1913, have the power to suspend the petitioner from his office? 2. Did said city council, on December 30, 1913, have jurisdiction to remove the petitioner from his office? 3. As subsidiary to the second question, if the city council did have the power to remove, had it taken the proper procedure for his removal?

It may be conceded at the outset, that nowhere in the law have we found any power conferred upon the city council [345] in express terms to suspend the petitioner from his office. If such power exist, then, it must be as incident to the power to remove. The

primary question, therefore, is as to the power to remove.

The broad claim of the petitioner that he is a "State or public officer" and not a "corporate or municipal officer," and that therefore the city council under its charter powers had no jurisdiction or authority over him, is not supported by authority, and is not in accord with the reasonable construction of the laws above cited. As we have seen above, boards of aldermen and town councils have from very early times been expressly authorized to act as local boards of health; and the mayor and aldermen of the city of Providence, composing one board (Charter, Section IV.) and exercising "the executive powers of said city generally, and the administration of police; together with such other powers as now are, or hereafter may be, conferred upon them by the laws of this State," . . . (Charter, Section VIII.) have for many years exercised the powers of a local board of health within and for the city of Providence. In the case of Pope Mfg. Co. v. Grangor, 21 R. I. 298, 301, 43 Atl. 590, this court said: "The board of aldermen is *ex officio* the board of health for said city. Gen. Laws, R. I. chap. 40, § 13. As a board of health they have sole charge of all matters within their jurisdiction, and when an appropriation has been made to enable them to discharge their duties, we fail to see any reason why they may not lawfully contract bills, in their discretion, to be paid out of such appropriation. They are sworn officials of the city; they constitute an important branch of the city government and are charged by law with the discharge of very important duties, especially when acting as a board of health, and it is certainly to be presumed that they will intelligently and faithfully perform such duties; and unless it clearly appears that a given act, like the one in question, is either beyond their jurisdiction or is a palpable abuse of their discretion, it is binding upon the city and cannot be questioned in a court of law. In the [346] case at bar the purchase was made by authority of a committee of the board of health; the bill was approved by said committee, by the superintendent of health, and also by the board itself; and there was money subject to the control of said board sufficient to pay the bill."

By reference to the various provisions of the statutes above quoted, whereby the offices of "inspector of milk" and "collector of samples of milk" were respectively created, it appears quite obvious that the election of these officers by town councils and boards of aldermen was authorized by the General Assembly for the purpose of assisting such local boards of health in the discharge of their duties in the important matter of regulating the sale of milk and its quality within their respective localities. The fact that the proper and efficient inspection of milk in the city of Providence, by means of which this most important article of food may be kept pure and healthful, within the city, is incidentally of interest to the inhabitants of the State who may happen to come into or sojourn within the city, or the fact that the preservation of the public health of one political division of the State is beneficial to the public at large, does not render either the inspector of milk or the collector of samples a "State or public officer" in any such sense as claimed by the petitioner. Such officer is primarily and essentially a local or municipal officer, and an assistant or servant of the local board of health. Each town and city is authorized to have its own inspector of milk appointed or elected by its local board of health and such local boards of health and their inspectors are entirely independent of each other and discharge purely local functions, having no jurisdiction outside their respective towns and cities. The collector of samples of milk is appointed by the inspector subject to the approval of the town council or of the mayor and aldermen, and is merely the assistant of the inspector, who may at any time revoke his appointment. As between the inspector and the collector, the latter is a mere employee or assistant without definite tenure of office, and may be [347] removed at the pleasure of the inspector; no cause need be assigned.

The petitioner apparently relies upon several cases in this state as authority for his position that he is a "State or public officer," but these cases do not support his position that such an officer may not be removed from office by action of the municipal authorities. The case of Gainer v. Dunn, 29 R. I. 232, 234, 69 Atl. 336, holding that the board of canvassers of the city of Providence is a "board of State officers exercising a State function rather than a board of municipal officers exercising a municipal function," was considering the powers and jurisdiction of the board under a very elaborate special act creating the board and defining its powers and duties and its relation to elections; and had no relation to the question of the removal of any member of the board from office. The case of Newport v. Horton, 22 R. I. 196, 47 Atl. 312, 50 L.R.A. 330, had to do with the constitutional right of the General Assembly, in the exercise of the general police power of the State, to impose upon a municipality a police commission appointed by State authority. It had no relation to the question of the power of removal; by the act establishing a board of police commissioners for the city of Newport (Chap. 804, Pub. Laws, R. I. May 31, 1900), the board was to be appointed by the

governor, with the advice and consent of the senate, and it was provided in the first section that, "The members of said board may be removed by the governor, with the advice and consent of the senate, for such cause as he shall deem sufficient and shall express in the order of removal." It thereby became plain that the General Assembly intended that the Newport board of police commissioners should be appointed by and be amenable to State rather than to municipal authority. (See, also, Horton v. Newport, 27 R. I. 283, 8 Ann. Cas. 1097, 61 Atl. 759, 1 L.R.A.(N.S.) 512; Opinion to Governor, 22 R. I. 654, 657, 49 Atl. 36.)

It may be of interest to note at this point, in view of petitioner's reference to the Providence Police Commission, that the General Assembly, November 22, 1901, passed an [348] act (Chap. 930) to establish a board of police commissioners for the city of Providence, substantially like the Newport act, vesting the appointment of the three commissioners in the governor, with the advice and consent of the senate, and providing for their removal "by the governor, with the advice and consent of the senate, for such cause as he shall deem sufficient and shall express in the order of removal." This act remained in force until April 6, 1906, when by Chap. 1379, the law was so amended as to vest the appointment of such commissioners in the mayor, subject to the approval of the board of aldermen; and providing that, "The members of said board may be removed by said mayor, subject to the approval of said board of aldermen, for such cause as he shall deem sufficient and shall express in the order of removal." The powers and duties of the board of police commissioners are not substantially changed, and the board remains just as much a board of state officers as ever, but the power of appointment and removal has been vested in a municipal board.

Petitioner also cites a number of cases which are referred to and approved in the Newport cases and which are to the same general effect; but in none of them is the question of the power of removal considered. The action of the General Assembly in the matter of the Providence Police Commission in first taking the administration of police out of the hands of the city authorities and afterwards restoring it to the mayor and aldermen, shows a legislative recognition of the wisdom of the policy, which is most common, of delegating the control of boards of police commissioners and the administration of police, including appointments and removals, to municipal authorities; as was in fact originally done by the charter of this city above referred to in Section VIII Clause 1, and Section IX Clause 1, above quoted. It may be here noted also, that by the terms of the charter, Section IX Clause 4, the city council was empowered "to appoint an officer to be styled the chief of police and to prescribe his duties and fix his compensation;" and in clause [349] 9 of the same section the city council is empowered by a concurrent vote, two-thirds of the members elected to either board voting in the affirmative, to "remove all officers for misconduct or incapacity." It will not be questioned that the chief of police is a state or public officer in the sense in which the term is used in Newport v. Horton, 22 R. I. 196, 204, 47 Atl. 312, 50 L.R.A. 330, and yet the General Assembly saw fit to delegate the power of appointment and removal of the chief of police to the city council by the express terms of the charter. In the case of Norton v. Adams, 24 R. I. 97, 52 Atl. 688, the court had under consideration Chap. 964 of Pub. Laws, R. I. passed February 21, 1872, under which the town council of East Providence was authorized, among many other things, "to provide for a day and night police," and was also empowered to "remove all officers" appointed by the council, "for misconduct or incapacity, at any regular meeting." Pursuant to such authority an ordinance was adopted providing for a police force and a chief of police; it was held that this chief of police, appointed under the ordinance, "was not a mere police constable, but a member of a paid force, similar to those in cities, and the office of chief of police was thereby made a new and distinct town office." It will be noted that the enabling act Chap. 964 nowhere mentions a chief of police; yet it was not questioned in the case that the power of removal of "all officers" applied to the "chief of police;" but it appeared that no charges against him had been made and no opportunity given him to be heard, and so it was held that the attempted removal by the town council was illegal. We are of the opinion that, in the last cited case, it was perfectly clear and unquestionable that the power of removal of the chief of police by the town council was clearly delegated by the statute above quoted; just as we hold that it is equally clear that in the charter of the city of Providence as above quoted the power of removal of the chief of police was originally delegated to the city council, under the words "all officers." The petitioner stands in no better position [350] under the charter of the city of Providence, than did the chief of police under that charter, or the chief of police in East Providence in Norton v. Adams, supra. It has been seen that under the charter Section II, Clause 1, above quoted, "The administration of all the fiscal, prudential and municipal affairs of said city, with the conduct and government thereof, shall be vested in one principal officer to be styled the mayor; one council of ten persons to be

styled the aldermen; and one council of forty persons to be styled the common council, together with such other magistrates or *officers* as are hereinafter specified, or *by the laws of this State or the ordinances of the said city are, or hereafter may be, authorized or prescribed.*"

It is quite plain that when, under the statutes above quoted, provision was made in 1870 for the appointment of inspectors of milk, and later in 1896, such appointment of an inspector or inspectors of milk was made obligatory upon the mayor and aldermen of Providence, and that when, in 1896, provision was also made for the appointment of collectors of samples, and those appointments were made, the inspector of milk and his collectors of samples so appointed in the city of Providence became officers of the city within the words of the charter last above quoted, being "officers" . . . "by the laws of this State" . . . "hereafter" . . . "authorized or prescribed;" and therefore that they became and were subject to the express power of removal under Section IX Clause 9, above quoted.

Many cases from other jurisdictions are cited on behalf of the petitioner; but they have to do with a variety of local statutes, and discussion of them in detail is unnecessary, in view of the fact that none of them in any way affects what we consider to be the plain construction of our own statutes; nor is any case cited wherein it is held that a power of removal expressly delegated to municipal authority may not be lawfully exercised even where an officer, such as a chief of police, a policeman, a police commissioner, or a city marshal, deemed for certain purposes to be a state or public [351] officer, appointed in accordance with a State law and whose duties are strictly defined by such law, is nevertheless by express terms of a city charter removable upon proper proceedings before a municipal body such as a town council, a board of aldermen or a city council. See Lowrey v. Central Falls, 23 R. I. 354, 50 Atl. 639; Norton v. Adams, 24 R. I. 97, 52 Atl. 688; Andrews v. King, 77 Me. 224, 231.

As to the distinction between local officers of a town or city or other local subdivision of the State, and state officers subject to impeachment under the constitution, see Lowrey v. Central Falls, 23 R. I. 354, 50 Atl. 639; In re Opinion of Justices, 167 Mass. 599, 46 N. E. 118; Ex p. Wiley, 54 Ala. 226, 228; State v. Dillon, 90 Mo. 229, 233, 2 S. W. 417; State v. Hewitt, 3 S. D. 187, 197, 52 N. W. 875, 44 Am. St. Rep. 788, 16 L.R.A. 413; State v. Smith, 6 Wash. 496–498, 33 Pac. 974, wherefrom it clearly appears that officers of the class to which the petitioner belongs are not subject to impeachment under our constitution or under similar constitutions in other states.

But the petitioner contends that he is not subject to the power of removal vested by the charter in the city council, because the statute, which creates his office (See Gen. Laws, 1909, Chap. 173, § 9), provides that the inspector who appoints him may at any time revoke his appointment; and petitioner thereupon claims that such power of revocation is exclusive of all other methods of removal. The argument in support of this position is not convincing; no cases are cited which in anywise support it. The power of revocation given to the inspector is solely for his benefit so that he can at any time dismise his assistant without being obliged to assign any cause or give any hearing; it might be simply because they had ceased to be harmonious, or the collector had become personally disagreeable to the inspector, without in any way failing to perform the duties required by law. But this power of revocation or dismissal is in no way inconsistent or in conflict with or exclusive of the power of removal for cause vested in the city council. On the contrary the very reasons why the inspector might [352] wish to retain his collector in office might furnish the basis of charges leading up to his removal for cause by the city council.

Having thus far determined that the city council had power and jurisdiction to remove the petitioner "for misconduct or incapacity" the question next arises whether the city council could suspend the petitioner from office pending the investigation of charges against him. It has already been shown that the charges preferred against the petitioner were of a very serious character, sufficient, if proved, to warrant his dismissal from office.

It is contended for the petitioner that no such power of suspension, pending charges, existed, and in support of such contention he cites from Throop, Public Officers, p. 304, Sec. 404, as follows: "The weight of authority in this country sustains the doctrine, that the power to suspend an officer does not follow from the grant of power to remove him." But the cases cited in support of this proposition in Throop, and cited also on petitioner's brief, fall far short of establishing any such general proposition.

The case of Tyrrell v. Jersey City, 25 N. J. L. 536, is not in point here. In that case the common council had power by charter to expel a member for disorderly conduct, and it was held that receiving bribes for his official influence and votes was disorderly conduct on the part of a member, within the meaning of the charter. It appeared that the relator (in a motion for mandamus) after a hearing before the common council had been found guilty on charges of bribery and corruption and had been removed from office; that a new election had been ordered; that he had been reelected and sworn in according to law; and that upon his appearing and

taking his seat in the common council that body passed a resolution directing that the president should not appoint the relator on any committee, that the clerk should not call his name among the list of members on any action, vote or proceeding, and that he (the relator) should not be allowed to take any part in any debate on [353] any question before the board. It was held that his original conviction and expulsion was proper; but that it did not disqualify him from reëlection; that if reëlected, he could not be expelled a second time for the same offence, the council by its expulsion having exhausted its power under the charter; that being reëlected and in office, there was no warrant for such suspension as was attempted under the resolution; on p. 544, the court said: "It only remains to be considered, whether the action of the common council in resolving that 'the president of council be directed not to appoint Tyrrell on any committee, and that the clerk do not call his name among the list of members in any action, vote, or proceeding of the council, and that he be not allowed to take part in any debate on any question which may come before the board of aldermen,' is warranted by law. We think it entirely clear that it is not. This proceeding amounts to a suspension of the relator from the exercise of his official duties, as a member of that body. It leaves his constituents unrepresented and without remedy. Expulsion creates a vacancy that can be supplied by a new election. Suspension from the duties of the office creates no vacancy; the seat is filled, but the occupant is silenced. The charter vests no such power in the council; it would be extraordinary if it did. The power is to expel, not to suspend."

We have quoted this case at some length because it has often been cited (as in this case) to the general proposition that the power to expel does not include or imply a power to suspend. It is not an authority to that effect. The extent of its authority is, in strictness, that the council had exhausted its power of expulsion, that it had no power to expel at the time when it attempted to suspend, and that the suspension would result in leaving a political constituency unrepresented and without remedy. It does not go to the extent of saying that a suspension, pending charges and while the right to expel still existed, would not be proper.

The case of Gregory v. New York, 113 N. Y. 416, 21 N. E. 119, 3 L.R.A. 854, also fails to support the petitioner's contention. There the [354] plaintiff was an inspector of excise employed by the commissioners of excise; they had full power to remove him at their own pleasure, without charges; they did attempt to suspend him without pay, and he tendered his services from time to time and finally sued for his salary. It was held that the power to remove from office does not necessarily and in all cases include the power to suspend; that the suspension in this case was improper in view of the duties required; that the inspector should have been removed; and that he was entitled to recover his pay. The court says, p. 420: "We do not go to the extent of saying that in no conceivable case can the power to suspend be inferred from a grant of the power to remove. There may be cases where such an inference, arising from the general scope and nature of the act granting the power, would be so strong as to compel recognition. We think there is no such inference to be drawn in the case before us." The case of Meteker v. Neally, 41 Kan. 122, 21 Pac. 206, 13 Am. St. Rep. 269, likewise does not support the petitioner. There the mayor attempted to suspend the city engineer, and the city marshal, acting in concert with the mayor, forcibly deprived the petitioner of his office room, books, etc. It was found that the mayor had no power to remove the city engineer from office, and that the power to remove rested in the mayor and council; that therefore the mayor could neither remove nor suspend. The court says, on p. 123: "We can readily believe that the greater power to amove might include the lessor one to suspend, but we have failed to notice any instance where the power to amove is not conceded that the authority to suspend is admitted. In this instance the plaintiff was not suspended pending any examination of charges against him, which if found true would have been grounds for a removal; but he was suspended without charges against him, and without notice."

Some other cases cited for petitioner apparently upon this point have no bearing.

We find a more comprehensive and discriminating statement of the law upon this point in 29 Cyc. p. 1405, as [355] follows: "Where no express power to suspend has been granted, the courts do not recognize that the power is included within the arbitrary power to remove, for the exercise of the power to suspend will produce an interregnum in office. The ends of discipline in such a case may be sufficiently subserved by the exercise of the power of removal, and do not require the recognition of a power to suspend. But where the power of removal is limited to cause, the power to suspend, made use of as a disciplinary power pending charges, is regarded as included within the power of removal."

The earlier portion of the above statement refers by note to the cases last above cited; while the last sentence is supported by the cases next referred to.

In State v. Police Com'rs, 16 Mo. App. 48, 50, the court held that the commissioners had authority pending a trial on charges to sus-

pend the chief of police, saying, p. 50: "The suspension of an officer, pending his trial for misconduct, so as to tie his hands for the time being, seems to be universally accepted as a fair, salutary, and often necessary incident of the situation. His retention, at such a time, of all the advantages and opportunities afforded by official position may enable and encourage him, not only to persist in the rebellious practices complained of, but also to seriously embarrass his triers in their approaches to the ends of justice. In the absence of any express limitation to the contrary, and none has been shown, we are of opinion that, in cases where guiltiness of the offence charged will involve a dismissal from office, there is, on general principles, no arbitrary or improper exercise of a supervisory authority in a suspension of the accused pending his trial in due and proper form."

In State v. Megaarden, 85 Minn. 41, 88 N. W. 412, 89 Am. St. Rep. 534, where it was found that the governor had express power to remove a sheriff for malfeasance or nonfeasance, it was held that the governor had an implied power to suspend pending the hearing of charges. The court quotes with hearty approval the [356] language above quoted from 16 Mo. App. 50; and the same was again approved in Blackwell v. Thayer, 101 Mo. App. 661, 665, 74 S. W. 375. See, also, Bringgold v. Spokane, 27 Wash. 202, 208, 67 Pac. 612; Maben v. Rosser, 24 Okla. 588, 607, 103 Pac. 674; Shannon v. Portsmouth, 54 N. H. 183.

In view of these authorities and of the nature and circumstances of the case at bar, and in view also of the express power of removal conferred upon the city council, we are clearly of the opinion that said city council had the power to suspend the petitioner pending the investigation of the charges against him, and that such suspension was within its jurisdiction.

The final question for our determination is whether or not the city council has taken the proper procedure for the removal of the petitioner. It appears from a record of proceedings which is certified by the city clerk and is before us upon the petition for a writ of certiorari, that prior to June 30, 1913, some investigation of the milk department had been made by the aldermanic committee on milk upon certain complaints and that a report thereof was made to the board of aldermen by the committee on milk recommending the formulation of charges and the appointment of a joint special committee to try the questions involved; consequent upon this report and recommendation, which was received and approved by the board of aldermen, June 30, 1913, special meetings of both branches of the city council were duly called by the mayor and were held July 8, 1913, at which time the several joint resolutions herein set forth suspending Scott, the inspector, and the petitioner, and appointing a joint special committee for the investigation of the charges presented against them were duly passed in concurrence and approved by the mayor. It further appears that this joint special committee of investigation, after due notice to the petitioner and other parties in interest, met as directed by the resolution, on July 14, 1913, and, after being duly organized, proceeded with their duties; and that the petitioner and other parties in interest were [357] present and were represented by counsel; that said committee proceeded to hear testimony relative to the charges both in support thereof and in defence thereto, and continued to hear such testimony at forty successive hearings until October 14, 1913, when the testimony was closed; that the petitioner was given full opportunity to present all such testimony in his defence as he saw fit to introduce (and there was a great deal of it); that after the close of the testimony full opportunity was given at three successive hearings for the argument of counsel, and that the petitioner's counsel was fully heard; that thereafter the committee took much time for consideration and finally reported fully to the city council, accompanying the report with a transcript of all the proceedings and the evidence, and its findings thereon, and its recommendations, in accordance with the resolution of appointment. They found the petitioner not guilty of the first four charges of misconduct with certain specifications of negligence and inefficiency, for the reason that, while they believed that the facts enumerated were proved, they did not believe that he was the person who should be held responsible therefor; and they found him guilty of the remaining charges involving graft and corrupt conduct in office, and recommended his removal for misconduct. This report was presented to a special meeting of the common council duly called and held for the special purpose of receiving the report, on December 26, 1913, at which thirty-six members were present; the report with the accompanying transcript of the testimony and exhibits was presented, the report was read and the same, with the transcript of testimony and the exhibit evidence, was ordered to be communicated to the board of aldermen; and the resolution above set forth requiring the petitioner to appear before the city council on December 30, 1913, to show cause why he should not be removed from office was duly passed, the roll call showing thirty-six members voting in the affirmative and none in the negative.

[358] The board of aldermen on the same day met in special meeting duly called and held for the same purpose, the mayor and all of the aldermen (10) being present, the said

report with the transcript of evidence and exhibits, being duly communicated to the board from the common council, was upon motion received by the board and the report was read by the clerk. The board then passed in concurrence the resolution requiring the petitioner to appear before the city council on December 30, 1913, as hereinbefore set forth, to show cause why he should not be removed from office, the roll call showing ten votes in the affirmative and none in the negative. Both the common council and the board of aldermen adjourned to meet on Tuesday, December 30, 1913, at 6:45 o'clock P. M. It appears that the city sergeant duly served upon the petitioner a copy of said report and of said resolution on December 27, 1913. It further appears that the petitioner having filed his written protest as set forth in his petition, the same was presented to the common council at its meeting of December 30th, and was read and received and ordered communicated to the board of aldermen; that said protest was thereupon communicated to said board, and was there read and received; that both branches of said city council met according to adjournment on December 30th; that they went into convention for the purpose of hearing said petitioner and Walter O. Scott, inspector of milk, in accordance with said resolutions of December 26th; that the convention met at seven o'clock P. M., in the chamber of the common council, the time and place provided in said resolution for the purpose of hearing said petitioner and said Scott; that there was present the mayor and ten aldermen, being the entire board of aldermen, and thirty-six members of the common council out of a total number of thirty-eight, being much more than "two-thirds of the members elected;" that the mayor, as presiding officer of said convention, after the clerk had read the resolution requiring the appearance of said Chace and Scott to show cause, etc., inquired if said [359] Chace or his counsel or Scott or his counsel were present and ready to proceed; and it appears that they failed to respond, and that some time was allowed to elapse awaiting their appearance; that they or either of them did not appear and the joint session at 7:15 P. M., dissolved; the board of aldermen then reassembled in session in its own chamber, and the common council reassembled in session in its chamber; whereupon the joint resolution last above quoted finding said Chace guilty of certain misconduct and removing him from his said office was presented to the common council and was read and passed, there being present thirty-five members out of a total of thirty-eight, all of said thirty-five voting in the affirmative, and none voting in the negative, it thus appearing that more than two-thirds of the members elected voted in the affirmative; the said resolution was then forthwith communicated to the board of aldermen, then in session, the mayor and all of the aldermen (10) being present, and said resolution was passed in concurrence, all of the aldermen voting in the affirmative, it thus appearing that more than the required two-thirds voted in the affirmative, and none in the negative. No question is raised by the petitioner as to the regularity of any of the meetings or of the proceedings at such meetings of either branch of the city council, or of the convention; and so far as the record before us discloses they all appear to have been regular and lawful meetings.

But the petitioner strenuously contends that he was tried before a committee; that he was found guilty by the committee; that the city council simply accepted the report of the committee, and acted thereon without any evidence being placed before it; that no evidence was taken before the city council itself; that he had the right to have the witnesses for and against him produced and examined before the city council itself, or at least before two-thirds of the members; that the city council had no power to delegate to a committee composed of some of its members its powers to try and convict him and to remove him from office; and, therefore, [360] that the action of the city council in finally removing him from office was taken without any lawful hearing and was null and void.

There was no delegation of power to the committee to try and sentence the petitioner; the resolution appointing the committee defined its powers, as follows: "Said joint special committee shall hear and receive the evidence presented in support of and against the accompanying charges against two officers of the milk department of the city, namely, Walter O. Scott, Inspector of Milk, and Baylies R. Chace, Collector of Samples, which charges, as recommended by the committee on milk to the board of aldermen, have been formulated by the law department; and said joint special committee shall cause said evidence to be taken stenographically, transcribed and with any documentary, book or other exhibit evidence in any form received by said committee to be filed with either branch of the city council, and therewith said committee shall submit to the city council its report relative to such charges and evidence, its findings thereon and its recommendations, for such further action as the city council may determine. Said committee may cause the transcribed evidence to be printed, and printed copies thereof to be also filed as aforesaid for the use of the city council, and may make its report in print."

The record, already briefly recited, shows that the committee explicitly obeyed these directions, had the testimony taken stenogra-

phically by sworn stenographers and transcribed, and that all this evidence so transcribed was submitted to both branches of the city council with the committee's report; that both the original transcript and printed copies thereof had for four days been before the city council as a whole at the time (December 30th) when its meeeting in joint session was held for the purpose of giving the petitioner a hearing and when he failed and refused to appear and to avail himself of the opportunity; and the final joint resolution of the city council passed in concurrence December [361] 30, 1913, after such joint session and petitioner's failure to appear, recites "That *after considering the evidence presented* relative to the charges against Baylies R. Chace, Collector of Samples of Milk, accompanying joint resolution of the city council No. 281, approved July 8, 1913, the city council finds," etc., as hereinabove fully set forth. The only powers of the committee were to hear evidence and report its findings and recommendations, "for such further action as the city council may determine." The petitioner was entitled to be heard before the city council as a whole upon all the evidence before them; the city council gave him the opportunity to be heard, he refused on the ground that they had no jurisdiction over him. It is not for us to assume that the city council would not have given him a full and fair hearing; nor can we assume as the petitioner urges us to do that the members did not fully and fairly consider the evidence as it was their duty to do, and as they had full opportunity to do, and as the recital in the final resolution of removal shows that they did. If the petitioner had desired to insist that the members should more fully consider the evidence before them, he had opportunity, by himself or his counsel, to have argued at length thereon and to have called their attention to any and all parts thereof in detail as he did at the final hearings before the committee.

As to the contention of the petitioner that all of the witnesses should have been produced and all of the evidence should have been taken in presence of the entire city council as a body, we find no ground either in reason or authority to support such contention. It is quite customary in all kinds of investigation of matters to be finally acted upon by legislative bodies, that committees of investigation are appointed to receive evidence and to report the same to the legislative body for its action thereon.

Thus, in 2 McQuillin, Municipal Corporations, p. 1351, § 615 (McQuillin Municipal Ordinances, § 123): "Provision is usually made in the organic law of the corporation, or [362] by ordinance or other regulations, duly adopted in pursuance thereof, for the creation and constitution of committees, to assist the legislative body in the performance of its proper duties, as in the collection of facts and information which are generally embodied in reports. This method of performing portions of the public business is not forbidden and has often been sanctioned by judicial decisions. The rule appears to be well established that certain municipal duties may be performed by agents or committees. Thus, the council may refer applications for the location or alteration of streets to a committee to examine into the matter and report to the council. So, where the council is the sole judge of the election of its own members, upon the institution of a contest, a committee may be appointed to take testimony and report to the council."

Again, in Throop on Public Officers, § 385: "Rights of accused at trial or hearing. As we have already shown, where the statute requires, expressly or impliedly, a hearing or trial, as distinguished from a mere 'explanation,' the charges must be proven by testimony, and the accused has the right to cross-examine the witnesses produced to sustain them, to produce witnesses in his defence, and to be assisted by counsel. It is not essential, that the testimony should be taken before all or a quorum of the members of the board, which is to act upon it; it may be taken by a stenographer, in the presence and under the direction of one of the members, and afterwards written out and submitted to the board, so as to form the basis of the judgment of the board; and the validity of the removal is not affected by the fact that the member, under whose direction it was taken, was not present, when it was so submitted and acted upon by the board; or that he had then ceased to be a member of the board."

Again in Section 393, Throop says: "And the corporation can lawfully appoint a committee to examine into the complaint, and to receive evidence and report thereupon and may remove the officer upon the report and evidence."

[363] Cooley's Constitutional Limitations, 6th ed. p. 161: "Each house must also be allowed to proceed in its own way in the collection of such information as may seem important to a proper discharge of its functions, and whenever it is deemed desirable that witnesses should be examined, the power and authority to do so is very properly referred to a committee, with any such powers short of final legislative or judicial action as may seem necessary or expedient in the particular case."

And it is not because, in all cases, there is a definite statute or ordinance, expresaly authorizing the reference to a committee in the particular instance under discussion but many of the decisions rest upon the ground

of general convenience or expediency in the practical conduct of matters cognizable by legislative bodies.

In Salmon v. Haynes, 50 N. J. L. 97, 11 Atl. 151, involving an election contest where the common council of Newark was sole judge of the election of its members, the court says (p. 99): "The mayor first contends that the common council had no authority to appoint the committee, or to empower them to do the acts comprised in the resolution which authorized them to expend money for a stenographer. The common council, by the charter, is made the sole judge of the election, returns and qualifications of its members. They were thus required to adjudicate upon the contest raised by O'Connor's petition. The duty of making that adjudication could not be delegated to any committee. But that is not what the common council did in this case. The duty imposed on the committee was simply to take testimony, and to report the facts they found, with the testimony taken. This is the well-known course of proceeding in every body having power to judge of the election of its own members, in case an election is contested. No other course seems practicable, and no injury is thereby done to the contestants, for the adjudication is made, upon the facts and testimony presented, by the whole body. In my judgment, the authority to appoint the committee [364] and to direct it to do the acts required by the resolution was clear."

We see no reason why the procedure of reference to a committee to take testimony and report the facts approved in the last quoted case in the matter of a contested election of a member, is not equally applicable upon principle in the case at bar.

Few cases are cited by either party to the case at bar which directly apply to the point here under discussion, and such has been the diligence of counsel that we presume they have cited all they could find. The case most nearly covering this disputed point is that of Osgood v. Nelson, 41 L. J. Q. B. (Eng.) 329, a final decision by the House of Lords and a leading English case; where it appeared that by virtue of a certain act of Parliament the chief clerk of the London (City) Small Debts Court was to be appointed by the mayor, aldermen and commons, and it was lawful for them, in case of the clerk's inability or misbehaviour, or for any other cause which might appear reasonable to them, the mayor, aldermen, and commons, to remove such clerk. Upon charges of misconduct in office against said clerk, which were brought before that body, elsewhere in the opinion called the "Court of Common Council," the matter was referred to a committee for them to inquire into it and report upon it. The committee gave several hearings at which all parties in interest were present, heard the testimony of all the witnesses who were produced, had the same stenographically taken and heard arguments of counsel; the transcript of the evidence and proceedings was before the committee and was carefully considered; and the committee reported to the council that they found the clerk guilty as charged. The evidence taken before the committee was printed and distributed to the members of the council, the report with transcript of evidence was duly filed and the accused clerk was duly notified and furnished with a copy of the report and allowed to inspect and take copies of the evidence, and he was ordered to show cause on a certain [365] fixed date before the Court of Common Council (equivalent to our city council) why he should not be removed from office. Further time was given at his request, he finally appeared by counsel and was heard; and thereupon after deliberation, the following resolutions were passed:

"Resolved, that in the opinion of this court the duties of chief clerk or registrar of the Sheriffs' Court have not been properly discharged by Mr. Osgood.

"Resolved, that this court having carefully considered the evidence as to the manner in which the duties of the office of chief clerk or registrar of the Sheriffs' Court, have been discharged by Mr. Osgood, is of opinion that reasonable cause exists for his removal from his said office, and this court doth hereby remove him accordingly."

Among other questions raised and determined, which need not be here stated, substantially the same point, now under consideration in the case at bar, was raised, viz.: that the power of amotion had not been properly exercised because the inquiry had been conducted before a small portion of the corporation, and the corporation was not entitled to delegate to a select body, such as the clerk's committee, the authority conferred upon them (p. 333); in the earlier stages of this case this contention was overruled in the Court of Queen's Bench (p. 334 by Cockburn, C. J.); in the Exchequer Chamber the judgment of the court of Queen's Bench was affirmed; on error to the House of Lords, judgment of the Exchequer Chamber was affirmed. Upon the point here under discussion, the House of Lords speaking through Martin, B., said, p. 335: "The next objection taken was that amotion did not take place, as the law required, on the authority of the lord mayor, aldermen and commons, but by delegation. Now, in our opinion, there was no delegation at all—nothing of the kind. What was done was, that a complaint having been made to the body which had control in the matter, viz.: the mayor, aldermen and commons of the city of London, as to the conduct of Mr. Osgood, it was referred by them

to a committee, [366] which seems to have been long used in the Corporation of London, known as the 'Officers' and Clerks' Committee;' and what they were directed to do was to make enquiry, with reference to the alleged complaint, to take evidence and to ascertain the truth of it, not for the purpose of that committee coming to any judgment or decision themselves, but for the purpose of their report being submitted to the mayor, aldermen and commons, in order that they might come to a judgment upon it. The argument of the learned counsel is erroneous in point of fact. That has not taken place which they allege to have taken place, and therefore there was no delegation."

And p. 340, Lord Colonsay says: "I quite agree with the observation made by the learned Baron, that there was no violation of the rule of delegation in this case. The mode adopted was the mode in which such enquiries are ordinarily considered, and necessarily conducted by such a tribunal. What was the course which was stated to have been requisite? It was that after this committee had made their report, if they did make such a report, there should have been an assembling of the common council, there should have been a prosecutor appointed, and there should have been a new trial, with all the formalities of a criminal trial, before they could have arrived at a conclusion. But the committee of enquiry into this matter, having made their enquiry in the ordinary way, having collected their evidence in the ordinary way, and allowed the party who had been present at the collecting of that evidence, to state his case by counsel, I cannot conceive a more fair mode of proceeding."

The criticism of the case of Osgood v. Nelson, supra, which has been attempted by petitioner's counsel, that it is of no weight as authority here, because the power of the Court of Common Council of London to remove officers may have been derived from prescription or custom or other obscure source is not warranted by the facts; since it clearly appears at large in the opinions, that its powers of amotion were derived from express statutory authority; and its [367] procedure was fully approved as having afforded a full and fair opportunity to the officer charged with misconduct to be heard in his defence.

Certain other cases are cited on behalf of the respondents, relating to certain rules of police commissions in New York City, where by such rules, adopted by the commissioners under their general discretionary powers to adopt rules for the conduct of the police department, it was provided that upon charges made against a member of the police, testimony might be taken before one commissioner or a deputy, and reported to the commissioner or board of commissioners, who should thereupon give a hearing to the accused party, and who alone could convict and punish. It has been frequently held that such rules were a proper exercise of discretion vested in the commissioners under the law, and that the evidence so taken before one commissioner could properly be submitted to and considered and acted upon by the full board of commissioners, although the witnesses were not produced before them. See People v. Board of Police, 93 N. Y. 97, 103; People v. Board of Police, 98 N. Y. 332, 335; People v. Board of Police, 99 N. Y. 676, 2 N. E. 151; People v. Greene, 183 N. Y. 483, 486, 76 N. E. 614.

We cite these cases simply to show that it has been found to be a reasonable rule, in relation to inquiries by a board of public officials, into charges of misconduct, that the evidence may be taken before one of such officials and reported to the board for their action; and that it is not the right of the accused person under such circumstances, that all of the witnesses must be examined before the full board. Such a recognition of what is reasonable in such cases, is of some weight in determining whether the petitioner in this case has had a fair opportunity to be heard in his defence.

We find no case cited on behalf of petitioner which supports his contention upon this point.

In Jacksonville v. Allen, 25 Ill. App. 54, the procedure seems to be substantially the same as in the case at bar up to the time that the officer under investigation was [368] notified to be present at a meeting of the city council if he saw fit and be heard in his defence. The case shows that he did appear and was not given the opportunity which the notice to appear offered him. It was the failure of the council to give him this opportunity which was the deciding factor in the case. The court expressly makes this the issue, at page 56: "That issue, strictly speaking, was whether the appellee was discharged without a hearing before the city council, and this leads to a statement of the real matter in controversy, which is whether the city council has power to discharge a regular policeman without giving him an opportunity to be heard in his defence." The test in this case is not, did the council in person take the testimony against the officer under investigation but, did the officer under investigation have an opportunity to be heard by the council in his defence.

In Chicago v. People, 210 Ill. 84, 71 N. E. 816, a trial board was expressly provided by statute. The trial was held before a board improperly constituted. This was of course illegal. The case also shows that the relator was not given an opportunity to be heard in his defence. The case has no bearing upon the question now under discussion.

In Andrews v. King, 77 Me. 224, the irregularities upon which the court bases its decision were that the charter required that the hearing be by the mayor and aldermen; that the hearing was held by the aldermen alone without the mayor and was not according to law; it also appeared that there was no determination or judgment upon the facts before sentence was passed. No hearing was had before a committee and the question here under discussion was not raised.

Charles v. Hoboken, 27 N. J. L. 203, is simply an authority to the same effect that if the power of removal is vested in the mayor and council, it may not be exercised by the council alone.

People v. Hamilton, 84 App. Div. 369, 82 N. Y. S. 884, involved the attempted removal of a docket comparing clerk in the office [369] of the county clerk of New York County. The proceedings for removal were taken under statutory authority before a deputy clerk who heard the evidence and himself had power to remove. He reported the evidence to the county clerk, who had not heard the witnesses; and who made an order of removal giving him any opportunity to be heard. The removal was held to be illegal on grounds which have no special bearing here. It was held that the deputy clerk who heard the evidence should have acted in the matter of removal.

No case in this state has passed directly upon this question. In Maroney v. Pawtucket, 19 R. I. 3, 31 Atl. 265, it appeared that charges of misconduct having been made against the petitioner, an assessor of taxes of the city of Pawtucket, the city council appointed a committee "to give a full, fair and impartial hearing to all parties in interest and to report to the city council the results of such hearing." The committee made a report to the city council and the testimony taken by the committee was read to the board of aldermen and common council assembled in joint convention. On the same day the city council passed a vote finding the petitioner guilty of misconduct in office and removing him from his office. Under the charter of the city of Pawtucket, "The city council may by concurrent vote of three-fifths of the members elected to each board remove from office for incapacity or misconduct any officer elected or appointed by them." The court said: "Though notice was given to the petitioner of the taking of the testimony before the committee of the city council appointed for that purpose, the record does not disclose any notice to him of the proceeding before the council for his removal from office, so that he could be heard on the question of his removal. Without such opportunity to be heard the proceeding was not such a trial as is contemplated by Clause 7 of the charter of Pawtucket. For this reason, we are of the opinion that the proceeding must be quashed." It will be noted that the court does not condemn that part [370] of the procedure which involves the taking of testimony before a committee of the city council, but places its objection to the proceedings solely upon the fact that the petitioner had no opportunity to appear before the council and be heard on the question of his removal after the committee had reported; an opportunity which was given to the petitioner in the case at bar and of which he refused to take advantage.

We are clearly of the opinion that the method of procedure adopted in this case was a reasonable and proper method, on the part of the city council, of gathering the evidence and bringing it before that body for its consideration and determination. It is not to be expected or required that a body like the city council, which has under the charter important legislative and administrative functions in the conduct of the affairs of the city and the members of which are men of business necessarily requiring time for their own affairs, should sit as a whole for the purpose of listening to all the witnesses produced in the course of a protracted investigation of this character; while it is proper that they should do so, if they see fit, in our opinion, the method of reference to a committee, to take the evidence and report, was an orderly and proper method well calculated to arrive at just results and in fact gave to the petitioner a better opportunity to present all of his evidence and to be heard at length thereon than would have been possible if the whole city council had sat as a body during all of the forty-three hearings. The language of Cockburn, C. J., quoted in the case of Osgood v. Nelson (supra), 41 L. J. Q. B. (Eng.) 329, at p. 333, is quite appropriate in this connection: "It is true that the Court of Common Council did not themselves hear the evidence, but that arose from the circumstances of the case. Where there is a tribunal of some 360 persons, you cannot expect them to sit down altogether whilst a long enquiry of several days goes on. But the facts of the case must be submitted in some way to those who have decided it; and the evidence having been printed and circulated [371] amongst all the members of the council, we must take it that those gentlemen did not come to the council to discharge so important a function as that of determining on the dismissal from his office of a gentleman like Mr. Osgood without having examined that evidence so submitted to them."

It is contended on behalf of the petitioner that although the respondents have brought before this court the numerous printed volumes of testimony taken before the committee,

and which were placed before the members of the city council prior to the time when the petitioner had his opportunity to appear and be heard, such testimony is no part of the record before this court, although certified with the record by the city clerk. It is true that it has been held by this court that, upon proceedings in *certiorari*, the evidence taken before the inferior tribunal forms no part of the record proper and that "the purpose of *certiorari* is to correct errors of law, and not to review findings of fact." Maroney v. Pawtucket, 19 R. I. 3, 31 Atl. 265; Smith v. Burrillville, 19 R. I. 61, 63, 31 Atl. 578, and in accordance with these views we have not examined said testimony with any purpose to review findings of fact. But it is apparent from the allegations of the petition that the charges against the petitioner were of a substantial character, and that if they were found to be true they furnished ample ground for the action of the city council in his removal from office for misconduct; and it is further apparent from an examination of the record which does include the report of the committee and all the proceedings before the city council that there was material evidence of a substantial character, in support of the charges, taken before the committee and by them placed before and considered by the city council, upon which the city council was justified in finding the defendant guilty. We have looked into the proceedings so far as to assure ourselves that the city council, in exercising its jurisdiction of removal acted upon serious and substantial grounds, supported by competent evidence, and that there was just and reasonable cause for their [372] action. Keenan v. Goodwin, 17 R. I. 649, 24 Atl. 148; O'Brien v. Pawtucket, 20 R. I. 49, 37 Atl. 302, 530; Osgood v. Nelson, supra. When, after due notice to the petitioner, the city council as a whole met in special session for the express purpose of giving to the petitioner the hearing to which he was entitled under the general principles recognized by all the cases cited, it is to be presumed that they were acting in good faith and that they intended to give him the fullest opportunity to be heard; he might then, if he saw fit, either by counsel or individually have criticised the testimony and pointed out its weaknesses, or mistakes if any; he might have offered material assistance to the members thereof in the examination and consideration of the testimony. If he was not satisfied that they had given all necessary examination to the evidence before them, then was his opportunity to see that they did so, and to place the matter of his defence before them in such light that they would be compelled to give it consideration. But he saw fit to refuse the opportunity, relying upon his general protest denying their jurisdiction; and it is too late for him now to complain of the result. We are not to assume, as the petitioner urges us to do, that the city council did not examine or consider the evidence submitted by the committee; rather, in view of the plain terms of the final resolution, we are to assume that they did consider the evidence in accordance with their duty; and did make their findings in accordance therewith. We are of the opinion that the city council did all that it was legally bound to do in the premises and that no ground exists for any interference with their action.

The appeal from the judgment of the Superior Court denying the writ of *mandamus* (in the first case) is dismissed, the judgment of the Superior Court is affirmed and that case is remanded to the Superior Court for further proceedings.

The petition for a writ of *certiorari* (in the second case) is denied and dismissed.

NOTE.

Power of Body Having Authority to Remove Public Officer to Appoint Committee to Conduct Hearing.

The reported case holds that a body vested with the power to remove a public officer may appoint a committee to conduct the hearing and take the evidence, and may base its own action on the evidence reported by that committee. That holding finds support in Osgood v. Nelson, L. R. 5 H. L. (Eng.) 636, 41 L. J. Q. B. 329, discussed at length in the reported case, and in the recent case of State v. Milwaukee, 157 Wis. 505, 147 N. W. 50, wherein, in reviewing the removal of a tax commissioner by a municipal council, the court said: "The relator claims he was denied a hearing in two respects: First, because the evidence was not taken before the common council, but before a committee thereof, and second, because he was denied the right to be heard by the common council by attorney before it acted upon the report of the committee. The first challenge of the regularity of the proceedings we hold not well taken. It is a familiar practice in legal proceedings to refer the taking of evidence to a referee or person other than the court and to report such evidence as well as the conclusions of the referee or person taking the evidence thereon to the court to act upon. Evidence so taken, reported, and acted upon by the court must in contemplation of law be deemed taken before the court. The necessity of so taking testimony by courts is quite apparent to those conversant with judicial proceedings. Much more so was there a necessity for the appointment of a committee to take the evidence in this proceeding. Over four hundred print-

ed pages of testimony are reported to this court, the taking of which, with intermissions, required weeks of time. It was not practicable for all the members of the common council to devote so much time to it. All the evidence taken was read to the common council before it acted upon the report of the committee. It must therefore, in contemplation of law, be deemed to have been taken before the common council, and that in this respect the proceeding was regular." In Rutter v. Burke (Vt.) 93 Atl. 842, the holding in the reported case was discussed without a definite decision thereon, the court saying: "The case against the commissioners was evidently presented to the city council on the theory that the evidence taken by the aldermanic committee as shown by the transcript was available in the further hearing. The right of a city council to remove for cause upon evidence taken and reported by a committee, if certain requirements have been complied with, is sustained by Chace v. Providence, 36 R. I. 331, 89 Atl. 1066, a Rhode Island case decided in 1914 on a full review of the authorities. The petitioner in that case objected that he was tried and found guilty by a committee, that the council simply accepted and acted on their report, without any evidence having been placed before it or taken by it, and that he had a right to have the witnesses for and against him produced and examined before the city council itself. The court considered that this claim of right was without foundation in reason or authority, that the taking of evidence by an authorized committee to be acted upon by the whole body was a reasonable and proper procedure, and that no special statute or ordinance was needed to give it validity. The court supported its position by quoting freely from Osgood v. Nelson, 41 L. J. Q. B. (Eng.) 329, a case relating to the powers of the court of common council of London, the final decision of which was by the House of Lords. But if we were to adopt the doctrine of these cases it would not avail the petitionees. If the testimony taken by the committee was to be used in the hearing before the council, it was necessary that the commissioners have the same notice of the proceeding and the same presentation of charges that were required for a hearing by the council in the first instance. There is nothing to show that any notice was given or charges served. There is nothing that would justify us in assuming that Mr. Kidder represented the commissioners before the committee. It is true that he spoke several times as if the commissioners were coming in later, and announced near the close of the hearing that they were not coming in. There is nothing in this that carries any implication of an authority to represent."

In accord with the holding of the reported case it has been held that a body having the power to remove a municipal employee may delegate to one of its number the taking of evidence. People v. Board of Police, 93 N. Y. 97; People v. Board of Police, 98 N. Y. 332; People v. McClave, 123 N. Y. 512, 25 N. E. 1047. A contrary view was taken in Jacksonville v. Allen, 25 Ill. App. 54; but in People v. Chicago, 234 Ill. 416, 84 N. E. 1044, a statute authorizing the appointment by the civil service commission of a trial board to hear proceedings for removal was sustained, the court saying: "As we understand the ruling of the trial court on the proposition of law in question, it was held that the part of section 12 of said Civil Service act which authorizes the civil service commission to allow the investigation to be conducted before an officer or board appointed by it, rather than by the commission itself, was a delegation of judicial power and therefore unconstitutional. If the civil service commission, in hearing such charges, would not exercise judicial functions, it is difficult to see how it delegates judicial functions to the board or officer designated to investigate the charges, when such board or officer exercises no greater power in the investigation than would the commission itself. Indeed, this trial board did not exercise as great a power as the commission, as it only had authority to hear the charges and recommend action, subject to approval or disapproval by the commission. Said section 12 specifically provides that these investigations may be conducted by such boards or officers, and the reasoning of this court in People v. Kipley, 171 Ill. 44, and Chicago v. People, 210 Ill. 84, is conclusive as to the constitutionality of this provision."

UNION ICE AND COAL COMPANY

v.

TOWN OF RUSTON.

Louisiana Supreme Court—May 25, 1914.

135 La. 898; 66 So. 262.

Taxation — Limits on Taxing Power — Public Purchase.

In addition to the limitations on the Legislature of a state contained in the federal and state Constitutions, the Legislature is further subject in the passage of legislation to the limitations which inhere in the nature of our form of government, such as that the power

of taxation can be validly exercised only for a public purpose, etc.

[See 16 Am. St. Rep. 365.]

Municipal Corporation — Power to Operate Ice Plant.

Const. art. 224, provides that the taxing power may be exercised by the General Assembly for state purposes and by parishes and municipal corporations and public boards, under authority delegated by the General Assembly for parish, municipal and local purposes "strictly" public in their nature. Held, that the word "strict" was used in the sense of exact; accurate; precise; undeviating; governed or governing by exact rules; and "strictly" as in a strict manner; closely, precisely, rigorously; stringently; postively; and that the construction and maintenance of a municipal ice plant by a small city operating a municipal waterworks and electric lighting system was not "strictly" a public activity, and could not be maintained by the exercise of the taxing power.

[See note at end of this case.]

Taxation — Purpose of Tax — What Constitutes Public Service.

The term "public service," within the rule that taxes can be laid only for public purposes, is not fulfilled by an activity whereby the private interests of many individuals are fulfilled; the test in general being whether the objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal.

Constitutional Law — Nature of Police Power.

The term "police power" has a meaning coextensive with sovereign power or sovereignty. As understood in American constitutional law, the term denotes the power of the state to impose those restraints on private rights which are necessary for the general welfare of all, and is but the power to enforce the maxim, "Sic utere tuo ut alienum non lædas." It is the power to regulate the business of others, and not a power to go into business.

[See 6 R. C. L. tit. *Constitutional Law*, p. 183.]

Appeal from Fourth District Court, Parish of Lincoln: HOLSTEAD, Judge.

Action to annul ordinance and for injunction. Union Ice and Coal Company, plaintiff, and Town of Ruston, defendant. Judgment for defendant. Plaintiff appeals. The facts are stated in the opinion. REVERSED.

Barksdale & Barksdale for appellant.

S. D. Pearce and *F. W. Price* for appellee.

[899] PROVOSTY, J.—The town council of the town of Ruston having adopted an ordinance providing for the purchase and installation of an ice manufacturing plant, to be operated in connection with its water and electric light plant for the production of ice to be sold to the inhabitants of the town, the plaintiff company, and ice-manufacturing company, which had theretofore been furnishing ice to the town, brought this suit, in its quality of a taxpayer, to annul the ordinance, and enjoin its execution.

The ordinance is said by plaintiff to contravene articles 46, 58, 227, 263, 270, and 287 of the state Constitution; but, while these grounds are not waived in the argument, [900] they are evidently not insisted on with any great confidence in their merit. The main ground, to which the bulk of the brief of plaintiff is devoted, and to which we shall confine ourselves, is that the cost of said ice-manufacturing plant is proposed to be paid in part out of revenues derived from taxation; and that the power of taxation can be exercised only for public purposes; and that the manufacturing of ice by a town for sale to the inhabitants of the town is not a public purpose.

Act No. 3, p. 128, of 1912, amending act No. 136 of 1898, provides as follows:

"The mayor and board of aldermen of every city and town owning, maintaining and operating either municipal waterworks or electric light system or both shall have the additional power to install, own, maintain and operate in connection with such system, an ice-making plant for the purpose of supplying its inhabitants with ice, and to prescribe the rates at which ice shall be supplied to its inhabitants."

There is no question, therefore, but that the town had authority to adopt said ordinance, if the conferring of such authority was within the power of the Legislature.

As we understand the argument of the learned counsel for the defendant, it is that the Legislature "may do everything which the state Constitution does not prohibit." This is not true. In addition to the limitations contained in the federal and state Constitutions, there are those limitations which inhere in the nature of our form of government; such as that the power of taxation can be validly exercised only for a public purpose. But, for finding this particular limitation, it is not necessary, in this state, to go outside of the Constitution, for its article 224 provides as follows:

"Art. 224. The taxing power may be exercised by the General Assembly for state purposes and by parishes and municipal corporations and public boards, under authority granted to them by the General Assembly, for parish, municipal, and local purposes, strictly public in their nature."

[901] The several Constitutions of this state prior to that of 1879 contained no restriction upon the taxation power except those of equality and uniformity. The Constitution of 1879 contained many restrictions. The Constitution of 1898 retained them, and add-

ed to them this one, that the power should be exercised by municipalities only for purposes "strictly public in their nature."

Our question is, therefore, whether the establishment and operation of an ice plant for making ice to be sold to the townspeople is a "purpose strictly public in its nature."

It may be well to premise that, in a case such as this, where a municipality is about to contract for an expenditure that will have to be met, in whole or in part, by taxation, the taxpayer who, like the plaintiff in this case, intends to resist the tax, does not have to wait until the tax has been actually imposed, or until his property is being seized to satisfy it, but that he may attack the ordinance itself which authorizes the expenditure to be incurred; indeed, that that is the proper course for him to pursue. As said by the Supreme Court of the United States in Citizens' Sav. etc. Ass'n v. Topeka, 20 Wall. 655, 660, 22 U. S. (L. ed.) 455–460:

"The validity of a contract which can only be fulfilled by a resort to taxation depends on the power to levy the tax for that purpose."

So well settled is this that the learned counsel for defendant have not made any point in that connection. See 20 Am. & Eng. Enc. of Law (2d ed.) 1084.

As indicating the public nature of such an enterprise, the learned counsel for defendant adduce the fact (not supported, by the way, by any evidence in the case) that the United States government has established ice plants of this kind for supplying its own needs, not for sale; and that the city of New York is meditating a like undertaking. But, we imagine, no one would contest the right of the town of Ruston to do this same thing if [902] the town were of proper size for such a thing. But Ruston is not a city, nor even a very large town.

The engineer in charge of the town electric light plant testified that an ice plant could be operated very economically in connection with the electric light plant, because it would be run during the day, when the load is off of the electric light plant, and therefore with the same engine and, to some extent, by the same employees, and with no great addition of fuel. But the question in such cases is not whether the thing can be done economically or not, but whether the doing of it falls within the legitimate functions of municipal government. The fact that shoes and ready-made clothing could be manufactured more cheaply by the municipality in connection with its public utilities would not justify the town in going into the shoes and clothes business.

We do not wish to be understood, however, as placing shoes and clothes on a parity with ice in connection with the possibility of their production being, or becoming, a municipal function. While both are to-day on a parity as articles of commerce, there is this difference between them: That the bulkiness of ice renders its being produced locally of greater necessity than is the case with shoes or clothes. Water and light may be—indeed, are—articles of commerce in towns unprovided with the modern facilities for furnishing both to the inhabitants more conveniently and economically; but the furnishing of them to the inhabitants of a town is now a well-recognized municipal function. Whether, if it were shown that ice can be produced so cheaply in connection with a town electric light plant as to be classable almost as a by-product, and, as such, be furnished to the inhabitants of the town with incomparably greater convenience and cheapness than by the ordinary mode, a case would not be presented to which the same reasons would in a [903] measure be applicable which justify the furnishing of water and light as municipal functions, we will not undertake to say. Such proof has not been made. Defendant's engineer has merely shown that the production under those conditions would be cheaper; and he admits that he is no expert in the matter, and that much of such information as he possesses on the subject has been derived from interested sources—from sellers of ice-making machinery.

On the question of what is a public purpose many illuminating passages are to be found in the decisions, from among which we select a few:

In People v. Salem, Tp. 20 Mich. 452, 4 Am. Rep. 400, Judge Cooley, speaking for the Supreme Court of Michigan, said:

"But when we examine the power of taxation with a view to ascertain the purposes for which burdens may be imposed upon the public, we perceive at once that necessity is not the governing consideration, and that in many cases it has little or nothing to do with the question presented. Certain objects must of necessity be provided for under this power, but in regard to innumerable other objects for which the state imposes taxes upon its citizens, the question is always one of mere policy, and if the taxes are imposed, it is not because it is absolutely necessary that those objects should be accomplished, but because, on the whole, it is deemed best by the public authorities that they should be. On the other hand, certain things of absolute necessity to civilized society the state is precluded, either by express constitutional provisions or by necessary implication, from providing for at all; and they are left wholly to the fostering care of private enterprise and private liberality. We concede, for instance, that religion is essential, and that without it we should degenerate to barbarism and brutality; yet we prohibit the state

from burdening the citizen with its support, and we content ourselves with recognizing and protecting its observance on secular grounds. Certain professions and occupations in life are also essential, but we have no authority to employ the public moneys to induce persons to enter them. The necessity may be pressing, and to supply it may be, in a certain sense, to accomplish a 'public purpose;' but it is not a purpose for which the power of taxation may be employed. The public necessity for an educated and skillful physician in some particular locality may be great and pressing; yet, if the people should be taxed to hire one to locate there, the common voice would exclaim that the public moneys [904] were being devoted to a private purpose. The opening of a new street in a city or village may be of trifling public importance as compared with the location within it of some new business or manufacture; but, while the right to pay out the public funds for the one would be unquestionable, the other, by common consent, is classified as a private interest, which the public can aid as individuals if they see fit, while they are not permited to employ the machinery of the government to that end. Indeed, the opening of a new street in the outskirts of a city is generally very much more a matter of private interest than of public concern; so much so that the owner of the land voluntarily throws it open to the public without compensation. Yet, even in a case where the public authorities did not regard the street as of sufficient importance to induce their taking the necessary action to secure it, it would not be doubted that the moment they should consent to accept it as a gift the street would at once become a public object and purpose, upon which the public funds might be expended with no more restraints upon the action of the authorities in that particular than if it were the most prominent and essential thoroughfare of the city.

"By common consent, also, a large portion of the most urgent needs of society are regulated exclusively to the law of demand and supply. It is this in its natural operation, and without the interference of the government, that gives us the proper proportion of tillers of the soil, artisans, manufacturers, merchants, and professional men, and that determines when and where they shall give to society the benefit of their particular services. However great the need in the direction of any particular calling, the interference of the government is not tolerated, because, though it might be supplying a public want, it is considered as invading the domain that belongs exclusively to private inclination and enterprise. We perceive, therefore, that the term 'public purposes,' as employed to denote the objects for which taxes may be levied, has no relation to the urgency of the public need, or to the extent of the public benefit which is to follow. It is, on the other hand, merely a term of classification, to distinguish the object for which, according to settled usage, the government is to provide, from those which, by the like usage, are left to private inclination, interest, or liberality."

In Citizens' Sav. etc. Ass'n v. Topeka, 20 Wall. 655, 664, 22 U. S. (L. ed.) 455–461, the Supreme Court of the United States, speaking through Justice Miller, said:

"It is undoubtedly the duty of the Legislature which imposes or authorizes municipalities to impose a tax to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified [905] in interposing when a violation of this principal is clear and the reason for interference cogent. And, in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily and by long course of legislation, levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal. Whatever lawfully pertains to this and is sanctioned by time and the acquiescence of the people may well be held to belong to the public use, and proper for the maintenance of good government, though this may not be the only criterion of rightful taxation."

The rigors of the New England winter making it highly desirable that the municipalities should be allowed to become dispensaries of fuel, coal and wood, to their inhabitants at a reduced rate, the Legislature of Massachusetts, in 1892, concluded to give this authority to the towns of that state, if it could do so constitutionally; but having its doubts on the subject, submitted the question to the judges of the Supreme Court. The answer of the judges, reported 155 Mass. 601, 30 N. E. 1143, 15 L.R.A. 810, is a full discussion of the question of what is a public purpose and is as follows:

"Whether the Legislature can authorize a city or town to buy fuel, coal and wood, and to sell them to its inhabitants for fuel, must be determined by considering whether the carrying on of such a business for the benefit of the inhabitants can be regarded as a public service. This inquiry underlies all the questions on which our opinion is required. If such a business is to be carried on, it must be with money raised by taxation. It is settled that the Legislature can authorize a city or town to tax its inhabitants only for public purposes. This is not only the law of

this commonwealth, but of the states generally, and of the United States. The following are some of the decisions or opinions on the subject: Kingman v. Brockton, 153 Mass. 255, 26 N. E. 998, 11 L.R.A. 123; Opinion of Justices, 150 Mass. 592, 24 N. E. 1084, 8 L.R.A. 487; Mead v. Acton, 139 Mass. 341, 1 N. E. 413; Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39; State v. Osawkee Tp. 14 Kan. 418, 19 Am. Rep. 99; Mather v. Ottawa, 114 Ill. 659, 3 N. E. 216; Citizens' Sav. etc. Ass'n v. Topeka, 20 Wall. 655, 22 U. S. (L. ed.) 455; Ottawa v. Carey, 108 U. S. 110, 2 S. Ct. 361, 27 U. S. (L. ed.) 669; Atty.-Gen. v. Eau Claire, 37 Wis. [906] 400; State v. Eau Claire, 40 Wis. 533; Allen v. Jay, 60 Me. 124, 11 Am. Rep. 185; Opinion of Justices, 58 Me. 590, appendix.

"It is not easy to determine in every case whether a benefit conferred upon many individuals in a community can be called a 'public service,' within the meaning of the rule that taxes can be laid only for public purposes. In general, however, it may be said that the promotion by taxation of the private interest of many individuals is not a public service, within the meaning of the Constitution. The preamble of the Constitution declares that: 'The end of the institution, maintenance, and administration of government is to secure the existence of the body politic; to protect it, and furnish the individuals who compose it with the power of enjoying in safety and tranquility their natural rights and the blessings of life.' It is declared in part 1, art 1: 'That all men are born free and equal and have certain natural, essential and inalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.' Constitutional questions concerning the power of taxation necessarily are largely historical questions. The Constitution must be interpreted as any other instrument with reference to the circumstances under which it was framed and adopted. It is not necessary to show that the men who framed it or who adopted it had in mind everything which by construction may be found in it, but some regard must be had to the modes of thought and action on political subjects then prevailing, to the discussions upon the nature of the government to be established, to the meaning of the language used as then understood, and to the grounds on which the adoption or rejection of the Constitution was advocated before the people. We know of nothing in the history of the adoption of the Constitution that gives any countenance to the theory that the buying and selling of such articles as coal and wood for the use of the inhabitants was regarded at that time as one of the ordinary functions of the government which was to be established. There are nowhere in the Constitution any provisions which tend to show that the government was established for the purpose of carrying on the buying and selling of such merchandise as, at the time the Constitution was adopted, was usually bought and sold by individuals, and with which individuals were able to supply the community, no matter how essential the business might be to the welfare of the inhabitants. The objects of the Constitution was to protect individuals in their rights to carry on the customary business of life, rather than to authorize the commonwealth or the 'towns, parishes, precincts, and other bodies politic' to undertake what had usually been left to the private enterprise of individuals. In the opinion in Citizens' Sav. etc. Ass'n v. Topeka, 20 Wall. 655, 664, 22 U. S. (L. ed.) 455, 461, the Supreme Court [907] of the United States say: 'It is undoubtedly the duty of the Legislature which imposes or authorizes municipalities to impose a tax to see that it is not to be used for purposes of private interest instead of a public use, and the courts can only be justified in interposing when a violation of this principle is clear and the reason for interference cogent.' And in deciding whether, in the given case, the object for which the taxes are assessed falls upon the one side or the other of this line, they must be governed mainly by the course and usage of the government, the objects for which taxes have been customarily, and by long course of legislation, levied, what objects or purposes have been considered necessary to the support and for the proper use of the government, whether state or municipal.'

"'The early usages of towns undoubtedly did not exhaust the authority which the Legislature can confer upon municipalities to levy taxes. Cities and towns, since the adoption of the Constitution, have been authorized to levy taxes for many other purposes than those for which taxes were then levied. Up to the present time, however, none of the purposes for which cities and towns have been authorized to raise money has included anything in the nature of what is commonly called trade or commercial business. Instances can be found of some very curious legislation by towns in the colonial and provincial times, some of which would certainly now be thought to be beyond the powers of towns under the Constitution. Whatever the theory was, towns in fact under the colony charter, and for some time under the province charter, often acted as if their powers were limited only by the opinion of the inhabitants as to what was best to be done. This was the result of their peculiar situation and condition, and the powers of towns or of the

general court were not much considered. The exercise of these extraordinary powers, however, gradually died out. The purposes for which, by the province laws, towns were authorized to raise money were for the maintenance of highways, the support of the ministry, schools, and the poor, and for the defraying of other necessary charges arising within the town. The words 'necessary charges' are still retained in the statutes, but they have been strictly construed by the courts. We do not find either in the colony or the province laws any legislation relating to the buying and selling of coal or wood by towns for the use of the inhabitants, or any legislation on any similar subject. It is possible that there may be found in the records of some town a vote or votes showing that the town, in an emergency, was authorized to buy wood or coal for the purpose of supplying its inhabitants with fuel, but we have not found any. Certainly it was not usual for towns to supply their inhabitants with fuel, unless they were paupers. Neither was it usual for towns to supply their inhabitants with grain or other commodities. We know of no instance of this being done, except by the town of Boston. In the fall of 1713 [908] there was a scarcity of grain, and the general court prohibited the exportation of it. 1 Pro. Laws, State Ed. p. 226. The Town of Boston, in March, 1713–14, voted to lay in a stock of grain to the amount of 5,000 bushels of corn, and to store it in some convenient place, and it was left to the selectmen to dispose of it as they saw fit. Eighth Report of Record Commissioners, pp. 101, 104. After that, as shown by the records, the town regularly bought and stored grain and sold it to the inhabitants, as late as 1775, and perhaps later, and it established two granaries, one of which, in the common, remained in use probably as long as the town bought and sold grain. Whether, after the Revolution, the town continued to buy grain we are not informed, as the records have not been printed. The amount which could be sold to any one person was often limited to a few bushels at a time. The report of a committee in 1774 shows that from March, 1769, to March, 1774, the quantity of corn and rye purchased was 5,836 bushels, and that the stock on hand was 376 bushels. It is apparent that the original purpose was to provide against a famine, and that it was not the intention of the town to assume the business of buying and selling all the grain which the inhabitants needed, but of keeping such an amount in store as was necessary in order that small quantities might be obtained, particularly by the poorer inhabitants, at what the selectmen, or a committee of the town, or the town itself, deemed reasonable prices. On May 25, 1795, the town voted to sell the granary. This action of the town of Boston was an exception to the usages of towns, and it appears from the reports of committees that before the Revolution it had come to be considered as of doubtful expediency, and during the Revolution, or not long after, it was discontinued. The nearest analogy under the Constitution to the subject we are considering is the authority given by the recent statute (Stat. 1891, c. 370), whereby cities and towns are empowered to maintain works for the manufacture and distribution of gas or electricity for furnishing lights to the municipalities and their inhabitants.

"In the opinion given to the House of Representatives on May 27, 1890, which is printed in Opinion of Justices, 150 Mass. 592, 24 N. E. 1084, 8 L.R.A. 487, the Justices advised that the manufacture and distribution of gas or electricity for furnishing light to the inhabitants of cities and towns might properly be regarded as constituting a public service. It was there said that: 'It must often be a question of kind and degree whether the promotion of the interests of many individuals in the same community constitutes a public service or not.' Gas or electricity for furnishing light has in recent times become a most convenient means of lighting both public and private buildings, streets, and grounds. It is impracticable that each individual should manufacture gas or electricity for himself; but this can best be done by some company or the [909] municipality for a considerable territory, and for the use of both the municipality itself and the inhabitants. Everybody who chooses within that territory, cannot be permitted to manufacture and distribute gas or electricity for the public use or the use of other persons, as it is distributed by means of pipes or wires; and the number who properly can be permitted to lay pipes or wires in a given territory must be limited to one, or, at most, to a few, persons or corporations. The pipes or wires must be laid in or over the public ways, or in or over land taken for the purpose, which may require the exercise of the right of eminent domain. These were some of the reasons why the subject seemed to the Justices a proper one for municipal regulation and control and to constitute a service which a municipality could be authorized to perform for itself and its inhabitants. But when the Constitution was adopted the buying and selling of wood and coal for fuel was a well-known form of private business, which was generally carried on as other kinds of business were carried on, and is now carried on in much the same manner as it was then. It was and is a kind of business which, in its relations to the community, did not and does not differ essentially from the business of selling any other of the necessaries of life. Although all kinds of business

may be regulated by the Legislature, yet to buy and sell coal and wood for fuel requires no authority from the Legislature, and requires the exercise of no powers derived from the Legislature, and every person who chooses can engage in it in the same manner as in the buying and selling of other merchandise. We are not aware of any necessity why cities and towns should undertake this form of business any more than many others which have always been conducted by private enterprise, and we are not called upon to consider what extraordinary powers the commonwealth may exercise, or may authorize cities and towns to exercise, in extraordinary exigencies, for the safety of the state or the welfare of the inhabitants. If there be any advantage to the inhabitants in buying and selling coal and wood for fuel at the risk of the community on a large scale, and on what has been called the co-operative plan, we are of the opinion that the Constitution does not contemplate this as one of the ends for which the government was established, or as a public service for which cities and towns may be authorized to tax their inhabitants. We therefore answer the questions in the negative."

The apparent urgency of the situation again pressing the Legislature to take some action in the matter, it resubmitted the question to the judges in 1903. The answer reported was as follows:

"It is established that under our Constitution private property cannot be taken from its owned except for a public use. This is equally true [910] whether the property is a dwelling house, taken by right of eminent domain, or money demanded by the tax collector. The establishment of a business like the buying and selling of fuel requires the expenditure of money. If this is done by an agency of the government, there is no way to obtain the money except by taxation. Money cannot be raised by taxation except for a public use. Until within a few years, it generally has been conceded, not only that it would not be a public use of money for the government to expend it in the establishment of stores and shops for the purpose of carrying on a business of manufacturing or selling goods in competition with individuals, but also that it would be a perversion of the function of government for the state to enter as a competitor into the field of industrial enterprise with a view either to the profit that could be made through the income to be derived from the business or to the indirect gain that might result to purchasers if prices were reduced by governmental competition. There may be some now who believe it would be well if business was conducted by the people collectively, living as a community, and represented by the government in the management of ordinary industrial affairs. But nobody contends that such a system is possible under our Constitution. It is plain, however, that taxation of the people to establish a city or town in the proprietorship of an ordinary mercantile or manufacturing business would be a long step towards it. If men of property, owning coal and wood yards, should be compelled to pay taxes for the establishment of a rival coalyard by a city or town, to furnish fuel at cost, they would thus be forced to make contributions of money for their own impoverishment; for, if the coalyard of the city or town was conducted economically, they would be driven out of business. A similar result would follow if the business of furnishing provisions and clothing, and other necessaries of life, were taken up by the government; and men who now earn a livelihood as proprietors would be forced to work as employees in stores and shops conducted by the public authorities. Except for the severely onerous conditions from which we are now suffering, the causes of which arose outside of this state, beyond the reach of our legislative enactments, there is nothing materially different between the proposed establishment of a governmental agency for the sale of fuel and the establishment of a like agency for the sale of other articles of daily use. The business of selling fuel can be conducted easily by individuals in competition. It does not require the exercise of any governmental function, as does the distribution of water, gas, and electricity, which involves the use of the public streets and the exercise of the right of eminent domain. It is not important that it should be conducted as a single large enterprise, with supplies emanating from a single source, as is required for the economical management of the kinds of business last mentioned. It does not even call for the investment of a large capital, [911] but it can be conducted profitably by a single individual of ordinary means. We therefore have no hesitation in answering the first three questions in the negative." Opinion of Justices, 182 Mass. 605, 66 N. E. 25, 60 L.R.A. 592.

The syllabus of the case reads as follows:

"Municipalities have authority to provide fuel for paupers; but they cannot be given power by the Legislature to buy and sell fuel in competition with private enterprise, although it is scarce and high in price, and the cost to consumers may be thereby reduced, unless there is such a scarcity as to create a general and widespread distress in the community, which cannot be met by private enterprise."

Very instructive in connection with our question, although not bearing directly upon it, are the tow decisions of the Supreme Court

of South Carolina in the celebrated Liquor Dispensary Cases.

In the case of McCullough v. Brown, 41 S. C. 220, 19 S. E. 458, 23 L.R.A. 410, the Supreme Court of South Carolina said:

"Finally the constitutionality of the dispensary act is assailed upon the ground that the Legislature have undertaken thereby to embark the state in a trading enterprise, which they have no constitutional authority to do; not because there is any express prohibition to that effect in the Constitution, but because it is utterly at variance with the very idea of civil government, the establishment of which was the expressly declared purpose for which the people adopted their Constitution; and therefore all the powers conferred by that instrument upon the various departments of the government must necessarily be regarded as limited by that declared purpose. Hence, when, by the first section of the second article of the Constitution, the legislative power was conferred upon the General Assembly, the language there cannot be construed as conferring upon the General Assembly the unlimited power of legislating upon any subject, or for any purpose, according to its unrestricted will, but must be construed as limited to such legislation as may be necessary or appropriate to the real and only purpose for which the Constitution was adopted—to wit, the formation of a civil government. In this connection it is noticeable that the word 'all' is not used in the section above referred to, but the language used is, 'the legislative power,' meaning such legislative power as may be necessary or appropriate to the declared purpose of the people in framing their Constitution and conferring their powers upon the various departments constituted for the sole purpose of carrying into effect their declared purpose. It is manifest from the numerous express restrictions [912] upon the legislative will found in the Constitution that the people were not willing to intrust even their own representatives with unlimited legislative power, but, as if not satisfied with these numerous express restrictions, and perhaps fearing that some important right might have been overlooked, a general clause, not usually found in state Constitutions, was inserted, apparently designed to cover any such omissions; for in section 41 of article 1 it is expressly declared that: 'The enumeration of rights in this Constitution shall not be construed to impair or deny others retained by the people, and all powers not herein delegated remain with the people.' Now, upon well-settled principles of constitutional construction, we are not at liberty to disregard this clause, but must give it some meaning and effect. It seems to us that the true construction of this clause is that, while there are many rights . . . reserved to the people, not expressly, but by necessary implication, which are beyond the reach of the legislative power, unless such power has been expressly delegated to the legislative department of the government. These views have not only the support of the highest authority in this country, as may be seen by reference to the cases of Citizens' Sav. etc. Ass'n v. Topeka, 20 Wall. 655, 22 U. S. (L. ed.) 455, and Parkersburg v. Brown, 106 U. S. 487, 1 S. Ct. 442, 27 U. S. (L. ed.) 238, but have been distinctly adopted by the Supreme Court of the state in Feldman v. Charleston, 23 S. C. 57, 55 Am. Rep. 6, as well as by the courts of Massachusetts and Maine, as may be seen by reference to Allen v. Jay, 60 Me. 124, 11 Am. Rep. 185, and Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39; and, what is more, they were applied to the vital power of taxation—a power absolutely essential to the very existence of every government. These cases substantially hold that, although there may be no express restrictions contained in a state Constitution forbidding the imposition of taxes for any other purpose than a public purpose, yet such a restriction must necessarily be implied from the very nature of civil government; and hence the legislative department, under the general power of taxation conferred upon it, cannot impose any tax except for some public purpose. Upon the same principle it seems to us clear that any act of the Legislature which is designed to or has the effect of embarking the state in any trade which involves the purchase and sale of any article of commerce for profit, is outside and altogether beyond the legislative power conferred upon the General Assembly by the Constitution, even though there may be no express provision in the Constitution forbidding such an exercise of legislative power. Trade is not, and cannot properly be, regarded as one of the functions of government. On the contrary, its function is to protect the citizen in the exercise of any lawful employment, the right to which is guaranteed to the citizen by the terms of the Constitution, and certainly has never been delegated to any department of the government."

[913] In the case of State v. Aiken, 42 S. C. 222, 20 S. E. 221, 26 L.R.A. 345, the same court reversed this decision on the ground that no rule of property was involved; that no one could acquire vested rights in the sale of intoxicating liquors; that intoxicating liquors could not be placed on the same footing with other commodities; and that the state, having the authority to prohibit the sale of intoxicating liquors, had authority to dispense them itself as a means of regulation. But in this decision the court reaffirmed and emphasized the rule that the state was without authority to engage in

trade or commerce. On this general principle the court said:

"We thing differences of opinion as to the constitutionality of this act arise from the attempt on the part of some to apply to it the law applicable to the ordinary commodities of life. . . .

"It is because liquor is not regarded as one of the ordinary commodities that the act of 1892 prohibiting its sale was, as to that matter, construed to be constitutional. We cannot for a moment believe that the court would have declared an act constitutional that prohibited entirely the sale of corn, cotton, or other ordinary commodities. It is fallacious to argue, in the light of this distinction, so thoroughly sustained by the authorities, that, if the government can take the exclusive control of the liquor traffic, it can do so as to any other avocations in life."

The court said further:

"It is contended that the foregoing section prevents the Legislature from embarking the state in a commercial enterprise. We have no doubt that if such was the object of the act, and it was not intended as a police measure, it would be unconstitutional, even in the absence of section 41, art. 1. As we have said, if the act is not a police measure, it is unconstitutional. It is quite a different thing, however, when trade is simply an incident to a police regulation."

In Rippe v. Becker, 56 Minn. 100, 57 N. W. 331, 22 L.R.A. 857, the Minnesota Supreme Court denied the authority of the state Legislature to authorize a municipality to maintain an elevator or warehouse for the public storage of grain.

In Keen v. Waycross, 101 Ga. 588, 29 S. E. 42, the Supreme Court of Georgia held that a town had no authority to engage in [914] the business of selling plumbers' materials even in connection with the management of its waterworks plant.

And in Re Opinion of Justices, 58 Me. 590, the Supreme Court of Maine held that the Legislature could not empower a town to establish manufacturies on its own account and run them by the ordinary town officers or otherwise.

It will be noted that Judge Cooley, in People v. Salem Tp. supra, and Judge Miller, in Citizens' Sav. etc. Ass'n v. Topeka, supra, would determine the question of whether a particular purpose is public or not mainly according to what has been the settled usage; Judge Miller very properly adding, however, that usage is not the sole criterion.

In the latter connection, the following extract from the decision of the Court of Appeals of New York, in the case of Sun Printing, etc. Ass'n v. New York, 8 App. Div. 230, 40 N. Y. S. 607, is apposite.

"In considering this question it must be premised that cities are not limited to providing for the strict necessities of their citizens. Under legislative authority, they may minister to their comfort, health, pleasure, or education. They are not limited to policing the city, to paving the streets, to providing it with light, water, sewers, docks, and markets. They may also be required by the sovereign power to furnish their citizens with schools, hospitals, dispensaries, parks, libraries, and museums, with zoological, botanical, and other gardens. They may thus gratify our ears with music of a summer afternoon, or minister to our comfort by providing us with public baths. Expenditures in all these directions under legislative authority have never been questioned. Where, then, shall we draw the line? It would be very simple to draw at those purposes for which precedent in the past can be found, and exclude all others. This test should be easy of application, but would be essentially vicious and erroneous. Growth and extension are as necessary in the domain of municipal action as in the domain of law. New conditions constantly arise which confront the Legislature with new problems. As the structure of society grows more complex, needs spring up which never existed before. These needs may be so general in their nature as to affect the whole country or the whole state, or they may be local and confined to a single county or municipality. [915] In any case, it is the duty of that legislative body which has the power and jurisdiction to apply the remedy. To hold that the Legislature of this state, acting as the parens patriae, may employ for the relief or welfare of the inhabitants of the cities of the state only those methods and agencies which have proved adequate in the past would be a narrow and dangerous interpretation to put upon the fundamental law. No such interpretation has thus far been placed upon the organic law by the courts of this state. Whenever the question has been considered, it has been universally treated in the broadest spirit."

What is meant here by treating the question in the broadest spirit is that the decision of the Legislature upon any particular point within its legitimate sphere of action is not to be overridden by the courts unless upon the clearest grounds of its being in violation either of the Constitution itself or of those fundamental principles which, apart from all written constitutional sanction, underlie our system of government. Touching this conclusiveness of the legislative decision, Judge Cooley, in his work on Taxation (2d ed.) p. 103, says:

"It is implied in all definitions of taxation that taxes can be levied for public purposes only. Differences of opinion frequently arise

concerning the power to impose taxation in particular cases, but all writers who treat the subject theoretically and all jurists agree in the fundamental requirement that the purpose shall be public, and they differ, when they differ at all, upon the question whether the particular purpose proposed is within the requirement. It is also agreed that the determination what is and what is not a public purpose belongs in the first instance to the legislative department. It belongs there because the taxing power is a branch of the legislative, and the Legislature cannot lie under the necessity of requiring the opinion or the consent of another department of the government before it will be at liberty to exercise one of its acknowledged powers. The independence of the Legislature is an axiom in government; and to be independent it must act in its own good time, on its own judgment, influenced by its own reasons, restrained only as the people may have seen fit to restrain the grant of legislative power in making it. The Legislature must, consequently, determine for itself, in every instance, whether a particular purpose is or is not one which so far concerns the public as to render taxation admissible."

[916] He adds:

"But it is also generally admitted that the legislative determination is not absolutely conclusive."

He then mentions the necessity of the purpose of a tax being public, and that the taxpayer may resist a tax whose purpose is not public, and adds:

"It is not inconsistent with this doctrine that in every instance the highest consideration should be paid to the determination of the Legislature that a tax should be laid. It is not lightly to be assumed that its members have come to the examination of the subject with any other than public motives, or that they have failed to give it due consideration or reflection. The presumption on the other hand must always be that they have considered it with honesty and fair purpose, and that their action is the result of their deliberate judgment. And with all these presumptions tending to support the legislative action, it would seem but reasonable and proper that the courts should support it when not clearly satisfied that an error has been committed. This is the general rule in constitutional law when the validity of legislation is involved, and it is applicable with peculiar force to the case of a legislative decision upon the purpose for which a tax may be laid."

The Legislature, by passing the said statute has determined that the establishing and carrying on of an ice plant by a town for supplying the citizens with ice is a purpose "strictly public in its nature;" and our question is whether that conclusion is clearly incorrect.

The only court that has had occasion to consider the question of whether the engaging in the ice business is a function of a public nature is the Supreme Court of Georgia. In Holton v. Camilla, 134 Ga. 560, 68 S. E. 472, 31 L.R.A.(N.S.) 116, 20 Ann. Cas. 199, that court said:

"If, in the hot season of the year, the inhabitant of the city must, for sanitary reasons, relinquish the cool draft from the well because, as has been demonstrated, wells of pure water cannot be maintained in populous communities, surely the city would have the right, were it practical, to cool the water which it delivers through pipes as a substitute, and which ofttimes is scarcely drinkable in its heated condition. [917] If not practicable to cool it in the pipes, and if it be necessary to the welfare, comfort, and convenience of the inhabitants that its temperature be lowered before being used for drinking purposes, why cannot the city provide for the delivery of a part of it in a frozen condition to be used in cooling such part of the balance as is used for drinking purposes? Is the difference between water in a liquid and in a frozen condition a radical one? Upon what principle could the doctrine rest that liquid water may be delivered by the city to its inhabitants by flowage through pipes, but that water in frozen blocks cannot be delivered by wagons or otherwise? If the city has a right to furnish its inhabitants with water in a liquid form, we fail to see . . . why it cannot furnish it to them in a frozen condition. . . . It is a well-known fact that one of the main uses to which ice is put is the cooling of water for drinking purposes; and when it is used for this purpose, if impure, it is as apt to be deleterious to the consumer, as any other impure water. Why, then, in the exercise of its police power, may not a city guard against impurities in the ice, as well as the water used by its inhabitants? Nor do we see any rational objection on the idea that the city will be engaging in a manufacturing enterprise. The city might perhaps equally as well be said to be manufacturing when, by the use of a filtering process, it changes impure water into that which is pure. When, in connection with its waterworks system, it produces ice, it merely, by certain processes, changes the form and temperature of a part of the water supplied by that system. We do not think the operation by the city of Camilla of an ice plant in connection with its waterworks system, for the purpose of furnishing ice to its inhabitants, is in violation of the sections of the Constitution referred to in the plaintiff's petition, or that it is illegal for any reason."

The same line of reasoning here adopted by the Supreme Court of Georgia having

been presented incidentally by counsel in the case of State v. Thompson, 149 Wis. 488, 137 N. W. 20, 43 L.R.A.(N.S.) 339, Ann. Cas. 1913C 774, in the Supreme Court of Wisconsin, Judge Timlin, in a concurring opinion, made the following answer to it:

"It was said by counsel in argument that the furnishing of water by a city to its inhabitants is a municipal affair; that ice is but frozen water; hence the furnishing of ice must be a municipal affair. But things which are similar from a physical or chemical viewpoint may be dissimilar from the legal viewpoint. Under a statute authorizing a city to buy coal, it probably could not buy diamonds, although it is said they are chemically identical. Neither is atmospheric [918] gas passed through a varying aperture and articulated by varying contacts always equivalent to argument. The difference between the collection and distribution of water by means of pipes laid in the streets and the manufacture, sale and distribution of ice is that the first is in the nature of a monopoly, while the second is a competitive business enterprise. The first does not depend so largely upon skill in management."

Putting aside the frozen water argument of the Georgia court as having been well answered by the amusing witticism of the Wisconsin court, we note that, as pointed out by the Wisconsin court, all analogy between the municipal distribution of water and the municipal distribution of ice is destroyed by the fact that for the one business pipes have to be laid in the public streets, and, necessarily, for doing this, the streets have to be torn up and disturbed, whereas the other is a purely competitive business enterprise. There would be analogy between the two if the city were to abandon the soverign mode of water distribution by means of underground conduits through the public streets, and to go peddling the liquid, as is done in towns unprovided with waterworks and unblessed by a sufficient rainfall for gathering a supply in cisterns, and has to be done with ice. There would then be complete analogy; but everybody would then see that the town was no longer discharging a sovereign function, but carrying on a private enterprise.

The invocation of the police power by the Georgia court amounts practically to an acknowledgment of the weakness of its side of the argument. For nothing is better established than that, when a legislative measure is dependent for its execution upon the exercise of the taxing power, its validity must be determined by the validity of the tax that will have to be imposed for carrying it out.

"As the funds of a municipal corporation are raised by taxation, the power of the Legislature to authorize such a corporation to incur indebtedness, or to expend its funds for the purpose of [919] aiding individuals or individual enterprises, depends upon the fundamental question whether the corporation could be authorized to levy a tax for the purpose of liquidating the indebtedness to be incurred or could have levied a tax for the purpose of the expenditure proposed." 20 Am. & Eng. Enc. of Law (2d ed.) 1084.

See, also, Citizens' Sav. etc. Ass'n v. Topeka, supra.

A city may, of course, "guard against impurities in the ice as well as in the water [and, we may add, in the milk, and fish, and meat, and bread] used by its inhabitants;" but the fact that it can do this, casts no light upon the question of whether it may go into the ice or the milk, or the fish, or the meat, or the bread, business. The terms "police power" and "eminent domain" have a meaning coextensive with sovereign power or sovereignty; but, as said by the Supreme Court of Minnesota, in a case where the police power was invoked for saving from nullity a plan to provide for the erection of a state grain elevator and storage warehouse (Rippe v. Becker, 56 Minn. 100, 57 N. W. 331, 22 L.R.A. 857, supra):

"As understood in American constitutional law, the term means simply the power of the state to impose those restraints upon private rights which are necessary for the general welfare of all, and is but the power to enforce the maxim, 'Sic utere tuo ut alienum non laedas.'"

In other words, it is a power to regulate the business of others, and not a power to go into business. Of course, if the business cannot be regulated otherwise than by the government going into it, or perhaps, even if, in the opinion of the Legislature, that mode of regulation is the most practical and best, such mode can be adopted; but nothing of that kind could be pretended in the case of the grain or the ice business. The police power, as a separate and distinct power from that of taxation, or in its meaning of one of the dismemberments of the sovereign power, is easily sufficient for regulating the ice business, without aid from the taxing power: and it can play no part in this case. [920] If, as stated in the argument, the ice business in this country is a monopoly that needs regulation, the power of taxation is not the proper power to use for that purpose. Such a thing might be done if the Constitution contained no restrictions on that power: but in this state the Constitution has practically put that power in a strait-jacket: and it goes without saying that the Legislature is powerless to liberate it therefrom.

One of these restrictions is that in municipal affairs that power can be exercised only where the purpose is "strictly public in

its nature." The word "strictly" here inserted by the framers of the Constitution has to be reckoned with. In other words, in this state it does not suffice that a purpose be merely public in order that the power of taxation may be exercised for it, but it must be strictly so, and be so "in its nature."

Among the definitions given to the words "strict" and "strictly" in Webster's New International Dictionary are the following:

"Strict: Exact; accurate; precise; undeviating; rigorously nice; hence, rigid in interpretation; free from latitude; as, to keep strict watch, or strict silence; strict construction of a law.

"Governed or governing by exact rules; rigorous; as very strict in observing the Sabbath; strict discipline.

"Strictly: In a strict manner; closely; precisely; rigorously; stringently; without latitude; positively."

The Century Dictionary gives the derivation of the word as from the Latin "strictus, past participle of stringere, draw tight, bind, contract," and, among other definitions, gives the following:

7. "Exacting; rigorous; severe; rigid.

8. "Restricted; taken strictly, narrowly, or exclusively.

"Strictly: Rigorously; severely; without remission or indulgence; with close adherence to rule."

In the interpretation of a statute or Constitution words are understood in their ordinary, popular meaning, and every word is to be given effect, if possible; none is to be [921] supposed to have been inserted by accident or inadvertence or without the deliberate intention that it should be understood in its ordinary meaning and given effect accordingly. Hence, in the interpretation of this article 224, the word "strict," qualifying the word "public," is to be understood in its ordinary, popular meaning as given hereinabove from the dictionaries, and is to be given effect accordingly. This is so elementary as not needing support by citation of authority. Let it be noted also that this article 224 does not contain this same qualification, limitation, or restriction when describing the state purposes for which the taxing power may be exercised, but has added it only when describing the municipal purposes. Its language is that:

"The taxing power may be exercised by the Legislature for state purposes [no qualification or restriction] and by municipal corporations for municipal purposes strictly public in their nature."

This contrast between the delegation of the power for state purposes and for municipal purposes places in a strong light the deliberate intention of the framers of this article 224 that the municipalities should be required to adhere rigidly to purposes strictly, or, in other words, clearly, or admittedly, public in their nature.

And it goes without saying that this provision of the Constitution is as binding on the Legislature as it is on the municipalities; that the Legislature can no more abate or arrest any part of its authority and controlling influence than the municipality can; and also that its rigid enforcement is as binding on the courts as the due observance of it is binding on the Legislature and the municipalities. Hence, unless a purpose is strictly public in its nature, the Legislature is as powerless to authorize the use of the taxing power for it as the municipality would be to use said power for the same purpose without legislative authority; and, if the [922] attempt is made to do so the courts are bound to enforce the constitutional provision.

It may not be amiss to call attention to the fact that, in the intention of this article 224, the Legislature cannot, by its fiat, make that a public purpose which is not already so. The requirement is that the purpose be in its nature public; that is to say, that it be of that character independently of the legislative fiat. This restriction of article 224 would be no restriction at all if the Legislature could make public in its nature every purpose for which it desired to delegate the taxing power to a municipality.

By a purpose being strictly public in its nature this article 224 does not mean merely that the purpose must be unaffected by or uncoupled with a private interest; or, in other words, merely that no private individual or private corporation be associated in the business with the municipality. It means that the business must in itself be public; or, in other words, that it must be a municipal business, such business as pertains to the administration of the municipality as a municipality. This results from the force of the expression "in its nature;" not because the Legislature chooses that the municipality may or shall conduct the business; but because the business is in its nature public. If the idea had been merely to prohibit or preclude the use of the taxing power in the interest of private individuals, or corporations, either in partnership with the municipality or separately, this provision would have been left out as useless, since ample provision had already been made by article 58, in the most specific and searching terms, against any use of the taxing power in connection with private interests.

No one familiar with the discussions that had taken place both in and out of the courts prior to the adoption of this restriction in article 224 touching this question of [923] how far the taxing power may be used by municipalities for engaging in business usu-

ally left to private enterprise, such as public grist mills, storage warehouses, distribution of fuel, etc., can fail to see at a glance that this restriction was adopted for the very purpose of settling that question in this state; of giving constitutional sanction in this state to the principle which, independently of constitutional expression, underlies our form of government, and, as such, had been enforced in other states—that the taxing power can be used only for public purposes.

The framers of this article 224 were familiar with these discussions, and knew that, while there was no disagreement on the point that the taxing power can be legitimately used only for a public purpose, there was great difficulty in ascertaining what was and what was not a public purpose; and to one familiar with the said discussions it is obvious that the peculiar phraseology of this article 224 was adopted with a view to removing that difficulty in this state as far as possible. It was not possible to enumerate what purposes should be held to be public and what not. General language had to be used; and the provision was worded as we find it; that the purpose must be public in its nature, and that it must be so, not merely by taking a liberal or latitudinous view of the matter, or, as some decisions had held, by viewing it in "a liberal spirit" but "strictly" so; i. e.:

"Restrictedly; severely; narrowly or exclusively; rigorously; without latitude; positively; with close adherence to rule."

Now, is this business in which the defendant municipality proposes to engage by this ordinance of this strictly public character in its nature?

We think clearly not. The business of manufacturing and selling ice has heretofore been left to private enterprise; as much so [924] as the business of making and selling bread or of any of the articles of household consumption.

The only feature of it that is suggested as likely to impart to it a public character is the growing necessity of ice as an article of household consumption, in modern life; but ice is no more necessary than bread and meat. In fact, this argument of necessity has been so thoroughly pulverized, annihilated, by Judge Cooley in the Salem Case, supra, that the discussion of it here would be mere waste of time. And the argument of cheapness of production comes in the same category and must share the same fate; unless, indeed, as intimated hereinabove by us, under very special circumstances such as are not revealed by the record in this case.

Nothing, then, indicates the public nature of this business, and still less its strictly public nature, and the case resolves itself into the proposition that, in disregard of the said restriction of article 224, the Legislature has undertaken to authorize the municipalities of this state to use the taxing power for a purpose not strictly public in its nature. In such a case the courts are left to choose between the Constitution and the Legislature, and necessarily must obey the Constitution.

In the brief of the defendant, the statement is made that:

"So far as research has been able to disclose, there is only one municipal ice plant in active operation in the United States, and this is in Weatherford, Okla."

The "research" here spoken of is not that of the defendant or of its counsel, but of J. Walls Wentworth, appointed by the president of the borough of Manhattan to gather statistical information on the subject of municipal and government ice plants, "and to extend his research in foreign countries as well as in the United States." This research [925] shows that there are two towns in England—Bolton and Wolverhampton—and several in Italy that manufacture ice for sale, and none other in the world, except the Oklahoma town. Judging from this, any one would unhesitatingly say that the making of ice for sale was not supposed by the world in general to be a municipal function; but that, on the contrary, the consensus of opinion throughout the civilized world was that it was not.

We do not lose sight of the fact that, as well as observed by the Court of Appeals of New York, supra, changed conditions may bring about new purposes for which the taxing power may be legitimately exercised: but ice was being manufactured in cities for sale long before the adoption of the Constitution of 1898, and the need for municipal distribution of ice was at that time just as great and as well known to everybody as now; and hence no changes brought about by new conditions can be invoked in connection with that business.

Not a city or town of the state, except the defendant, has sought to take advantage of this law, so far as we know. And we should not wonder at this lack of interest, if the operation of this law is to be the same in all the towns and cities as is shown in this case it would be the defendant town. The soda water stands are shown to consume a large quantity of ice and to pay but an insignificant amount of taxes. The Rock Island Railroad pays over $3,000 of taxes, approximately one-fourth of the total tax of the town, and consumes but an insignificant amount of ice. The operation of this ice plant scheme would be to make the Rock Island Railroad and other large taxpayers who at the same time are small consumers

[926] of ice pay in part for the ice to be furnished by the town to the small taxpayers who are at the same time large consumers of ice. What would be the operation of this law in the city of New Orleans with its street railways and banks and agencies of all kinds paying heavy taxes and needing no ice save a lump for the water cooler, is easily imagined. The pockets of these large taxpayers would be gone into by the city to enable her to drive out of business and destroy the existing ice companies. The operation of this law is thus referred to as calculated to throw a sidelight upon the question of whether this ice making and selling enterprise by a town or city is or is not a "purpose strictly public in its nature."

For the support of its paupers and indigent sick the municipality may go as deeply as the necessity of the case may require into the pockets of its large taxpayers; but it cannot do so for the purpose of selling ice, or bread, or meat, or drugs, etc., etc., more cheaply to its inhabitants in general than the regular merchants are doing. This would be paternalism pure and simple, a thing foreign to our form of government.

The judgment appealed from is therefore set aside, and it is now ordered, adjudged, and decreed that the ordinance of the town of Ruston No. 120, adopted on October 28, 1912, be, and the same is, hereby decreed to be unconstitutional, null, and void, and is hereby annulled, that an injunction issue enjoining the mayor and board of aldermen of said town from attempting to carry said ordinance into effect, and that defendant pay the costs of this suit.

O'Niell, J., takes no part.

Rehearing denied October 20, 1914.

NOTE.

Power of Municipality to Operate Plant for Purpose of Furnishing Ice to Inhabitants.

Since the decision in Tolton v. Camilla, 134 Ga. 560, 20 Ann. Cas. 199, which is said in the note thereto to be a case of first impression, no decision other than the reported case seems to have passed on the power of a municipality to operate a plant for the purpose of furnishing ice to its inhabitants. That case, taking a strict view of the nature of municipal functions, reaches a conclusion opposite to that arrived at in Holton v. Camilla, supra, and denies the existence of the power in question. The question was referred to in a concurring opinion in State v. Thompson, 149 Wis. 488, Ann. Cas. 1913C 774, the holding in that case being that a "Home Rule" statute under which it was sought to adopt a charter amendment allowing a municipal ice plant was invalid. The closely related question of the power of a municipality to furnish fuel to its inhabitants is discussed in the note to Laughlin v. Portland, Ann. Cas 1916C 734.

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